Federal Register

10–11–05 Wednesday
Vol. 70 No. 196 Oct. 12, 2005

Pages 59209–59620

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Washington, DC 20002

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Printed on recycled paper.

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DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 13

[DHS–2005–0059]

RIN 1601–AA11

Program Fraud Civil Remedies

AGENCY: Office of the Secretary, Homeland Security.

ACTION: Interim rule.

SUMMARY: This interim rule establishes uniform administrative procedures for the Department of Homeland Security (DHS) to implement the Program Fraud Civil Remedies Act of 1986 (the Act). The interim rule will provide a uniform, department-wide, administrative process for assessing penalties and recovering funds procured by fraud under departmental programs. It replaces the existing program fraud civil remedies rules of entities transferred from eight departments and the General Services Administration into DHS and establishes for the first time civil administrative procedures to deal with fraud under Federal Emergency Management Agency (FEMA) programs.

DATES: *Effective Date:* This interim rule is effective October 12, 2005.

Comments: Written comments may be submitted to the Department of Homeland Security on or before November 14, 2005.

ADDRESSES: You may submit comments, identified by Docket DHS–2005–0059 or RIN 1601–AA11, Program Fraud Civil Remedies, by *one* of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- E-mail: *FEMA-rules@dhs.gov.* Include Docket DHS–2005–0059 or RIN 1601–AA11 Program Fraud Civil Remedies, in the subject line of the message.
- Facsimile: Rules Docket Clerk, Office of the General Counsel, Federal Emergency Management Agency, (fax) 202–646–4536. Include Docket DHS–2005–0059 or RIN 1601–AA11, Program Fraud Civil Remedies, in the subject line of the message.
- Mail or Hand Delivery/Courier: For paper, disk, or CD–ROM submissions, Rules Docket Clerk, Office of the General Counsel, Federal Emergency Management Agency, Department of Homeland Security, 500 C Street, SW., Washington, DC 20472. Include Docket DHS–2005–0059 or RIN 1601–AA11, Program Fraud Civil Remedies, in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Michael Russell, Acting Deputy Associate General Counsel, Office of the General Counsel, Department of Homeland Security, Washington, DC 20528. Telephone: 202–205–4634 or facsimile: 202–772–9735, not toll free calls; or email: *michael.d.russell@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the interim rule. DHS also invites comments that relate to the economic, environmental, or federalism affects that might result from this interim rule. Comments that will provide the most assistance to DHS in developing these procedures will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

I. Background

This interim rule will implement the Program Fraud Civil Remedies Act of 1986 (the Act) which is codified at 31 U.S.C. 3801–3812. The Act establishes an administrative remedy against anyone who makes a false Claim or written Statement to any of certain Federal agencies, including the Department of Homeland Security (DHS or the Department). In brief, any person who submits a claim or written statement to an affected agency knowing or having reason to know that it is false, fictitious, or fraudulent, is liable for a penalty of up to $5,500 per false claim or statement and, in addition, with respect to claims, for an assessment of up to double the amount falsely claimed. The Act requires each affected Federal agency to publish rules and regulations necessary to implement the provisions of the Act (31 U.S.C. 3809).

Congress established DHS in large part by transferring entities from other Federal departments and agencies to DHS. Before their transfer most of these entities were part of departments or agencies that had published rules under the Act. Prior to publication of this rule, most of the transferred entities followed the rules from their legacy department. The following program fraud rules have been in force:

- The program fraud regulations for the Bureau of Customs and Border Patrol, the Federal Law Enforcement Training Center, and the United States Secret Service, which were part of the U.S. Department of the Treasury, are in 31 CFR part 16;
- The program fraud regulations for the United States Coast Guard and the Transportation Security Administration, which were part of the Department of Transportation, are in 49 CFR part 31;
- The program fraud regulations for U.S. Citizenship and Immigration Services, the Bureau of Immigration and Customs Enforcement, the National Infrastructure Protection Center, the Office of Domestic Preparedness, and the Domestic Emergency Support Teams, which were part of the Department of Justice, are in 28 CFR part 71;
- The program fraud regulations for the National Communications System and the National Bio-Weapons Defense Analysis Center, which were part of the Department of Defense, are in 32 CFR part 277;
- The program fraud regulations for functions relating to agriculture import and entry inspection that were formerly in the Department of Agriculture, are in 7 CFR part 1, subpart L;
- The program fraud regulations for the National Infrastructure Simulation and Analysis Center (and energy security and assurances programs), programs and activities of the Department of Energy relating to the strategic nuclear defense posture of the United States, the Environmental Measurements Laboratory and, in some cases, the Nuclear Incident Response

Team, which were part of the Department of Energy are in 10 CFR part 1013;

- The program fraud regulations for the Critical Infrastructure Assurance Office and the Integrated Hazard Information System, which were part of the Department of Commerce, are in 15 CFR part 25;
- The program fraud regulations for the Strategic National Stockpile, the Office of Emergency Preparedness, the National Disaster Medical System, and the Metropolitan Medical Response System, which were part of the Department of Health and Human Services, are in 45 CFR part 79; and
- The program fraud regulations for the Federal Protective Service and the Federal Computer Incident Response Center, which were part of the General Services Administration, are in 41 CFR part 105–70.

Although these entities transferred to DHS, their published rules and procedures for dealing with program fraud cases remained in full force and effect. The ''savings provision'' of the Homeland Security Act of 2002, section 1512, ''saves'' completed administrative actions, such as regulations, until such time as DHS amends, modifies, supersedes, terminates, sets aside, or revokes them in accordance with law. Pub. L. 107–296 (Nov. 25, 2002). Under the savings provision, the legacy program fraud regulations from eight departments and the General Services Administration remained in full force and effect for the relevant DHS components.

The only major DHS function not previously covered by regulations providing for an administrative resolution of suspected program fraud cases was the Federal Emergency Management Agency (FEMA). FEMA's cases of suspected fraud have required direct referral to the Department of Justice. The Department of Justice made a determination on the merits of a case and decided whether to proceed on either a criminal or civil basis against a Defendant. This interim rule will provide an administrative process, including hearings and appeals for the Defendant, to resolve program fraud cases for all DHS components, including FEMA. As in the past, this interim rule contemplates a review by the Department of Justice before issuance of a complaint against a person suspected of program fraud.

DHS is therefore publishing this interim rule to ensure that all of its components are covered by rules under the Act. Furthermore, we have compared this interim rule with the rules that currently apply to DHS components and believe that this interim rule is, in material parts, identical to, or indistinguishable from, the existing rules. For example, the interim rule will mirror the complaint processing, hearing, and appeal rights that now exist.

As applied to defendants in actions brought by FEMA, the regulations will prove less burdensome both to FEMA and to defendants. FEMA will have the same administrative procedures and administrative adjudication that are available to the rest of DHS, and, we estimate, a greater likelihood that legal action would be taken on cases that the Department of Justice might not otherwise prosecute. This interim rule will provide the additional benefit of reducing the caseloads in Federal courts by diverting actions to civil administrative proceedings at DHS. Defendants will have the advantage of a less formal, perhaps less expensive, adjudication and swifter resolution of complaints brought by DHS.

II. The Interim Rule

This interim rule will implement the Program Fraud Civil Remedies Act of 1986, which imposes, through administrative adjudication and procedures, civil penalties and assessments against certain persons making false claims or statements against or to the Federal Government. The rule contains procedures governing the imposition of civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to DHS or any of its components.

III. Procedural Requirements

Administrative Procedure Act

Implementation of this rule as an interim rule with a request for public comment after the effective date of the rule is based upon the ''good cause'' exception found under the Administrative Procedure Act (APA) at 5 U.S.C. 553(b)(B). DHS has determined that delaying implementation of this rule to await public notice and comment is unnecessary, impracticable, and contrary to the public interest.

The rule provides procedures governing the imposition of civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to the Department or any of its components.

Congress established DHS in large part by transferring entities from other federal departments and agencies to DHS. Before their transfer most of these entities were part of departments or agencies that had published rules under the Act. Although the entities transferred to DHS, their published rules and procedures for dealing with program fraud cases remained in full force and effect. The ''savings provision'' of the Homeland Security Act of 2002, section 1512, ''saves'' completed administrative actions, such as regulations, until such time as DHS amends, modifies, supersedes, terminates, sets-aside or revokes them in accordance with law. Under the savings provision program fraud regulations that the nine entities had in place when they transferred to the Department of Homeland Security remain in full force and effect until DHS amends or otherwise changes them. See section 19.1(d).

DHS is therefore publishing this interim rule to ensure that all of its components are covered by rules under the Act. Furthermore, we have compared this rule against the rules that formerly applied to DHS components and believe that this rule is, in material parts, identical to, or indistinguishable from, the former rules. For example, the rule mirrors the complaint processing, hearing, and appeal rights of the other agencies. Since this rule borrows from existing rules that have already been subject to APA notice and comment procedures, and applies very similar rules to FEMA, we believe that publishing this rule with the usual notice and comment procedures is unnecessary.

As applied to defendants in actions brought by FEMA, the regulations will prove less burdensome both to FEMA and to defendants. FEMA will have the same administrative procedures and administrative adjudication available to the rest of DHS, and, we estimate, a greater likelihood that legal action may be taken on cases that the Department of Justice might not otherwise undertake to prosecute. It could have the further benefit of reducing the caseloads in federal courts, diverting actions to civil administrative proceedings. Defendants will have the advantage of a less formal, perhaps less expensive administrative and swifter process to resolve complaints bought by the Department.

The Department has a great number of grant and other financial assistance programs that benefit the public. We, therefore, believe it is in the public interest to implement this rule as soon as possible to afford DHS consolidated, uniform remedies under the Act against those who attempt to defraud the taxpayers.

Moreover, the historic assistance and relief efforts following Hurricane Katrina will make more urgent the need for efficient administrative procedures for processing cases of fraud. The department is responsible to the public for stewardship of public funds. The increase in the expenditure of program funds in response to Hurricane Katrina necessitates these immediate measures to ensure that resources appropriated for relief efforts reach their intended recipients.

DHS also finds good cause, under 5 U.S.C. 553(d)(3), for this interim rule to take effect immediately. DHS finds that, for the reasons previously discussed, it would be impracticable and contrary to the public interest to subject this interim rule to prior notice and public comment, or to delay its taking effect.

Although we have good cause to publish this rule without prior notice and comment, we value public comments. The Department does not anticipate a significant number of comments, but will consider any such comments in the process of amending or revising the rule in the future.

Executive Order 12866

This interim rule is considered by the Department of Homeland Security to be a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review. 58 FR 51735, October 4, 1993 (Executive Order). Under Executive Order 12866 a significant regulatory action is subject to an Office of Management and Budget (OMB) review and to the requirements of the Executive Order. The Executive Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $ 100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof;

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Due to the ''savings clause'' discussed above, the only additional programmatic impact of this interim rule relates to fraud cases resulting from FEMA programs—major disasters, emergencies, and other financial assistance programs. FEMA's cases of suspected fraud currently require direct referral to the Department of Justice. The Department of Justice makes a determination on the merits of a case and decides whether to proceed on either a criminal or civil basis in the federal courts against a defendant. This interim rule will provide an administrative process, including hearings for the defendant, to resolve program fraud cases for all components in DHS, including FEMA. It is difficult to predict the precise number of additional program fraud cases. Exogenous variables that could affect the number of FEMA program fraud cases include the number and severity of major disasters and emergencies in a given year. FEMA expects that these administrative procedures will be less costly to defendants than cases referred to the Department of Justice and litigated in the Federal court system.

The interim rule will not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, the legal sector, the insurance sector, State, local or tribal governments or communities, competition, or other sectors of the economy. As most other Departments and agencies have nearly identical rules in place, it will create no serious inconsistency or otherwise interfere with an action taken or planned by another agency. It will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof, although it will alter the procedures to be followed when an entity is alleged to have engaged in a fraudulent act, involving no more than $150,000, in a program operated by the Department.

Because this rule announces procedures for a unique and relatively new cabinet-level department, and because DHS engages in uncommon relief and assistance efforts such as those following Hurricane Katrina, this rule may raise novel policy issues. Accordingly, this rule was reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) mandates that an agency conduct an RFA analysis when an agency is ''required by section 553 * * *, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for interpretative rule involving the internal revenue laws of the United States * * *.'' 5 U.S.C. 603(a). RFA analysis is not required when a rule is exempt from notice and comment rulemaking under 5 U.S.C. 553(b). DHS has determined that good cause exists under 5 U.S.C. 553(b)(B) to exempt this rule from the notice and comment requirements of 5 U.S.C. 553(b). Therefore no RFA analysis under 5 U.S.C. 603 is required for this rule.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. The Act does not require an assessment in the case of an interim rule issued without prior notice and public comment. Nevertheless, DHS does not expect this rule to result in such an expenditure. We discuss this rule's effects elsewhere in this preamble.

Executive Order 13132, Federalism

This interim rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. It will not preempt any state laws. In accordance with section 6 of Executive Order 13132, we determine that this rule will not have federalism implications sufficient to warrant the preparation of a federalism impact statement.

Executive Order 12988, Civil Justice Reform

This interim rule meets the applicable standards in section 3(a) and 3(b)(2) of Executive Order 12988.

Paperwork Reduction Act

This interim rule will not require or invite any additional record or information maintenance, submission, or collection for the DHS programs. Therefore, this interim rule will not invoke the requirements of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 6 CFR Part 13

Administrative practice and procedure, Claims, Fraud, Penalties.

Authority and Issuance

■ This interim rule is issued under the authority of 31 U.S.C. 3809. Accordingly, chapter I of 6 CFR is amended by adding part 13 to read as follows:

PART 13—PROGRAM FRAUD CIVIL REMEDIES

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Authority: Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C., Ch. 1, sections 101 et seq.); 5 U.S.C. 301; 31 U.S.C. 3801–3812.

§ 13.1 Basis, purpose, scope and effect.

(a) *Basis.* This part implements the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. 3801–3812. Section 3809 of title 31, United States Code, requires each authority to promulgate regulations necessary to implement the provisions of the statute.

(b) *Purpose.* This part:

(1) Establishes administrative procedures for imposing civil penalties and assessments against Persons who Make, submit, or present, or cause to be Made, submitted, or presented, false, fictitious, or fraudulent Claims or written Statements to the Authority or to certain others; and

(2) Specifies the hearing and appeal rights of Persons subject to allegations of liability for such penalties and assessments.

(c) *Scope.* This part applies to all components of the Department of Homeland Security.

(d) *Effect.* (1) This part applies to program fraud cases initiated by any component of the Department of Homeland Security on or after October 12, 2005.

(2) Program fraud cases initiated by any component of the Department of Homeland Security before October 12, 2005, but not completed before October 12, 2005, will continue to completion under the rules and procedures in effect before this part.

§ 13.2 Definitions.

The following definitions have general applicability throughout this part:

(a) *ALJ* means an Administrative Law Judge in the Authority appointed pursuant to 5 U.S.C. 3105 or detailed to the Authority pursuant to 5 U.S.C. 3344. An ALJ will preside at any hearing convened under the regulations in this part.

(b) *Authority* means the Department of Homeland Security.

(c) *Authority Head* means the Deputy Secretary, Department of Homeland Security, or another officer designated by the Deputy Secretary.

(d) *Benefit* means, in the context of a Statement, anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan guarantee.

(e) *Claim* means any request, demand, or submission:

(1) Made to the Authority for property, services, or money (including money representing grants, loans, insurance, or Benefits);

(2) Made to a recipient of property, services, or money from the Authority or to a party to a contract with the Authority:

(i) For property or services if the United States:

(A) Provided such property or services;

(B) Provided any portion of the funds for the purchase of such property or services; or

(C) Will reimburse such recipient or party for the purchase of such property or services; or

(ii) For the payment of money (including money representing grants, loans, insurance, or Benefits) if the United States:

(A) Provided any portion of the money requested or demanded; or

(B) Will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(3) Made to the Authority which has the effect of decreasing an obligation to pay or account for property, services, or money.

(f) *Complaint* means the administrative Complaint served by the Reviewing Official on the Defendant under § 13.7.

(g) *Defendant* means any Person alleged in a Complaint under § 13.7 to be liable for a civil penalty or assessment under § 13.3.

(h) *Government* means the Government of the United States.

(i) *Individual* means a natural Person.

(j) *Initial Decision* means the written decision of the ALJ required by § 13.10 or § 13.37, and includes a revised Initial Decision issued following a remand or a motion for reconsideration.

(k) *Investigating Official* means the Inspector General of the Department of Homeland Security or an officer or employee of the Office of the Inspector General designated by the Inspector General and eligible under 31 U.S.C. 3801(a)(4)(B).

(l) *Knows or Has Reason to Know,* means that a Person, with respect to a Claim or Statement:

(1) Has actual knowledge that the Claim or Statement is false, fictitious, or fraudulent;

(2) Acts in deliberate ignorance of the truth or falsity of the Claim or Statement; or

(3) Acts in reckless disregard of the truth or falsity of the Claim or Statement.

(m) *Makes* includes presents, submits, and causes to be made, presented, or submitted. As the context requires, Making or Made will likewise include the corresponding forms of such terms.

(n) *Person* means any Individual, partnership, corporation, association, or private organization, and includes the plural of that term.

(o) *Representative* means an attorney who is a member in good standing of the bar of any State, Territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico. This definition is not intended to foreclose *pro se* appearances. That is, an Individual may appear for himself or herself, and a corporation or other entity may appear by an owner, officer, or employee of the corporation or entity.

(p) *Reviewing Official* means the General Counsel of the Department of

Homeland Security, or other officer or employee of the Department who is designated by the General Counsel and eligible under 31 U.S.C. 3801(a)(8).

(q) *Statement* means any representation, certification, affirmation, Document, record, or accounting or bookkeeping entry Made:

(1) With respect to a Claim or to obtain the approval or payment of a Claim (including relating to eligibility to Make a Claim); or

(2) With respect to (including relating to eligibility for):

(i) A contract with, or bid or proposal for a contract with the Authority, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or Benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or Benefit; or

(ii) A grant, loan, or Benefit from, the Authority, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or Benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or Benefit.

§ 13.3 Basis for civil penalties and assessments.

(a) *Claims.* (1) Except as provided in paragraph (c) of this section, a Person will be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,500 for each Claim (as adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 (Public Law 101–140), as amended by the Debt Collection Improvement Act of 1996 (Public Law 104–134)) if such Person Makes a Claim that such Person Knows or Has Reason to Know:

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by any written Statement that asserts a material fact that is false, fictitious, or fraudulent;

(iii) Includes or is supported by any written Statement that:

(A) Omits a material fact;

(B) Is false, fictitious, or fraudulent as a result of such omission; and

(C) Is a Statement in which the Person Making such Statement has a duty to include such material fact; or

(iv) Is for payment for the provision of property or services that the Person has not provided as claimed.

(2) Each voucher, invoice, Claim form, or other Individual request or demand for property, services, or money constitutes a separate Claim.

(3) A Claim will be considered Made to the Authority, recipient, or party when such Claim is actually Made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of the Authority, recipient, or party.

(4) Each Claim for property, services, or money is subject to a civil penalty regardless of whether such property, services, or money is actually delivered or paid.

(5) If the Government has Made any payment (including transferred property or provided services) on a Claim, a Person subject to a civil penalty under paragraph (a)(1) of this section will also be subject to an assessment of not more than twice the amount of such Claim or that portion thereof that is determined to be in violation of paragraph (a)(1) of this section. Such assessment will be in lieu of damages sustained by the Government because of such Claim.

(b) *Statements.* (1) Except as provided in paragraph (c) of this section, a Person will be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,500 (as adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 (Public Law 101–140), as amended by the Debt Collection Improvement Act of 1996 (Public Law 104–134)) if such Person Makes a written Statement that:

(i) The Person Knows or Has Reason to Know:

(A) Asserts a material fact that is false, fictitious, or fraudulent; or

(B) Is false, fictitious, or fraudulent because it omits a material fact that the Person Making the Statement has a duty to include in such Statement; and

(ii) Contains, or is accompanied by, an express certification or affirmation of the truthfulness and accuracy of the contents of the Statement.

(2) Each written representation, certification, or affirmation constitutes a separate Statement.

(3) A Statement will be considered Made to the Authority when such Statement is actually Made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of the Authority.

(c) *Specific intent not required.* No proof of specific intent to defraud is required to establish liability under this section.

(d) *More than one Person liable.* (1) In any case in which it is determined that more than one Person is liable for Making a Claim or Statement under this section, each such Person may be held liable for a civil penalty under this section.

(2) In any case in which it is determined that more than one Person is liable for Making a Claim under this section on which the Government has Made payment (including transferred property or provided services), an assessment may be imposed against any such Person or jointly and severally against any combination of such Persons.

§ 13.4 Investigation.

(a) If an Investigating Official concludes that a subpoena pursuant to the Authority conferred by 31 U.S.C. 3804(a) is warranted:

(1) The subpoena so issued will notify the Person to whom it is addressed of the Authority under which the subpoena is issued and will identify the records or Documents sought;

(2) The Investigating Official may designate a Person to act on his or her behalf to receive the Documents sought; and

(3) The Person receiving such subpoena will be required to tender to the Investigating Official or the Person designated to receive the Documents a certification that the Documents sought have been produced, or that such Documents are not available and the reasons therefore, or that such Documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(b) If the Investigating Official concludes that an action under the Act may be warranted, the Investigating Official will submit a report containing the findings and conclusions of such investigation to the Reviewing Official.

(c) Nothing in this section will preclude or limit an Investigating Official's discretion to refer allegations directly to the Department of Justice for suit under the False Claims Act or other civil relief, or to defer or postpone a report or referral to the Reviewing Official to avoid interference with a criminal investigation or prosecution.

(d) Nothing in this section modifies any responsibility of an Investigating Official to report violations of criminal law to the Attorney General.

§ 13.5 Review by the Reviewing Official.

(a) If, based on the report of the Investigating Official under § 13.4(b), the Reviewing Official determines that there is adequate evidence to believe that a Person is liable under § 13.3, the Reviewing Official will transmit to the Attorney General a written notice of the

Reviewing Official's intention to issue a Complaint under § 13.7.

(b) Such notice will include:

(1) A Statement of the Reviewing Official's reasons for issuing a Complaint;

(2) A Statement specifying the evidence that supports the allegations of liability;

(3) A description of the Claims or Statements upon which the allegations of liability are based;

(4) An estimate of the amount of money or the value of property, services, or other Benefits requested or demanded in violation of § 13.3;

(5) A Statement of any exculpatory or mitigating circumstances that may relate to the Claims or Statements known by the Reviewing Official or the Investigating Official; and

(6) A Statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments.

§ 13.6 Prerequisites for issuing a Complaint.

(a) The Reviewing Official may issue a Complaint under § 13.7 only if:

(1) The Department of Justice approves the issuance of a Complaint in a written Statement described in 31 U.S.C. 3803(b)(1); and

(2) In the case of allegations of liability under § 13.3(a) with respect to a Claim, the Reviewing Official determines that, with respect to such Claim or a group of related Claims submitted at the same time such Claim is submitted (as defined in paragraph (b) of this section), the amount of money or the value of property or services demanded or requested in violation of § 13.3(a) does not exceed $150,000.

(b) For the purposes of this section, a related group of Claims submitted at the same time will include only those Claims arising from the same transaction (e.g., grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

(c) Nothing in this section will be construed to limit the Reviewing Official's authority to join in a single Complaint against a Person's Claims that are unrelated or were not submitted simultaneously, regardless of the amount of money, or the value of property or services, demanded or requested.

§ 13.7 Complaint.

(a) On or after the date the Department of Justice approves the issuance of a Complaint in accordance with 31 U.S.C. 3803(b)(1), the Reviewing Official may serve a Complaint on the Defendant, as provided in § 13.8.

(b) The Complaint will state:

(1) The allegations of liability against the Defendant, including the statutory basis for liability, an identification of the Claims or Statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from such Claims or Statements;

(2) The maximum amount of penalties and assessments for which the Defendant may be held liable;

(3) Instructions for filing an answer to request a hearing, including a specific Statement of the Defendant's right to request a hearing by filing an answer and to be represented by a Representative; and

(4) That failure to file an answer within 30 days of service of the Complaint will result in the imposition of the maximum amount of penalties and assessments without right to appeal, as provided in § 13.10.

(5) That the Defendant may obtain copies of relevant material and exculpatory information pursuant to the process outlined in § 13.20.

(c) At the same time the Reviewing Official serves the Complaint, he or she will serve the Defendant with a copy of the regulations in this part.

§ 13.8 Service of Complaint.

(a) Service of a Complaint must be Made by certified or registered mail or by delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure. Service of a Complaint is complete upon receipt.

(b) Proof of service, stating the name and address of the Person on whom the Complaint was served, and the manner and date of service, may be Made by:

(1) Affidavit of the Individual serving the Complaint by delivery;

(2) A United States Postal Service return receipt card acknowledging receipt; or

(3) Written acknowledgment of receipt by the Defendant or his or her Representative; or

(4) In case of service abroad, authentication in accordance with the Convention on Service Abroad of Judicial and Extrajudicial Documents in Commercial and Civil Matters.

§ 13.9 Answer.

(a) The Defendant may request a hearing by serving an answer on the Reviewing Official within 30 days of service of the Complaint. Service of an answer will be Made by delivering a copy to the Reviewing Official or by placing a copy in the United States mail, postage prepaid and addressed to the Reviewing Official. Service of an answer is complete upon such delivery or mailing. An answer will be deemed to be a request for hearing.

(b) In the answer, the Defendant:

(1) Will admit or deny each of the allegations of liability Made in the Complaint;

(2) Will state any defense on which the Defendant intends to rely;

(3) May state any reasons why the Defendant contends that the penalties and assessments should be less than the statutory maximum; and

(4) Will state the name, address, and telephone number of the Person authorized by the Defendant to act as Defendant's Representative, if any.

(c) If the Defendant is unable to file an answer meeting the requirements of paragraph (b) of this section within the time provided, the Defendant may, before the expiration of 30 days from service of the Complaint, serve on the Reviewing Official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to serve an answer meeting the requirements of paragraph (b) of this section. The Reviewing Official will file promptly the Complaint, the general answer denying liability, and the request for an extension of time as provided in § 13.11. For good cause shown, the ALJ may grant the Defendant up to 30 additional days from the original due date within which to serve an answer meeting the requirements of paragraph (b) of this section.

§ 13.10 Default upon failure to answer.

(a) If the Defendant does not answer within the time prescribed in § 13.9(a), the Reviewing Official may refer the Complaint to an ALJ by filing the Complaint and a Statement that Defendant has failed to answer on time.

(b) Upon the referral of the Complaint, the ALJ will promptly serve on Defendant in the manner prescribed in § 13.8, a notice that an Initial Decision will be issued under this section.

(c) In addition, the ALJ will assume the facts alleged in the Complaint to be true, and, if such facts establish liability under § 13.3, the ALJ will issue an Initial Decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, by failing to answer on time, the Defendant waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the Initial Decision will become final and binding upon the parties 30 days after it is issued.

(e) If, before such an Initial Decision becomes final, the Defendant files a motion seeking to reopen on the grounds that extraordinary circumstances prevented the Defendant from answering, the Initial Decision will be stayed pending the ALJ's decision on the motion.

(f) If, on such motion, the Defendant can demonstrate extraordinary circumstances excusing the failure to answer on time, the ALJ will withdraw the Initial Decision in paragraph (c) of this section, if such a decision has been issued, and will grant the Defendant an opportunity to answer the Complaint.

(g) A decision of the ALJ denying a Defendant's motion under paragraph (e) of this section is not subject to reconsideration under § 13.38.

(h) The Defendant may appeal to the Authority Head the decision denying a motion to reopen by filing a notice of appeal in accordance with § 13.26 within 15 days after the ALJ denies the motion. The timely filing of a notice of appeal will stay the Initial Decision until the Authority Head decides the issue.

(i) If the Defendant files a timely notice of appeal with the Authority Head, the ALJ will forward the record of the proceeding to the Authority Head.

(j) The Authority Head will decide expeditiously whether extraordinary circumstances excuse the Defendant's failure to answer on time based solely on the record before the ALJ.

(k) If the Authority Head decides that extraordinary circumstances excused the Defendant's failure to answer on time, the Authority Head will remand the case to the ALJ with instructions to grant the Defendant an opportunity to answer.

(l) If the Authority Head decides that the Defendant's failure to answer on time is not excused, the Authority Head will reinstate the Initial Decision of the ALJ, which will become final and binding upon the parties 30 days after the Authority Head issues such decision.

§ 13.11 Referral of Complaint and answer to the ALJ.

Upon receipt of an answer, the Reviewing Official will refer the matter to an ALJ by filing the Complaint and answer in accordance with § 13.26.

§ 13.12 Notice of hearing.

(a) When the ALJ receives the Complaint and answer, the ALJ will promptly serve a notice of hearing upon the Defendant in the manner prescribed by § 13.8.

(b) Such notice will include:

(1) The tentative time and place, and the nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the Representative of the Government and of the Defendant, if any; and

(6) Such other matters as the ALJ deems appropriate.

§ 13.13 Parties to the hearing.

(a) The parties to the hearing will be the Defendant and the Authority.

(b) Pursuant to 31 U.S.C. 3730(c)(5), a private plaintiff under the False Claims Act may participate in these proceedings to the extent authorized by the provisions of that Act.

§ 13.14 Separation of functions.

(a) The Investigating Official, the Reviewing Official, and any employee or agent of the Authority who takes part in investigating, preparing, or presenting a particular case may not, in such case or a factually related case:

(1) Participate in the hearing as the ALJ;

(2) Participate or advise in the Initial Decision or the review of the Initial Decision by the Authority Head, except as a witness or a Representative in public proceedings; or

(3) Make the collection of penalties and assessments under 31 U.S.C. 3806.

(b) The ALJ will not be responsible to, or subject to the supervision or direction of, the Investigating Official or the Reviewing Official.

(c) Except as provided in paragraph (a) of this section, the Representative for the Government may be employed anywhere in the Authority, including in the offices of either the Investigating Official or the Reviewing Official.

§ 13.15 *Ex parte* contacts.

No party or Person (except employees of the ALJ's office) will communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a Person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

§ 13.16 Disqualification of Reviewing Official or ALJ.

(a) A Reviewing Official or ALJ in a particular case may disqualify himself or herself at any time.

(b) A party may file a motion for disqualification of a Reviewing Official or an ALJ. Such motion will be accompanied by an affidavit alleging personal bias or other reason for disqualification.

(c) Such motion and affidavit will be filed promptly upon the party's discovery of reasons requiring disqualification, or such objections will be deemed waived.

(d) Such affidavit will state specific facts that support the party's belief that personal bias or other reason for disqualification exists and the time and circumstances of the party's discovery of such facts. It will be accompanied by a certificate of the Representative of record that it is Made in good faith.

(e)(1) If the ALJ determines that a Reviewing Official is disqualified, the ALJ will dismiss the Complaint without prejudice.

(2) If the ALJ disqualifies himself or herself, the case will be reassigned promptly to another ALJ.

(3) If the ALJ denies a motion to disqualify, the Authority Head may determine the matter only as part of his or her review of the Initial Decision upon appeal, if any.

§ 13.17 Rights of parties.

Except as otherwise limited by this part, all parties may:

(a) Be accompanied, represented, and advised by a Representative;

(b) Participate in any conference held by the ALJ;

(c) Conduct discovery;

(d) Agree to stipulations of fact or law, which will be Made part of the record;

(e) Present evidence relevant to the issues at the hearing;

(f) Present and cross-examine witnesses;

(g) Present oral arguments at the hearing as permitted by the ALJ; and

(h) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

§ 13.18 Authority of the ALJ.

(a) The ALJ will conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is Made.

(b) The ALJ has the authority to:

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses and the production of Documents at depositions or at hearings;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of discovery;

(8) Regulate the course of the hearing and the conduct of Representatives and parties;

(9) Examine witnesses;

(10) Receive, rule on, exclude, or limit evidence;

(11) Upon motion of a party, take official notice of facts;

(12) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;

(13) Conduct any conference, argument, or hearing on motions in Person or by telephone; and

(14) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this part.

(c) The ALJ does not have the authority to Make any determinations regarding the validity of treaties or other international agreements, Federal statutes or regulations, or Departmental Orders or Directives.

§ 13.19 Prehearing conferences.

(a) The ALJ may schedule prehearing conferences as appropriate.

(b) Upon the motion of any party, the ALJ will schedule at least one prehearing conference at a reasonable time in advance of the hearing.

(c) The ALJ may use prehearing conferences to discuss the following:

(1) Simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite Statement;

(3) Stipulations and admissions of fact or as to the contents and authenticity of Documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

(5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument;

(6) Limitation of the number of witnesses;

(7) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery;

(9) The time and place for the hearing; and

(10) Such other matters as may tend to expedite the fair and just disposition of the proceedings.

(d) The ALJ may issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

§ 13.20 Disclosure of Documents.

(a) Upon written request to the Reviewing Official, the Defendant may review, at a time and place convenient to the Authority, any relevant and material Documents, transcripts, records, and other materials that relate to the allegations set out in the Complaint and upon which the findings and conclusions of the Investigating Official under § 13.4(b) are based, unless such Documents are subject to a privilege under Federal law. Special arrangements as to confidentiality may be required by the Reviewing Official, who may also assert privilege or other related doctrines. Upon payment of fees for duplication, the Defendant may obtain copies of such Documents.

(b) Upon written request to the Reviewing Official, the Defendant also may obtain a copy of all exculpatory information in the possession of the Reviewing Official or Investigating Official relating to the allegations in the Complaint, even if it is contained in a Document that would otherwise be privileged. If the Document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the Reviewing Official as described in § 13.5 is not discoverable under any circumstances.

(d) The Defendant may file a motion to compel disclosure of the Documents subject to the provisions of this section. Such a motion may only be filed following the serving of an answer pursuant to § 13.9.

§ 13.21 Discovery.

(a) *In general.* (1) The following types of discovery are authorized:

(i) Requests for production of Documents for inspection and copying;

(ii) Requests for admissions of the authenticity of any relevant Document or of the truth of any relevant fact;

(iii) Written interrogatories; and

(iv) Depositions.

(2) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ will regulate the timing of discovery.

(b) *Documents defined.* (1) For the purpose of this section and §§ 13.22 and 13.23, the term *Documents* includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence.

(2) Nothing in this part will be interpreted to require the creation of a Document.

(c) *Motions for discovery.* (1) A party seeking discovery may file a motion. Such a motion will be accompanied by a copy of the request for production of Documents, request for admissions, or interrogatories or, in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service, a party may file an opposition to the motion or a motion for protective order as provided in § 13.24.

(3) The ALJ may grant a motion for discovery only if he or she finds that the discovery sought:

(i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under § 13.24.

(d) *Depositions.* (1) If a motion for deposition is granted, the ALJ will issue a subpoena for the deponent, which may require the deponent to produce Documents. The subpoena will specify the time and place at which the deposition will be held. Deposition requests for senior level DHS officials (including career and non-career senior executive level employees) shall not be approved absent showing of compelling need that cannot be met by any other means.

(2) The party seeking to depose will serve the subpoena in the manner prescribed in § 13.8.

(3) The deponent may file a motion to quash the subpoena or a motion for a protective order within ten days of service. If the ALJ has not acted on such a motion by the return date, such date will be suspended pending the ALJ's final action on the motion.

(4) The party seeking to depose will provide for the taking of a verbatim transcript of the deposition, which it will Make available to all other parties for inspection and copying.

(e) Each party will bear its own costs of discovery.

§ 13.22 Exchange of witness lists, Statements, and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties will exchange witness lists, copies of prior Statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written Statements that the party intends to offer in lieu of live testimony in accordance with § 13.33(b). At the time the above Documents are

exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the ALJ, will provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects, the ALJ will not admit into evidence the testimony of any witness whose name does not appear on the witness list of any exhibit not provided to the opposing party as provided above unless the ALJ finds good cause for the failure or that there is no prejudice to the objecting party.

(c) Unless another party objects within the time set by the ALJ, Documents exchanged in accordance with paragraph (a) of this section will be deemed to be authentic for the purpose of admissibility at the hearing.

§ 13.23 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any Individual at the hearing may request that the ALJ issue a subpoena. Requests for witness testimony of senior level DHS officials (including career and non-career senior executive level employees) shall not be approved absent a showing of compelling need that cannot be met by any other means.

(b) A subpoena requiring the attendance and testimony of an Individual may also require the Individual to produce Documents at the hearing.

(c) A party seeking a subpoena will file a written request therefore not less than 15 days before the date fixed for the hearing unless otherwise allowed by the ALJ for good cause shown. Such request will be accompanied by a proposed subpoena, which will specify and Documents to be produced and will designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

(d) The subpoena will specify the time and place at which the witness is to appear and any Documents the witness is to produce.

(e) The party seeking the subpoena will serve it in the manner prescribed in § 13.8. A subpoena on a party or upon an Individual under the control of party may be served by first class mail.

(f) A party or the Individual to whom the subpoena is directed may file a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if it is less than ten days after service. If the ALJ has not acted on such a motion by the return date, such date will be suspended pending the ALJ's final action on the motion.

§ 13.24 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may Make any order that justice requires to protect a party or Person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only through a method of discovery other than that requested;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except Persons designated by the ALJ;

(6) That the contents of discovery or evidence be sealed;

(7) That a deposition after being sealed be opened only by order of the ALJ;

(8) That a trade secret or other confidential research, development, commercial information, or facts pertaining to any criminal investigation, proceeding, or other administrative investigation not be disclosed or be disclosed only in a designated way; and

(9) That the parties simultaneously submit to the ALJ specified Documents or information enclosed in sealed envelopes to be opened as directed by the ALJ.

§ 13.25 Fees.

The party requesting a subpoena will pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage will accompany the subpoena when served, except that when a subpoena is issued on behalf of the Authority, a check for witness fees and mileage need not accompany the subpoena.

§ 13.26 Filing, form and service of papers.

(a) *Filing and form.* (1) Documents filed with the ALJ will include an original and two copies.

(2) Every pleading and paper filed in the proceeding will contain a caption setting forth the title of the action, the case number assigned by the ALJ, and a designation of the paper (*e.g.*, Motion to Quash Subpoena).

(3) Every pleading and paper will be signed by, and will contain the address and telephone number of, the party or the Person on whose behalf the paper was filed, or his or her Representative.

(4) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or its Representative or by proof that the Document was sent by certified or registered mail.

(b) *Service.* A party filing a Document will, at the time of filing, serve a copy of such Document on every other party. Service upon any party of any Document other than those required to be served as prescribed in § 13.8 will be Made by delivering a copy, or by placing a copy of the Document in the United States mail, postage prepaid and addressed, to the party's last known address. When a party is represented by a Representative, service will be Made upon such Representative in lieu of the actual party.

(c) *Proof of service.* A certificate of the Individual serving the Document by Personal delivery or by mail, setting forth the manner of service, will be proof of service.

§ 13.27 Computation of time.

(a) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal Government, in which event it includes the next business day.

(b) When the period of time allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal Government will be excluded from the computation.

(c) Where a Document has been served or issued by placing it in the United States mail, an additional five days will be added to the time permitted for any responses.

§ 13.28 Motions.

(a) Any application to the ALJ for an order or ruling will be by motion. Motions will state the relief sought, the authority relied upon, and the facts alleged, and will be filed and served on all other parties.

(b) Except for motions Made during a prehearing conference or at the hearing, all motions will be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to such motion.

(d) The ALJ may not grant a written motion before the time for filing response thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

(e) The ALJ will Make a reasonable effort to dispose of all outstanding motions before the hearing begins.

(f) Except as provided by §§ 13.21(e)(3) and 13.23(f), which concern subpoenas, the filing or pendency of a motion will not automatically alter or extend a deadline or return date.

§ 13.29 Sanctions.

(a) The ALJ may sanction a Person, including any party or Representative, for:

(1) Failing to comply with an order, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Sanctions include but are not limited to those specifically set forth in paragraphs (c), (d), and (e) of this section. Any such sanction will reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the ALJ may:

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deem each matter of which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and

(4) Strike any part of the pleadings or other submissions of the party failing to comply with such request.

(d) If a party fails to prosecute or defend an action under this part begun by service of a notice of hearing, the ALJ may dismiss the action or may issue an Initial Decision imposition penalties and assessments.

(e) The ALJ may refuse to consider any motion, request, response, brief or other Document that is not filed in a timely fashion.

§ 13.30 The hearing and burden of proof.

(a) The ALJ will conduct a hearing on the record in order to determine whether the Defendant is liable for a civil penalty or assessment under § 13.3 and, if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

(b) The Authority will prove Defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) The Defendant will prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing will be open to the public unless otherwise ordered by the ALJ for good cause shown.

§ 13.31 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the ALJ and the Authority Head, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty should be imposed.

(b) Although not exhaustive, the following factors are among those that may influence the ALJ and the Authority Head in determining the amount of penalties and assessments to impose with respect to the misconduct (i.e., the false fictitious, of fraudulent Claims or Statements) charged in the Complaint:

(1) The number of false, fictitious, or fraudulent Claims or Statements;

(2) The time period over which such Claims or Statements were Made;

(3) The degree of the Defendant's culpability with respect to the misconduct;

(4) The amount of money or the value of the property, services, or Benefit falsely claimed;

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation;

(6) The relationship of the amount imposed as civil penalties to the amount of the Government's loss;

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs;

(8) Whether the Defendant has engaged in a pattern of the same or similar misconduct;

(9) Whether the Defendant attempted to conceal the misconduct;

(10) The degree to which the Defendant has involved others in the misconduct or in concealing it;

(11) Where the misconduct of employees or agents is imputed to the Defendant, the extent to which the Defendant's practices fostered or attempted to preclude such misconduct;

(12) Whether the Defendant cooperated in or obstructed an investigation of the misconduct;

(13) Whether the Defendant assisted in identifying and prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the Defendant's sophistication with respect to it, including the extent of the Defendant's prior participation in the program or in similar transactions;

(15) Whether the Defendant has been found, in any criminal, civil, or administrative proceeding to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State, directly or indirectly; and

(16) The need to deter the Defendant and others from engaging in the same or similar misconduct.

(c) Nothing in this section will be construed to limit the ALJ or the Authority Head from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

§ 13.32 Location of hearing.

(a) The hearing may be held:

(1) In any judicial district of the United States in which the Defendant resides or transacts business;

(2) In any judicial district of the United States in which the Claim or Statement in issue was Made; or

(3) In such other place as may be agreed upon by the Defendant and the ALJ.

(b) Each party will have the opportunity to present written and oral argument with respect to the location of the hearing.

(c) The hearing will be held at the place and at the time ordered by the ALJ.

§ 13.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing will be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written Statement or deposition. Any such written Statement must be provided to all other parties along with the last known address of such witness, in a manner that allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written Statements of witnesses proposed to testify at the hearing and deposition transcripts will be exchanged as provided in § 13.22(a).

(c) The ALJ will exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth;

(2) Avoid needless consumption of time; and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The ALJ will permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ, cross-examination on matters outside the scope of direct examination will be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ will order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of:

(1) A party who is an Individual;

(2) In the case of a party that is not an Individual, an officer or employee of the party;

(i) Appearing for the entity pro se; or

(ii) Designated by the party's Representative; or

(3) An Individual whose presence is shown by a party to be essential to the presentation of its case, including an Individual employed by the Government engaged in assisting the Representative for the Government.

§ 13.34 Evidence.

(a) The ALJ will determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ will not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where appropriate, e.g., to exclude unreliable evidence.

(c) The ALJ will exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement will be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The ALJ will permit the parties to introduce rebuttal witnesses and evidence.

(h) All Documents and other evidence offered or taken for the record will be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to § 13.24.

§ 13.35 The record.

(a) The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the Authority Head.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ pursuant to § 13.24.

§ 13.36 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ will fix the time for filing such briefs. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

§ 13.37 Initial Decision.

(a) The ALJ will issue an Initial Decision based only on the record, which will contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact will include a finding on each of the following issues:

(1) Whether the Claims or Statements identified in the Complaint, or any portions thereof, violate § 13.3;

(2) If the Person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments considering any mitigating or aggravating factors that he or she finds in the case, such as those described in § 13.31.

(c) The ALJ will promptly serve the Initial Decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ will at the same time serve all parties with a Statement describing the right of any Defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the Authority Head. If the ALJ fails to meet the deadline contained in this paragraph, he or she will notify the parties of the reason for the delay and will set a new deadline.

(d) Unless the Initial Decision of the ALJ is timely appealed to the Authority Head, or a motion for reconsideration of the Initial Decision is timely filed, the Initial Decision will constitute the final decision of the Authority Head and will be final and binding on the parties 30 days after it is issued by the ALJ.

§ 13.38 Reconsideration of Initial Decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the Initial Decision within 20 days of receipt of the Initial Decision. If service was Made by mail, receipt will be presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion will be accompanied by a supporting brief.

(c) Responses to such motions will be allowed only upon request of the ALJ.

(d) No party may file a motion for reconsideration of an Initial Decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised Initial Decision.

(f) If the ALJ denies a motion for reconsideration, the Initial Decision will constitute the final decision of the Authority Head and will be final and binding on the parties 30 days after the ALJ denies the motion, unless the Initial Decision is timely appealed to the Authority Head in accordance with § 13.39.

(g) If the ALJ issues a revised Initial Decision, that decision will constitute the final decision of the Authority Head and will be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the Authority Head in accordance with § 13.39.

§ 13.39 Appeal to Authority Head.

(a) Any Defendant who has served a timely answer and who is determined in an Initial Decision to be liable for a civil penalty or assessment may appeal such decision to the Authority Head by filing a notice of appeal in accordance with this section and § 13.26.

(b)(1) A notice of appeal may be filed at any time within 30 days after the ALJ issues an Initial Decision. However, if another party files a motion for reconsideration under § 13.38, consideration of the appeal will be stayed automatically pending resolution of the motion for reconsideration.

(2) If a Defendant files a timely motion for reconsideration, a notice of appeal may be filed within 30 days after the ALJ denies the motion or issues a revised Initial Decision, whichever applies.

(3) The Authority Head may extend the initial 30-day period for an additional 30 days if the Defendant files with the Authority Head a request for an extension within the initial 30-day period and shows good cause.

(c) If the Defendant files a timely notice of appeal and the time for filing motions for reconsideration under § 13.38 has expired, the ALJ will forward two copies of the notice of appeal to the Authority Head, and will forward or Make available the record of the proceeding to the Authority Head.

(d) A notice of appeal will be accompanied by a written brief specifying exceptions to the Initial Decision and reasons supporting the exceptions.

(e) The Representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the Authority Head.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the Initial Decision, the Authority Head will not consider any objection that was not raised before the ALJ unless a demonstration is Made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the Authority Head that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the Authority Head will remand the matter to the ALJ for consideration of such additional evidence.

(j) The Authority Head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the ALJ in any Initial Decision.

(k) The Authority Head will promptly serve each party to the appeal with a copy of the decision of the Authority Head and with a Statement describing the right of any Person determined to be liable for a penalty or assessment to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a Defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the Authority Head serves the Defendant with a copy of the Authority Head's decision, a determination that a Defendant is liable under § 13.3 is final and is not subject to judicial review.

§ 13.40 Stays ordered by the Department of Justice.

If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the Authority Head a written finding that continuation of the administrative process described in this part with respect to a Claim or Statement may adversely affect any pending or potential criminal or civil action related to such Claim or Statement, the Authority Head will stay the process immediately. The Authority Head may order the process resumed only upon receipt of the written authorization of the Attorney General.

§ 13.41 Stay pending appeal.

(a) An Initial Decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the Authority Head.

(b) No administrative stay is available following a final decision of the Authority Head.

§ 13.42 Judicial review.

Section 3805 of title 31, United States Code, authorizes judicial review by an appropriate United States District Court of a final decision of the Authority Head imposing penalties or assessments under this part and specifies the procedures for such review.

§ 13.43 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of title 31, United States Code, authorize actions for collection of civil penalties and assessments imposed under this part and specify the procedures for such actions.

§ 13.44 Right to administrative offset.

The amount of any penalty or assessment that has become final, or for which a judgment has been entered under § 13.42 or § 13.43, or any amount agreed upon in a compromise or settlement under § 13.46, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be Made under that subsection against a refund of an overpayment of Federal taxes, then or later owing by the United States to the Defendant.

§ 13.45 Deposit in Treasury of United States.

All amounts collected pursuant to this part will be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

§ 13.46 Compromise or settlement.

(a) Parties may Make offers of compromise or settlement at any time.

(b) The Reviewing Official has the exclusive authority to compromise or settle a case under this part at any time after the date on which the Reviewing Official is permitted to issue a Complaint and before the date on which the ALJ issues an Initial Decision.

(c) The Authority Head has exclusive authority to compromise or settle a case under this part at any time after the date on which the ALJ issues an Initial Decision, except during the pendency of any review under § 13.42 or during the pendency of any action to collect penalties and assessments under § 13.43.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under § 13.42 or of any action to recover penalties and assessments under 31 U.S.C. 3806.

(e) The Investigating Official may recommend settlement terms to the Reviewing Official, the Authority Head, or the Attorney General, as appropriate. The Reviewing Official may recommend settlement terms to the Authority Head, or the Attorney General, as appropriate.

(f) Any compromise or settlement must be in writing and signed by all parties and their Representatives.

§ 13.47 Limitations.

(a) The notice of hearing with respect to a Claim or Statement must be served in the manner specified in § 13.8 within 6 years after the date on which such Claim or Statement is Made.

(b) If the Defendant fails to serve a timely answer, service of a notice under § 13.10(b) will be deemed a notice of hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

Dated: September 25, 2005.

Michael Chertoff,

Secretary.

[FR Doc. 05–20346 Filed 10–11–05; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1005 and 1007

[Docket No. AO–388–A15 and AO–366–A44; DA–03–11]

Milk in the Appalachian and Southeast Marketing Areas; Order Amending the Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This partial final rule amends the Appalachian and Southeast marketing orders. Specifically, the final rule expands the Appalachian milk marketing area, eliminates the ability to simultaneously pool the same milk on the Appalachian or Southeast order and on a State-operated milk order that has marketwide pooling, and amends the transportation credit provisions of the Southeast and Appalachian orders. The amendments are based on record evidence of a public hearing held February 2004. More than the required number of dairy farmers approved the issuance of the amended orders.

EFFECTIVE DATE: November 1, 2005.

FOR FURTHER INFORMATION CONTACT: Antoinette M. Carter, Marketing Specialist, USDA/AMS/Dairy Programs, Order Formulation and Enforcement, STOP 0231—Room 2971, 1400 Independence Avenue, SW., Washington, DC 20250–0231, (202) 690–3465, e-mail address: *antoinette.carter@usda.gov.*

SUPPLEMENTARY INFORMATION: This administrative action is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

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

The Agricultural Marketing Agreement Act of 1937, as amended, (7 U.S.C. 601–674) provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Department a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Department would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Department's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a ''small business'' if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a ''small business'' if it has fewer than 500 employees.

For the purposes of determining which dairy farms are ''small businesses,'' the $750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most ''small'' dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

During February 2004, the month in which the hearing was held, the milk of 7,311 dairy farmers was pooled on the Appalachian (Order 5) and Southeast (Order 7) milk orders (3,395 Order 5 dairy farmers and 3,916 Order 7 dairy farmers). Of the total, 3,252 dairy farmers (or 96 percent) and 3,764 dairy farmers (or 96 percent) were considered small businesses on the Appalachian and Southeast orders, respectively.

During February 2004, there were a total of 36 plants associated with the Appalachian order (25 fully regulated plants, 7 partially regulated plants, 1 producer-handler, and 3 exempt plants) and a total of 51 plants associated with the Southeast order (32 fully regulated plants, 6 partially regulated plants, and 13 exempt plants). The number of plants meeting the small business criteria under the Appalachian and Southeast orders were 13 (or 36 percent) and 13 (or 25 percent), respectively.

The final rule will expand the Appalachian milk marketing area to include 25 unregulated counties and 15 unregulated cities in the State of Virginia that currently are not in any Federal milk marketing area. Adopted amendments to the producer milk provisions of the Appalachian and Southeast milk orders will prevent producers who share in the proceeds of a state marketwide pool from simultaneously sharing in the proceeds of a Federal marketwide pool on the same milk. In addition, this final rule amends the transportation credit provisions of the Appalachian and Southeast orders.

The final rule amendments that will expand the Appalachian marketing area will likely continue to regulate under the Appalachian order two fluid milk distributing plants located in Roanoke, Virginia, and Lynchburg, Virginia, and shift the regulation of a distributing plant located in Mount Crawford, Virginia, from the Northeast order to the Appalachian order.

The amendments will allow the Kroger Company's (Kroger) Westover Dairy plant, located in Lynchburg, Virginia, that competes for a milk supply with other Appalachian order plants to continue to be regulated under the order if it meets the order's minimum performance standards. The plant has been regulated by the Appalachian order since January 2000. In addition, the adopted amendments will remove the disruption that occurs as a result of the Dean Foods Company's (Dean Foods) Morningstar Foods plant, located in Mount Crawford, Virginia, shifting its regulatory status under the Northeast order.

The Appalachian order currently contains a ''lock-in'' provision that provides that a plant located within the marketing area that meets the order's minimum performance standard will be regulated by the Appalachian order even if the majority of the plant's Class I route sales are in another marketing area. The expansion of the Appalachian marketing area along with the lock-in provision will regulate fluid milk distributing plants physically located in the marketing area that meet the order's minimum performance standard even if

the majority of their sales are in another Federal order marketing area. Accordingly, the amendments will regulate three distributing plants under the Appalachian order: Kroger's Westover Dairy, located in Lynchburg, Virginia; Dean Foods' Morningstar Foods plant, located in Mount Crawford, Virginia; and National Dairy Holdings' Valley Rich Dairy, located in Roanoke, Virginia. Based on Small Business Administration criteria these are all large businesses.

This final rule contains amendments to the transportation credit provisions of the Appalachian and Southeast orders. The Appalachian and Southeast orders contain provisions for a transportation credit balancing fund from which payments are made to handlers to partially offset the cost of moving bulk milk into each marketing area to meet fluid milk demands.

The amendments included in this final rule will increase the maximum rate of the transportation credit assessment of the Appalachian and Southeast orders by 3 cents per hundredweight. Specifically, the amendments will increase the maximum rate of assessment for the Appalachian order from 6.5 cents per hundredweight to 9.5 cents per hundredweight while increasing the maximum rate of assessment for the Southeast order from 7 cents per hundredweight to 10 cents per hundredweight. Increasing the transportation assessment rates will tend to minimize the exhaustion of the transportation credit balancing fund when there is a need to import supplemental milk from outside the marketing areas to meet Class I needs.

Currently, the Appalachian and Southeast orders provide that transportation credits shall apply to the milk of a dairy farmer who was not a ''producer'' under the order during more than two of the immediately preceding months of February through May but not more than 50 percent of the milk production of the dairy farmer, in aggregate, was received as producer milk under the order during those two months. The adopted amendments contained in this final rule will provide the Market Administrator of the Appalachian order and the Market Administrator of the Southeast order the discretionary authority to adjust the 50 percent milk production standard.

This final rule will prohibit the simultaneous pooling of the same milk on the Appalachian or Southeast milk marketing orders and on a State-operated order that provides for the marketwide pooling of milk. Since the 1960's, the Federal milk order program has recognized the harm and disorder that result to both producers and handlers when the same milk of a producer is simultaneously pooled on more than one Federal order. When this occurs, producers do not receive uniform minimum prices, and handlers receive unwarranted competitive advantages.

The need to prevent ''double pooling'' became critically important as distribution areas expanded, orders merged, and a national pricing surface was adopted. Milk already pooled under a State-operated program and able to simultaneously be pooled under a Federal order has essentially the same undesirable outcomes that Federal orders once experienced and subsequently corrected. Thus, amendments to eliminate the ''double pooling'' of the same milk on the Appalachian or Southeast order and a State-operated milk order that has marketwide pooling are included in this final rule.

The amendments contained in this final rule will be applied to all Appalachian and Southeast order participants (producers and handlers), which consist of both large and small business. Since the adopted amendments in this final rule will be subject to all the orders' producers and handlers regardless of their size, the provisions are not expected to provide a competitive advantage to any participant. Accordingly, the amendments will not have a significant economic impact on a substantial number of small entities.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). It was determined that these adopted amendments will have no impact on reporting, recordkeeping, or other compliance requirements because they will remain identical to the current requirements. No new forms are proposed and no additional reporting requirements will be necessary.

This action does not require additional information collection that requires clearance by the Office of Management and Budget (OMB) beyond currently approved information collection. The primary sources of data used to complete the forms are routinely used in most business transactions. Forms require only a minimal amount of information which can be supplied without data processing equipment or a trained statistical staff. Thus, the information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly disadvantage any handler that is smaller than the industry average.

Prior documents in this proceeding:

Notice of Hearing: Issued January 16, 2004; published January 23, 2004 (69 FR 3278).

Partial Recommended Decision: Issued May 13, 2005; published May 20, 2005 (70 FR 29410).

Partial Final Decision: Issued September 15, 2005; published September 21, 2005 (70 FR 55458).

Findings and Determinations

The following findings and determinations hereinafter set forth supplement those that were made when the Appalachian and Southeast orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

The following findings are hereby made with respect to each of the aforesaid orders:

(a) *Findings upon the basis of the hearing record.* Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900), a public hearing was held upon certain proposed amendments to the tentative marketing agreements and to the orders regulating the handling of milk in the specified marketing areas.

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said orders as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the aforesaid marketing areas. The minimum prices specified in the orders as hereby amended are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The said orders as hereby amended regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, marketing agreements upon which a hearing has been held.

(4) All milk and milk products handled by handlers, as defined in the order as hereby amended, are in the

current of interstate commerce or directly burden, obstruct, or affect interstate commerce in milk or its products.

(b) *Additional Findings*. It is necessary and in the public interest to make these amendments to the Appalachian and Southeast orders effective November 1, 2005. This effective date will ensure the timely implementation of the amendments. Any delay beyond that date would tend to disrupt the orderly marketing of milk in the aforesaid marketing areas.

The amendments to these orders are known to handlers. The partial final decision containing the proposed amendments to these orders was issued on September 15, 2005.

The changes that result from these amendments will not require extensive preparation or substantial alteration in the method of operation for handlers. In view of the foregoing, it is hereby found and determined that good cause exists for making theses amendments effective November 1, 2005. It would be contrary to the public interest to delay the effective date of these amendments for 30 days after their publication in the **Federal Register**. (Sec. 553(d), Administrative Procedure Act, 5 U.S.C 551–559.)

(c) *Determinations*. It is hereby determined that:

(1) The refusal or failure of handlers (excluding cooperative associations specified in Sec. 8c(9) of the Act) of more than 50 percent of the milk that is marketed within the specified marketing areas to sign a proposed marketing agreement tends to prevent the effectuation of the declared policy of the Act;

(2) The issuance of this order amending the Appalachian and Southeast orders are the only practical means pursuant to the declared policy of the Act of advancing the interests of producers as defined in the orders as hereby amended;

(3) The issuance of the order amending the Appalachian and Southeast orders is favored by at least two-thirds of the producers who were engaged in the production of milk for sale in each of the marketing areas.

List of Subjects in 7 CFR Parts 1005 and 1007

Milk marketing orders.

Order Relative to Handling

■ *It is therefore ordered*, that on and after the effective date hereof, the handling of milk in the Appalachian and Southeast marketing areas shall be in conformity to and in compliance with the terms and conditions of the orders, as mended, and as hereby further amended, as follows:

PART 1005—MILK IN THE APPALACHIAN MARKETING AREA

■ 1. The authority citation for 7 CFR part 1005 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 1005.2 is amended by revising the Virginia counties and cities to read as follows:

§ 1005.2 Appalachian marketing area.

* * * * *

Virginia Counties and Cities

Alleghany, Amherst, Augusta, Bath, Bedford, Bland, Botetourt, Buchanan, Campbell, Carroll, Craig, Dickenson, Floyd, Franklin, Giles, Grayson, Henry, Highland, Lee, Montgomery, Patrick, Pittsylvania, Pulaski, Roanoke, Rockbridge, Rockingham, Russell, Scott, Smyth, Tazewell, Washington, Wise, and Wythe; and the cities of Bedford, Bristol, Buena Vista, Clifton Forge, Covington, Danville, Galax, Harrisonburg, Lexington, Lynchburg, Martinsville, Norton, Radford, Roanoke, Salem, Staunton, and Waynesboro.

* * * * *

■ 3. Section 1005.13 is amended by revising the introductory text and adding a new paragraph (e) to read as follows:

§ 1005.13 Producer milk.

Except as provided for in paragraph (e) of this section, *Producer milk* means the skim milk (or the skim equivalent of components of skim milk) and butterfat contained in milk of a producer that is:

* * * * *

(e) Producer milk shall not include milk of a producer that is subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing program imposed under the authority of a State government maintaining marketwide pooling of returns.

§ 1005.81 [Amended]

■ 4. In § 1005.81(a), remove ''$0.065'' and add, in its place, ''$0.095''.

§ 1005.82 [Amended]

■ 5. In § 1005.82, paragraph (b) is amended by removing the words ''Director of the Dairy Division'' and adding, in their place, the words ''Deputy Administrator of Dairy Programs'' and adding a new paragraph (c)(2)(iv) to read as follows:

§ 1005.82 Payments from the transportation credit balancing fund.

* * * * *

(c) * * *

(2) * * *

(iv) The market administrator may increase or decrease the milk production standard specified in paragraph (c)(2)(ii) of this section if the market administrator finds that such revision is necessary to assure orderly marketing and efficient handling of milk in the marketing area. Before making such a finding, the market administrator shall investigate the need for the revision either on the market administrator's own initiative or at the request of interested persons. If the investigation shows that a revision might be appropriate, the market administrator shall issue a notice stating that the revision is being considered and inviting written data, views, and arguments. Any decision to revise an applicable percentage must be issued in writing at least one day before the effective date.

* * * * *

PART 1007—MILK IN THE SOUTHEAST MARKETING AREA

■ 6. The authority citation for 7 CFR part 1007 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 7. Section 1007.13 is amended by revising the introductory text and adding a new paragraph (e) to read as follows:

§ 1007.13 Producer milk.

Except as provided for in paragraph (e) of this section, *Producer milk* means the skim milk (or the skim equivalent of components of skim milk) and butterfat contained in milk of a producer that is:

* * * * *

(e) Producer milk shall not include milk of a producer that is subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing program imposed under the authority of a State government maintaining marketwide pooling of returns.

§ 1007.81 [Amended]

■ 8. In § 1007.81(a), remove ''$0.07'' and add, in its place, ''$0.10''.

§ 1007.82 [Amended]

■ 9. In § 1007.82, paragraph (b) is amended by removing the words ''Director of the Dairy Division'' and adding, in their place, the words ''Deputy Administrator of Dairy Programs'' and adding a new paragraph (c)(2)(iv) to read as follows:

§ 1007.82 Payments from the transportation credit balancing fund.

* * * * *

(c) * * *

(2) * * *

(iv) The market administrator may increase or decrease the milk production standard specified in paragraph (c)(2)(ii) of this section if the market administrator finds that such revision is necessary to assure orderly marketing and efficient handling of milk in the marketing area. Before making such a finding, the market administrator shall investigate the need for the revision either on the market administrator's own initiative or at the request of interested persons. If the investigation shows that a revision might be appropriate, the market administrator shall issue a notice stating that the revision is being considered and inviting written data, views, and arguments. Any decision to revise an applicable percentage must be issued in writing at least one day before the effective date.

* * * * *

Dated: October 7, 2005.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. 05–20525 Filed 10–7–05; 12:57 pm]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Rural Business-Cooperative Service

Rural Utilities Service

Farm Service Agency

7 CFR Part 1902

Disbursement of Funds

AGENCIES: Rural Housing Service, Rural Business-Cooperative Service, Rural Utilities Service, and Farm Service Agency, USDA.

ACTION: Final rule.

SUMMARY: The Agencies are revising their disbursement of funds regulations. This action is necessary since existing regulations do not accurately reflect the current disbursement methodologies employed by the Agencies. The intended effect is to simplify and update the regulations; to eliminate reference to the obsolete Loan Disbursement System; clarify Federal Deposit Insurance Corporation (FDIC) and National Credit Union Administration (NCUA) insurance coverage; and eliminate reference to the now defunct Federal Savings and Loan Insurance Corporation (FSLIC). These amended regulations are to ensure the Agencies' field offices have current guidance on the disbursement methods available and supervised bank accounts.

EFFECTIVE DATE: October 12, 2005.

FOR FURTHER INFORMATION CONTACT: Ronald Gianella, Staff Accountant, Office of the Deputy Chief Financial Officer, Policy and Internal Review Division, U.S. Department of Agriculture, STOP 33, P.O. Box 200011, St. Louis, Missouri 63120, telephone: (314) 457–4298.

SUPPLEMENTARY INFORMATION:

Classification

This action is not subject to the provisions of Executive Order 12866 since it involves only internal Agency management. This action is not published for prior notice and comment under the Administrative Procedure Act since it involves only internal Agency management and publication for comment is unnecessary and contrary to the public interest.

Programs Affected

The Catalog of Federal Domestic Assistance programs impacted by this action are as follows:

10.353—National Rural Development Partnership
10.405—Farm Labor Housing Loans and Grants
10.410—Very Low to Moderate Income Housing Loans
10.411—Rural Housing Site Loans and Self-Help Housing Land Development Loans
10.415—Rural Rental Housing Loans
10.417—Very Low-Income Housing Repair Loans and Grants
10.420—Rural Self-Help Housing Technical Assistance
10.421—Indian Tribes and Tribal Corporation Loans
10.427—Rural Rental Assistance Payments
10.433—Rural Housing Preservation Grants
10.438—Section 538 Rural Rental Housing Guaranteed Loans
10.441—Technical and Supervisory Assistance Grants
10.442—Housing Application Packaging Grants
10.444—Direct Housing Natural Disaster Loans and Grants
10.445—Direct Housing Natural Disaster
10.446—Rural Community Development Initiative
10.760—Water and Waste Disposal Systems for Rural Communities
10.761—Technical Assistance and Training Grants
10.762—Solid Waste Management Grants
10.763—Emergency Community Water Assistance Grants
10.766—Community Facilities Loans and Grants
10.767—Intermediary Relending Program
10.768—Business and Industry Loans
10.769—Rural Business Enterprise Grants
10.770—Water and Waste Disposal Loans and Grants (Section 306C)
10.771—Rural Cooperative Development Grants
10.772—Empowerment Zones Program
10.773—Rural Business Opportunity Grants
10.775—Renewable Energy Systems and Energy Efficiency Improvements Program
10.854—Rural Economic Development Loans and Grants

Intergovernmental Consultation

Programs with Catalog of Federal Domestic Assistance numbers 10.353, 10.405, 10.411, 10.415, 10.420, 10.421, 10.427, 10.433, 10.760, 10.763, 10.766, 10.767, 10.768, 10.769, 10.770, 10.771, 10.773, and 10.854 are subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Programs with Catalog of Federal Domestic Assistance numbers 10.410, 10.417, 10.438, 10.441, 10.442, 10.444, 10.445, 10.446, 10.761, 10.762, 10.772, 10.775 are excluded from the scope of Executive Order 12372.

Civil Justice Reform

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. In accordance with this rule: (1) Unless otherwise specifically provided, all State and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given to this rule except as specifically prescribed in the rule; and (3) administrative proceedings of the National Appeals Division (7 CFR part 11) must be exhausted before litigation against the Department is instituted.

Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. Chapter 35 and were assigned OMB control number 0575–0184 in accordance with the Paperwork Reduction Act of 1995. No person is required to respond to a collection of information unless it displays a valid OMB control number. This rule does not impose any new

information collection requirements from those approved by OMB.

GPEA Statement

The Agencies are committed to compliance with GPEA, which requires Government agencies, in general, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under Section 202 of the UMRA, the Agencies generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, or tribal governments, in the aggregate, or to the private sector, of $100 million or more in any 1 year. When such a statement is needed for a rule, Section 205 of the UMRA generally requires the agencies to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective, or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local, and tribal governments or the private sector. Thus, the rule is not subject to the requirements of Sections 202 and 205 of the UMRA.

Environmental Impact Statement

This document has been reviewed in accordance with 7 CFR part 1940, Subpart G, ''Environmental Program.'' The Agencies have determined that this final action does not constitute a major Federal action significantly affecting the quality of human environment, and in accordance with the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, an Environmental Impact Statement is not required.

Executive Order 13132, Federalism

The policies contained in this rule do not have any substantial direct effect on 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. In addition, this rule does not impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

Discussion of Final Rule

7 CFR 1902, subpart A, is being revised to eliminate procedures servicing officials should follow in ordering loan and grant disbursements. These procedures are in 7 CFR 2018, subpart D. 7 CFR 1902, subpart A, is being revised to clarify FDIC and NCUA insurance coverage and eliminate reference to the now defunct FSLIC. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 abolished the insolvent FSLIC. The FDIC insures deposits in banks and savings associations and insures each person's share in all joint accounts at an institution up to $100,000. The NCUA insures deposits in Federal credit unions and insures each person's share in all joint accounts at an institution up to $100,000.

The Farm Service Agency (FSA) disbursement policies are established in internal agency handbooks. While disbursements under some FSA programs were processed according to 7 CFR 1902, subpart A, prior to the USDA Reorganization Act, FSA no longer utilizes this subpart.

List of Subjects in 7 CFR Part 1902

Accounting, banks, banking, grant programs—housing and community development, loan programs—agriculture, loan programs—housing and community development.

■ For reasons set forth in the preamble, Chapter XVIII, title 7, Code of Federal Regulations is amended as follows:

PART 1902—SUPERVISED BANK ACCOUNTS

■ 1. The authority citation for part 1902 is revised to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1989; 7 U.S.C. 6991, et seq.; 42 U.S.C. 1480; Reorganization Plan No. 2 of 1953 (5 U.S.C. App.).

Subpart A—Supervised Bank Accounts of Loan, Grant, and Other Funds

■ 2. The title of subpart A is revised to read as set forth above.

■ 3. Section 1902.1 is revised to read as follows:

§ 1902.1 General.

This subpart prescribes the policies and procedures in establishing and using supervised bank accounts, and in placing Multi-Family Housing (MFH) reserve accounts in supervised bank accounts. 7 CFR part 2018, subpart D, provides the procedures Servicing Officials should follow in ordering loan and grant disbursements.

(a) Borrowers referred to in this subpart include both loan and grant recipients. They are referred to as ''depositors'' in the deposit agreements hereinafter described. References herein and in deposit agreements to ''other lenders'' include lenders and grantors other than Rural Development.

(b) Banks and savings associations referred to in this subpart are those in which deposits are insured by the FDIC.

(c) Credit unions referred to in this subpart are those in which deposits are insured by the NCUA.

(d) Financial institutions as referred to in this subpart include banks, savings associations, and credit unions which are covered by the proper insurance coverage cited in paragraphs (b) and (c) of this section.

(e) Supervised bank accounts referred to in this subpart are bank, savings association, or credit union accounts established through deposit agreements entered into between the borrower, the United States of America acting through Rural Development, and the Financial Institution on Form RD 402–1, ''Deposit Agreement''.

(f) Form RD 402–1 provides for the deposit of funds in a supervised bank account to ensure the performance of the borrower's obligation to Rural Development in connection with a loan and/or grant.

(g) ''Interest-Bearing Deposit Agreement'' (Exhibit B of this subpart), provides for the deposit of loan or grant funds that are not required for immediate disbursement in specified interest-bearing deposits, and it is executed in conjunction with Form RD 402–1.

(h) Servicing officials referred to in this instruction include county supervisors, district directors, local supervisors, area supervisors, and National Office grant program managers.

(i) Automated systems referred to in this instruction refers to the loan accounting systems; e.g., Program Loan Accounting System, Automated Multi-Housing Accounting System, and Dedicated Loan Origination System, from which loan and grant disbursements are ordered.

(j) This subpart includes the National Office directly servicing a grant recipient or recipient of cooperative agreement funds.

■ 4. Section 1902.2 is revised to read as follows:

§ 1902.2 Policies concerning disbursement of funds.

(a) Generally, loan and grant disbursements may be requested on an as needed basis, thereby reducing the need for supervised bank accounts. For

all construction loans and those loans using multiple advances, only the actual amount to be disbursed at loan closing will be requested through the automated systems. Subsequent disbursements will be ordered as needed. However, supervised bank accounts may be used in certain circumstances. For example:

(1) When a construction loan is made and the construction is substantially completed, but a small amount is being withheld pending completion of landscaping or some similar item. In this case, funds not disbursed may be placed in a supervised bank account for future disbursement as appropriate.

(2) When a large number of checks will be issued in the construction of a dwelling or other development. In such cases, loan and grant disbursements will be requested in accordance with 7 CFR part 2018, subpart D as necessary, deposited in a supervised bank account, and disbursed as necessary to suppliers, sub-contractors, etc.

(3) Association loan and grant funds made on a multiple advance basis may be deposited in a supervised bank account when required by State statutes or when determined necessary by the loan approval official.

(4) Supervised bank accounts may be used when needed as defined in paragraph (a)(5) of this section to ensure the correct expenditures of all or a part of loan and grant funds, borrower contributions, and borrower income. Such accounts will be limited in amount and duration to the extent feasible through the prudent disbursement of funds and the prompt termination of the interests of Rural Development and other lenders when the accounts are no longer required.

(5) When it is determined by the Servicing Official that special supervision is needed in the management of the borrower's finances, funds may be deposited in a supervised bank account. This supervisory technique will be used for a temporary period to help the borrower learn to properly manage his/her finances. Such a period will not exceed 1 year unless extended by the Servicing Official.

(b) Program instructions provide information as to the type of note to be utilized and the method of handling advances and the interest accrued.

(c) The debt instruments executed at the time of loan closing constitute an obligation on the part of the Government to disburse all funds at one time or in multiple advances, provided the funds are for purposes authorized by the Government at the time of loan closing. This obligatory commitment takes priority over any intervening liens or advances by other creditors, regardless of the provisions of the State laws involved.

■ 5. Section 1902.3, is amended by revising paragraphs (a), (b) introductory text, and (c) to read as follows:

§ 1902.3 Procedures to follow in fund disbursement.

(a) The Servicing Official will determine during loan approval the amount(s) of loan or grant disbursement(s)—full or partial—and will process the request to the appropriate automated system in accordance with 7 CFR part 2018, subpart D.

(b) When Treasury check(s) are delivered to the Servicing Official, the Servicing Official will make sure that the name of the borrower and the amount(s) of check(s) coincide with the request on file. The Servicing Official should be sure that the check is properly endorsed to ensure payment to the intended recipient. Examples of such restrictive endorsements are:

* * * * *

(c) When necessary, and only under the circumstances listed in § 1902.2, the Servicing Official will establish, or cause to be established, a supervised bank account. Funds deposited in a supervised bank account are to be recorded and accounted for on Form RD 402–2, ''Statement of Deposits and Withdrawals''.

■ 6. Section 1902.4 is amended by revising paragraphs (a)(3), (a)(5), and (b)(1) to read as follows:

§ 1902.4 Establishing MFH reserve accounts in a supervised bank account.

(a) * * *

(3) *Interest bearing.* The reserve account funds are encouraged to be maintained in an interest-bearing account. The ''Interest-Bearing Deposit Agreement'' set out in Exhibit B of this subpart is not required to be used for reserve accounts.

* * * * *

(5) *Financial institutions.* The reserve account must be maintained in authorized financial institutions set out in subpart C of part 1930 of this chapter; *e.g.*, banks, savings associations, credit unions, brokerage firms, mutual funds. Generally, any financial institution may be used provided invested or deposited funds are insured to protect against theft and dishonesty. The reserve account funds need not be Federally insured, but must be otherwise covered by non-Federal insurance against theft and dishonesty.

* * * * *

(b) * * *

(1) *Deposits.* Generally, Rural Development will not require the review or approval of deposits or the use of Form RD 402–1 or 402–2.

* * * * *

7. Section 1902.6, is amended by revising paragraphs (a), (b)(3), (c), (d), (e), and (f) to read as follows:

§ 1902.6 Establishing supervised bank accounts.

(a) Each borrower will be given an opportunity to choose the financial institution in which the supervised bank account will be established, provided the financial institution is a member of the FDIC or NCUA, as applicable.

(b) * * *

(3) An agreement is reached with the financial institution regarding the place where the counter-signature will be on the checks.

(c) When possible, Servicing Officials will make arrangements with financial institutions to waive service charges in connection with supervised bank accounts. However, there is no objection to the payment by the borrower of a reasonable charge for such service.

(d) For each borrower, if the amount of any loan and grant funds, plus any borrower contributions and funds from other sources to be deposited in the supervised bank account will exceed $100,000, the financial institution will be required to pledge collateral for the excess over $100,000 before the deposit is made (see § 1902.7 of this subpart). If the supervised bank account is a joint account, any amount over the FDIC- or NCUA-insured limit must be collateralized.

(e) Only one supervised bank account will be established for any borrower regardless of the amount or source of funds, except for *Rural Rental Housing* loans where separate accounts will be established for each project.

(f) When a supervised bank account is established, an original and two copies of the applicable Deposit Agreement and the Interest-Bearing Deposit Agreement (Exhibit B of this subpart), when applicable, will be executed by the borrower, the financial institution, and a Servicing Office employee. The original will be retained in the borrower's case file, one executed copy will be delivered to the financial institution and one executed copy to the borrower. An extra copy of the Interest-Bearing Deposit Agreement, when applicable, will be prepared and attached to the certificate, passbook, or other evidence of deposit representing the interest-bearing deposit.

* * * * *

■ 8. Section 1902.7, is amended by revising paragraphs (a), (b) introductory

text, (b)(1), (b)(2), (c), (d), (e), and (f) to read as follows:

§ 1902.7 Pledging collateral for deposit of funds in supervised bank accounts.

(a) Funds in excess of $100,000 per financial institution, deposited for borrowers in supervised bank accounts, must be secured by pledging acceptable collateral with the Federal Reserve Bank (FRB) in an amount not less than the excess. If the supervised bank account is a joint account, any amount over the FDIC- or NCUA-insured limit must be collateralized.

(b) As soon as it is determined that the loan will be approved and the applicant has selected or tentatively selected a financial institution for the supervised bank account, the Servicing Official will contact the financial institution to determine:

(1) That the financial institution selected is insured by the FDIC (banks and savings associations) or NCUA (credit unions).

(2) Whether the financial institution is willing to pledge collateral with the FRB under 31 CFR part 202 (Treasury Circular 176) to the extent necessary to secure the amount of funds being deposited in excess of the FDIC or NCUA insurance limit.

* * * * *

(c) If the financial institution agrees to pledge collateral, the Servicing Official should complete RD Form Letter 1902–A–2, ''Designated Financial Institution—Collateral Pledge'', in an original and two copies: The original for the National Office, Policy and Analysis Division; the first copy for the State Office; and the second copy for the Servicing Official. The Rural Development Form Letter 1902–A–2 should be forwarded to the National Office, Policy and Analysis Division, at least 30 days before the date of loan closing.

(d) The National Office, Policy and Analysis Division, will arrange for the financial institution under its designation as a depository and financial agent of the U.S. Government to pledge the requested collateral.

(e) If, two days before loan closing, the local Rural Development office which requested the collateral has not received notification from the National Office, Policy and Analysis Division, that collateral has been pledged, contact should be made with the financial institution to ascertain whether they have pledged collateral with their local FRB under 31 CFR part 202 (Treasury Circular 176). If the financial institution has pledged collateral, the local Rural Development office should contact the National Office, Policy and Analysis Division, who will follow-up with the local FRB concerning the collateral.

(f) When the amount of deposit in the supervised bank account has been reduced to a point where the financial institution desires part or all of the collateral released, it should contact the National Office, Policy and Analysis Division. The local Rural Development office will be contacted for release authorization. The authorization release will be made through the local FRB, with notification to the financial institution. The local Rural Development office may also request release through the National Office, Policy and Analysis Division.

■ 9. Section 1902.8, is added to read as follows:

§ 1902.8 Authority to establish and administer supervised bank accounts.

Servicing Officials are authorized to establish supervised bank accounts, deposit loan checks and other funds, countersign checks, close accounts, and execute all forms in connection with supervised bank account transactions and redelegate this authority to a person under their supervision who is considered capable of exercising such authority. State Directors will make written demand upon the bank for withdrawals outlined in § 1902.16.

■ 10. Section 1902.9, is amended by revising paragraphs (a)(1), (a)(2), (a)(3), (a)(5), (b) introductory text, and (b)(2) to read as follows:

§ 1902.9 Deposits.

(a) * * *

(1) Checks made payable solely to the Federal Government or any Agency thereof, and a joint check when the Treasurer of the United States is a joint payee, may not be deposited in a supervised bank account.

(2) Rural Development personnel will accept funds for deposit in a borrower's supervised bank account ONLY in the form of: A check or money order endorsed by the borrower ''For Deposit Only;'' a check drawn to the order of the financial institution in which the funds are to be deposited; a loan check drawn on the U.S. Treasury; or a Rural Development electronic funds transfer disbursement.

(i) A joint check that is payable to the borrower and Rural Development will be endorsed by the Servicing Official as provided in 7 CFR part 1951, subpart B, Exhibit B, section 4.

(ii) Ordinarily, when deposits are made from funds which are received as the result of consent or subordination agreements or assignments of income, the check should be drawn to the order of the financial institution in which the supervised bank account is established or jointly to the order of the borrower and Rural Development. All such checks should be delivered or mailed to the Servicing Office.

(3) If direct or insured loan funds or borrower contributions are to be deposited in a supervised bank account, such funds will be deposited on the date of loan closing after it has been determined that the loan can be closed. However, if it is impossible to deposit the funds on the day the loan is closed due to reasons such as distance from the financial institution or banking hours, the funds will be deposited on the first banking day following the date of loan closing.

* * * * *

(5) When funds from any source in the form of cash, check, or money order are deposited by Rural Development personnel in a supervised bank account, a deposit slip will be prepared in an original and two copies with distribution as follows: Original to the financial institution, one copy to the borrower, and one copy for the borrower's case folder. The name of the borrower, the sources of funds, ''Subject to Rural Development Countersignature'' and, if applicable, the account number, will be entered on each deposit slip.

* * * * *

(b) *Deposits by borrowers.* Funds in the form of cash, check, or money order may be deposited in the supervised bank account by the borrower if authorized by Rural Development, provided the financial institution has agreed that when a deposit is made to the account by other than Rural Development personnel, the financial institution will promptly deliver or mail a copy of the deposit slip to the Rural Development Servicing Office.

* * * * *

(2) Funds other than loan or grant funds may be deposited by the borrower in those exceptional instances where an agreement is reached between the Servicing Official and the borrower, whereby the borrower will make deposits of income from any source directly into the supervised bank account. In such instances the borrower will be instructed to prepare the deposit slip in the manner described in § 1902.9 (a)(5) of this subpart.

■ 11. Section 1902.10, is amended by revising paragraph (a), revising paragraphs (d)(2) through (d)(5), and removing paragraph (d)(6) to read as follows:

§ 1902.10 Withdrawals.

(a) The Servicing Official will not countersign checks on the supervised bank account for the use of funds unless the funds deposited by the borrower from other sources were cash deposits, checks which the Servicing Official knows to be good, or deposited checks which have cleared.

* * * * *

(d) * * *

(2) Ordinarily, a check will be countersigned before it is delivered to the payee. However, in justifiable circumstances, such as when excessive travel on the part of the borrower or Servicing Official would be involved, or purchase would be prevented, and the borrower can be relied upon to select goods and services in accordance with the plans, a check may be delivered to the payee by the borrower before being countersigned.

(i) When a check is to be delivered to the payee before being countersigned, the Servicing Official must make it clear to the borrower and to the payee, if possible, that the check will be countersigned only if the quantity and quality of items purchased are in accordance with approved plans.

(ii) Checks delivered to the payee before counter-signature will bear the following legend in addition to the legend for countersignature: Valid only upon countersignature of Rural Development.''

(iii) The check must be presented by the payee or a representative to the Rural Development Servicing Office for the required countersignature.

(iv) Such check must be accompanied by a bill of sale, invoice, or receipt signed by the borrower identifying the nature and cost of goods or services purchased, or similar information must be indicated on the check.

(3) For real estate loans or grants, whether the check is delivered to the payee before or after countersignature, the number and date of the check will be inserted on all bills of sale, invoices, receipts, and itemized statements for materials, equipment, and services.

(4) Bills of sale, invoices, receipts, or itemized statements may be returned to the borrower with the canceled check for the payment of the bill.

(5) Checks to be drawn on a supervised bank account will bear the legend:

• ''Countersigned,'' not as co-maker or endorser.

_____

_____

(Title)
Rural Development

■ 12. Section 1902.11 is revised to read as follows:

§ 1902.11 Servicing Office records.

A record of funds deposited in a supervised bank account will be maintained on Form RD 402–2 in accordance with the Forms Manual Insert. The record of funds provided for operating purposes by another creditor or grantor will be on a separate Form RD 402–2 so that they can be clearly identified.

■ 13. Section 1902.14 is revised to read as follows:

§ 1902.14 Reconciliation of accounts.

(a) A checking account statement will be obtained periodically in accordance with established practices in the area. If the checking statement does not include sufficient information to reconcile the account (the name of the payee or the check number and the amount of each check; *i.e.*, a negotiable demand draft drawn on a financial institution), the original cancelled check or either a copy or other reasonable facsimile of the cancelled check must be provided to the Servicing Office with the statement. Checking account statements will be reconciled promptly with Servicing Office records. The person making the reconciliation will initial the record and indicate the date of the action.

(b) All checking account statements and, if necessary, original cancelled checks or either a copy or other reasonable facsimile of the cancelled checks will be forwarded immediately to the borrower when bank statements and Servicing Office records are in agreement. If a transmittal is used, Form RD 140–4, ''Transmittal of Documents'', is prescribed for that purpose.

(c) If the financial institution did not return the original cancelled check(s) to the Agency with the statements, and Rural Development has a need for the original cancelled check(s), the financial institution, upon request by the Agency, will furnish to the Agency the requested original cancelled check(s) or a certified copy or other reasonable certified facsimile of the cancelled check(s) and will provide this service to Rural Development with no fees being assessed the Agency or the Depositor's account for the service.

■ 14. Section 1902.15 is amended by revising paragraph (b), removing paragraph (c), redesignating paragraph (d) as paragraph (c) and revising newly designated paragraphs (c)(1)(i) introductory text, (c)(2) introductory text, (c)(2)(iii), and (c)(4) to read as follows:

§ 1902.15 Closing accounts.

* * * * *

(b) For all loan accounts, after completion of authorized loan funds expenditures, and after promptly refunding any remaining unexpended loan funds on the borrower's loan account with Rural Development or another lender, as appropriate.

(c) * * *

(1) * * *

(i) Ordinarily, upon notice of the death of a borrower, the Servicing Official will request the State Director to make demand upon the bank for the balance on deposit and apply all the balance after payment of any bank charges to the borrower's Rural Development indebtedness. When the State Director approves continuation with a survivor, the supervised bank account of a deceased borrower may be continued with a remaining joint debtor who is liable for the loan and agrees to use the unexpended funds as planned, provided:

* * * * *

(2) *Borrowers in default.* Whenever it is impossible or impractical to obtain a signed check from a borrower whose supervised bank account is to be closed, the Servicing Official will request the State Director to make demand upon the financial institution for the balance on deposit in the borrower's supervised bank account for application as appropriate:

* * * * *

(iii) For the return of Rural Development grant funds in accordance with 7 CFR part 1951, subpart B or

* * * * *

(4) *Paid up borrowers.* A paid-up borrower is one who has a balance remaining in the supervised bank account and has repaid the entire indebtedness to Rural Development and has properly expended all funds advanced by other lenders. In such cases the Servicing Official will:

(i) Notify the borrower in writing that the interests in the account of Rural Development have been terminated, and

(ii) Inform the borrower of the balance remaining in the supervised bank account.

■ 15. Section 1902.50 is revised to read as follows:

§ 1902.50 OMB control number.

The reporting and recordkeeping requirements contained in this regulation have been approved by the OMB and have been assigned OMB Control Number 0575–0158.

■ 16. Exhibit B of this subpart is amended by revising the prefix for the

date from ''19'' to be ''20'' every place it is mentioned.

Dated: September 16, 2005.

Russell T. Davis,

Administrator, Rural Housing Service.

[FR Doc. 05–20357 Filed 10–11–05; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–22626; Directorate Identifier 2002–NM–295–AD; Amendment 39–14332; AD 2005–20–35]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A320–111 Airplanes

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

ACTION: Final rule; request for comments.

SUMMARY: The FAA is superseding an existing airworthiness directive (AD), which applies to certain Airbus Model A320–111 airplanes. The existing AD currently requires repetitive inspections for cracking in the front and rear faces and at the crown fittings of the upper stringers of the center wing box and applicable repairs. This new AD requires continuing the repetitive inspections at revised thresholds and intervals, and applicable repairs. This AD results from a manufacturer survey of airplanes affected by the existing inspection program that led to the consequent revision of the thresholds and intervals of the repetitive inspections. We are issuing this AD to detect and correct fatigue cracking of the upper stringers of the center wing box, which could lead to loss of structural integrity of the wing.

DATES: Effective October 27, 2005.

The Director of the **Federal Register** approved the incorporation by reference of a certain publication listed in the AD as of October 27, 2005.

We must receive comments on this AD by December 12, 2005.

ADDRESSES: Use one of the following addresses to submit comments on this 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.

Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for service information identified in this AD.

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

SUPPLEMENTARY INFORMATION:

Discussion

On October 13, 1993, the FAA issued AD 93–16–10, amendment 39–8667 (58 FR 47825, September 13, 1993). That AD applies to certain Airbus Model A320 airplanes. That AD requires repetitive inspections for cracking in the front and rear faces and at the crown fittings of the upper stringers of the center wing box and applicable repairs, if necessary. We issued that AD to detect fatigue cracking in the upper stringer, which could lead to loss of structural integrity.

Actions Since Existing AD Was Issued

Since we issued AD 93–16–10, Airbus conducted a survey of the upper stringers of the center wing boxes of airplanes affected by the existing inspection program. The results of the survey demonstrated that it was necessary to decrease the thresholds and intervals of the repetitive inspections, due to an adjustment of the A320 family reference fatigue mission.

Relevant Service Information

Airbus has issued Service Bulletin A320–57–1030, Revision 03, dated August 28, 2002. The service bulletin describes procedures for performing repetitive inspections—at thresholds and intervals which have been revised from those specified in Service Bulletin A320–57–1030, dated August 12, 1991, which is the service information referenced in AD 93–16–10—for cracking in the front and rear faces and at the crown fittings of the upper stringers of the center wing box between frame (FR) 36 and FR42. The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, mandated the service information and issued French airworthiness directive 2002–341(B), dated June 26, 2002, to ensure the continued airworthiness of these airplanes in France.

FAA's Determination and Requirements of This AD

This airplane model is manufactured in France and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. We have examined the DGAC's findings, evaluated all pertinent information, and determined that we need to issue an AD for products of this type design that are certificated for operation in the United States.

Therefore, we are issuing this AD to supersede AD 93–16–10. This new AD continues to require repetitive inspections with revised inspection thresholds and intervals, applicable repairs; as specified in the service information described previously, except as discussed under ''Differences Between the AD and Service Information.''

Differences Between the AD and Service Information

Where the service bulletin describes procedures to contact the manufacturer for repair methods, this AD requires operators to use a repair method that we or the DGAC (or its delegated agent) approve.

Clarification of Inspection Terminology

In this AD, the ''detailed visual inspection'' specified in the service bulletin is referred to as a ''detailed inspection.'' We have included the definition for a detailed inspection in Note 1 of this AD.

Explanation of Change to Applicability

We have revised the applicability of the existing AD to identify model designations as published in the most recent type certificate data sheet for the affected models.

Costs of Compliance

None of the airplanes affected by this action are on the U.S. Register. All airplanes affected by this AD are currently operated by non-U.S. operators under foreign registry; therefore, they are not directly affected by this AD action. However, we consider this AD necessary to ensure that the unsafe condition is addressed if

any affected airplane is imported and placed on the U.S. Register in the future.

If an affected airplane is imported and placed on the U.S. Register in the future, the required inspection would take about 2 work hours per airplane, at an average labor rate of $65 per work hour. Based on these figures, the estimated cost of the AD would be $130 per airplane, per inspection cycle.

FAA's Determination of the Effective Date

No airplane affected by this AD is currently on the U.S. Register. Therefore, providing notice and opportunity for public comment is unnecessary before this AD is issued, and this AD may be made effective in less than 30 days after it is published in the **Federal Register**.

Comments Invited

This AD is a final rule that involves requirements that affect flight safety and was not preceded by notice and an opportunity for public comment; however, we invite you to submit any relevant written data, views, or arguments regarding this AD. Send your comments to the address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2005–22626; Directorate Identifier 2002–NM–295–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the AD that might suggest a need to modify it.

We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this AD. Using the search function of that Web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://dms.dot.gov*.

Examining the Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov*, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the Docket Management System receives them.

Authority for This Rulemaking

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

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

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by removing amendment 39–8667 (58 FR 47825, September 13, 1993) and by adding the following new airworthiness directive (AD):

2005–20–35 Airbus: Amendment 39–14332. Docket No. FAA–2005–22626; Directorate Identifier 2002–NM–295–AD.

Effective Date

(a) This AD becomes effective October 27, 2005.

Affected ADs

(b) This AD supersedes AD 93–16–10.

Applicability

(c) This AD applies to Airbus Model A320–111 airplanes, certificated in any category, having manufacturer serial number 002 through 021 inclusive.

Unsafe Condition

(d) This AD results from a manufacturer survey of airplanes affected by the inspection program required by AD 93–16–10 and the consequent revision of the thresholds and intervals of the repetitive inspections. We are issuing this AD to detect and correct fatigue cracking of the upper stringers of the center wing box, which could lead to loss of structural integrity of the wing.

Compliance

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

Initial Inspection

(f) Prior to the accumulation of 6,500 total flight cycles or within 50 flight cycles after the effective date of this AD, whichever occurs later, except as provided by paragraph (g) of this AD, perform a detailed inspection for cracking in the front and rear faces and at the crown fittings of the upper stringers of the center wing box between frame (FR) 36 and FR42, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–57–1030, Revision 03, dated August 28, 2002.

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

(1) If no crack is found, repeat the inspection thereafter at intervals not to

exceed 5,500 flight cycles, in accordance with the service bulletin.

(2) If any crack is found, prior to further flight, repair in accordance with a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the Direction Générale de l'Aviation Civile (DGAC) or its delegated agent.

Previous Initial Inspection

(g) Airplanes that received an initial inspection prior to the effective date of this AD using any service information specified in paragraph (h) of this AD must receive the next inspection within 2,000 flight cycles after the effective date of this AD or 7,500 flight cycles since the last inspection, whichever occurs first; in accordance with paragraph (f) of this AD.

Previous Revisions of Service Bulletins

(h) Actions accomplished before the effective date of this AD in accordance with Airbus Service Bulletin A320–57–1030, dated August 12, 1991; Revision 1, dated September 16, 1996; or Revision 02, dated February 20, 1998; are considered acceptable for compliance with the corresponding actions specified in paragraph (f) of this AD, except as provided by paragraph (g) of this AD.

No Reporting Requirement

(i) Although Airbus Service Bulletin A320–57–1030, Revision 03, dated August 28, 2002, describes procedures for reporting inspection findings to Airbus, this AD does not require such a report.

Alternative Methods of Compliance (AMOCs)

(j)(1) The Manager, International Branch, ANM–116, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with 14 CFR 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

(3) AMOCs approved previously according to AD 93–16–10 are not approved as AMOCs for this AD.

Related Information

(k) French airworthiness directive 2002–341(B), dated June 26, 2002, also addresses the subject of this AD.

Material Incorporated by Reference

(l) You must use Airbus Service Bulletin A320–57–1030, Revision 03, dated August 28, 2002, to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of this document in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Nassif Building, Washington, DC; on the Internet at *http://dms.dot.gov*; or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

Issued in Renton, Washington, on September 28, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–20069 Filed 10–11–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–22625; Directorate Identifier 2003–NM–213–AD; Amendment 39–14331; AD 2005–20–34]

RIN 2120–AA64

Airworthiness Directives; British Aerospace Model HS 748 Airplanes

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

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain British Aerospace Model HS 748 airplanes. This AD requires relocating the battery earth posts located on the nose landing gear (NLG) pintle webs. This AD results from an accident in which the nose landing leg, together with the pintle webs, detached from the airplane. As a result, the battery earth return cables were severed from their earth posts. We are issuing this AD to prevent loss of safety critical services including fuel shut-off and nacelle fire extinguishing services.

DATES: This AD becomes effective October 27, 2005.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of October 27, 2005.

We must receive comments on this AD by December 12, 2005.

ADDRESSES: Use one of the following addresses to submit comments on this 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.

Contact British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171, for service information identified in this AD.

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

SUPPLEMENTARY INFORMATION:

Discussion

The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom, notified us that an unsafe condition may exist on certain British Aerospace Model HS 748 airplanes. The CAA advises that, in an accident involving a Model HS 748 airplane, the nose landing leg, together with the pintle webs, detached from the airplane. As a result, the battery earth return cables were severed from their earth posts. This condition, if not corrected, could result in the loss of safety critical services including fuel shut-off and nacelle fire extinguishing services.

Relevant Service Information

BAE Systems (Operations) Limited has issued Service Bulletin HS748–24–131, Revision 1, dated June 16, 2003. The service bulletin describes procedures for relocating the battery earth posts. The tasks comprise:

- Assembling a new earth post mounting plate;
- Fitting the mounting plate on the side beams of the nose landing gear (NLG) below the cockpit floor;
- Testing the bonding on the new earth post plate installation;
- Rerouting the battery earth return cables;
- Connecting the cables to the earth posts at their new location; and
- Connecting the aircraft batteries.

Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition. The CAA mandated the service information and issued British

airworthiness directive 006–01–2003 to ensure the continued airworthiness of these airplanes in the United Kingdom.

FAA's Determination and Requirements of this AD

This airplane model is manufactured in the United Kingdom and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the CAA has kept the FAA informed of the situation described above. We have examined the CAA's findings, evaluated all pertinent information, and determined that we need to issue an AD for products of this type design that are certificated for operation in the United States.

Therefore, we are issuing this AD to prevent loss of safety critical services including fuel shut-off and nacelle fire extinguishing services. This AD requires accomplishing the actions specified in the service information described previously.

Costs of Compliance

None of the airplanes affected by this action are on the U.S. Register. All airplanes affected by this AD are currently operated by non-U.S. operators under foreign registry; therefore, they are not directly affected by this AD action. However, we consider this AD necessary to ensure that the unsafe condition is addressed if any affected airplane is imported and placed on the U.S. Register in the future.

The following table provides the estimated costs to comply with this AD for any affected airplane that might be imported and placed on the U.S. Register in the future.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts cost	Cost per airplane
Earth post relocation	16	$65	$500	$1,540

FAA's Determination of the Effective Date

No airplane affected by this AD is currently on the U.S. Register. Therefore, providing notice and opportunity for public comment is unnecessary before this AD is issued, and this AD may be made effective in less than 30 days after it is published in the **Federal Register**.

Comments Invited

This AD is a final rule that involves requirements that affect flight safety and was not preceded by notice and an opportunity for public comment; however, we invite you to submit any relevant written data, views, or arguments regarding this AD. Send your comments to an address listed in the **ADDRESSES** section. Include ''Docket No. FAA–2005–22625; Directorate Identifier 2003–NM–213–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the AD that might suggest a need to modify it.

We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this AD. Using the search function of that Web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://dms.dot.gov*.

Examining the Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov*, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the Docket Management System receives them.

Authority for This Rulemaking

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

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

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

2005–20–34 BAE Systems (Operations) Limited (Formerly British Aerospace Regional Aircraft): Amendment 39–14331. Docket No. FAA–2005–22625; Directorate Identifier 2003–NM–213–AD.

Effective Date

(a) This AD becomes effective October 27, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to BAE Systems (Operations) Limited Model HS 748 series 2A and series 2B airplanes, certificated in any category, with batteries installed in the nosecone.

Unsafe Condition

(d) This AD results from an accident in which the nose landing leg, together with the pintle webs, detached from the airplane. As a result, the battery earth return cables were severed from their earth posts. We are issuing this AD to prevent loss of safety critical services including fuel shut-off and nacelle fire extinguishing services.

Compliance

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

Battery Earth Post Relocation

(f) Within 120 days after the effective date of this AD, relocate the battery earth posts, in accordance with the Accomplishment Instructions of BAE Systems (Operations) Limited Service Bulletin HS748–24–131, Revision 1, dated June 16, 2003.

Alternative Methods of Compliance (AMOCs)

(g)(1) The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with 14 CFR 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Related Information

(h) British airworthiness directive 006–01–003 also addresses the subject of this AD.

Material Incorporated by Reference

(i) You must use BAE Systems (Operations) Limited Service Bulletin HS748–24–131, Revision 1, dated June 16, 2003, to perform the actions that are required by this AD, unless the AD specifies otherwise. BAE Systems (Operations) Limited Service Bulletin HS748–24–131, Revision 1, dated June 16, 2003, contains the following effective pages:

Page number	Revision level shown on page	Date shown on page
1–12, 14	1	June 16, 2003.
13	Original	January 20, 2003.

The Director of the **Federal Register** approved the incorporation by reference of this document in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171, for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Nassif Building, Washington, DC; on the Internet at *http://dms.dot.gov*; or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

Issued in Renton, Washington, on September 28, 2005.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–20068 Filed 10–11–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–22614; Directorate Identifier 2005–NM–035–AD; Amendment 39–14324; AD 2005–20–27]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A340–211, –212, –311, and –312 Airplanes

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

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Airbus Model A340–211, –212, –311, and –312 airplanes. This AD requires an initial rotating probe inspection and initial and repetitive ultrasonic inspections for discrepancies of the first fastener hole of the horizontal flange of the keel beam on previously modified airplanes, installation of new fasteners, and corrective action if necessary. This AD results from a report that certain inspections done before accomplishing the modification of the lower keel beam fitting and forward lower shell connection, revealed cracking that was outside the modification limits specified in the service bulletin; the cracking was repaired by installing a titanium doubler. We are issuing this AD to find and fix discrepancies of the fastener holes of the horizontal flange of the keel beam, which could result in reduced structural integrity of the fuselage.

DATES: This AD becomes effective October 27, 2005.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of October 27, 2005.

We must receive comments on this AD by December 12, 2005.

ADDRESSES: Use one of the following addresses to submit comments on this 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.

Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for service information identified in this AD.

FOR FURTHER INFORMATION CONTACT: Tim Backman, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2797; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, notified us that an unsafe condition may exist on certain Airbus Model A340–211, –212, –311, and –312 airplanes. The DGAC advises that certain inspections done before accomplishing the modification specified in Airbus Service Bulletin A340–57–4036 (Airbus Modification 43577), Revision 05, dated March 14, 2000, revealed cracking that was outside the modification limits specified in that service bulletin. The cracking was repaired by installing a titanium doubler using certain repair drawings. Subsequently, a detailed structural analysis was done on the repaired airplanes. It was determined by the manufacturer that a specific inspection program is necessary for the repaired airplanes in order to maintain structural integrity. Cracking of the fastener holes of the horizontal flange of the keel beam could result in reduced structural integrity of the fuselage.

Relevant Service Information

Airbus has issued Service Bulletin A340–57–4087, dated November 21, 2003. The service bulletin describes procedures for an initial rotating probe inspection and initial and repetitive ultrasonic inspections for discrepancies (cracking, out-of-tolerance fastener holes, and fastener damage) of the first fastener hole of the horizontal flange of the keel beam. If no cracking is found during the rotating probe inspection, the service bulletin describes procedures for installation of a new fastener and determining if the fastener hole is out-of-tolerance. The corrective action for any out-of-tolerance hole includes reaming any out-of-tolerance fastener holes to oversize and installing oversized fasteners. The service bulletin also describes procedures for repetitive follow-on ultrasonic inspections for cracking, and contacting Airbus for repair instructions if cracking is found. Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition. The DGAC mandated the service information and issued French airworthiness directive F–2005–007, dated January 5, 2005, to ensure the continued airworthiness of these airplanes in France.

The service bulletin also specifies to contact the manufacturer for disposition of certain repair conditions and report inspection findings to the manufacturer. The service bulletin refers to Airbus Service Bulletin A340–57–4036, Revision 05, dated March 14, 2000, as the source of service information for accomplishing Airbus Modification 43577. The modification was previously accomplished on all airplanes affected by this AD.

FAA's Determination and Requirements of This AD

These airplane models are manufactured in France and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. We have examined the DGAC's findings, evaluated all pertinent information, and determined that we need to issue an AD for products of this type design that are certificated for operation in the United States.

Therefore, we are issuing this AD to find and fix discrepancies of the fastener holes of the horizontal flange of the keel beam, which could result in reduced structural integrity of the fuselage. This AD requires accomplishing the actions specified in Service Bulletin A340–57–4087, described previously, except as discussed under ''Difference Between this AD, the French Airworthiness Directive, and Service Bulletin A340–57–4087.''

Difference Between This AD, the French Airworthiness Directive, and Service Bulletin A340–57–4087

The French airworthiness directive and the service bulletin specify contacting the manufacturer for disposition of certain repair conditions; this AD requires the repair of those conditions to be accomplished per a method approved by either the FAA or the DGAC (or its delegated agent). In light of the type of repair that would be required to address the identified unsafe condition, and in consonance with existing bilateral airworthiness agreements, the FAA has determined that, for this AD, a repair approved by either the FAA or the DGAC (or its delegated agent) would be acceptable for compliance with this AD.

Although the French airworthiness directive allows for use of the procedures specified in Airbus Technical Disposition F57D03012810 or 582.0651/2002 for accomplishing the first rotating probe inspection, this AD does not allow for those documents to be used. This difference has been coordinated with the DGAC.

Clarification of Compliance Time

The service bulletin and French airworthiness directive do not provide a compliance time for the initial ultrasonic inspection if no cracking is found during the rotating probe inspection; however, this AD requires that the inspection be done within 1,480 flight cycles or 7,400 flight hours after accomplishing the one-time rotating probe inspection.

Costs of Compliance

None of the airplanes affected by this action are on the U.S. Register. All airplanes affected by this AD are currently operated by non-U.S. operators under foreign registry; therefore, they are not directly affected by this AD action. However, we consider this AD necessary to ensure that the unsafe condition is addressed if any affected airplane is imported and placed on the U.S. Register in the future.

If an affected airplane is imported and placed on the U.S. Register in the future, it would take between 3 and 8 work hours per airplane for the initial inspections and about 2 work hours per airplane for each repetitive inspection, at an average labor rate of $65 per work hour. Two kits would be required for installing the new fasteners after discarding the removed fasteners. Parts cost is $190 for each kit. Based on these figures, the estimated cost of the initial actions would be between $575 and $900 per airplane; and the estimated cost of the repeat inspection is estimated to be $130 per airplane, per inspection cycle.

FAA's Determination of the Effective Date

No airplane affected by this AD is currently on the U.S. Register. Therefore, providing notice and opportunity for public comment is unnecessary before this AD is issued, and this AD may be made effective in less than 30 days after it is published in the **Federal Register**.

Comments Invited

This AD is a final rule that involves requirements that affect flight safety and was not preceded by notice and an opportunity for public comment; however, we invite you to submit any relevant written data, views, or arguments regarding this AD. Send your comments to an address listed in the **ADDRESSES** section. Include ''Docket No. FAA–2005–22614; Directorate Identifier 2005–NM–035–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the AD that might suggest a need to modify it.

We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this AD. Using the search function of that web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://dms.dot.gov*.

Examining the Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov*, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the Docket Management System receives them.

Authority for this Rulemaking

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

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

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

2005–20–27 Airbus: Amendment 39–14324. Docket No. FAA–2005–22614; Directorate Identifier 2005–NM–035–AD.

Effective Date

(a) This AD becomes effective October 27, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Airbus Model A340–211, –212, –311, and –312 airplanes, certificated in any category, serial numbers 0006, 0007 (right-hand side only), 0008, 0013, 0020, 0024 (left-hand side only), 0027 through 0029 inclusive, 0031, 0033, 0035, 0038 through 0040 inclusive, 0043, 0047, 0049, and 0052.

Unsafe Condition

(d) This AD results from a report that certain inspections done before accomplishing the modification of the lower keel beam fitting and forward lower shell connection revealed cracking that was outside the modification limits specified in the service bulletin; the cracking was repaired by installing a titanium doubler. The FAA is issuing this AD to find and fix discrepancies of the fastener holes of the horizontal flange of the keel beam, which could result in reduced structural integrity of the fuselage.

Compliance

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

Note 1: Airbus Service Bulletin A340–57–4087, dated November 21, 2003, cites Airbus Service Bulletin A340–57–4036, Revision 05, dated March 14, 2000, as the source of service information for accomplishing Airbus Modification 43577.

Initial/Repetitive Nondestructive Test Inspections/Repair

(f) Within 5,420 flight cycles or 26,200 flight hours after accomplishing Airbus Modification 43577, whichever is first: Perform an initial rotating probe inspection for discrepancies of the first fastener hole of the horizontal flange of the keel beam by doing all the actions in accordance with the Accomplishment Instructions of Airbus Service Bulletin A340–57–4087, dated November 21, 2003. If no cracking is found, before further flight, inspect for correct fastener diameter tolerance; if the fastener diameter is out-of-tolerance, before further flight, ream to oversize the fastener holes and install oversize fasteners in accordance with the Accomplishment Instructions of the service bulletin.

(g) If no cracking is found during any inspection required by paragraph (f) of this AD: Within 1,480 flight cycles or 7,400 flight hours, whichever is first, after accomplishing the inspection: Perform an initial ultrasonic inspection for discrepancies of the first fastener hole of the horizontal flange of the keel beam by doing all the actions in accordance with the Accomplishment Instructions of Airbus Service Bulletin A340–57–4087, dated November 21, 2003. If no cracking is found, repeat the ultrasonic inspection thereafter at intervals not to exceed 1,480 flight cycles or 7,400 flight hours, whichever is first.

Repair Per the FAA or the Direction Générale De L'Aviation Civile (DGAC)

(h) If any cracking is found during any inspection required by this AD: Before

further flight, repair per a method approved by either the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the DGAC (or its delegated agent). Within 1,480 flight cycles or 7,400 flight hours, whichever is first, after repair of any cracking, perform an ultrasonic inspection as required by paragraph (g) of this AD. Repeat the ultrasonic inspection thereafter at intervals not to exceed 1,480 flight cycles or 7,400 flight hours, whichever is first.

No Reporting Required

(i) Although Airbus Service Bulletin A340–57–4087, dated November 21, 2003, specifies submitting an inspection report to the manufacturer, this AD does not include that requirement.

Alternative Methods of Compliance (AMOCs)

(j)(1) The Manager, International Branch, ANM–116, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with 14 CFR 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Related Information

(k) French airworthiness directive F–2005–007, dated January 5, 2005, also addresses the subject of this AD.

Material Incorporated by Reference

(l) You must use Airbus Service Bulletin A340–57–4087, including Appendix 01, dated November 21, 2003, to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of this document in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Nassif Building, Washington, DC; on the Internet at *http://dms.dot.gov*; or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal-register/cfr/ibr-locations.html*.

Issued in Renton, Washington, on September 28, 2005.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–20073 Filed 10–11–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–21862; Directorate Identifier 2005–NM–091–AD; Amendment 39–14333; AD 2005–20–36]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A320–111 Airplanes; and Model A320–200, A321–100, and A321–200 Series Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Airbus Model A320–111 airplanes; and Model A320–200, A321–100, and A321–200 series airplanes. This AD requires installing a bonding lead between the low pressure valve and the adjacent pipe assembly in each wing. This AD results from fuel system reviews conducted by the manufacturer. We are issuing this AD to prevent an ignition source for fuel vapor in the wing, which could result in fire or explosion in the adjacent wing fuel tank.

DATES: This AD becomes effective November 16, 2005.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of November 16, 2005.

ADDRESSES: You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., Nassif Building, room PL–401, Washington, DC.

Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for service information identified in this AD.

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

SUPPLEMENTARY INFORMATION:

Examining the Docket

You may examine the airworthiness directive (AD) docket on the Internet at *http://dms.dot.gov* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the street address stated in the **ADDRESSES** section.

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to certain Airbus Model A320–111 airplanes; and Model A320–200, A321–100, and A321–200 series airplanes. That NPRM was published in the **Federal Register** on July 19, 2005 (70 FR 41352). That NPRM proposed to require installing a bonding lead between the low pressure valve and the adjacent pipe assembly in each wing.

Comments

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

Request to Allow Credit for Use of Original Issue of Service Bulletin

One commenter requests that we give credit for actions accomplished prior to the effective date of the AD using Airbus Service Bulletin A320–28–1055, dated July 12, 1993. The commenter contends that such credit is permitted by French airworthiness directive F–2005–058, dated April 13, 2005.

We agree with this request. We have reviewed the original issue of the service bulletin and determined that no significant technical changes were made in the issuance of Airbus Service Bulletin A320–28–1055, Revision 1, dated March 8, 1994. Therefore, we have added new paragraph (g) to give credit as specified and re-identified existing paragraphs (g) and (h) to (h)(1) and (i) in this AD.

Clarification of Alternative Method of Compliance (AMOC) Paragraph

We have revised this action to clarify the appropriate procedure for notifying the principal inspector before using any approved AMOC on any airplane to which the AMOC applies.

Conclusion

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

Costs of Compliance

This AD will affect about 403 airplanes of U.S. registry. The required

actions will take about 2 work hours per airplane, at an average labor rate of $65 per work hour. Required parts will be obtained from operator stores. Based on these figures, the estimated cost of the AD for U.S. operators is $52,390, or $130 per airplane.

Authority for This Rulemaking

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

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

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

2005–20–36 Airbus: Amendment 39–14333. Docket No. FAA–2005–21862; Directorate Identifier 2005–NM–091–AD.

Effective Date

(a) This AD becomes effective November 16, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Airbus Model A320–111, –211, –212, –214, –231, –232, and –233 airplanes, and Model A321–111, –112, –131, –211, and –231 airplanes, certificated in any category; except those airplanes on which Airbus Modification 23645 has been incorporated in production.

Unsafe Condition

(d) This AD was prompted by the results of fuel system reviews conducted by the manufacturer. We are issuing this AD to prevent an ignition source for fuel vapor in the wing, which could result in fire or explosion in the adjacent wing fuel tank.

Compliance

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

Installation of Bonding Lead

(f) Within 56 months after the effective date of this AD, install a bonding lead between the low pressure valve and the adjacent pipe assembly in each wing, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–28–1055, Revision 1, dated March 8, 1994.

Actions Accomplished Using Original Issue of Service Bulletin

(g) Actions accomplished prior to the effective date of this AD in accordance with Airbus Service Bulletin A320–28–1055, dated July 12, 1993, are considered acceptable for compliance with the corresponding actions required by paragraph (f) of this AD.

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with 14 CFR 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Related Information

(i) French airworthiness directive F–2005–058, dated April 13, 2005, also addresses the subject of this AD.

Material Incorporated by Reference

(j) You must use Airbus Service Bulletin A320–28–1055, Revision 1, dated March 8, 1994, to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of this document in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Nassif Building, Washington, DC; on the Internet at *http://dms.dot.gov*; or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

Issued in Renton, Washington, on September 28, 2005.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–20067 Filed 10–11–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–21173; Directorate Identifier 2005–CE–22–AD; Amendment 39–14321; AD 2005–20–25]

RIN 2120–AA64

Airworthiness Directives; The Cessna Aircraft Company Models 401, 401A, 401B, 402, 402A, 402B, 402C, 404, 411, 411A, 414, 414A, 421, 421A, 421B, 421C, 425, and 441 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA adopts a new airworthiness directive (AD) for certain The Cessna Aircraft Company (Cessna) Models 401, 401A, 401B, 402, 402A, 402B, 402C, 404, 411, 411A, 414, 414A, 421, 421A, 421B, 421C, 425, and 441 airplanes equipped with certain avionics bus circuit breaker switches.

This AD requires you to inspect the avionics bus circuit breaker switch to determine the date code and replace any without a date code. This AD also imposes a 1,000-hour safe life limit on avionics bus circuit breaker switches with a date code earlier than 0434. This AD results from reports of smoke and a burning smell in the cockpit. We are issuing this AD to prevent failure of the avionics bus circuit breaker switch, which could result in smoke and a burning smell in the cockpit. This failure could lead to reduced ability to control the airplane.

DATES: This AD becomes effective on November 9, 2005.

As of November 9, 2005, the Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulation.

ADDRESSES: To get the service information identified in this AD, contact The Cessna Aircraft Company, Product Support P.O. Box 7706, Wichita, Kansas 67277; telephone: (316) 517–5800; facsimile: (316) 942–9006.

To view the AD docket, go to the Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001 or on the Internet at *http://dms.dot.gov.* The docket number is FAA–2005–21173; Directorate Identifier 2005–CE–22–AD.

FOR FURTHER INFORMATION CONTACT: Gerald Pilj, Aerospace Engineer, FAA, Wichita ACO, 1801 Airport Road, Mid-Continent Airport, Wichita, Kansas 67209; telephone: (316) 946–4151; facsimile: (316) 946–4107.

SUPPLEMENTARY INFORMATION:

Discussion

What events have caused this AD? We have received failure reports of certain Tyco Electronics circuit breaker switches installed on the master avionics bus of Cessna Models 401, 401A, 401B, 402, 402A, 402B, 402C, 404, 411, 411A, 414, 414A, 421, 421A, 421B, 421C, 425, and 441 airplanes. Failure of these circuit breaker switches causes smoke and a burning smell in the cockpit.

Analysis of the circuit breaker switch revealed the copper braid inside the switch had frayed. Continued use causes an internal short. The internal short could result in the internal switch components or external wiring melting because it is no longer protected by the circuit breaker.

The affected circuit breaker switches have a date code earlier than 0434 or do not have a date code on them.

The date code consists of four digits. The first two represent the year and the last two represent the week of the year the part was made.

What is the potential impact if FAA took no action? If not prevented, failure of the avionics bus circuit breaker switch could cause smoke and a burning smell in the cockpit. This failure could lead to reduced ability to control the airplane.

Has FAA taken any action to this point? We issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain Cessna Models 401, 401A, 401B, 402, 402A, 402B, 402C, 404, 411, 411A, 414, 414A, 421, 421A, 421B, 421C, 425, and 441 airplanes equipped with certain avionics bus circuit breaker switches. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on June 9, 2005 (70 FR 33720). The NPRM proposed to require you to:

- inspect the avionics bus circuit breaker switch to determine the date code;
- replace all avionics bus circuit breaker switches without a date code; and
- implement a 1,000-hour safe life limit for all avionics bus circuit breaker switches with a date code earlier than 0434.

Comments

Was the public invited to comment? We provided the public the opportunity to participate in developing this AD. We received no comments on the proposal or on the determination of the cost to the public.

Conclusion

What is FAA's final determination on this issue? We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed except for minor editorial corrections. We have determined that these minor corrections:

- are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- do not add any additional burden upon the public than was already proposed in the NPRM.

Changes to 14 CFR Part 39—Effect on the AD

How does the revision to 14 CFR part 39 affect this AD? On July 10, 2002, the FAA published a new version of 14 CFR part 39 (67 FR 47997, July 22, 2002), which governs the FAA's AD system. This regulation now includes material that relates to altered products, special flight permits, and alternative methods of compliance. This material previously was included in each individual AD. Since this material is included in 14 CFR part 39, we will not include it in future AD actions.

Costs of Compliance

How many airplanes does this AD impact? We estimate that this AD affects 7,125 airplanes in the U.S. registry.

What is the cost impact of this AD on owners/operators of the affected airplanes? We estimate the following costs to accomplish the inspection and replacement:

For Models 401, 401A, 401B, 402, 402A, 402B, 402C, 404, 411, 411A, 414, 414A, 421, 421A, 421B, and 421C airplanes:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
4 work hours × $65 an hour = $260.	$119 each.	$498 (if 2 switches are required).	$498 × 6,527 = $3,250,446.

For Models 425 and 441 airplanes:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
8 work hours × $65 an hour = $520.	$119 each.	$758 (if 2 switches are required).	$758 × 598 = $453,284.

Authority for This Rulemaking

What authority does FAA have for issuing this rulemaking action? Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

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

Regulatory Findings

Will this AD impact various entities? We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

Will this AD involve a significant rule or regulatory action? For the reasons discussed above, I certify that this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a summary of the costs to comply with this AD (and other information as included in the Regulatory Evaluation) and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES**. Include ''Docket No. FAA–2005–21173; Directorate Identifier 2005–CE–22–AD'' in your request.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2005–20–25 The Cessna Aircraft Company: Amendment 39–14321; Docket No. FAA–2005–21173; Directorate Identifier 2005–CE–22–AD.

When Does This AD Become Effective?

(a) This AD becomes effective on November 9, 2005.

What Other ADs Are Affected By This Action?

(b) None.

What Airplanes Are Affected by This AD?

(c) This AD affects the following airplane models and serial numbers that are:

(1) Equipped with an avionics bus circuit breaker switch, part number (P/N) CM3589–50, 593–250–101, 593–250–102, W31–X2M5A–50, or W31–X1000–50; and

(2) certificated in any category:

Model	Serial numbers
401 ...	655 and 401–0001 through 401–0322.
401A	655 and 401A0001 through 401A0132.
401B	401B0001 through 401B0221.
402 ...	402–0001 through 402–0322.
402A	402A0001 through 402A0129.
402B	402B0001 through 402B0122, 402B0201 through 402B0249, 402B0301 through 402B0455, 402B0501 through 402B0640, 402B0801 through 402B0935, 402B1001 through 402B1100, 402B1201 through 402B1250, and 402B1301 through 402B1384.
402C	689, 402C0001 through 402C0125, 402C0201 through 402C0355, 402C0401 through 402C0528, 402C0601 through 402C0653, 402C0801 through 402C0807, and 402C0808 through 402C1020.
404 ...	682, 404–0001 through 404–0136, 404–0201 through 404–0246, 404–0401 through 404–0460, 404–0601 through 404–0695, and 404–0801 through 404–0859.
411 ...	642 and 411–0001 through 411–0250.
411A	411–0251 through 411–0300.
414 ...	667, 414–0001 through 414–0099, 414–0151 through 414–0175, 414–0251 through 414–0280, 414–0351 through 414–0437, 414–0451 through 414–0550, 414–0601 through 414–0655, 414–0801 through 414–0855, and 414–0901 through 414–0965.
414A	414A0001 through 414A0121, 414A0201 through 414A0340, 414A0401 through 414A0535, 414A0601 through 414A0680, 414A0801 through 414A0858, and 414A1001 through 414A1212.
421 ...	693 and 421–0001 through 421–0200.
421A	421A0001 through 421A0158.
421B	421B0001 through 421B0056, 421B0101 through 421B0147, 421B0201 through 421B0275, 421B0301 through 421B0486, 421B0501 through 421B0665, and 421B0801 through 421B0970.
421C	421C0001 through 421C0171, 421C0201 through 421C0350, 421C0401 through 421C0525, 421C0601 through 421C0715, 421C0801 through 421C0910, 421C1001 through 421C1115, 421C1201 through 421C1257, 421C1401 through 421C1413, and 421C1801 through 421C1807.
425 ...	425–0001 through 425–0236.
441 ...	698 and 441–0001 through 441–0362.

What is the Unsafe Condition Presented in This AD?

(d) This AD is the result of reports of smoke and a burning smell in the cockpit. The actions specified in this AD are intended to prevent failure of the avionics bus circuit breaker switch, which could result in smoke and a burning smell in the cockpit. This failure could lead to reduced ability to control the airplane.

What Must I do to Address This Problem?

(e) To address this problem, you must do the following:

Actions	Compliance	Procedures
(1) Inspect the avionics bus circuit breaker switch to determine the part number (P/N) and date code. (i) If the P/N is CM3589–50, 593–250–101, 593–250–102, W31–X2M5A–50, or W31–X1000–50; and (ii) The date code is 0434 or later; then (iii) No further action is required.	Within the next 200 hours time-in-service (TIS), the next 12 months, or at the next scheduled inspection, after November 9, 2005 (the effective date of this AD), whichever occurs first.	*For Models 425 and 441 airplanes*, follow the procedures in Cessna Conquest Service Bulletin CQB05–2, dated February 21, 2005, and the applicable maintenance manual. *For all other affected airplane models*, follow the procedures in Cessna Multi-engine Service Bulletin MEB05–1 dated February 21, 2005, and the applicable maintenance manual.
(2) If the P/N is CM3589–50, 593–250–101, 593–250–102, W31–X2M5A–50, or W31–X1000–50 and there is no date code, replace the avionics bus circuit breaker switch with a P/N CM3589–50 that has a date code of 0434 or later.	Before further flight after the inspection required in paragraph (e)(1) of this AD.	*For Models 425 and 441 airplanes*, follow the procedures in Cessna Conquest Service Bulletin CQB05–2, dated February 21, 2005, and the applicable maintenance manual. *For all other affected airplane models*, follow the procedures in Cessna Multi-engine Service Bulletin MEB05–1, dated February 21, 2005, and the applicable maintenance manual.
(3) If the P/N is CM3589–50, 593–250–101, 593–250–102, W31–X2M5A–50, or W31–X1000–50, or W31–X1000–50 and the date code is earlier than 0434, the part has a safe life limit of 1,000 hours TIS and must be replaced within the 1,000-hour time limit with a P/N CM3589–50 that has a date code of 0434 or later.	Within the 1,000-hour TIS safe life limit	*For Models 425 and 441 airplanes*, follow the procedures in Cessna Conquest Service Bulletin CQB05–2, dated February 21, 2005, and the applicable maintenance manual. *For all other affected airplane models*, follow the procedures in Cessna Multi-engine Service Bulletin MEB05–1, dated February 21, 2005, and the applicable maintenance manual.
(4) Do not install a P/N CM3589–50, 593–250–101, 593–250–102, W31–X2M5A–50, or W31–X1000–50 that does not have a date code or has a date code earlier than 0434.	As of November 9, 2005 (the effective date of this AD).	Not applicable.

May I Request an Alternative Method of Compliance?

(f) You may request a different method of compliance or a different compliance time for this AD by following the procedures in 14 CFR 39.19. Unless FAA authorizes otherwise, send your request to your principal inspector. The principal inspector may add comments and will send your request to the Manager, Wichita Aircraft Certification Office (ACO), FAA. For information on any already approved alternative methods of compliance, contact Gerald Pilj, Aerospace Engineer, FAA Wichita ACO, 1801 Airport Road, Mid-Continent Airport, Wichita, Kansas 67209; telephone: (316) 946–4151; facsimile: (316) 946–4107.

Does This AD Incorporate Any Material by Reference?

(g) You must do the actions required by this AD following the instructions in Cessna Conquest Service Bulletin CQB05–2, dated February 21, 2005, and Cessna Multi-engine Service Bulletin MEB05–1, dated February 21, 2005. The Director of the Federal Register approved the incorporation by reference of this service bulletin in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. To get a copy of this service information, contact The Cessna Aircraft Company, Citation Marketing Division, Product Support P.O. Box 7706, Wichita, Kansas 67277; telephone: (316) 517–5800; facsimile: (316) 942–9006. To review copies of this service information, go to the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html* or call (202) 741–6030. To view the AD docket, go to the Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001 or on the Internet at *http://dms.dot.gov*. The docket number is FAA–2005–21173; Directorate Identifier 2005–CE–22–AD.

Issued in Kansas City, Missouri, on September 28, 2005.

David R. Showers,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–19928 Filed 10–11–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–21464; Directorate Identifier 2005–CE–32–AD; Amendment 39–14320; AD 2005–20–24]

RIN 2120–AA64

Airworthiness Directives; SOCATA—Groupe AEROSPATIALE Model TBM 700 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA adopts a new airworthiness directive (AD) for certain SOCATA—Groupe AEROSPATIALE (SOCATA) Model TBM 700 airplanes. This AD requires you to inspect the fuselage skin in the VHF1 antenna mounting area for cracks and loose rivets. This AD also requires you to modify the area if you find cracks or loose rivets. This AD results from mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for France. We are issuing this AD to detect and correct cracks in the fuselage skin, which could result in loss of aircraft pressurization. Loss of aircraft pressurization could lead to flight crew incapacitation.

DATES: This AD becomes effective on November 9, 2005.

As of November 9, 2005, the Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulation.

ADDRESSES: To get the service information identified in this AD, contact EADS SOCATA Tarbes, Direction des Services, 65921 Tarbes Cedex 9, France; telephone: 33 (0)5 62.41.73.00; facsimile: 33 (0)5 62.41.76.54; or SOCATA AIRCRAFT, North Perry Airport, 7501 Pembroke Road, Pembroke Pines, Florida 33023.

To view the AD docket, go to the Docket Management Facility; U.S. Department of Transportation, 400

Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001 or on the Internet at *http://dms.dot.gov*. The docket number is FAA–2005–21464; Directorate Identifier 2005–CE–32–AD.

FOR FURTHER INFORMATION CONTACT: Peter L. Rouse, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4135; facsimile: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Discussion

What events have caused this AD? The Direction Générale de L'Aviation Civile (DGAC), which is the airworthiness authority for France, notified FAA that an unsafe condition may exist on certain SOCATA Model TBM 700 airplanes. The DGAC reports cracks in the fuselage skin by the passenger door on the affected airplanes. These airplanes have a VHF1 antenna mounted under the fuselage between frame C12 and C13 or C13 and C13bis.

Investigations reveal that antenna vibrations are causing the cracks.

What is the potential impact if FAA took no action? If not detected and corrected, cracks in the fuselage skin could cause loss of aircraft pressurization. Loss of pressurization could lead to flight crew incapacitation.

Has FAA taken any action to this point? We issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain SOCATA Model TBM 700 airplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on July 7, 2005 (70 FR 39204). The NPRM proposed to require you to inspect the fuselage skin where the VHF1 antenna mounts under the fuselage between frame C12 and C13 or C13 and C13bis for cracks and loose rivets. The NPRM also proposes to require you to modify the VHF1 antenna bracket and the antenna/fuselage interface.

Comments

Was the public invited to comment? We provided the public the opportunity to participate in developing this AD. We received no comments on the proposal or on the determination of the cost to the public.

Conclusion

What is FAA's final determination on this issue? We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed except for minor editorial corrections. We have determined that these minor corrections:

—Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and

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

Changes to 14 CFR Part 39—Effect on the AD

How does the revision to 14 CFR part 39 affect this AD? On July 10, 2002, the FAA published a new version of 14 CFR part 39 (67 FR 47997, July 22, 2002), which governs the FAA's AD system. This regulation now includes material that relates to altered products, special flight permits, and alternative methods of compliance. This material previously was included in each individual AD. Since this material is included in 14 CFR part 39, we will not include it in future AD actions.

Costs of Compliance

How many airplanes does this AD impact? We estimate that this AD affects 185 airplanes in the U.S. registry.

What is the cost impact of this AD on owners/operators of the affected airplanes? We estimate the following costs to do the inspection:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
1 work hour × $65 per hour = $65	Not applicable	$65	$65 × $185 = $12,025

We estimate the following costs to do the modification.

Labor cost	Parts cost	Total cost per airplane
4 work hours × $65 per hour = $260	$181	$441

Authority for This Rulemaking

What authority does FAA have for issuing this rulemaking action? Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

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

Regulatory Findings

Will this AD impact various entities? We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

Will this AD involve a significant rule or regulatory action? For the reasons discussed above, I certify that this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a summary of the costs to comply with this AD (and other information as included in the Regulatory Evaluation) and placed it in the AD Docket. You may get a copy of

this summary by sending a request to us at the address listed under **ADDRESSES**. Include ''Docket No. FAA–2005–21464; Directorate Identifier 2005–CE–32–AD'' in your request.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2005–20–24 Socata—Groupe Aerospatiale: Amendment 39–14320; Docket No. FAA–2005–21464; Directorate Identifier 2005–CE–32–AD.

When Does This AD Become Effective?

(a) This AD becomes effective on November 9, 2005.

What Other ADs Are Affected by This Action?

(b) None.

What Airplanes Are Affected by This AD?

(c) This AD affects the following Model TBM 700 airplanes, serial numbers 1 through 255; 257 through 267; and 270, that are:

(1) equipped with a VHF1 antenna mounted under the fuselage between frame C12 and C13 or C13 and C13bis; and

(2) certificated in any category.

What Is the Unsafe Condition Presented in This AD?

(d) This AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for France. The actions specified in this AD are intended to detect and correct cracks in the fuselage skin, which could result in loss of aircraft pressurization. Loss of aircraft pressurization could lead to flight crew incapacitation.

What Must I Do To Address This Problem?

(e) To address this problem, you must do the following:

Note: The EADS SOCATA Mandatory Service Bulletin TBM Aircraft, SB 70–103, Amendment 1, ATA No. 53, dated September 2003, allows the pilot to perform the visual inspection of the fuselage skin in the VHF1 antenna mount area for cracks and loose rivets. The Federal Aviation Regulations (14 CFR 43.3) only allow the pilot to perform preventive maintenance as described in 14 CFR part 43, App. A, paragraph (c). These visual inspections are not considered preventive maintenance under 14 CFR part 43, App. A, paragraph (c). Therefore, an appropriately-rated mechanic must perform all actions of this AD.

Actions	Compliance	Procedures
(1) Inspect the fuselage skin in the VHF1 antenna mount area between frame C12 and C13 or C13 and C13bis for cracks and loose rivets.	Within the next 50 hours time-in-service (TIS) after November 9, 2005, (the effective date of this AD). Repetitively inspect thereafter at intervals not to exceed 50 hours TIS until the modification in paragraph (e)(2) of this AD is done. Modifying the VHF1 antenna bracket and interface area terminates the repetitive inspection requirement of this AD.	Follow EADS SOCATA Mandatory Service Bulletin TBM Aircraft, SB 70–103, Amendment 1, ATA No. 53, dated September 2003.
(2) Modify the VHF1 antenna bracket and the antenna/fuselage interface.	At whichever of the following that occurs first: (i) Before further flight anytime a crack or loose rivet is found during any inspection required in paragraph (e)(1) of this AD. (ii) Within 100 hours TIS or 12 months after November 9, 2005 (the effective date of this AD), whichever occurs later.	Follow EADS SOCATA Recommended Service Bulletin TBM Aircraft, SB 70–111, ATA No. 53, dated October 2003, and the applicable maintenance manual.

May I Request an Alternative Method of Compliance?

(f) You may request a different method of compliance or a different compliance time for this AD by following the procedures in 14 CFR 39.19. Unless FAA authorizes otherwise, send your request to your principal inspector. The principal inspector may add comments and will send your request to the Manager, Standards Office, Small Airplane Directorate, FAA. For information on any already approved alternative methods of compliance, contact Peter L. Rouse, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4135; facsimile: (816) 329–4090.

Is There Other Information That Relates to This Subject?

(g) French AD Number F–2003–367 R1, Distribution A, Issue date: February 4, 2004, also addresses the subject of this AD.

Does This AD Incorporate Any Material by Reference?

(h) You must do the actions required by this AD following the instructions in EADS SOCATA Mandatory Service Bulletin TBM Aircraft, SB 70–103, Amendment 1, ATA No. 53, dated September 2003, and EADS SOCATA Recommended Service Bulletin TBM Aircraft, SB 70–111, ATA No. 53, dated October 2003. The Director of the Federal Register approved the incorporation by reference of this service bulletin in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. To get a copy of this service information, contact EADS SOCATA Tarbes, Direction des Services, 65921 Tarbes Cedex 9, France; telephone: 33 (0)5 62.41.73.00; facsimile: 33 (0)5 62.41.76.54; or SOCATA AIRCRAFT, North Perry Airport, 7501 Pembroke Road, Pembroke Pines, Florida 33023. To review copies of this service information, go to the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html* or call (202) 741–6030. To view the AD docket, go to the Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001 or on the Internet at *http://dms.dot.gov.* The docket number is FAA–2005–21464; Directorate Identifier 2005–CE–32–AD.

Issued in Kansas City, Missouri, on September 28, 2005.

David R. Showers,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–19930 Filed 10–11–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–20848; Directorate Identifier 2005–NE–02–AD; Amendment 39–14323; AD 2005–20–26]

RIN 2120–AA64

Airworthiness Directives; Aviointeriors S.p.A. (formerly ALVEN), Series 312 Box Mounted Seats

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

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for Aviointeriors S.p.A. (formerly ALVEN), series 312 box mounted seats. This AD requires initial and repetitive inspections of the seat attachments for cracks, and if necessary, replacing the attachments. This AD results from 10 reports of cracked attachments of series 312 box mounted seats. We are issuing this AD to prevent series 312 box mounted seats from detaching from the passenger compartment floor, which could result in injury to the occupant of the seat, and prevent evacuation of passengers in the event of an emergency.

DATES: This AD becomes effective November 16, 2005. The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of November 16, 2005.

ADDRESSES: Contact Aviointeriors S.p.A., Via Appia Km. 66.4—04013 Latina, Italy; telephone: 39–0773–6891; fax: 39–0773–631546 for the service information identified in this AD.

You may examine the AD docket on the Internet at *http://dms.dot.gov* or in Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Jeffrey Lee, Aerospace Engineer, Boston Aircraft Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone: 781–238–7161; fax: 781–238–7170.

SUPPLEMENTARY INFORMATION: The FAA proposed to amend 14 CFR part 39 with a proposed airworthiness directive (AD). The proposed AD applies to Aviointeriors S.p.A. (formerly ALVEN), series 312 box mounted seats. We published the proposed AD in the **Federal Register** on April 11, 2005 (70 FR 18322). That action proposed to require initial and repetitive inspections of the seat attachments for cracks, and if necessary, replacing the attachments.

Examining the AD Docket

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

Comments

We provided the public the opportunity to participate in the development of this AD. We received no comments on the proposal or on the determination of the cost to the public.

Conclusion

We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

Costs of Compliance

There are about 68 Aviointeriors S.p.A. series 312 box mounted seats installed on airplanes of U.S. registry that are affected by this AD. We estimate that it will take about 0.5 work hour per seat to perform the inspections, and about 0.5 work hour per seat to perform the replacement of an attachment. The average labor rate is $65 per work hour. Required parts will cost about $297.50 per seat. Based on these figures, we estimate the total cost of one inspection and total parts replacement to U.S. operators to be $24,650.

Authority for This Rulemaking

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

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

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive:

2005–20–06 Aviointeriors S.p.A. (formerly ALVEN): Amendment 39–14323. Docket No. FAA–2005–20848; Directorate Identifier 2005–NE–02–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective November 16, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Aviointeriors S.p.A. (formerly ALVEN), series 312 box mounted

seats, part number (P/N) 312( )( )27–( )( )( ) ( )( ) and P/N 312( )( )36–( )( )( )( )( ). These seats are installed in, but not limited to, Fokker Model F27 Mark 050, Mark 500, and Mark 600 airplanes.

(d) The parentheses appearing in the seat P/N indicate the presence or absence of an additional letter(s), or number(s), that varies the basic seat configuration. This AD still applies regardless of whether these letters, or numbers, are present or absent in the seat P/N designation.

Unsafe Condition

(e) This AD results from 10 reports of cracked attachments of series 312 box mounted seats. We are issuing this AD to prevent series 312 box mounted seats from detaching from the passenger compartment floor, which could result in injury to the occupant of the seat, and prevent evacuation of passengers in the event of an emergency.

Compliance

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

Attachments That Have Already Accumulated 8,000 Hours Time-In-Service (TIS) or More

(g) For attachments that have already accumulated 8,000 hours TIS or more on the effective date of this AD, do the following:

(1) Within 90 days after the effective date of this AD, replace attachments with new attachments of the same P/N, using Section 2., Replacement Procedure, Steps 2.4 though 2.6 of Aviointeriors Service Bulletin No. 312/912–05, Revision 1, dated August 24, 2001.

(2) Perform repetitive visual inspections as specified in paragraph (i) of this AD.

Initial Visual Inspection

(h) Perform an initial visual inspection of the seat outboard and inboard attachments for cracks, within 90 days after the effective date of this AD, as follows:

(1) Inspect seat outboard attachment, part number (P/N) DM03313–1, and seat inboard attachment, P/N DM03314–1, using Section 2., Inspection Procedure, Steps 2.1 through 2.5 of Aviointeriors Service Bulletin (SB) No. 312/912–05, Revision 1, dated August 24, 2001.

(2) Replace any cracked attachment with a new attachment of the same P/N, using Section 2., Replacement Procedure, Steps 2.4 though 2.6 of Aviointeriors SB No. 312/912–05, Revision 1, dated August 24, 2001.

(3) Replace attachments when they have accumulated 8,000 hours time-in-service (TIS), with new attachments of the same P/N, using Section 2., Replacement Procedure, Steps 2.4 though 2.6 of Aviointeriors SB No. 312/912–05, Revision 1, dated August 24, 2001.

Repetitive Visual Inspections

(i) Within 650 hours TIS after the last inspection, or within 650 hours TIS after attachment was replaced, and whenever the seat is being installed or removed, perform repetitive visual inspections for cracks, and replace cracked seat outboard and inboard attachments. Use paragraphs (h)(1) through (h)(3) of this AD to inspect and disposition the attachments.

Alternative Methods of Compliance

(j) The Manager, Boston Aircraft Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

Related Information

(k) Ente Nazionale per l'Aviazione Civile airworthiness directive AD 2001–479, dated November 12, 2001, also addresses the subject of this AD.

Material Incorporated by Reference

(l) You must use Aviointeriors Service Bulletin No. 312/912–05, Revision 1, dated August 24, 2001, to perform the actions required by this AD. The Director of the Federal Register approved the incorporation by reference of this service bulletin in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Aviointeriors S.p.A., Via Appia Km. 66.4—04013 Latina, Italy; telephone: 39–0773–6891; fax: 39–0773–631546, for a copy of this service information. You may review copies at the Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001, on the internet at *http://dms.dot.gov,* or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Burlington, Massachusetts, on September 30, 2005.

Francis A. Favara,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 05–19941 Filed 10–11–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–20223; Directorate Identifier 2004–NM–193–AD; Amendment 39–14334; AD 2005–20–37]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–135BJ, –135ER, –135KE, –135KL, –135LR, –145, –145ER, –145MR, –145LR, –145XR, –145MP, and –145EP Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all EMBRAER Model EMB–135 airplanes and Model EMB–145, –145ER, –145MR, –145LR, –145XR, –145MP, and –145EP airplanes. This AD requires repetitive detailed inspections for surface bruising of the main landing gear (MLG) trailing arms and integrity of the MLG pivot axle sealant, and corrective actions if necessary. This AD also provides for optional terminating action for the repetitive detailed inspections. This AD results from a report of a fractured axle of the trailing arm of the MLG due to corrosion of the axle. We are issuing this AD to prevent a broken trailing arm and consequent failure of the MLG, which could lead to loss of control and damage to the airplane during takeoff or landing.

DATES: This AD becomes effective November 16, 2005.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of November 16, 2005.

ADDRESSES: You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., Nassif Building, room PL–401, Washington, DC.

Contact Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil, for service information identified in this AD.

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

SUPPLEMENTARY INFORMATION:

Examining the Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the street address stated in the **ADDRESSES** section.

Discussion

The FAA issued a supplemental notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to certain EMBRAER Model EMB–135 and –145 series airplanes. That supplemental NPRM was published in the **Federal Register** on August 11, 2005 (70 FR 46788). That supplemental NPRM proposed to require repetitive detailed

inspections for surface bruising of the main landing gear (MLG) trailing arms and integrity of the MLG pivot axle sealant, and corrective actions if necessary. The supplemental NPRM also proposed to provide optional terminating action for the repetitive detailed inspections.

Comments

We provided the public the opportunity to participate in the development of this AD. No comments have been received on the supplemental NPRM or on the determination of the cost to the public.

Clarification of Costs of Compliance

We determined that the Costs of Compliance of the supplemental NPRM did not clearly indicate that airplanes having MLGs installed that do not have cardan assembly part number (P/N) 2309–2041–003 installed are not subject to all requirements of the AD. We have revised the Costs of Compliance to clarify that only airplanes having MLGs installed that do have cardan assembly P/N 2309–2041–003 installed are subject to all requirements of this AD.

Clarification of Alternative Method of Compliance (AMOC) Paragraph

We have revised this action to clarify the appropriate procedure for notifying the principal inspector before using any approved AMOC on any airplane to which the AMOC applies.

Correction of Typographical Error

Paragraph (j) of this AD is required for all subject MLGs intended to be installed on any affected airplane after the effective date of this AD, therefore, the last sentence of paragraph (f) of the AD should read " * * * except as provided by paragraph (j) of this AD." However, we noticed that paragraph (f) of the supplemental NPRM reads " * * * except as provided by paragraph (i) of this AD." We have revised paragraph (f) of the AD accordingly to correct this typographical error from (i) to (j) as described.

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

Costs of Compliance

This AD will affect about 488 airplanes of U.S. registry.

The part number verification will take about 1 work hour per airplane, at an average labor rate of $65 per work hour. Based on these figures, the estimated cost of the required inspection for U.S. operators is $31,720, or $65 per airplane.

If required, the inspection of the MLG trailing arm surface and pivot axle sealant will take about 1 work hour per airplane, at an average labor rate of $65 per work hour. Based on these figures, the estimated cost of the inspection for U.S. operators is up to $31,720, or $65 per airplane, per inspection cycle.

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

Authority for this Rulemaking

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

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

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

(1) Is not a "significant regulatory action" under Executive Order 12866;

(2) Is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

2005–20–37 Empresa Brasileira De Aeronautica S.A. (EMBRAER): Amendment 39–14334. Docket No. FAA–2005–20223; Directorate Identifier 2004–NM–193–AD.

Effective Date

(a) This AD becomes effective November 16, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all EMBRAER Model EMB–135BJ, –135ER, –135KE, –135KL, –135LR, –145, –145ER, –145MR, –145LR, –145XR, –145MP, and –145EP airplanes, certificated in any category.

Unsafe Condition

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

Compliance

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

Part Number Verification

(f) Within 600 flight hours or 180 days after the effective date of this AD, whichever occurs first, inspect the left and right MLG to determine whether cardan assembly part number (P/N) 2309–2041–003 is installed. A

review of airplane maintenance records is acceptable in lieu of this inspection if the P/N of the cardan assembly can be conclusively determined from that review. If cardan P/N 2309–2041–003 is not installed in the MLG, no further action is required for that MLG, except as provided by paragraph (j) of this AD. If cardan P/N 2309–2041–003 is installed in the MLG, continue with paragraph (g) of this AD.

Inspection

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

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

Corrective/Terminating Actions

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

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

(2) Replace the MLG cardan with a new, improved cardan having P/N 2309–2041–401.

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

(i) If no corrosion is found, prior to further flight, apply protective paint and corrosion inhibitors.

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

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

Actions Accomplished According to Previous Issue of Service Bulletin

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

Parts Installation

(j) As of the effective date of this AD, no person may install an MLG having a cardan assembly, part number 2309–2041–003, on any affected airplane, unless the requirements of paragraphs (g) and (h) of this AD, as applicable, have been accomplished.

Alternative Methods of Compliance (AMOCs)

(k)(1) The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Related Information

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

Material Incorporated by Reference

(m) You must use EMBRAER Service Bulletin 145–32–0091, Change 01, dated July 1, 2004, to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of this document in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Empresa Brasileira de Aeronautica S.A. (EMBRAER), PO Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil, for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Nassif Building, Washington, DC; on the Internet at *http://dms.dot.gov*; or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on September 28, 2005.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–20066 Filed 10–11–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–20879; Directorate Identifier 2004–NM–55–AD; Amendment 39–14326; AD 2005–20–29]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–300, 747SP, and 747SR Series Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–300, 747SP, and 747SR series airplanes. This AD requires repetitive inspections to detect cracks in various areas of the upper deck floor beams, and repair if necessary. This AD results from fatigue testing that revealed severed upper chords of the upper deck floor beams due to fatigue cracking. We are issuing this AD to detect and correct cracking in the upper chords of the upper deck floor beams. Undetected cracking could result in large deflection or deformation of the upper deck floor beams, resulting in damage to wire bundles and control cables for the flight control system, and reduced controllability of the airplane. Multiple adjacent severed floor beams could result in rapid decompression of the airplane.

DATES: This AD becomes effective November 16, 2005.

The Director of the Federal Register approved the incorporation by reference of Boeing Service Bulletin 747–53A2349, Revision 2, dated April 3, 2003; and Boeing Alert Service Bulletin 747–53A2452, dated April 3, 2003; as of November 16, 2005.

On June 27, 2002 (67 FR 36081, May 23, 2002), the Director of the Federal Register approved the incorporation by reference of Boeing Alert Service Bulletin 747–53A2349, Revision 1, dated October 12, 2000.

On June 11, 1993 (58 FR 27927, May 12, 1993), the Director of the Federal Register approved the incorporation by reference of Boeing Service Bulletin 747–53–2349, dated June 27, 1991.

ADDRESSES: You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street

SW., Nassif Building, room PL–401, Washington, DC.

Contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207, for service information identified in this AD.

FOR FURTHER INFORMATION CONTACT: Ivan Li, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6437; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Examining the Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the street address stated in the **ADDRESSES** section.

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to certain Boeing Model 747–100, –100B, 100B SUD, –200B, and –300 series airplanes; and Model 747SP and 747SR series airplanes. That NPRM was published in the **Federal Register** on April 11, 2005 (70 FR 18327). That NPRM proposed to require repetitive inspections to detect cracks in various areas of the upper deck floor beams, and repair if necessary.

Comments

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

Request To Revise Paragraph (b)

One commenter, the manufacturer, requests that paragraph (b) of the proposed AD be revised to state, ''Supersedes AD 2002–10–10, amendment 39–12756 (67 FR 36081, May 23, 2002), paragraphs (a)(1), (d), (e), and (f).'' The commenter states that the revision indicates the parts of AD 2002–10–10 that are being superseded by the proposed AD.

We do not agree. This final rule does not supersede AD 2002–10–10. This final rule is a stand-alone AD to address the upper deck floor beam inspections specified in AD 2002–10–10 and the additional upper deck floor beam inspections specified in Boeing Alert Service Bulletin 747–53A2452, dated April 3, 2003. As explained in the ''Other Related Rulemaking'' section of the proposed AD, we proposed to supersede AD 2002–10–10 with a separate AD that does not include the upper deck floor beam inspections. Consequently, on April 1, 2005, we issued a notice of proposed rulemaking (NPRM), Docket No. FAA–2005–20880, to propose to require repetitive inspections to detect cracks in various areas of the fuselage internal structure, and related investigative/corrective actions if necessary. That NPRM, which would supersede AD 2002–10–10, was published in the **Federal Register** on April 11, 2005 (70 FR 18332). We have not revised the final rule in this regard.

Request To Revise Note 1

The same commenter requests that Note 1 of the proposed AD be revised to reference paragraph (c) instead of paragraph (b). The commenter states that paragraph (b) was incorrectly referenced.

We agree with the commenter and have revised Note 1 of the final rule accordingly.

Request To Revise Paragraph (h)(2)

The same commenter requests that the description of the inspection area in paragraph (h)(2) of the proposed AD be revised to remove the reference to the body stations. The commenter believes that the reference to body station (STA) 380 through STA 1100 is an error carried over from AD 2002–10–10. The commenter notes that circle note 1 in Figure 2 of Boeing Alert Service Bulletin 747–53A2349, Revision 1, dated October 12, 2000, specifies that Group 3 airplanes inspect upper deck floor beams from STA 260 to STA 1100.

We agree with the commenter that the reference to STA 380 is in error and that the beginning station should have been cited as STA 260. However, we do not agree that a change to paragraph (h)(2) of the final rule is necessary. Operators will be doing the next inspection in accordance with paragraph (l) of the final rule. Paragraph (l) references Boeing Service Bulletin 747–53A2349, Revision 2, dated April 3, 2003, which specifies an inspection of the upper deck structure from STA 260 through STA 1100. We have not revised the final rule in this regard.

Request To Clarify Applicability of Paragraphs (i)(1) and (i)(2)

The same commenter requests that the applicability of paragraphs (i)(1) and (i)(2) of the proposed AD be clarified. The commenter notes that paragraph (i) of the proposed AD refers to both Boeing Alert Service Bulletin 747–53A2349, Revision 1, dated October 12, 2000; and Boeing Alert Service Bulletin 747–53A2452, dated April 3, 2003. The commenter also points out that paragraphs (i)(1) and (i)(2) of the proposed AD refer to groups for the paragraph applicability but do not specify which service bulletin the groups are defined in. The commenter notes that the correct groups are defined only in Boeing Alert Service Bulletin 747–53A2349, Revision 1.

We agree with the commenter. Boeing Alert Service Bulletin 747–53A2349, Revision 1, defines the groups referenced in paragraphs (i)(1) and (i)(2) of the final rule. We have revised paragraphs (i)(1) and (i)(2) of the final rule accordingly.

Request To Revise Paragraph (j) To Clarify Wording

The same commenter requests that the wording in paragraph (j) of the proposed AD be clarified. The commenter states that ''Area 1'' referenced in paragraph (j) has a different meaning in Boeing Alert Service Bulletin 747–53A2349, Revision 1, dated October 12, 2000, than it does in Boeing Alert Service Bulletin 747–53A2452, dated April 3, 2003. The commenter suggests replacing the phrase ''For Area 1 only'' with ''For upper deck floor beams only.''

We agree with the commenter that ''Area 1'' is defined differently in the service bulletins. To avoid confusion, we have removed the phrase ''For Area 1 only'' from paragraph (j) of the final rule.

Request To Revise Inspection Area Specified in Paragraph (l)

The same commenter requests that paragraph (l) of the proposed AD be revised to clarify the inspection area. The commenter states the inspection area of ''the horizontal flanges of the upper chord of the upper deck floor beams'' specified in paragraph (l) be replaced with ''the cab floor and of the upper deck floor beams.'' The commenter points out that Figure 2 of Boeing Service Bulletin 747–53A2349, Revision 2, dated April 3, 2003, specifies to do an inspection of the upper chord, web, and lower chord of all upper deck floor beams from STA 260 and aft, and an inspection of the cab floor web and its nutplates and cutout locations.

We agree with the commenter because the intent of the inspection specified in paragraph (l) of the final rule is to inspect all of area 1, as specified in Figure 2 of the service bulletin. For clarity, we have revised paragraph (l) of the final rule to specify doing an inspection for cracking of the cab floor and of the upper deck floor beams.

Request To Revise Compliance Time in Paragraph (m)(3)(i)(B)

The same commenter requests that one of the compliance times for the inspection specified in paragraph (m)(3)(i)(B) of the proposed AD be removed. The commenter contends that the inspection is currently required by AD 2002–10–10 at 2,000-flight-cycle intervals; therefore, the compliance time of ''within 2,000 flight cycles after the most recent inspection required by paragraph (i) of this AD,'' is satisfactory. The commenter states that the additional compliance time of ''or within 750 flight cycles after the effective date of this AD, whichever is first'' is not needed.

We disagree. For the inspection specified in paragraph (m)(3)(i)(B) of the final rule, the compliance time of ''Within 2,000 flight cycles after the most recent inspection required by paragraph (i) of this AD, or 750 flight cycles after the effective date of this AD, whichever is first,'' is required in order to make a transition from doing the inspections in accordance with Boeing Alert Service Bulletin 747–53A2349, Revision 1, dated October 12, 2000, at the 2,000-flight-cycle interval, to doing the inspections in accordance with Boeing Alert Service Bulletin 747–53A2452, dated April 3, 2003, at the 750-flight-cycle interval. We have not revised the final rule in this regard.

Request To Revise Compliance Time in Paragraph (m)(4)(i)(B)

The same commenter requests that one of the compliance times for the inspection specified in paragraph (m)(4)(i)(B) of the proposed AD be removed. The commenter contends that the inspection is currently required by AD 2002–10–10 at 6,000-flight-cycle intervals; therefore, the compliance time of ''within 6,000 flight cycles after the most recent inspection required by paragraph (i) of this AD'' is satisfactory. The commenter states that the additional compliance time of ''or within 3,000 flight cycles after the effective date of this AD, whichever is first'' is not needed.

We disagree. For the inspection specified in paragraph (m)(4)(i)(B) of the final rule, the compliance time of ''Within 6,000 flight cycles after the most recent inspection required by paragraph (i) of this AD, or 3,000 flight cycles after the effective date of this AD, whichever is first,'' is required in order to make a transition from doing the inspections in accordance with Boeing Alert Service Bulletin 747–53A2349, Revision 1, dated October 12, 2000, at the 6,000 flight-cycle interval, to doing the inspections in accordance with Boeing Alert Service Bulletin 747–53A2452, dated April 3, 2003, at the 3,000-flight-cycle interval. We have not revised the final rule in this regard.

Request To Clarify Inspection Reference

The same commenter requests that paragraph (m)(4) of the proposed AD be revised to clarify that the open-hole HFEC inspection must be done in accordance with circle note 2a. of Figure 2 of Boeing Alert Service Bulletin 747–53A2349, Revision 1, dated October 12, 2000. The commenter notes that the inspection in paragraph (m)(4) of the proposed AD is for airplanes on which the inspection specified in paragraph (i) of the proposed AD has been done in accordance with the service bulletin, using the open-hole inspection per circle note 2a. or the surface inspection per circle note 2b. of Figure 2.

We partially agree with the commenter. We agree that the previously accomplished open-hole HFEC inspection must be done in accordance with circle note 2a. of Figure 2 of Boeing Alert Service Bulletin 747–53A2349, Revision 1. However we do not agree that it is necessary to revise paragraph (m)(4) of the final rule. The open-hole HFEC inspection specified in Figure 2 of the service bulletin can be done only in accordance with circle note 2a. Paragraph (m)(4) does specify which circle note must be used for the surface HFEC inspection because Figure 2 of the service bulletin specifies that inspection can be done in accordance with circle note 2b. or 2c. We have not revised the final rule in this regard.

Request To Revise Method of Counting Flight Cycles

The same commenter requests that we revise the method of counting flight cycles for paragraphs (l), (m), and (n) of the proposed AD. The commenter suggests that a paragraph be added to allow adjustments to the compliance times if the cabin differential pressure is at 2.0 pounds per square inch (psi) or less. The commenter states that this allowance is consistent with previous requirements for these inspections and is a continuation of the allowance for the upper deck floor beams given in paragraph (f) of AD 2002–10–10. The commenter adds that the fatigue and crack growth behavior at the floor panel holes in the upper chord of the upper deck floor beams, that are the subject of the proposed AD, is caused by tension stresses in the floor beam upper chords. The commenter further states that the tension stresses in the 747 upper deck floor beams are almost entirely the result of reacting loads due to cabin differential pressure. The commenter concludes that it is technically correct not to count flight cycles that have a low cabin differential pressure, and do not significantly contribute to fatigue and crack growth.

We acknowledge the commenter's technical rationale for not counting the pressurization cycles less than 2.0 psi in this final rule. However, we do not agree with the commenter's request for the following reasons:

- There have been several instances of other in-service issues where analytical rationales, similar to that of the commenter, have indicated that pressurization cycles less than 2.0 psi should not be counted. However, when fleet records have been examined, the airplanes engaging in such operations have the same or greater occurrences of crack findings compared with airplanes on which all pressurized flights are counted. As a result, we carefully consider such matters based on all available factors, including individual operators' specific maintenance programs, technical rationale, and fleet experience.
- We have found that such provisions are applicable only to a small number of operators that may not pressurize their airplanes above 2.0 psi in all their flights. We have determined that the best way to handle such circumstances is for operators to request an alternative method of compliance (AMOC) in accordance with paragraph (s) of this AD, rather than by increasing the complexity of the AD by addressing each operator's unique situation.

Request To Clarify Headings for Paragraphs (p) and (q)

The same commenter requests that the headings for paragraphs (p) and (q) of the proposed AD be clarified to indicate that the paragraphs are applicable only to areas 1 and 2. The commenter states that the repairs and modifications specified in Boeing Alert Service Bulletin 747–53A2452, dated April 3, 2003, are applicable only to areas 1 and 2.

We agree with the commenter that the actions specified in paragraphs (p) and (q) of the final rule are applicable only to areas 1 and 2, as specified in the service bulletin. Paragraphs (p) and (q) of the final rule clearly state that the specified actions are for areas 1 and 2, as specified in the service bulletin. For further clarity, we have revised the headings for paragraphs (p) and (q) of the final rule.

Request To Include Effect of AD 2004–07–22 on the Proposed AD

Two commenters request that the proposed AD include the effect of AD 2004–07–22, amendment 39–13566 (69 FR 18250, April 7, 2004), which mandates Boeing Document No. D6–35022, ''Supplemental Structural Inspection Document,'' (SSID) for Model 747 Airplanes, Revision G, dated December 2000. One commenter states that it has done the SSID inspections required by AD 2004–07–22 and that the proposed AD may include inspections already covered by the SSID inspections. The commenter suggests that, to prevent double work, the proposed AD should identify the paragraphs for which SSID inspections are acceptable as an alternate means of compliance (AMOC). The other commenter, the manufacturer, notes that the SSID includes statements that allow the use of Boeing Service Bulletin 747–53–2349 inspections in lieu of SSID inspections. The commenter notes that because of the proposed AD, there will be a requirement to perform the SSID inspections and the Boeing Service Bulletin 747–53–2349 inspections without an allowance to use the service bulletin inspections as a substitute for the SSID inspections. The commenter also states that SSID items F–19B, F–19I, F–19J, and F–20A are addressed by Boeing Alert Service Bulletin 747–53A2452, dated April 3, 2003 (this service bulletin is referenced as the appropriate source of service information for doing certain inspections in the proposed AD). The commenter suggests that it is better to have an operator use the service bulletin inspections due to the improved level of detailed instructions.

We agree with the commenters that certain inspections done in accordance with Boeing Service Bulletin 747–53–2349 or Boeing Alert Service Bulletin 747–53A2452 may be acceptable as a substitute for corresponding SSID inspections and vice versa, because both inspections cover common areas. However, operators must identify the inspections and substantiate that any substitutions would provide an acceptable level of safety, and we must approve any substitutions. In order to avoid further delay to the inspections required by this final rule, we have not revised the final rule in this regard. Operators may request approval for AMOCs according to paragraph (s) of this final rule. For AD 2004–07–22, operators may request approval for AMOCs according to paragraph (g) of that AD.

Credit for Actions Done in Accordance With AD 2005–06–11

Note 4 of the proposed AD specifies that inspections done in accordance with AD 2000–04–17 are acceptable for compliance with the requirements of paragraph (i) of the proposed AD. On March 9, 2005, we issued AD 2005–06–11, amendment 39–14017 (70 FR 13353, March 21, 2005), which supersedes AD 2000–04–17. Inspections done in accordance with AD 2005–06–11 are also acceptable for compliance with the requirements of paragraph (i) of the final rule. We have revised Note 4 of the final rule accordingly.

Explanation of Change Made to This AD

We have revised the ''Alternative Methods of Compliance (AMOCs)'' paragraph in this AD to clarify the delegation authority for Authorized Representatives for the Boeing Commercial Airplanes Delegation Option Authorization. We have also simplified paragraphs (g), (k), (o), and (p) of this AD by referring to the ''AMOCs'' paragraph of this AD for repair methods.

Clarification of AMOC Paragraph

We have revised this final rule to clarify the appropriate procedure for notifying the principal inspector before using any approved AMOC on any airplane to which the AMOC applies.

Conclusion

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

Costs of Compliance

There are about 489 airplanes of the affected design worldwide. This AD will affect about 155 airplanes of U.S. registry.

The actions for the upper deck floor beams that are required by AD 93–08–12, and retained in AD 2002–10–10 and this AD, take about 150 work hours per airplane, at an average labor rate of $65 per work hour. Based on these figures, the estimated costs of these currently required actions are $9,750 per airplane, per inspection cycle.

The inspections of the upper deck floor beams that are required by AD 2002–10–10 and retained in this AD take about 255 work hours per airplane, at an average labor rate of $65 per work hour. Based on these figures, the estimated cost of these currently required inspections is $16,575 per airplane, per inspection cycle.

The new inspections will take about 155 work hours per airplane, at an average labor rate of $65 per work hour. Based on these figures, the estimated cost of the new actions specified in this AD for U.S. operators is $1,561,625 or $10,075 per airplane, per inspection cycle.

Authority for This Rulemaking

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

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

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

2005–20–29 Boeing: Amendment 39–14326. Docket No. FAA–2005–20879; Directorate Identifier 2004–NM–55–AD.

Effective Date

(a) This AD becomes effective November 16, 2005.

Affected ADs

(b) Related to AD 2002–10–10, amendment 39–12756 (67 FR 36081, May 23, 2002).

Applicability

(c) This AD applies to Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–300, 747SP, and 747SR series airplanes; certificated in any category; as identified in Boeing Alert Service Bulletin 747–53A2452, dated April 3, 2003.

Unsafe Condition

(d) This AD results from fatigue testing by the manufacturer that revealed severed upper chords of the upper deck floor beams due to fatigue cracking. We are issuing this AD to detect and correct cracking in the upper chords of the upper deck floor beams. Undetected cracking could result in large deflection or deformation of the upper deck floor beams, resulting in damage to wire bundles and control cables for the flight control system, and reduced controllability of the airplane. Multiple adjacent severed floor beams could result in rapid decompression of the airplane.

Compliance

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

Note 1: Paragraphs (f) and (g) of this AD restate the requirements of paragraphs (a) and (c) of AD 2002–10–10. As allowed by the phrase, ''unless accomplished previously,'' if those requirements of AD 2002–10–10 have already been accomplished, this AD does not require that those actions be repeated.

Inspection

(f) Before the accumulation of 22,000 total flight cycles, or within 1,000 flight cycles after June 11, 1993 (the effective date of AD 93–08–12, amendment 39–8559), whichever occurs later, unless accomplished previously within the last 2,000 flight cycles; and thereafter at intervals not to exceed 3,000 flight cycles: Do a detailed inspection to detect cracks in the upper deck floor beams in Sections 41 and 42, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 747–53–2349, dated June 27, 1991; Boeing Alert Service Bulletin 747–53A2349, Revision 1, dated October 12, 2000; or Boeing Service Bulletin 747–53A2349, Revision 2, dated April 3, 2003. After the effective date of this AD, only Boeing Service Bulletin 747–53A2349, Revision 2, dated April 3, 2003, may be used. Continue doing the inspections required by this paragraph until the inspections required by paragraph (h) or (l) of this AD are accomplished.

Repair of Cracks Detected During Paragraph (f) Inspections

(g) Before further flight, repair any cracking detected during the inspections done in accordance with paragraph (f) of this AD, according to a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA; or according to data meeting the certification basis of the airplane approved a Boeing Company Designated Engineering Representative (DER) who has been authorized by the Manager, Seattle ACO, to make such findings; or according to a method approved in accordance with the procedures specified in paragraph (s) of this AD.

Note 2: Paragraphs (h), (i), (j), and (k), of this AD restate the requirements of paragraphs (d), (e), (f), and (g), of AD 2002–10–10. As allowed by the phrase, ''unless accomplished previously,'' if those requirements of AD 2002–10–10 have already been accomplished, this AD does not require that those actions be repeated.

Additional Inspections

(h) Before the accumulation of 22,000 total flight cycles, or within 3,000 flight cycles after doing the most recent inspection required by paragraph (f) of this AD, whichever occurs later: Do a detailed inspection to find cracking in the areas specified in paragraph (h)(1) or (h)(2), as applicable, in accordance with Figure 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2349, Revision 1, dated October 12, 2000; or Boeing Service Bulletin 747–53A2349, Revision 2, dated April 3, 2003. After the effective date of this AD, only Boeing Service Bulletin 747–53A2349, Revision 2, may be used. Repeat the inspection thereafter at intervals not to exceed 3,000 flight cycles. Continue doing the inspection required by this paragraph until the initial inspection required by paragraph (l) of this AD is accomplished. Accomplishment of the inspection in this paragraph terminates the inspections required by paragraph (f) of this AD.

(1) For Groups 1, 2, 4, and 5 airplanes: Do the inspections of Area 1 (sections 41 and 42 upper deck floor beams), including existing repairs and modifications.

(2) For Group 3 airplanes: Do the inspections of Area 1 (sections 41, 42, and 44 upper deck floor beams from body stations 380 through 1100 inclusive), including existing repairs and modifications.

Note 3: For the purposes of this AD, a detailed inspection is defined as: ''An intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc., may be used. Surface cleaning and elaborate access procedures may be required.''

(i) Before the accumulation of 28,000 total flight cycles, or within 3,000 flight cycles after doing the most recent inspection required by paragraph (f) of this AD, whichever occurs later: Do a high frequency eddy current (HFEC) inspection to find cracking of the open holes in the horizontal flanges of the upper chord of the upper deck floor beams in the areas specified in paragraph (i)(1) or (i)(2) of this AD, as applicable, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2349, Revision 1, dated October 12, 2000. Do the inspection in accordance with the ''Inspection Alternatives'' as specified in Sheet 7 of Figure 2 of the Accomplishment Instructions of the service bulletin. Repeat the applicable inspection at the times specified in the ''Repeat Inspection Intervals'' in Sheet 7 of Figure 2 of the Accomplishment Instructions of the service bulletin. After the effective date of this AD, Boeing Alert Service Bulletin 747–53A2452, dated April 3, 2003, must be used to perform the inspections required by this paragraph. Repeat the inspections until the requirements of paragraph (m) of this AD are accomplished.

(1) For Group 1, 2, 4, and 5 airplanes, as defined in Boeing Alert Service Bulletin 747–53A2349, Revision 1, dated October 12, 2000: Do the inspections at the applicable locations (BS 380 through BS 780 inclusive for Groups 1, 2, and 4, BS 380 through BS 860 inclusive for Group 5) as specified in Sheet 7 of Figure 2.

(2) For Group 3 airplanes, as defined in Boeing Alert Service Bulletin 747–53A2349, Revision 1, dated October 12, 2000: Do the inspections as specified in Sheet 7 of Figure 2, at the upper deck floor beams from BS 380 through BS 1100 inclusive.

Note 4: HFEC inspections of the left and right sides of the upper deck floor beam at body station 380, between buttock lines 40 and 76, done in accordance with AD 2000–04–17 or AD 2005–06–11, are considered acceptable for compliance with the applicable inspections specified in paragraph (i) of this AD.

Adjustments to Compliance Time: Cabin Differential Pressure

(j) For the purposes of calculating the compliance threshold and repetitive interval for the actions required by paragraphs (h) and (i) of this AD: The number of flight cycles in which cabin differential pressure is at 2.0 pounds per square inch (psi) or less need not be counted when determining the number of flight cycles that have occurred on the airplane, provided that flight cycles with momentary spikes in cabin differential pressure above 2.0 psi are included as full pressure cycles. For this provision to apply, all cabin pressure records must be

maintained for each airplane: No fleet-averaging of cabin pressure is allowed.

Repair of Cracks Detected During Paragraph (h) and (i) Inspections

(k) Before further flight, repair any cracking found during the inspections done in accordance with paragraphs (h) and (i) of this AD, in accordance with Boeing Alert Service Bulletin 747–53A2349, Revision 1, dated October 12, 2000. Where the service bulletin specifies to contact Boeing for repair instructions, repair according to a method approved by the Manager, Seattle ACO; or according to a method approved in accordance with the procedures specified in paragraph (s) of this AD.

New Requirements of This AD

Detailed Inspection

(l) Before the accumulation of 22,000 total flight cycles, or within 3,000 flight cycles after the most recent inspection required by paragraph (f) or (h) of this AD, whichever is later: Do a detailed inspection for cracking of the cab floor and of the upper deck floor beams. Do the inspection in accordance with the Accomplishment Instructions of Boeing Service Bulletin 747–53A2349, Revision 2, dated April 3, 2003. Repeat the inspection thereafter at intervals not to exceed 3,000 flight cycles. Doing the initial inspection required by this paragraph terminates the inspections required by paragraphs (f) and (h) of this AD.

High Frequency Eddy Current (HFEC) Inspection

(m) Do a HFEC inspection for cracking of the horizontal flanges of the upper chord of the upper deck floor beams, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2452, dated April 3, 2003, at the applicable time specified in paragraph (m)(1), (m)(2), (m)(3), or (m)(4) of this AD. Areas 1, 2, and 3, as specified in paragraphs (m) and (n) of this AD, are defined in the service bulletin. Accomplishment of this inspection terminates the inspections required by paragraph (i) of this AD.

(1) For airplanes that have not been inspected in accordance with the requirements of paragraph (f), (h), or (i) of this AD:

(i) For Area 1: Before the accumulation of 22,000 total flight cycles, or within 1,000 flight cycles after the effective date of this AD, whichever is later.

(ii) For Area 2: Before the accumulation of 28,000 total flight cycles.

(iii) For Area 3: Before the accumulation of 22,000 total flight cycles, or within 1,000 flight cycles after the effective date of this AD, whichever is later.

(2) For airplanes that have been inspected in accordance with the requirements of paragraph (f) or (h) of this AD, but not in accordance with the requirements of paragraph (i) of this AD:

(i) For Area 1: Before the accumulation of 22,000 total flight cycles, or within 3,000 flight cycles after the most recent inspection required by paragraph (f) or (h) of this AD, whichever is later.

(ii) For Area 2: Before the accumulation of 28,000 total flight cycles, or within 3,000 flight cycles after the most recent inspection required by paragraph (f) or (h) of this AD, whichever is later.

(iii) For Area 3: Before the accumulation of 22,000 total flight cycles, or within 3,000 flight cycles after the most recent inspection required by paragraph (f) or (h) of this AD, whichever is later.

(3) For airplanes on which a surface HFEC inspection of the horizontal flanges of the upper chord of the upper deck floor beams, as required by paragraph (i) of this AD, was accomplished, and the surface HFEC inspection was accomplished from below the upper deck floor beams as specified by Figure 2, circle note 2c., of Boeing Alert Service Bulletin 747–53A2349, Revision 1, dated October 12, 2000:

(i) For Area 1: At the later of the times specified in paragraphs (m)(3)(i)(A) and (m)(3)(i)(B) of this AD.

(A) Before the accumulation of 22,000 total flight cycles.

(B) Within 2,000 flight cycles after the most recent inspection required by paragraph (i) of this AD, or 750 flight cycles after the effective date of this AD, whichever is first.

(ii) For Area 2: Before the accumulation of 28,000 total flight cycles, or within 2,000 flight cycles after the most recent inspection required by paragraph (i) of this AD, whichever is later.

(iii) For Area 3: Before the accumulation of 22,000 total flight cycles, or within 3,000 flight cycles after the most recent inspection required by paragraph (f) or (h) of this AD, whichever is later.

(4) For airplanes on which either a surface or open-hole HFEC inspection of the horizontal flanges of the upper chord of the upper deck floor beams, as required by paragraph (i) of this AD has been accomplished, and the surface HFEC inspection was accomplished from above and below the upper deck floor beams, as specified by Figure 2, circle note 2b., of Boeing Alert Service Bulletin 747–53A2349, Revision 1, dated October 12, 2000:

(i) For Area 1: At the later of the times specified in paragraphs (m)(4)(i)(A) and (m)(4)(ii)(B) of this AD.

(A) Before the accumulation of 22,000 total flight cycles.

(B) Within 6,000 flight cycles after the most recent inspection required by paragraph (i) of this AD, or within 3,000 flight cycles after the effective date of this AD whichever is first.

(ii) For Area 2: Before the accumulation of 28,000 total flight cycles, or within 6,000 flight cycles after the most recent inspection required by paragraph (i) of this AD, whichever is later.

(iii) For Area 3: Before the accumulation of 22,000 total flight cycles, or within 3,000 flight cycles after the most recent inspection required by paragraph (f) or (h) of this AD, whichever is latest.

Repetitive Inspections

(n) Except as required by paragraphs (o), (p), and (q) of this AD, repeat the inspections required by paragraph (m) of this AD at intervals not to exceed those specified in paragraphs (n)(1), (n)(2), and (n)(3) of this AD:

(1) For Area 1: 3,000 flight cycles if an open-hole HFEC inspection was accomplished, or 750 flight cycles if a surface HFEC inspection was accomplished.

(2) For Area 2: 6,000 flight cycles if an open-hole HFEC inspection was accomplished, or 2,000 flight cycles if a surface HFEC inspection was accomplished.

(3) For Area 3: 3,000 flight cycles.

Repair of Cracking Detected During Paragraph (l), (m), and (n) Inspections

(o) Before further flight, repair any cracking found during any inspection required by paragraph (l), (m), or (n) of this AD in accordance with Boeing Alert Service Bulletin 747–53A2452, dated April 3, 2003. Repairs done in accordance with this service bulletin terminates the requirements of paragraphs (l), (m), and (n) of this AD for the repaired area only. Where the service bulletin specifies to contact Boeing for repair instructions, repair according to a method approved by the Manager, Seattle ACO; or according to a method approved in accordance with the procedures specified in paragraph (s) of this AD.

After-Repair Inspections in Areas 1 and 2

(p) At the applicable new inspection thresholds specified in Figure 1 of Boeing Alert Service Bulletin 747–53A2452, dated April 3, 2003, perform the after-repair inspections for cracking in Areas 1 and 2, as specified in the service bulletin. Where the service bulletin specifies a threshold after the date of the service bulletin, use that same threshold after the effective date of this AD. Perform the after-repair inspections by accomplishing all of the applicable actions specified in the alert service bulletin. Repair any cracking found during any inspection required by this paragraph, according to a method approved by the Manager, Seattle ACO; or according to a method approved in accordance with the procedures specified in paragraph (s) of this AD. Any cracking found during any inspection must be repaired before further flight. Repeat the inspections of Areas 1 and 2 thereafter at intervals not to exceed 3,000 flight cycles.

Optional Preventative Modification in Areas 1 and 2

(q) If no cracking was found during the open-hole HFEC inspections required by paragraph (m) or (n) of this AD, repairing or modifying Areas 1 and 2, as defined in Figure 1 of Boeing Alert Service Bulletin 747–53A2452, dated April 3, 2003, in accordance with the service bulletin, defers the repetitive inspections required by paragraph (n) of this AD, and establishes new inspection methods, thresholds, and repetitive inspection intervals for the repaired or modified area. The new inspection thresholds and intervals are specified in Figure 1 of the service bulletin. Where the service bulletin specifies a threshold after the date of the service bulletin, use that same threshold after the effective date of this AD.

Inspections Done Previously

(r) Doing the inspections required by paragraphs (m) and (n) of this AD before the effective date of this AD, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2349, Revision 1, dated October 12, 2000, is

acceptable for compliance with the corresponding actions required by this AD.

Alternative Methods of Compliance (AMOCs)

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

(2) Before using any AMOC approved in accordance with 14 CFR 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

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

(4) Alternative methods of compliance and FAA-approved repairs, approved previously in accordance with AD 2002–10–10 are approved as AMOCs for the corresponding actions required by this AD.

Material Incorporated by Reference

(t) You must use the service bulletins specified in Table 1 of this AD, as applicable, to perform the actions that are required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approves the incorporation by reference of Boeing Service Bulletin 747–53A2349, Revision 2, dated April 3, 2003; and Boeing Alert Service Bulletin 747–53A2452, dated April 3, 2003; in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

(2) The Director of the Federal Register previously approved the incorporation by reference of Boeing Alert Service Bulletin 747–53A2349, Revision 1, dated October 12, 2000, as of June 27, 2002 (67 FR 36081, May 23, 2002).

(3) The Director of the Federal Register previously approved the incorporation by reference of Boeing Service Bulletin 747–53–2349, dated June 27, 1991, as of June 11, 1993 (58 FR 27927, May 12, 1993).

(4) Contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207, for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Nassif Building, Washington, DC; on the Internet at http://dms.dot.gov; or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

TABLE 1.—MATERIAL INCORPORATED BY REFERENCE

Service bulletin	Revision level	Date
Boeing Alert Service Bulletin 747–53A2349	1	October 12, 2000
Boeing Alert Service Bulletin 747–53A2452	Original	April 3, 2003.
Boeing Service Bulletin 747–53–2349	Original	June 27, 1991.
Boeing Service Bulletin 747–53A2349	2	April 3, 2003.

Issued in Renton, Washington, on September 28, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–20071 Filed 10–11–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–20880; Directorate Identifier 2003–NM–229–AD; Amendment 39–14327; AD 2005–20–30]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–300, 747SP, and 747SR Series Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is superseding an existing airworthiness directive (AD), which applies to certain Boeing Model 747 series airplanes. That AD currently requires repetitive inspections to detect cracks in various areas of the fuselage internal structure, and repair if necessary. This new AD requires repetitive inspections of additional areas of the fuselage internal structure, and related investigative/corrective actions if necessary. This new AD also removes certain requirements from the existing AD. This AD results from fatigue testing of the fuselage structure of a Boeing Model 747SR series airplane. We are issuing this AD to prevent the loss of the structural integrity of the fuselage, which could result in rapid depressurization of the airplane.

DATES: Effective November 16, 2005.

The Director of the Federal Register approved the incorporation by reference of Boeing Service Bulletin 747–53A2349, Revision 2, dated April 3, 2003, as of November 16, 2005.

On June 27, 2002 (67 FR 36081, May 23, 2002), the Director of the Federal Register approved the incorporation by reference of Boeing Alert Service Bulletin 747–53A2349, Revision 1, dated October 12, 2000.

On June 11, 1993 (58 FR 27927, May 12, 1993), the Director of the Federal Register approved the incorporation by reference of Boeing Service Bulletin 747–53–2349, dated June 27, 1991.

ADDRESSES: You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., Nassif Building, room PL–401, Washington, DC.

Contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207, for service information identified in this AD.

FOR FURTHER INFORMATION CONTACT: Ivan Li, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6437; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Examining the Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the street address stated in the **ADDRESSES** section.

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that supersedes AD 2002–10–10, amendment 39–12756 (67 FR 36081, May 23, 2002). The existing AD applies to certain Boeing Model 747 series airplanes. That NPRM was published in the **Federal Register** on April 11, 2005 (70 FR

18332). That NPRM proposed to require repetitive inspections to detect cracks in various areas of the fuselage internal structure, and related investigative/corrective actions if necessary.

Comments

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

Request To Clarify Paragraph (b) of the NPRM

One commenter, the manufacturer, requests that paragraph (b) of the NPRM be revised to indicate that the NPRM does not address the upper deck floor beams, one subject of AD 2002–10–10. The commenter suggests that paragraph (b) be revised to read, ''This AD supersedes AD 2002–10–10, amendment 39–12756 (67 FR 36081, May 23, 2002), except AD 2002–10–10, paragraphs (a)(1), (d), (e), and (g), are not addressed by this AD.''

We do not agree. In the ''Other Related Rulemaking'' section of the NPRM, we clarified that all requirements from AD 2002–10–10 related to the upper deck floor beams are included in a separate rulemaking action. Consequently, on April 1, 2005, we issued an NPRM, Docket No. FAA–2005–20879, to propose to address cracking in the upper chords of the upper deck floor beams. That NPRM was published in the **Federal Register** on April 11, 2005 (70 FR 18327). We have not revised the final rule in this regard.

Request To Revise Paragraph (i) of the NPRM

The same commenter requests that paragraph (i) of the NPRM be revised to indicate that the inspection for the areas specified in paragraph (i)(5) of the NPRM consists of internal and external detailed inspections. The commenter notes that the revision should be made to agree with Boeing Service Bulletin 747–53A2349, Revision 2, dated April 3, 2003 (which is referenced as the appropriate source of service information for accomplishing the proposed actions).

We agree with the commenter. The inspections of the nose wheel well bulkheads and floor beams specified in paragraph (i)(5) of the final rule are internal and external inspections. We have revised paragraph (i) of the final rule accordingly.

Request To Move Grace Period From Paragraph (j)(2) to Paragraph (j)(1)

The same commenter requests that the grace period ''within 1,000 flight cycles after the effective date of this AD,'' be removed from the compliance time in paragraph (j)(2) of the NPRM and be added to the compliance time in paragraph (j)(1) of the NPRM. The commenter believes moving the grace period will convey the true intent of the service bulletin. The commenter states that the grace period can be removed from paragraph (j)(2) because the paragraph applies to operators that have already performed the inspections specified in paragraphs (i)(5) and (i)(7) of the NPRM. The commenter explains that these operators therefore are using Revision 2 of the service bulletin and would continue the inspections at the 3,000-flight-cycle repetitive interval.

We partially agree with the commenter. We agree with the commenter that the grace period ''within 1,000 flight cycles after the effective date of this AD'' should be added to the compliance time in paragraph (j)(1) of the final rule and have revised paragraph (j)(1) accordingly. We find that the grace period will keep airplanes from being grounded unnecessarily and will provide an acceptable level of safety. However, we do not agree to remove the grace period from paragraph (j)(2) of the final rule. Operators that have voluntarily accomplished the inspections specified in paragraphs (i)(5) and (i)(7) of the final rule before the effective date of the final rule should be given the same grace period for the new inspections as operators that have not done the inspections specified in paragraphs (i)(5) and (i)(7). We also note that this grace period is for the new inspections specified in paragraphs (i)(5) and (i)(7) and that operators are still required to do the inspections specified in paragraph (f) of the final rule at intervals not to exceed 3,000 flight cycles until all the inspections required by paragraph (i) of the final rule are done.

Request To Revise Compliance Time in Paragraph (j)(3)

The same commenter requests that the compliance time specified in paragraph (j)(3) of the NPRM be revised to clarify that the grace period is limited to the ''new work'' specified in paragraphs (i)(5) and (i)(7) of the NPRM. The commenter states that the existing compliance time would allow deferral of all the inspections until 23,000 total flight cycles. The commenter recommends that the compliance time read as follows: ''Accomplish the inspections required by paragraphs (i)(1), (i)(2), (i)(3), (i)(4), (f)(5), and (i)(6) of this AD prior to the accumulation of 22,000 flight cycles. Accomplish the inspections required by paragraphs (i)(5) and (i)(7) of this AD prior to the accumulation of 22,000 flight cycles, or within 1,000 flight cycles after the effective date of this AD, whichever is later.''

We acknowledge that the only new inspections required by the final rule are the inspections specified in paragraphs (i)(5) and (i)(7) of the final rule. However, we do not agree that the compliance time specified in paragraph (j)(3) of the final rule allows for deferral of the other inspections specified in paragraph (i) of the final rule. Although an operator may delay doing the inspections specified in paragraphs (i)(1), (i)(2), (i)(3), (i)(4), and (i)(6) of the final rule until the end of the grace period, the operator is still required to do the equivalent inspections specified in paragraph (f) of the final rule. Thus the existing inspections required by paragraph (f) of the final rule must be done at the compliance times specified in paragraph (f) until all the inspections required by paragraph (i) are done. We have not changed the final rule in this regard.

Request To Clarify Repair Reference

The same commenter requests that paragraphs (h) and (k) of the NPRM be revised to clarify that the Boeing Structural Repair Manuals (SRMs) meet the intent of the NPRM for repairs. The commenter contends that the SRMs contain the appropriate repairs and are referenced in Boeing Service Bulletin 747–53–2349. The commenter believes that the phrase ''For a repair method to be approved, the approval must specifically reference this AD'' in the second part of paragraph (k) should apply only to the second part of the paragraph that says to ''contact Boeing.'' The commenter notes that some operators may have already done the repair per the SRM and suggests it would be best to state that the SRMs meet the intent of the AD.

We partially agree with the commenter. We agree with the commenter that the SRM procedures referenced in the service bulletin are an appropriate source of service information for doing the repairs required by the final rule. We have revised paragraph (h) of the final rule to allow operators to do repairs in accordance with Boeing Service Bulletin 747–53A2349, Revision 2, as specified in paragraph (k) of the final rule.

However, we do not agree to revise paragraph (k) of the final rule to state that the SRM meets the intent of the final rule because paragraph (k) specifies to do the repair in accordance with Boeing Service Bulletin 747–53A2349, Revision 2, which references the SRM. Therefore, operators that do the repair in accordance with the applicable SRM referenced in the service bulletin meet the repair requirement of the final rule and do not need further FAA approval. Paragraph (k) of the final rule specifies to repair in accordance with FAA approval only where the service bulletin specifies to contact Boeing for repair. Thus, operators are required to obtain FAA approval only for repairs that are beyond the scope of the service bulletin or SRM. As the commenter noted, the phrase, ''For a repair method to be approved, the approval must specifically reference this AD,'' applies only to operators that are required to obtain FAA approval. We have not revised the final rule in this regard.

Request To Include Effect of AD 2004–07–22 on the NPRM

Two commenters request that the NPRM include the effect of AD 2004–07–22, amendment 39–13566 (69 FR 18250, April 7, 2004), which mandates Boeing Document No. D6–35022, ''Supplemental Structural Inspection Document,'' (SSID) for Model 747 Airplanes, Revision G, dated December 2000. One commenter states that it has done the SSID inspections required by AD 2004–07–22 and that the NPRM may include inspections already covered by the SSID inspections. The commenter suggests that, to prevent duplicate work, the NPRM should identify the paragraphs for which SSID inspections are acceptable as an alternative method of compliance (AMOC). The other commenter, the manufacturer, notes that the SSID includes statements that allow the use of Boeing Service Bulletin 747–53–2349 inspections in lieu of SSID inspections. The commenter notes that, because of the NPRM, there will be a requirement to perform the SSID inspections and the Boeing Service Bulletin 747–53–2349 inspections without an allowance to use the service bulletin inspections as a substitute for the SSID inspections. The commenter contends that it is better to have an operator use the service bulletin inspections due to the improved level of detailed instructions.

We acknowledge that certain inspections done in accordance with Boeing Service Bulletin 747–53–2349 may be acceptable as a substitute for corresponding SSID inspections and vice versa, because inspections done in accordance with both documents cover common areas. However, operators must identify the inspections and substantiate that any substitutions would provide an acceptable level of safety, and we must approve any substitutions. In order to avoid further delay to the inspections required by this final rule, we have not revised the final rule in this regard. Operators may request approval for AMOCs according to paragraph (m) of this final rule. For AD 2004–07–22, operators may request approval for AMOCs according to paragraph (g) of that AD.

Explanation of Change Made to This Final Rule

We have simplified paragraphs (h)(1), (h)(2), and (k) of this AD by referring to the ''Alternative Methods of Compliance (AMOCs)'' paragraph (m) of this final rule for repair methods.

Clarification of AMOC Paragraph

We have revised this final rule to clarify the appropriate procedure for notifying the principal inspector before using any approved AMOC on any airplane to which the AMOC applies.

Conclusion

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

Costs of Compliance

This AD will affect about 489 airplanes worldwide, and 155 airplanes of U.S. registry. The following table provides the estimated costs for U.S. operators to comply with this AD.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts	Cost per airplane, per inspection cycle	Number of U.S.-registered airplanes	Fleet cost
Inspections, excluding upper deck floor beams, per inspection cycle (required by AD 2002–10–10).	145	$65	None	$9,425	155	$1,460,875
Inspections (new AD)	130	65	None	8,450	155	1,309,750

Authority for This Rulemaking

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

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

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with

this AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by removing amendment 39–12756 (67 FR 36081, May 23, 2002) and by adding the following new airworthiness directive (AD):

2005–20–30 Boeing: Amendment 39–14327. Docket No. FAA–2005–20880; Directorate Identifier 2003–NM–229–AD.

Effective Date

(a) This AD becomes effective November 16, 2005.

Affected ADs

(b) This AD supersedes AD 2002–10–10.

Applicability

(c) This AD applies to Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–300, 747SP, and 747SR series airplanes; certificated in any category; identified in Boeing Service Bulletin 747–53A2349, Revision 2, dated April 3, 2003.

Unsafe Condition

(d) This AD was prompted by the results of fatigue testing of the fuselage structure of a Boeing Model 747SR series airplane. We are issuing this AD to prevent the loss of the structural integrity of the fuselage, which could result in rapid depressurization of the airplane.

Compliance

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

Restatement of Requirements of AD 2002–10–10 (Excluding Upper Deck Floor Beams)

Repetitive Inspections

(f) Prior to the accumulation of 22,000 total flight cycles, or within 1,000 flight cycles after June 11, 1993 (the effective date of AD 93–08–12, amendment 39–8559), whichever occurs later, unless accomplished previously within the last 2,000 flight cycles; and thereafter at intervals not to exceed 3,000 flight cycles: Perform an internal detailed inspection to detect cracks in the areas of the fuselage internal structure specified in paragraphs (f)(1) through (f)(6) of this AD; in accordance with Boeing Service Bulletin 747–53–2349, dated June 27, 1991; Boeing Alert Service Bulletin 747–53A2349, Revision 1, dated October 12, 2000; or Boeing Service Bulletin 747–53A2349, Revision 2, dated April 3, 2003. After the effective date of this AD, only Revision 2 of Boeing Service Bulletin 747–53A2349 may be used. Continue doing the inspections until the inspections required by paragraph (i) of this AD are done.

(1) Section 42 upper lobe frames.
(2) Section 46 lower lobe frames.
(3) Section 42 lower lobe frames.
(4) Main entry door cutouts.
(5) Section 41 body station 260, 340, and 400 bulkheads.
(6) Main entry doors.

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

(g) Prior to the accumulation of 25,000 total flight cycles, or within 1,000 flight cycles after June 11, 1993, whichever is later, unless already done within the last 2,000 flight cycles; and thereafter at intervals not to exceed 3,000 flight cycles: Do an internal detailed inspection to detect cracks in the Section 46 upper lobe frames, in accordance with Boeing Service Bulletin 747–53–2349, dated June 27, 1991; Boeing Alert Service Bulletin 747–53A2349, Revision 1, dated October 12, 2000; or Boeing Service Bulletin 747–53A2349, Revision 2, dated April 3, 2003. After the effective date of this AD, only Revision 2 of Boeing Service Bulletin 747–53A2349 may be used.

Repair of Cracks Detected During Paragraph (f) or (g) Inspections

(h) Before further flight, repair any cracks detected during the inspections done per paragraph (f) or (g) of this AD by doing the actions specified in paragraph (h)(1) or (h)(2) of this AD, as applicable.

(1) Repair in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA; or using a method approved in accordance with paragraph (m) of this AD.

(2) Repair in accordance with Boeing Service Bulletin 747–53A2349, Revision 2, dated April 3, 2003. Where the service bulletin specifies to contact Boeing for repair instructions, repair in accordance with a method approved by the Manager, Seattle ACO; or using a method approved in accordance with paragraph (m) of this AD.

New Requirements of This AD

Repetitive Inspections

(i) Do an internal detailed inspection to detect cracking in the areas of the fuselage internal structure specified in paragraphs (i)(1), (i)(2), and (i)(3) of this AD, and internal and external detailed inspections of the areas specified in paragraphs (i)(4), (i)(5), (i)(6), and (i)(7) of this AD. Do the inspections in accordance with Boeing Service Bulletin 747–53A2349, Revision 2, dated April 3, 2003. Do the inspections at the applicable time specified in paragraph (j) of this AD. Accomplishment of these inspections terminates the requirements of paragraph (f) of this AD.

(1) Section 42 upper lobe frames.
(2) Section 46 lower lobe frames.
(3) Section 42 lower lobe frames.
(4) Main entry door cutouts.
(5) Nose wheel well bulkheads, sidewall panels, and the STA 360 and 380 floor beams. These areas include the Section 41 body station 260, 340, and 400 bulkheads.
(6) Main entry doors.
(7) Main electronics bay access door cutout.

(j) Do the inspections required by paragraph (i) of this AD at the applicable time specified in paragraph (j)(1), (j)(2), or (j)(3) of this AD. Repeat the inspections thereafter at intervals not to exceed 3,000 flight cycles.

(1) For airplanes on which the inspections required by paragraphs (f)(1), (f)(2), (f)(3), (f)(4), and (f)(6) of this AD have been done before the effective date of this AD, but the inspections required by paragraphs (i)(5) and (i)(7) of this AD have not been done: Within 3,000 flight cycles since accomplishment of the most recent inspection required by paragraphs (f)(1), (f)(2), (f)(3), (f)(4), and (f)(6) of this AD, except the inspections specified in paragraphs (i)(5) and (i)(7) of this AD may be done within 3,000 flight cycles since accomplishment of the most recent inspection required by paragraphs (f)(1), (f)(2), (f)(3), (f)(4), and (f)(6) of this AD, or within 1,000 flight cycles after the effective date of this AD, whichever is later.

(2) For airplanes on which the inspections required by paragraphs (i)(5) and (i)(7) have been done before the effective date of this AD: Within 3,000 flight cycles since accomplishment of the most recent inspection required by paragraphs (i)(5) and (i)(7) of this AD, or within 1,000 flight cycles after the effective date of this AD, whichever is later.

(3) For airplanes on which the inspections required by paragraph (f) of this AD have not been done before the effective date of this AD: Prior to the accumulation of 22,000 total flight cycles, or within 1,000 flight cycles after the effective date of this AD, whichever is later.

Repair of Cracks Detected During Paragraph (i) Inspection

(k) Before further flight, repair any cracking found during any inspection required by paragraph (i) of this AD in accordance with Boeing Service Bulletin 747–53A2349, Revision 2, dated April 3, 2003. Where the service bulletin specifies to contact Boeing for repair instructions, repair in accordance with a method approved by the Manager, Seattle ACO; or using a method approved in accordance with paragraph (m) of this AD.

Actions Previously Accomplished

(l) Inspections required by paragraph (i) of this AD, accomplished before the effective date of this AD, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 747–53–2349, dated June 27, 1991; or Boeing Alert Service Bulletin 747–53A2349, Revision 1, dated October 12, 2000; are acceptable for compliance with the corresponding action required by paragraph (i) of this AD.

Alternative Methods of Compliance (AMOCs)

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

(2) Before using any AMOC approved in accordance with 14 CFR 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

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

(4) Alternative methods of compliance and FAA-approved repairs, approved previously in accordance with AD 2002–10–10 or AD 93–08–12, are approved as alternative methods of compliance with the corresponding requirements of this AD.

Material Incorporated by Reference

(n) You must use Boeing Service Bulletin 747–53–2349, dated June 27, 1991; Boeing Alert Service Bulletin 747–53A2349, Revision 1, dated October 12, 2000; or Boeing Service Bulletin 747–53A2349, Revision 2, dated April 3, 2003; to perform the actions that are required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approves the incorporation by reference of Boeing Service Bulletin 747–53A2349, Revision 2, dated April 3, 2003, in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

(2) The Director of the Federal Register previously approved the incorporation by reference of Boeing Alert Service Bulletin 747–53A2349, Revision 1, dated October 12, 2000, as of June 27, 2002 (67 FR 36081, May 23, 2002).

(3) The Director of the Federal Register previously approved the incorporation by reference of Boeing Service Bulletin 747–53–2349, dated June 27, 1991, as of June 11, 1993 (58 FR 27927, May 12, 1993).

(4) To get copies of the service information, contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Nassif Building, Washington, DC; on the Internet at *http://dms.dot.gov*; or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on September 26, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–20072 Filed 10–11–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–20687; Directorate Identifier 2004–NM–171–AD; Amendment 39–14325; AD 2005–20–28]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A319–100 Series Airplanes; Model A320–111 Airplanes; Model A320–200 Series Airplanes, and Model A321–100 and –200 Series Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Airbus airplane models, as specified above. This AD requires modifying the floor proximity emergency escape path marking system. This AD results from information that the existing system design for interconnection of the emergency power supply units of the floor proximity emergency escape path marking system does not provide adequate floor path lighting and marking for safe evacuation of the airplane in the event of an emergency. We are issuing this AD to prevent inadequate lighting and marking of the escape path, which could delay or impede the flightcrew and passengers when exiting the airplane during an emergency landing.

DATES: This AD becomes effective November 16, 2005.

The Director of the **Federal Register** approved the incorporation by reference of a certain publication listed in the AD as of November 16, 2005.

ADDRESSES: You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., Nassif Building, room PL–401, Washington, DC.

Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for service information identified in this AD.

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

SUPPLEMENTARY INFORMATION:

Examining the Docket

You may examine the airworthiness directive (AD) docket on the Internet at *http://dms.dot.gov* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the street address stated in the **ADDRESSES** section.

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to certain Airbus Model A319, A320, and A321 series airplanes. That NPRM was published in the **Federal Register** on March 23, 2005 (70 FR 14597). That NPRM proposed to require modifying the floor proximity emergency escape path marking system (FPEEPMS).

Comments

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

Request To Clarify Certain Sections in the Preamble

One commenter disagrees with the implication that Bruce Industries equipment is the root cause of the unsafe condition. The commenter states that the language in the Discussion section of the NPRM indicates that the root cause of the unsafe condition is the design of the Bruce power supply. The commenter adds that this is not the case, and notes that the problem is not with the design but with the method of installing that component on the airplane. The commenter states that it contacted Airbus regarding this problem, and Airbus responded by identifying the source of the problem as the incorrect installation of the Bruce power supply and the wiring on the airplane. Airbus and Bruce Industries have since developed a resolution. The

commenter reiterates the Discussion section in the NPRM and asks that the final sentence of that section be changed, as follows: ''The DGAC advises that the existing system design for interconnection of the emergency power supply units (EPSU) of the FPEEPMS installed on these airplanes does not provide adequate floor path lighting and marking for safe evacuation of the airplane in the event of an emergency.'' The commenter adds that it is very sensitive to the company's reputation in the industry and feels that the existing language of the NPRM unfairly targets the company as providing an unsafe product.

The commenter also states that the corrective action language as described in the ''Relevant Service Information'' section is correct. The language the commenter is referring to is as follows ''The modification includes removing the BRUCE and DIEHL EPSUs of the FPEEPMS; modifying the wiring; installing placards; and installing new, improved DIEHL EPSUs.'' The commenter notes that if the problem were due solely to the design of the Bruce power supplies, the resolution would be to replace only those units.

We agree with the commenter's statements, but cannot make changes to the ''Discussion'' or ''Relevant Service Information'' sections in the NPRM because those sections are not restated in the final rule. However, for clarity's sake and for operators' reference, we have changed the Summary section and paragraph (d) of this AD to add, ''the existing system design for interconnection of the EPSU of the FPEEPMS does not provide adequate floor path lighting and marking for safe evacuation of the airplane in the event of an emergency.''

Request To Extend Compliance Time

One commenter states that the NPRM allows only 17 months from the effective date of the AD to accomplish the modification. The commenter adds that trying to meet the 17-month deadline would require either extending C-check visits (accomplishing a heavy maintenance visit won't meet the deadline), or adding scheduled special route visits.

We infer that the commenter is asking that the compliance time for the modification be extended. We agree that the compliance time may be extended somewhat. We have reconsidered the urgency of the unsafe condition and the amount of work related to the required actions. We find that extending the compliance time from 17 months to 24 months will not adversely affect safety, and, for the majority of affected operators, will allow the required actions to be performed during regularly scheduled maintenance at a base where special equipment and trained maintenance personnel will be available if necessary. We have changed the compliance time for accomplishing the modification required by paragraph (f) of this AD accordingly.

Request To Change Applicability

One commenter refers to French airworthiness directive F–2004–121 R1, dated October 13, 2004 (referenced in the NPRM), and states that the applicability specified in the NPRM should be the same as the effectivity in the French airworthiness directive. The commenter adds that the French airworthiness directive does not affect aircraft fitted with DIEHL EPSUs having part numbers (P/Ns) 3214–51, –52, –54, or –55, with no BRUCE EPSU having P/N 100865. The commenter notes that the reason for this is that DIEHL equipment must be replaced if associated with a BRUCE EPSU having P/N 100865.

We agree with the commenter for the reasons provided. The applicability specified in this AD has been changed accordingly.

Request To Change Cost Estimate

One commenter requests that we revise the cost estimate for the modification in the NPRM. The commenter states that the referenced service bulletin shows an estimate of approximately 28 work hours per airplane, but the commenter believes this to be overly optimistic. The commenter adds that the work requires several seat units to be removed, multiple ceiling panels to be lowered, and certain power supplies to be replaced and then rewired. The commenter does not believe that even doubling the estimate in the service bulletin will be adequate. The commenter further states that the need to do the modification during special visits will be necessary, which will increase the cost to operators.

We acknowledge the commenter's concerns. We recognize that, in accomplishing the requirements of any AD, operators may incur ''incidental'' costs in addition to the ''direct'' costs that are reflected in the cost analysis presented in the AD preamble. However, the cost analysis in AD rulemaking actions typically does not include incidental costs.

Further, because ADs require specific actions to address specific unsafe conditions, they appear to impose costs that would not otherwise be borne by operators. However, because of the general obligation of operators to maintain and operate their airplanes in an airworthy condition, this appearance is deceptive. Attributing those costs solely to the issuance of this AD is unrealistic because, in the interest of maintaining and operating safe airplanes, prudent operators would accomplish the required actions even if they were not required to do so by the AD. In any case, we have determined that direct and incidental costs are still outweighed by the safety benefits of the AD. We have not changed the AD in this regard.

Explanation of Change to Applicability

We have changed the applicability of the NPRM to identify model designations as published in the most recent type certificate data sheet for the affected models.

Clarification of Alternative Method of Compliance (AMOC) Paragraph

We have changed this AD to clarify the appropriate procedure for notifying the principal inspector before using any approved AMOC on any airplane to which the AMOC applies.

Conclusion

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

Costs of Compliance

This AD would affect about 236 airplanes of U.S. registry. The modification will take about 28 work hours per airplane, at an average labor rate of $65 per work hour. Required parts will cost about $280 per airplane. Based on these figures, the estimated cost of the modification for U.S. operators is $495,600, or $2,100 per airplane.

Authority for This Rulemaking

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

We are issuing this rulemaking under the authority described in subtitle VII, part A, subpart III, section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations

for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

2005–20–28 Airbus: Amendment 39–14325. Docket No. FAA–2005–20687; Directorate Identifier 2004–NM–171–AD.

Effective Date

(a) This AD becomes effective November 16, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Airbus Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes; Model A320–111, –211, –212, –214, –231, –232, and –233 airplanes; and Model A321–111, –112, –131, –211 and –231 airplanes; certificated in any category; in which the floor proximity emergency escape path marking system (FPEEPMS) is equipped with BRUCE emergency power supply units (EPSUs) having BRUCE part number (P/N) 100865.

Unsafe Condition

(d) This AD was prompted by information that the existing system design for interconnection of the EPSUs of the FPEEPMS does not provide adequate floor path lighting and marking for safe evacuation of the airplane in the event of an emergency. We are issuing this AD to prevent inadequate lighting and marking of the escape path, which could delay or impede the flightcrew and passengers when exiting the airplane during an emergency landing.

Compliance

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

Modification

(f) Within 24 months after the effective date of this AD: Modify the FPEEPMS by doing all the actions specified in the Accomplishment Instructions of Airbus Service Bulletin A320–33–1041, dated December 11, 2003.

Alternative Methods of Compliance (AMOCs)

(g)(1) The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with 14 CFR 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Related Information

(h) French airworthiness directive F–2004–121 R1, dated October 13, 2004, also addresses the subject of this AD.

Material Incorporated by Reference

(i) You must use Airbus Service Bulletin A320–33–1041, dated December 11, 2003, to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the **Federal Register** approved the incorporation by reference of this document in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Nassif Building, Washington, DC; on the Internet at *http://dms.dot.gov*; or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr _locations.html.*

Issued in Renton, Washington, on September 28, 2005.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–20074 Filed 10–11–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–20441; Directorate Identifier 2003–CE–35–AD; Amendment 39–14322; AD 2003–19–14 R2]

RIN 2120–AA64

Airworthiness Directives; BURKHART GROB LUFT—UND RAUMFAHRT GmbH & CO KG Models G103 TWIN ASTIR, G103A TWIN II ACRO, and G103C TWIN III ACRO Sailplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is revising Airworthiness Directive (AD) 2003–19–14 R1, which applies to certain BURKHART GROB LUFT—UND RAUMFAHRT GmbH & CO KG (GROB) Models G103 TWIN ASTIR, G103A TWIN II ACRO, and G103C TWIN III ACRO sailplanes. AD 2003–19–14 R1 requires you to modify the airspeed indicators, install flight speed reduction and aerobatic maneuver restrictions placards (as applicable), and revise the flight and maintenance manuals. AD 2003–19–14 R1 approves simple aerobatic maneuvers for Model G103A TWIN II ACRO sailplanes and provides an option for modifying the rear fuselage for Models G103A TWIN II ACRO and G103C TWIN III ACRO sailplanes to terminate the flight limitation restrictions for aerobatic maneuvers. This AD retains all the actions from AD 2003–19–14 R1 for Models G103A TWIN II ACRO and G103C TWIN III ACRO and reinstates certain operating limits for Model G103 TWIN ASTIR sailplanes. We are issuing this AD to prevent damage to the fuselage during limit load flight, which could result in reduced structural integrity. This condition could lead to loss of control of the sailplane.

DATES: This AD becomes effective on November 30, 2005.

On August 12, 2004 (69 FR 34258, June 21, 2004) the Director of the

Federal Register approved the incorporation by reference GROB Service Bulletin No. MSB315–65, dated September 15, 2003; GROB Service Bulletin No. OSB 315–66, dated October 16, 2003; and GROB Work Instruction for OSB 315–66, dated October 16, 2003.

As of November 30, 2005, the Director of the Federal Register approved the incorporation by reference of GROB Service Bulletin No. MSB315–64/3, dated September 14, 2004.

ADDRESSES: To get the service information identified in this AD, contact GROB Luft-und Raumfahrt, Lettenbachstrasse 9, D–86874 Tussenhausen-Mattsies, Germany; telephone: 011 49 8268 998139; facsimile: 011 49 8268 998200; e-mail: *productsupport@grob-aerospace.de.*

To view the AD docket, go to the Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001 or on the Internet at *http://dms.dot.gov.* The docket number is FAA–2005–20441; Directorate Identifier 2003–CE–35–AD.

FOR FURTHER INFORMATION CONTACT: Gregory A. Davison, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4130; facsimile: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Discussion

Has FAA taken any action to this point? Reports from the Luftfahrt-Bundesamt (LBA), which is the airworthiness authority for Germany, that the safety margins established into the design of the fuselage may not be sufficient to sustain limit loads during certain maneuvers and during flight at certain speeds for Model G103 TWIN ASTIR, G103 TWIN II, G103A TWIN II ACRO, and G103C TWIN III ACRO sailplanes. This caused us to issue AD 2003–19–14, Amendment 39–13317 (68 FR 56152, September 30, 2003). AD 2003–19–14 required the following:

—Modifying the airspeed indicators;
—Installing placards restricting flight speeds, prohibiting aerobatic maneuvers, and restricting load limits; and
—Incorporating revisions to the flight and maintenance manuals.

AD 2003–19–14 was issued as an interim action until the manufacturer completed further investigations into the effects of certain flight conditions on the fuselage structure and the development of corrective procedures.

The manufacturer conducted further investigations and static strength tests to verify the safety margins of the fuselage on the affected sailplanes. This information prompted us to issue AD 2003–19–14 R1, Amendment 39–13676 (69 FR 34258, June 21, 2004). AD 2003–19–14 R1 requires the following:

For Model G103 TWIN ASTIR sailplanes:

—Retain all flight limitation restrictions in AD 2003–19–14.

For Model G103 TWIN II sailplanes:

—Reinstate the original flight speed limitations and maneuver operations and remove from the applicability section of AD 2003–19–14;

For Model G103A TWIN II ACRO (utility category) sailplanes:

—Reinstate the original flight speed limitations and maneuver operations; and
—Allow only basic aerobatic maneuvers (spins, lazy eights, chandelles, stall turns, steep turns, and positive loops).

For Model G103A TWIN II ACRO (aerobatic category) sailplanes:

—Reinstate the original flight speed limitations except for rough air (V_B) and maneuvering speeds (V_A); and
—Allow only basic aerobatic maneuvers (spins, lazy eights, chandelles, stall turns, steep turns, and positive loops).

For Model G103C TWIN III ACRO sailplanes:

—Increase airspeed limits specified in AD 2003–19–14 but maintain a reduction from the original limitations; and
—Retain restrictions in AD 2003–19–14 on all aerobatic flights, including simple maneuvers, and cloud flying.

The manufacturer also developed a modification for Models G103A TWIN II ACRO (aerobatic category) and G103C TWIN III ACRO sailplanes (aerobatic category). When this modification is incorporated, full acrobatic status is restored to these sailplanes.

What has happened since AD 2003–19–14 R1 to initiate this proposed action? The LBA recently notified FAA of the need to change AD 2003–19–14 R1. Based on analysis, the LBA reports that certain limits of operation for Model G103 TWIN ASTIR sailplanes may be reinstated.

Specifically, the maximum airspeed in calm air (V_{NE}) could be reinstated to 135 knots (155 mph/250kmh) for Model G103 TWIN ASTIR sailplanes. Aerobatic flight is still prohibited; however, simple aerobatic flight (looping, steep turns, lazy eights, and chandelles) may be performed following the flight manual.

What is the potential impact if FAA took no action? If not prevented, damage to the fuselage during limit load flight could result in reduced structural integrity. This condition could lead to loss of control of the sailplane.

Has FAA taken any action to this point? We issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain GROB Models G103 TWIN ASTIR, G103A TWIN II ACRO, and G103C TWIN III ACRO sailplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on March 23, 2005 (70 FR 14580). The NPRM proposed to revise AD 2003–19–14 R1 with a new AD that would:

(1) retain all actions required in AD 2003–19–14 R1 for Models G103A TWIN II ACRO and G103C TWIN III ACRO sailplanes; and

(2) reinstate certain operating limits for Model G103 TWIN ASTIR sailplanes.

Comments

Was the public invited to comment? We provided the public the opportunity to participate in developing this AD. We received no comments on the proposal or on the determination of the cost to the public.

Conclusion

What is FAA's final determination on this issue? We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed except for minor editorial corrections. We have determined that these minor corrections:

—Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
—Do not add any additional burden upon the public than was already proposed in the NPRM.

Changes to 14 CFR Part 39—Effect on the AD

How does the revision to 14 CFR part 39 affect this AD? On July 10, 2002, the FAA published a new version of 14 CFR part 39 (67 FR 47997, July 22, 2002), which governs the FAA's AD system. This regulation now includes material that relates to altered products, special flight permits, and alternative methods of compliance. This material previously was included in each individual AD. Since this material is included in 14 CFR part 39, we will not include it in future AD actions.

Costs of Compliance

How many sailplanes does this AD impact? We estimate that this AD affects 94 sailplanes in the U.S. registry.

What is the cost impact of this AD on owners/operators of the affected sailplanes? We estimate the following costs to do the modifications to the airspeed indicators, flight limitations placards, and revising the flight and maintenance manuals:

Labor cost	Parts cost	Total cost per sailplane	Total cost on U.S. operators
1 work hour × $65 = $65	Not applicable	$65	$65 × 94 = $6,110.

For G103A TWIN II ACRO (aerobatic category) sailplanes and G103C TWIN III ACRO (aerobatic category) sailplanes, we estimate the following costs to do the fuselage modification:

Labor cost	Parts cost	Total cost per sailplane
30 work hours × $65 = $1,950	$5,307	$7,257.

What is the difference between the cost impact of this AD and the cost impact of AD 2003–19–14 R1? There is no cost difference between this AD and AD 2003–19–14 R1. This AD is only revising certain operating limits for certain Model G103 TWIN ASTIR. This AD does not require any additional actions than are currently required in AD 2003–19–14 R1.

Authority for This Rulemaking

What authority does FAA have for issuing this rulemaking action? Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

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

Regulatory Findings

Will this AD impact various entities? We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

Will this AD involve a significant rule or regulatory action? For the reasons discussed above, I certify that this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a summary of the costs to comply with this AD (and other information as included in the Regulatory Evaluation) and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES.** Include ''Docket No. FAA–2005–20441; Directorate Identifier 2003–CE–35–AD'' in your request.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2003–19–14 R1, Amendment 39–13676 (69 FR 34258, June 21, 2004), and by adding a new AD to read as follows:

2003–19–14 R2 BURKHART GROB LUFT—UND RAUMFAHRT GmbH & CO KG: Amendment 39–14322; Docket No. FAA–2005–20441; Directorate Identifier 2003–CE–35–AD; Revises AD 2003–19–14 R1, Amendment 39–13676.

When Does This AD Become Effective?

(a) This AD becomes effective on November 30, 2005.

What Other ADs Are Affected By This Action?

(b) This AD revises AD 2003–19–14 R1, Amendment 39–13676.

What Sailplanes Are Affected by This AD?

(c) This AD affects the following sailplane models and serial numbers that are certificated in any category:

Model	Serial numbers
G103 TWIN ASTIR	All serial numbers.
G103A TWIN II ACRO (aerobatic category)	All serial numbers with suffix ''K''.
G103C TWIN III ACRO (aerobatic category)	All serial numbers.

What Is the Unsafe Condition Presented in This AD?

(d) This AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Germany. The actions specified in this AD are intended to prevent damage to the fuselage during limit load flight, which could result in reduced structural integrity. This condition could lead to loss of control of the sailplane.

What Must I Do To Address This Problem?

(e) To address this problem, you must do the following:

Actions	Compliance	Procedures
(1) *For G103 TWIN ASTIR sailplanes:* (i) Re-set the airspeed indicator to the new placard limitations; (ii) Install the following placard:	Within the next 25 hours time-in-service (TIS) after November 30, 2005 (the effective date of this AD), unless already done.	Following GROB Service Bulletin No. MSB315–64/3, dated September 14, 2004.

Maximum flying weight				
Without Waterballast:	650 kg / 1435lbs			
With Waterballast:	650 kg / 1435 lbs			
Maximum airspeeds:		**km/h**	**kts**	**mph**
In calm air:	V_{NE}	250	135	155
In rough air:	V_B	170	92	106
Aerotow:	V_T	170	92	106
Winch or auto launch:	V_W	120	65	75
Airbrakes open:	V_{DF}	250	135	155
Maneuvering speed:	V_A	170	92	106

(iii) You may perform simple aerobatic flight (looping, steep turns, lazy eights, and chandelles) following the flight manual; and

(iv) Revise the flight and maintenance manuals.

(2) *For G103A TWIN II ACRO (acrobatic category) and G103C TWIN III ACRO (acrobatic category) sailplanes:* (i) Re-set the airspeed indicator to the new placard limitations; and (ii) Install the following placards on Model G103A TWIN II ACRO (aerobatic category) sailplanes:	Within the next 25 hours time-in-service (TIS) after August 12, 2004 (the effective date AD 2003–19–14 R1), unless already done.	Follow Grob Service Bulletin No. MSB315–65, dated September 15, 2003.

"Simple Aerobatic" maneuvers (spins, lazy eights, chandelles, stall turns, steep turns, and positive loops) are permitted.

Maximum flying weight				580 kg / 1280 lbs
Maximum airspeeds:		**km/h**	**kts**	**mph**
In calm air:	V_{NE}	250	135	155
In rough air:	V_B	170	92	106
Aerotow:	V_T	170	92	106
Winch or auto tow:	V_W	120	65	75
Airbrakes extended:	V_{FE}	250	135	155
Maneuvering speed:	V_A	170	92	106

(iii) Install the following placards on Model G103C TWIN III ACRO (aerobatic category) sailplanes:

All aerobatic maneuvers and cloud flying are prohibited

Maximum flying weight				**580 kg / 1280 lbs**
Maximum airspeeds:		**km/h**	**kts**	**mph**
In calm air:	V_{NE}	250	135	155
In rough air:	V_{RA}	170	92	106
Aerotow:	V_T	170	92	106
Winch or auto tow:	V_W	120	65	75
Airbrakes extended:	V_{FE}	250	135	155
Maneuvering speed:	V_A	170	92	106

(3) *For G103A TWIN II ACRO (acrobatic category) and G103C TWIN III ACRO (acrobatic category) sailplanes:* as an alternative to the flight restrictions in paragraph (e)(2) of this AD, you may install additional stringers in the rear fuselage section. Installing additional stringers terminates the flight restrictions in paragraph (e)(2) of this AD.

(4) *For G103A TWIN II ACRO (acrobatic category) and G103C TWIN III ACRO (acrobatic category) sailplanes:* only if you installed the additional stringers specified in paragraph (e)(3) of this AD, do the following:

(i) Remove the placard prohibiting all aerobatic maneuvers;

(ii) Install the following flight limitation placard on Model G103A TWIN II ACRO (aerobatic category) sailplanes:

Maximum flying weight				**580 kg / 1280 lbs**
Maximum airspeeds:		**km/h**	**kts**	**mph**
In calm air:	V_{NE}	250	135	155
In rough air:	V_{RA}	180	97	112
Aerotow:	V_T	170	92	106
Winch or auto tow:	V_W	120	65	75
Airbrakes extended:	V_{FE}	250	135	155
Maneuvering speed:	V_A	180	97	112

(iii) Install the following flight limitation placard on Model G103C TWIN III ACRO (aerobatic category) sailplanes:

Maximum flying weight				**600 kg / 1323 lbs**
Maximum airspeeds:		**km/h**	**kts**	**mph**
In calm air:	V_{NE}	280	151	174
In rough air:	V_B	200	108	124
Aerotow:	V_T	185	100	115
Winch or auto tow:	V_W	140	76	87
Airbrakes extended:	V_{FE}	280	151	174
Maneuvering speed:	V_A	185	100	115

At any time after August 12, 2004 (the effective date AD 2003–19–14 R1).

Follow Grob Service Bulletin No. OSB 315–66, dated October 16, 2003, and Work Instruction for OSB 315–66, dated October 16, 2003.

Prior to further flight after doing the actions in paragraph (e)(3) of this AD.

Follow Grob Service Bulletin No. OSB 315–66, dated October 16, 2003.

Note: The placard information in this AD is different from the information in the applicable service bulletins. This AD takes precedence over the service bulletins. You should update your placards to reflect the information presented in this AD.

May I Request an Alternative Method of Compliance?

(f) You may request a different method of compliance or a different compliance time for this AD by following the procedures in 14 CFR 39.19. Unless FAA authorizes otherwise, send your request to your principal inspector. The principal inspector may add comments and will send your request to the Manager, Standards Office, Small Airplane Directorate, FAA. For information on any already approved alternative methods of compliance, contact Gregory A. Davison, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4130; facsimile: (816) 329–4090.

Is There Other Information That Relates to This Subject?

(g) German AD D–2003–231R3, dated November 9, 2004, also addresses the subject of this AD.

Does This AD Incorporate Any Material by Reference?

(h) You must do the actions required by this AD following the instructions in GROB Service Bulletin No. MSB315–64/3, dated September 14, 2004; Grob Service Bulletin No. MSB315–65, dated September 15, 2003; Grob Service Bulletin No. OSB 315–66, dated October 16, 2003; and Work Instruction for OSB 315–66, dated October 16, 2003.

(1) On August 12, 2004 (69 FR 34258, June 21, 2004), and in accordance with 5 U.S.C. 552(a) and 1 CFR part 51, the Director of the Federal Register approved the incorporation by reference of Grob Service Bulletin No. MSB315–65, dated September 15, 2003; Grob Service Bulletin No. OSB 315–66, dated October 16, 2003; and Work Instruction for OSB 315–66, dated October 16, 2003.

(2) As of November 30, 2005, and in accordance with 5 U.S.C. 552(a) and 1 CFR part 51, the Director of the Federal Register approved the incorporation by reference of GROB Service Bulletin No. MSB315–64/3, dated September 14, 2004.

(3) To get a copy of this service information, contact GROB Luft-und Raumfahrt, Lettenbachstrasse 9, D–86874 Tussenhausen-Mattsies, Germany; telephone: 011 49 8268 998139; facsimile: 011 49 8268 998200; e-mail: *productsupport@grob-aerospace.de.* To review copies of this service information, go to the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html* or call (202) 741–6030. To view the AD docket, go to the Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001 or on the Internet at *http://dms.dot.gov.* The docket number is FAA–2005–20441; Directorate Identifier 2003–CE–35–AD.

Issued in Kansas City, Missouri, on September 28, 2005.

David R. Showers,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–19929 Filed 10–11–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–20221; Directorate Identifier 2004–NM–173–AD; Amendment 39–14329; AD 2005–20–32]

RIN 2120–AA64

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

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

ACTION: Final rule.

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

DATES: This AD becomes effective November 16, 2005.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of November 16, 2005.

ADDRESSES: You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., Nassif Building, room PL–401, Washington, DC.

Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for service information identified in this AD.

FOR FURTHER INFORMATION CONTACT: Tim Backman, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2797; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Examining the Docket

You may examine the airworthiness directive (AD) docket on the Internet at *http://dms.dot.gov* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the street address stated in the **ADDRESSES** section.

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to all Airbus Model A330, A340–200, and A340–300 series airplanes. That NPRM was published in the **Federal Register** on February 1, 2005 (70 FR 5073). That NPRM proposed to require inspecting to determine the part number and serial number of the left- and right-hand elevator assemblies, performing related investigative and corrective actions if necessary, and re-protecting the elevator assembly.

Comments

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

Request To Allow Records Check as a Method of Compliance

One commenter believes that it is unnecessary to inspect its fleet to determine that none of the airplanes in its fleet are subject to the proposed AD. The commenter states that its airplanes were delivered new from Airbus in July 2003, after Airbus had changed its production processes to prevent moisture penetration of the elevator. The delivery records for these airplanes show the part number and serial number of the left- and right-hand elevator assemblies. The commenter notes that it has not replaced the elevator assemblies on any airplane in its fleet. Further, the Illustrated Parts Catalog shows that the elevator assemblies that would be affected by the proposed AD cannot legally be installed on the airplanes in its fleet. The commenter asserts that its airplanes are in compliance with the intent of the proposed AD, and that it will be able to ensure continuing compliance by inspecting all incoming spare elevator

assemblies and any elevators on airplanes purchased from other operators to ensure that the elevator assemblies are not subject to the proposed AD. The commenter states that these measures will provide a level of safety equivalent to the level that would be provided by the proposed AD.

The airplane manufacturer also comments that airplane records should contain the part number and serial number of each elevator assembly, even in the event that the elevator assembly has been replaced. The airplane manufacturer states that a records check would be better than an inspection for determining the part number and serial number of the elevator assemblies, especially considering that very few airplanes with the subject part number/serial number combinations could be registered in the U.S.

We infer that the first commenter's request is the same as the second commenter's—remove the requirement to inspect the elevator assemblies to determine the part number and serial number, or allow a records check as a method of compliance with this AD.

We concur with the commenters' request to allow a records check as a method of compliance with this AD. We have revised paragraph (g) of this AD to state that a review of maintenance records is acceptable in lieu of an inspection, provided that the part number and serial number of the elevator assemblies can be conclusively determined from that review.

Request To Revise Compliance Times

One commenter, the airplane manufacturer, requests that we revise paragraph (g)(1) of the proposed AD to remove the reference to ''the date of issuance of the original Airworthiness Certificate or the date of issuance of the original Export Certificate of Airworthiness.'' (This term was used in lieu of the term ''the first flight of the airplane,'' which the Direction Générale de l'Aviation Civile (DGAC) uses to establish the compliance times specified in French airworthiness directive F–2004–118 R1, dated October 13, 2004.) The commenter states that it does not see any advantage in the FAA's terminology. The commenter states that the reference for the service life of the airplane is the first flight—the point at which flight hours and flight cycles begin to count. The commenter states that the first flight of an airplane cannot be ''interpreted differently by different operators'' (as the FAA states under ''Differences Among the Proposed AD, the French Airworthiness Directive, and the Service Information'' in the proposed AD). The commenter states that the date of the first flight is recorded in the airplane's logbook.

We agree with the commenter's request. We find that, for the airplane models affected by this AD, operators should be able to readily determine the date of the first flight of the airplane. We have revised paragraph (g)(1) of this AD accordingly.

The same commenter also takes issue with the grace period of 18 months after the effective date of the AD, which is specified in paragraph (g)(2) of the proposed AD. The commenter states that this date will be long after the January 31, 2006, compliance date specified in French airworthiness directive F–2004–118 R1.

We do not concur. We would use a calendar date to express a compliance time only when engineering analysis establishes a direct relationship between the date and either the compliance threshold or the grace period. In this case, this relationship does not exist, and we find that a grace period of 18 months after the effective date of this AD represents an appropriate interval of time for affected airplanes to continue to operate without compromising safety. Also, we note that the compliance time of January 31, 2006, specified in French airworthiness directive F–2004–118 R1 is approximately 18 months after the effective date of the original issue of French airworthiness directive F–2004–118, July 31, 2004. Thus, the 18-month grace period is consistent with the grace period allowed by the DGAC in French airworthiness directive F–2004–118 R1. We have not changed the AD in this regard.

Request To Refer to Service Bulletins for Repair Instructions

One commenter, the airplane manufacturer, notes that paragraph (f)(1) of the proposed AD would require repairs to be done in accordance with a method approved by the FAA, the Direction Générale de l'Aviation Civile (DGAC) (which is the airworthiness authority for France), or the DGAC's delegated agent, where the service bulletins specify to contact Airbus. The commenter states that any repair solution provided by Airbus would be DGAC approved through Airbus's privileges as a Delegation Option Authorization (DOA) organization. For this reason, the commenter states that the instructions specified in the service bulletins should be followed.

We infer that the commenter is asking that we remove paragraph (f)(1) from this AD. We do not agree. We cannot specify in an AD that operators may contact the manufacturer for repair instructions when the nature of that repair is unknown. Doing so would be delegating our rulemaking authority to the manufacturer. We acknowledge that Airbus is able to approve repairs, as allowed by Airbus's delegation authorization from the European Aviation Safety Agency (EASA). We find that requiring repair ''according to a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the Direction Générale de l'Aviation Civile (or its delegated agent),'' as specified in paragraph (f)(1) of this AD, meets the intent of the commenter's request (i.e., it allows repair in accordance with a method approved by Airbus), without compromising the terms of our rulemaking authority. We have not changed the AD in this regard.

Request To Require Reporting

One commenter, the airplane manufacturer, notes that paragraph (f)(2) of the proposed AD states that reporting information to the manufacturer is not required. The commenter requests that we revise the proposed AD to require inspection results be sent to Airbus. The commenter states that receiving the inspection results will allow it to gain as much information from the field as possible to allow continuous improvement.

We do not concur with the commenter's request. The Office of Management and Budget (OMB) must approve information collection requirements under the provisions of the Paperwork Reduction Act (PRA) of 1980 (44 U.S.C. 3501 *et seq.*). The PRA requires government agencies to consider the extent of the paperwork burden that will accompany any new rule. The PRA is intended to reduce these burdens by requiring agencies not only to analyze the information collection and reporting costs they are imposing on the private sector, but to use those analyses to minimize the cost. We require operators to submit information relevant to AD actions only when our analyses indicate that such information is needed to ensure safety or to document compliance. We cannot require operators to submit information to improve processes. We have not changed the AD in this regard.

Explanation of Change to Applicability

We have revised the applicability of this AD to identify model designations as published in the most recent type certificate data sheet for the affected models.

Clarification of Alternative Method of Compliance (AMOC) Paragraph

We have revised this action to clarify the appropriate procedure for notifying the principal inspector before using any approved AMOC on any airplane to which the AMOC applies.

Conclusion

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

Costs of Compliance

This AD affects about 20 airplanes of U.S. registry. The inspection to determine the part number and serial number of installed elevator assemblies takes about 1 work hour per airplane, at an average labor rate of $65 per work hour. Based on these figures, the estimated cost of this AD for U.S. operators is $1,300, or $65 per airplane.

Authority for This Rulemaking

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

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

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

2005–20–32 Airbus: Amendment 39–14329. Docket No. FAA–2005–20221; Directorate Identifier 2004–NM–173–AD.

Effective Date

(a) This AD becomes effective November 16, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Airbus Model A330–201, –202, –203, –223, –243, –301, –321, –322, –323, –341, –342, and –343 airplanes; and Model A340–211, –212, –213, –311, –312, and –313 airplanes; certificated in any category.

Unsafe Condition

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

Compliance

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

Service Bulletin References

(f) The term ''service bulletin,'' as used in this AD, means the Accomplishment Instructions of Airbus Service Bulletin A330–55–3032 (for Model A330–201, –202, –203, –223, –243, –301, –321, –322, –323, –341, –342, and –343 airplanes) or Airbus Service Bulletin A340–55–4029 (for Model A340–211, –212, –213, –311, –312, and –313 airplanes), both dated December 22, 2003, as applicable.

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

(2) Although the service bulletins specify submitting certain information to the manufacturer, this AD does not include that requirement.

Determining Part Number, Serial Number

(g) At the later of the times specified in paragraphs (g)(1) and (g)(2) of this AD: Perform an inspection to determine the part number and serial number of the left- and right-hand elevator assemblies. A review of airplane maintenance records is acceptable in lieu of this inspection if the part number and serial number of each elevator assembly can be conclusively determined from that review. If neither elevator assembly has a part number and serial number combination identified in Table 1 of this AD, no further action is required by this paragraph. If either elevator assembly has a part number and serial number combination identified in Table 1 of this AD, do paragraph (h) of this AD.

(1) Within 10 years after the date of the first flight of the airplane, or before the accumulation of 12,000 total flight cycles, whichever is first.

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

TABLE 1.—AFFECTED ELEVATOR PART NUMBERS AND SERIAL NUMBERS

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

TABLE 1.—AFFECTED ELEVATOR PART NUMBERS AND SERIAL NUMBERS—Continued

Part	Affected part numbers	Affected serial numbers
Right-hand elevator assembly	F55280000001, F55280000005	CG1002 through CG1094 inclusive, CG2001.

Inspections

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

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

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

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

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

Parts Installation

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

Alternative Methods of Compliance (AMOCs)

(j)(1) The Manager, International Branch, ANM–116, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with 14 CFR 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Related Information

(k) French airworthiness directive F–2004–118 R1, dated October 13, 2004, also addresses the subject of this AD.

Material Incorporated by Reference

(l) You must use Airbus Service Bulletin A330–55–3032, excluding Appendix 01, dated December 22, 2003; or Airbus Service Bulletin A340–55–4029, excluding Appendix 01, dated December 22, 2003; as applicable; to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of these documents in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Nassif Building, Washington, DC; on the Internet at *http://dms.dot.gov;* or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on September 29, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–20064 Filed 10–11–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NM–238–AD; Amendment 39–14330; AD 2005–20–33]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 727, 727C, 727–100, and 727–100C Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Boeing Model 727, 727C, 727–100, and 727–100C series airplanes. This AD requires repetitive inspections of the frame inner chord, outer chord, and web of the forward and aft edge frames of the lower lobe forward cargo door (FCD) cutout, and corrective action if necessary. The actions specified by this AD are intended to detect and correct fatigue cracking of the forward and aft edge frames of the lower lobe FCD cutout, which could result in the loss of the FCD and rapid decompression of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective November 16, 2005.

The incorporation by reference of a certain publication listed in the regulations is approved by the Director of the Federal Register as of November 16, 2005.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Daniel F. Kutz, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6456; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain Boeing Model 727, 727C, 727–100, and 727–100C series airplanes was published as a supplemental notice of proposed rulemaking (NPRM) in the **Federal Register** on August 22, 2005 (70 FR 48904). That action proposed to require repetitive inspections of the frame inner chord, outer chord, and web of the forward and aft edge frames of the lower lobe forward cargo door cutout, and corrective action if necessary.

Clarification of Alternative Method of Compliance (AMOC) Paragraph

We have revised this action to clarify the appropriate procedure for notifying the principal inspector before using any approved AMOC on any airplane to which the AMOC applies.

Comments

We provided the public the opportunity to participate in the development of this AD. We have considered the comment received. The commenter supports the supplemental NPRM.

Conclusion

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

Interim Action

We consider this final rule to be an interim action. The manufacturer is currently developing a modification that will address the unsafe condition identified in this AD. Once this modification is developed, approved, and available, we may consider additional rulemaking.

Cost Impact

There are approximately 211 airplanes of the affected design in the worldwide fleet. The FAA estimates that 116 airplanes of U.S. registry will be affected by this AD, that it will take approximately 6 to 8 work hours per airplane to accomplish the required inspections, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be between $45,240 and $60,320, or between $390 and $520 per airplane.

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

Authority for This Rulemaking

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

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

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2005–20–33 Boeing: Amendment 39–14330. Docket 2003–NM–238–AD.

Applicability: Model 727, 727C, 727–100, and 727–100C series airplanes, line numbers 1 through 694 inclusive; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To detect and correct fatigue cracking of the forward and aft edge frames of the lower lobe forward cargo door (FCD) cutout, which could result in the loss of the FCD and rapid decompression of the airplane, accomplish the following:

Note 1: This AD is related to AD 98–11–03 R1, amendment 39–10983, and affects Structural Significant Item (SSI) F–11B of the Boeing 727 Supplemental Structural Inspection Document (SSID) program, D6–48040–1, Revision H, dated June 1994.

Initial and Repetitive Inspections

(a) For airplanes on which the forward and aft edge frames of the lower lobe FCD cutout have not been inspected per AD 98–11–03 R1 as of the effective date of this AD: Prior to the accumulation of 21,000 total flight cycles, or within 3,000 flight cycles after the effective date of this AD, whichever occurs later, do the inspections specified in paragraph (c) of this AD.

(b) For airplanes on which the forward and aft edge frames of the lower lobe FCD cutout have been inspected per AD 98–11–03 R1 as of the effective date of this AD: Within the next scheduled inspection required by AD 98–11–03 R1, or within 3,000 flight cycles after the effective date of this AD, whichever occurs first, do the inspections specified in paragraph (c) of this AD.

(c) At the time specified in paragraph (a) or paragraph (b) of this AD, as applicable: Perform the detailed and high frequency eddy current inspections for cracks in the web and the inner and outer chords of the forward and aft frames of the forward cargo doorway in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 727–53A0229, dated March 24, 2005. Repeat the inspections thereafter at intervals not to exceed 3,000 flight cycles.

Corrective Action

(d) If any crack is found during any inspection required by paragraph (c) of this AD: Before further flight, repair per a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA; or according to data meeting the certification basis of the airplane approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization who has been authorized by the

Manager, Seattle ACO, to make those findings. For a repair method to be approved, the approval must meet the certification basis of the airplane, and the approval must specifically reference this AD.

Certain Actions Constitute Compliance With AD 98–11–03 R1

(e) Accomplishment of the inspections specified in paragraph (c) of this AD is terminating action for the inspections required by AD 98–11–03 R1 that pertain to SSI F–11B of Boeing Document D6–48040–1, Boeing 727 SSID, Revision H, dated June 1994, for the areas specified in paragraph (c) of this AD only. Accomplishment of the actions required by paragraph (c) of this AD does not terminate the inspections required by AD 98–11–03 R1 for the remaining areas of SSI F–11B and does not terminate the remaining requirements of AD 98–11–03 R1.

No Reporting Required

(f) Although the service bulletin referenced in this AD specifies to provide certain information to the manufacturer, this AD does not include that requirement.

Alternative Methods of Compliance

(g)(1) In accordance with 14 CFR 39.19, the Manager, Seattle ACO, is authorized to approve alternative methods of compliance (AMOCs) for this AD.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Incorporation by Reference

(h) Unless otherwise specified in this AD, the actions must be done in accordance with Boeing Alert Service Bulletin 727–53A0229, dated March 24, 2005. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. To get copies of this service information, contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207. To inspect copies of this service information, go to the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or to the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Effective Date

(i) This amendment becomes effective on November 16, 2005.

Issued in Renton, Washington, on September 29, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–20075 Filed 10–11–05; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–2005–0260; FRL–7738–8]

Imidacloprid; Pesticide Tolerances for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a time-limited tolerance for the combined residues of imidacloprid, (1-[6-chloro-3-pyridinyl) methyl]-*N*-nitro-2-imidazolidinimine) and its metabolites containing the 6-chloropyridinyl moiety, all expressed as parent in or on pomegranates. This action is in response to EPA's granting of an emergency exemption under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizing use of the pesticide on pomegranates. This regulation establishes a maximum permissible level for residues of imidacloprid in this food commodity. The tolerance will expire and is revoked on December 31, 2008.

DATES: This regulation is effective October 12, 2005. Objections and requests for hearings must be received on or before December 12, 2005.

ADDRESSES: To submit a written objection or hearing request follow the detailed instructions as provided in Unit VII. of the **SUPPLEMENTARY INFORMATION.** EPA has established a docket for this action under docket identification (ID) number OPP–2005–0260. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the 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.

FOR FURTHER INFORMATION CONTACT: Andrew Ertman, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number:(703) 308–9367; e-mail address: *Sec-18-Mailbox@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111)
- Animal production (NAICS code 112)
- Food manufacturing (NAICS code 311)
- Pesticide manufacturing (NAICS code 32532)

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document and Other Related Information?

In addition to using EDOCKET *(http://www.epa.gov/edocket/)*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/.* A frequently updated electronic version of 40 CFR part 180 is available on E-CFR Beta Site Two at *http://www.gpoaccess.gov/ecfr/.*

II. Background and Statutory Findings

EPA, on its own initiative, in accordance with sections 408(e) and 408 (l)(6) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, is establishing a tolerance for the combined residues of imidacloprid, (1-[6-chloro-3-pyridinyl) methyl]-*N*-nitro-2-imidazolidinimine) and its metabolites containing the 6-chloropyridinyl moiety, all expressed as parent in or on pomegranates at 0.20 parts per million (ppm). This tolerance will expire and is revoked on December 31, 2008. EPA will publish a document in the **Federal Register** to remove the revoked tolerance from the Code of Federal Regulations.

Section 408(l)(6) of the FFDCA requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under section 18 of FIFRA. Such tolerances can be established without providing notice or period for public comment. EPA does not intend for its actions on section 18 related tolerances to set binding precedents for the application of section 408 of the FFDCA and the new safety standard to other tolerances and exemptions. Section 408(e) of the FFDCA allows EPA to establish a tolerance or an exemption from the requirement of a tolerance on its own initiative, i.e., without having received any petition from an outside party.

Section 408(b)(2)(A)(i) of the FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of the FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of the FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

Section 18 of the FIFRA authorizes EPA to exempt any Federal or State agency from any provision of FIFRA, if EPA determines that ''emergency conditions exist which require such exemption.'' This provision was not amended by the Food Quality Protection Act of 1996 (FQPA). EPA has established regulations governing such emergency exemptions in 40 CFR part 166.

III. Emergency Exemption for Imidacloprid on Pomegranates and FFDCA Tolerances

The State of California requested the use of imidacloprid on pomegranates to control whiteflies. The applicant stated that uncontrolled whitefly populations cause significant problems for producers. Immature life stages exude honeydew on the trees and developing fruit, which contribute to the development of molds (which mar the surface of the pomegranates) and also contribute to the sunburning of the fruit. Since the introduction of the pest on pomegranates, cull rates went from 15–30% to 40–50%. This increase in cull rates is forcing growers and shippers to move fruit from the fresh market to the juice market, which in turn is causing significant economic damage. EPA has authorized under FIFRA section 18 the use of imidacloprid on pomegranates for control of whiteflies in California. After having reviewed the submission, EPA concurs that emergency conditions exist for this State.

As part of its assessment of this emergency exemption, EPA assessed the potential risks presented by residues of imidacloprid in or on pomegranates. In doing so, EPA considered the safety standard in section 408(b)(2) of the FFDCA, and EPA decided that the necessary tolerance under section 408(l)(6) of the FFDCA would be consistent with the safety standard and with FIFRA section 18. Consistent with the need to move quickly on the emergency exemption in order to address an urgent non-routine situation and to ensure that the resulting food is safe and lawful, EPA is issuing this tolerance without notice and opportunity for public comment as provided in section 408(l)(6) of the FFDCA. Although this tolerance will expire and is revoked on December 31, 2008, under section 408(l)(5) of the FFDCA, residues of the pesticide not in excess of the amounts specified in the tolerance remaining in or on pomegranates after that date will not be unlawful, provided the pesticide is applied in a manner that was lawful under FIFRA, and the residues do not exceed a level that was authorized by this tolerance at the time of that application. EPA will take action to revoke this tolerance earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

Because this tolerance is being approved under emergency conditions, EPA has not made any decisions about whether imidacloprid meets EPA's registration requirements for use on pomegranates or whether a permanent tolerance for this use would be appropriate. Under these circumstances, EPA does not believe that this tolerance serves as a basis for registration of imidacloprid by a State for special local needs under FIFRA section 24(c). Nor does this tolerance serve as the basis for any State other than California to use this pesticide on this crop under section 18 of FIFRA without following all provisions of EPA's regulations implementing FIFRA section 18 as identified in 40 CFR part 166. For additional information regarding the emergency exemption for imidacloprid, contact the Agency's Registration Division at the address provided under **FOR FURTHER INFORMATION CONTACT**.

IV. Aggregate Risk Assessment and Determination of Safety

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. For further discussion of the regulatory requirements of section 408 of the FFDCA and a complete description of the risk assessment process, see the final rule on Bifenthrin Pesticide Tolerances in the **Federal Register** of November 26, 1997 (62 FR 62961) FRL–5754–7).

Consistent with section 408(b)(2)(D) of the FFDCA , EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of imidacloprid and to make a determination on aggregate exposure, consistent with section 408(b)(2) of the FFDCA, for a time-limited tolerance for the combined residues of imidacloprid, (1-[6-chloro-3-pyridinyl) methyl]-*N*-nitro-2-imidazolidinimine) and its metabolites containing the 6-chloropyridinyl moiety, all expressed as parent in or on pomegranates at 0.20 ppm. EPA's assessment of the dietary exposures and risks associated with establishing the tolerance follows.

A. Toxicological Endpoints

The dose at which no adverse effects are observed (the NOAEL) from the toxicology study identified as appropriate for use in risk assessment is used to estimate the toxicological endpoint. However, the lowest dose at which adverse effects of concern are identified (the LOAEL) is sometimes used for risk assessment if NOAEL was achieved in the toxicology study selected. An uncertainty factor (UF) is applied to reflect uncertainties inherent in the extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. An UF of 100 is routinely used, 10X to account for interspecies differences and 10X for intraspecies differences.

For dietary risk assessment (other than cancer) the Agency uses the UF to calculate an acute or chronic reference dose (aRfD or cRfD) where the RfD is equal to the NOAEL divided by the appropriate UF (RfD = NOAEL/UF). Where an additional safety factor is

retained due to concerns unique to the FQPA, this additional factor is applied to the RfD by dividing the RfD by such additional factor. The acute or chronic Population Adjusted Dose (aPAD or cPAD) is a modification of the RfD to accommodate this type of FQPA safty factor (SF).

For non-dietary risk assessments (other than cancer) the UF is used to determine the level of concern (LOC). For example, when 100 is the appropriate UF (10X to account for interspecies differences and 10X for intraspecies differences) the LOC is 100. To estimate risk, a ratio of the NOAEL to exposures (margin of exposure (MOE) = NOAEL/exposure) is calculated and compared to the LOC.

The linear default risk methodology (Q*) is the primary method currently used by the Agency to quantify carcinogenic risk. The Q* approach assumes that any amount of exposure will lead to some degree of cancer risk. A Q* is calculated and used to estimate risk which represents a probability of occurrence of additional cancer cases (e.g., risk is expressed as 1 x10^6 or one in a million). Under certain specific circumstances, MOE calculations will be used for the carcinogenic risk assessment. In this non-linear approach, a ''point of departure'' is identified below which carcinogenic effects are not expected. The point of departure is typically a NOAEL based on an endpoint related to cancer effects though it may be a different value derived from the dose response curve. To estimate risk, a ratio of the point of departure to exposure (MOE_{cancer} = point of departure/exposures) is calculated. A summary of the toxicological endpoints for imidacloprid used for human risk assessment is shown in the following Table 1:

TABLE 1.—SUMMARY OF TOXICOLOGICAL DOSE AND ENDPOINTS FOR IMIDACLOPRID FOR USE IN HUMAN RISK ASSESSMENT

Exposure Scenario	Dose Used in Risk Assessment, UF	*Special FQPA SF and Level of Concern for Risk Assessment	Study and Toxicological Effects
Acute dietary all populations	LOAEL = 42 mg/kg/day UF = 300 ARfD = 0.14 mg/kg	FQPA SF = 1X aPAD = acute RfD FQPA SF = 0.14 mg/kg	Acute neurotoxicity - rat LOAEL = 42 mg/kg, based upon the decrease in motor and locomotor activities observed in females
Chronic dietary all populations	NOAEL= 5.7 mg/kg/day UF = 100 Chronic RfD = 0.057 mg/kg/day	FQPA SF = 1X cPAD = chr RfD FQPA SF = 0.057 mg/kg/day	Combined chronic tox/carcinogenicity - rat LOAEL = 16.9 mg/kg/day, based upon increased incidence of mineralized particles in thyroid colloid in males
Short-term oral (1–30 days)	Oral study NOAEL= 10 mg/kg/day	LOC for MOE = 100	Developmental toxicity - rat Maternal LOAEL = 30 mg/kg/day, based upon decreased body weight gain and corrected body weight gain
Short-term dermal (1–30 days)	Oral study NOAEL= 10 mg/kg/day (dermal absorption rate = 7.2%)	LOC for MOE = 100	Developmental toxicity - rat Maternal LOAEL = 30 mg/kg/day, based upon decreased body weight gain and corrected body weight gain
Short-term inhalation (1–30 days)	Oral study NOAEL = 10 mg/kg/day (inhalation absorption rate = 100%)	LOC for MOE = 100	Developmental toxicity - rat Maternal LOAEL = 30 mg/kg/day, based upon decreased body weight gain and corrected body weight gain
Cancer (oral, dermal, inhalation)	Group E	Not applicable	No evidence of carcinogenicity in rats and mice

[1] UF = uncertainty factor, FQPA SF = Special FQPA safety factor, NOAEL = no observed adverse effect level, LOAEL = lowest observed adverse effect level, PAD = population adjusted dose (a = acute, c = chronic) RfD = reference dose, MOE = margin of exposure, LOC = level of concern

B. Exposure Assessment

1. *Dietary exposure from food and feed uses.* Tolerances have been established (40 CFR 180.472) for the combined residues of imidacloprid, in or on a variety of raw agricultural commodities. Meat, milk, poultry and egg tolerances have also been established for the combined residues of imidacloprid. Risk assessments were conducted by EPA to assess dietary exposures from imidacloprid in food as follows:

i. *Acute exposure.* Acute dietary risk assessments are performed for a food-use pesticide if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure. The Dietary Exposure Evaluation Model (DEEM™) analysis evaluated the individual food consumption as reported by respondents in the U.S. Department of Agriculture (USDA) 1994–1996 and 1998 nationwide Continuing Surveys of Food Intake by Individuals (CSFII) and accumulated exposure to the chemical for each commodity. The following assumptions were made for the acute exposure assessments: A Tier 1, deterministic acute dietary exposure assessment was conducted using tolerance-level residues, 100% percent crop treated (PCT) information for registered and proposed commodities; and modified DEEM™ (version 2.0) processing factors for some commodities based on guideline processing studies. EPA estimated exposure based on the 95th percentile value from this deterministic exposure assessment.

ii. *Chronic exposure.* In conducting this chronic dietary risk assessment the DEEM™ analysis evaluated the individual food consumption as reported by respondents in the USDA 1994–1996 and 1998 nationwide CSFII and accumulated exposure to the chemical for each commodity. The following assumptions were made for the chronic exposure assessments: A

Tier 2 partially refined, deterministic assessment using tolerance-level residue and average weighted PCT information and modified DEEM™ (version 2.0) processing factors for some commodities based on guideline processing studies.

iii. *Cancer*. A quantitative cancer aggregate risk assessment was not performed because imidacloprid is not carcinogenic.

iv. *Anticipated residue and PCT information*. Section 408(b)(2)(F) of the FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if the Agency can make the following findings: Condition 1, that the data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain such pesticide residue; Condition 2, that the exposure estimate does not underestimate exposure for any significant subpopulation group; and Condition 3, if data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area. In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by section 408(b)(2)(F) of the FFDCA, EPA may require registrants to submit data on PCT.

The Agency used PCT information as follows: For the chronic assessment, average weighted PCT information was used for the following commodities: Apple 34%; brussels sprouts 56%; broccoli 35%; cabbage 14%; cantaloupe 31%; cauliflower 52%; collards 10%; corn, field 1%; cotton 3%; cucumber 2%; eggplant 36%; grapefruit 3%; grape 32%; mustard greens16%; honeydew 26%; kale 30%; lemon 1%; lettuce, head 49%; lime 5%; orange 1%; pear 16%; pepper 62%; pumpkin 7%; spinach 15%; squash 7%; sugarbeet 1%; tangerine 9%; tomato 9%; watermelon 6%; wheat 1%. A default value of 1% was used for all commodities which were-reported as having <1 CT.

The Agency believes that the three conditions listed above have been met. With respect to Condition 1, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. EPA uses a weighted average PCT for chronic dietary exposure estimates. This weighted average PCT figure is derived by averaging State-level data for a period of up to 10–years, and weighting for the more robust and recent data. A weighted average of the PCT reasonably represents a person's dietary exposure over a lifetime, and is unlikely to underestimate exposure to an individual because of the fact that pesticide use patterns (both regionally and nationally) tend to change continuously over time, such that an individual is unlikely to be exposed to more than the average PCT over a lifetime. For acute dietary exposure estimates, EPA uses an estimated maximum PCT. The exposure estimates resulting from this approach reasonably represent the highest levels to which an individual could be exposed, and are unlikely to underestimate an individual's acute dietary exposure. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimation. As to Conditions 2 and 3, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available information on the regional consumption of food to which imidacloprid may be applied in a particular area.

2. *Dietary exposure from drinking water*. The Agency lacks sufficient monitoring exposure data to complete a comprehensive dietary exposure analysis and risk assessment for imidacloprid in drinking water. Because the Agency does not have comprehensive monitoring data, drinking water concentration estimates are made by reliance on simulation or modeling taking into account data on the physical characteristics of imidacloprid.

The Agency uses the First Index Reservoir Screening Tool (FIRST) or the Pesticide Root Zone/Exposure Analysis Modeling System (PRZM/EXAMS) to produce estimates of pesticide concentrations in an index reservoir. The Screening Concentration in Ground Water (SCI-GROW) model is used to predict pesticide concentrations in shallow ground water. For a screening-level assessment for surface water EPA will generally use FIRST (a Tier 1 model) before using PRZM/EXAMS (a Tier 2 model). The FIRST model is a subset of the PRZM/EXAMS model that uses a specific high-end runoff scenario for pesticides. While both FIRST and PRZM/EXAMS incorporate an index reservoir environment, the PRZM/EXAMS model includes a PC area factor as an adjustment to account for the maximum percent crop coverage within a watershed or drainage basin.

None of these models include consideration of the impact processing (mixing, dilution, or treatment) of raw water for distribution as drinking water would likely have on the removal of pesticides from the source water. The primary use of these models by the Agency at this stage is to provide a coarse screen for sorting out pesticides for which it is highly unlikely that drinking water concentrations would ever exceed human health levels of concern.

Since the models used are considered to be screening tools in the risk assessment process, the Agency does not use estimated environmental concentrations (EECs) from these models to quantify drinking water exposure and risk as a %RfD or %PAD. Instead drinking water levels of comparison (DWLOCs) are calculated and used as a point of comparison against the model estimates of a pesticide's concentration in water. DWLOCs are theoretical upper limits on a pesticide's concentration in drinking water in light of total aggregate exposure to a pesticide in food, and from residential uses. Since DWLOCs address total aggregate exposure to imidacloprid they are further discussed in the aggregate risk sections below.

Based on the FIRST and SCI-GROW models the EECs of imidacloprid for acute exposures are estimated to be 36.04 parts per billion (ppb) for surface water and 2.09 ppb for ground water. The EECs for chronic exposures are estimated to be 17.24 ppb for surface water and 2.09 ppb for ground water.

3. *From non-dietary exposure*. The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Imidacloprid is currently registered for use on the following residential non-dietary sites: Granular products for application to lawns and ornamental plants; ready-to-use spray for application to flowers, shrubs and house plants; plant spikes for application to indoor and outdoor residential potted plants; ready-to-use potting medium for indoor and outdoor plant containers; liquid concentrate for application to lawns, trees, shrubs and flowers; ready-to-use liquid for directed spot application to cats and dogs. In

addition, there are numerous registered products intended for use by commercial applicators to residential sites. These include gel baits for cockroach control; products intended for commercial ornamental, lawn and turf pest control; products for ant control; and products used as preservatives for wood products, building materials, textiles and plastics.

As these products are intended for use by commercial applicators only, they are not be addressed in terms of residential pesticide handler. The risk assessment was conducted using the following residential exposure assumptions: EPA has determined that residential handlers are likely to be exposed to imidacloprid residues via dermal and inhalation routes during handling, mixing, loading, and applying activities. Based on the current use patterns, EPA expects duration of exposure to be short-term (1–30 days). EPA does not expect imidacloprid to result in residential exposure durations that would result in intermediate-term or long-term exposure.

The scenarios likely to result in adult dermal and/or inhalation residential handler exposures are as follows:

-Dermal and inhalation exposure from using a granular push-type spreader.

-Dermal exposure from using potted plant spikes.

-Dermal exposure from using a plant potting medium.

-Dermal and inhalation exposure from using a garden hose-end sprayer (dermal and inhalation exposure from using a RTU trigger pump spray is expected to be negligible).

-Dermal and inhalation exposure from using a water can/bucket for soil drench applications.

-Dermal exposure from using pet spot-on.

EPA has also determined that there is potential for short-term (1 to 30 days), post-application exposure to adults and children/toddlers from the many residential uses of imidacloprid. Due to residential application practices and the half-lives observed in the turf transferable residue study, intermediate-term and long-term post-application exposures are not expected. The scenarios likely to result in dermal (adult and child/toddler), and incidental non-dietary (child/toddler) short-term post-application exposures are as follows:

-Toddler oral hand-to-mouth exposure from contacting treated turf.

-Toddler incidental oral ingestion of granules.

-Toddler incidental oral ingestion of pesticide-treated soil.

-Toddler incidental oral exposure from contacting treated pet.

-Toddler dermal exposure from contacting treated turf.

-Toddler dermal exposure from hugging treated pet/contacting treated pet.

-Adult dermal exposure from contacting treated turf.

-Adult golfer dermal exposure from contacting treated turf.

-Adolescent golfer dermal exposure from contacting treated turf.

-Adult dermal exposure from contacting treated pet

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of the FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to imidacloprid and any other substances and imidacloprid does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that imidacloprid has a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the policy statements released by EPA's Office of Pesticide Programs concerning common mechanism determinations and procedures for cumulating effects from substances found to have a common mechanism on EPA's website at *http://www.epa.gov/pesticides/cumulative/.*

C. Safety Factor for Infants and Children

1. *In general.* Section 408 of the FFDCA provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the data base on toxicity and exposure unless EPA determines that a different margin of safety (MOS) will be safe for infants and children. MOSs are incorporated into EPA risk assessments either directly through use of a MOE analysis or through using UF (safety) in calculating a dose level that poses no appreciable risk to humans.

2. *Prenatal and postnatal sensitivity.* There is no quantitative or qualitative evidence of increased susceptibility of rat and rabbit fetuses to *in utero* exposure in developmental studies. There is no quantitative or qualitative evidence of increased susceptibility of rat offspring in the multi-generation reproduction study. There is evidence of increased qualitative susceptibility in the rat developmental neurotoxicity study, but the concern is low since:

i. The effects in pups are well-characterized with a clear NOAEL.

ii. The pup effects occur in the presence of maternal toxicity with the same NOAEL for effects in pups and dams, and

iii. The doses and endpoints selected for regulatory purposes are protective of the pup effects noted at higher doses in the developmental neurotoxicity study. Therefore, there are no residual uncertainties for prenatal/postnatal toxicity in this study.

3. *Conclusion.* There is a complete toxicity data base for imidacloprid and exposure data are complete or are estimated based on data that reasonably accounts for potential exposures. EPA determined that the 10X SF to protect infants and children should be reduced to 1X for the following reasons:

-The toxicological database is complete for FQPA assessment.

-The acute dietary food exposure assessment utilizes existing and proposed tolerance level residues and 100% CT information for all commodities. By using these screening-level assessments, actual exposures/risks will not be underestimated.

-The chronic dietary food exposure assessment utilizes existing and proposed tolerance level residues and PCT data verified by the Agency for several existing uses. For all proposed uses, 100% CT is assumed. The chronic assessment is somewhat refined and based on reliable data and will not underestimate exposure/risk.

-The dietary drinking water assessment utilizes water concentration values generated by model and associated modeling parameters which are designed to provide conservative, health protective, high-end estimates of water concentrations which will not likely be exceeded.

-The residential handler assessment is based upon the residential standard operating procedures (SOPs) in conjunction with chemical-specific study data in some cases and the Pesticide Handlers Exposure Database (PHED) unit exposures in other cases. The majority of the residential post-application assessment is based upon chemical-specific turf transferrable

residue data or other chemical-specific post-application exposure study data. The chemical-specific study data as well as the surrogate study data used are reliable and also are not expected to underestimate risk to adults as well as to children. In a few cases where chemical-specific data were not available, the SOPs were used alone. The residential SOPs are based upon reasonable worst-case assumptions and are not expected to underestimate risk. These assessments of exposure are not likely to underestimate the resulting estimates of risk from exposure to imidacloprid.

D. Aggregate Risks and Determination of Safety

To estimate total aggregate exposure to a pesticide from food, drinking water, and residential uses, the Agency calculates DWLOCs which are used as a point of comparison against the model estimates of a pesticide's concentration in water (EECs). DWLOC values are not regulatory standards for drinking water. DWLOCs are theoretical upper limits on a pesticide's concentration in drinking water in light of total aggregate exposure to a pesticide in food and residential uses. In calculating a DWLOC, the Agency determines how much of the acceptable exposure (i.e., the PAD) is available for exposure through drinking water e.g., allowable chronic water exposure milligrams/kilogram/ day (mg/kg/day) = cPAD - (average food + chronic non-dietary, non-occupational exposure). This allowable exposure through drinking water is used to calculate a DWLOC.

A DWLOC will vary depending on the toxic endpoint, drinking water consumption, and body weights. Default body weights and consumption values as used by the U.S. EPA Office of Water are used to calculate DWLOCs: 2 liter (L)/70 kg (adult male), 2L/60 kg (adult female), and 1L/10 kg (child). Default body weights and drinking water consumption values vary on an individual basis. This variation will be taken into account in more refined screening-level and quantitative drinking water exposure assessments. Different populations will have different DWLOCs. Generally, a DWLOC is calculated for each type of risk assessment used: Acute, short-term, intermediate-term, chronic, and cancer.

When EECs for surface water and ground water are less than the calculated DWLOCs, EPA concludes with reasonable certainty that exposures to imidacloprid in drinking water (when considered along with other sources of exposure for which EPA has reliable data) would not result in unacceptable levels of aggregate human health risk at this time. Because EPA considers the aggregate risk resulting from multiple exposure pathways associated with a pesticide's uses, levels of comparison in drinking water may vary as those uses change. If new uses are added in the future, EPA will reassess the potential impacts of imidacloprid on drinking water as a part of the aggregate risk assessment process.

1. *Acute risk*. Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food to imidacloprid will occupy 26% of the aPAD for the U.S. population, 17% of the aPAD for females 13 to 49 years, 57% of the aPAD for infants <1 year old and 66% of the aPAD for children 1–2 years. In addition, despite the potential for acute dietary exposure to imidacloprid in drinking water, after calculating DWLOCs and comparing them to conservative model estimated environmental concentrations of imidacloprid in surface water and ground water, EPA does not expect the aggregate exposure to exceed 100% of the aPAD, as shown in the following Table 2:

TABLE 2.—AGGREGATE RISK ASSESSMENT FOR ACUTE EXPOSURE TO IMIDACLOPRID

Population Subgroup	aPAD (mg/kg)	%aPAD (Food)	Surface Water EEC (ppb)	Ground Water EEC (ppb)	Acute DWLOC (ppb)
U.S. population	0.14	26	36.04	2.09	3600
Females (13–49 years)	0.14	17	36.04	2.09	3500
Infants (1 year)	0.14	57	36.04	2.09	600
Children (1–2 years)	0.14	66	36.04	2.09	470

2. *Chronic risk*. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that exposure to imidacloprid from food will utilize 12% of the cPAD for the U.S. population, 29% of the cPAD for infants <1 year and 38% of the cPAD for children 1–2 years. Based the use pattern, chronic residential exposure to residues of imidacloprid is not expected. In addition, there is potential for chronic dietary exposure to imidacloprid in drinking water. After calculating DWLOCs and comparing them to the EECs for surface water and ground water, EPA does not expect the aggregate exposure to exceed 100% of the cPAD, as shown in the following Table 3:

TABLE 3.—AGGREGATE RISK ASSESSMENT FOR CHRONIC (NON-CANCER) EXPOSURE TO IMIDACLOPRID

Population Subgroup	cPAD mg/kg/day	%cPAD (Food)	Surface Water EEC (ppb)	Ground Water EEC (ppb)	Chronic DWLOC (ppb)
U.S. population	0.057	12	17.24	2.09	1800
Infants (1 year)	0.057	29	17.24	2.09	400
Children (1–2 years)	0.057	38	17.24	2.09	350
Females (13–49 years)	0.057	10	17.24	2.09	1600

3. *Short-term risk*. The short-term aggregate risk assessment estimates risks likely to result from 1 to 30 day exposure to imidacloprid residues from food, drinking water, and residential pesticide uses. High-end estimates of the residential exposure are used in the short-term assessment, and average values are used for food and drinking water exposures.

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded that food and residential exposures aggregated result in aggregate MOEs of 310 for the U.S. population, and 170 for children 1–2 years. These aggregate MOEs do not exceed the Agency's level of concern for aggregate exposure to food and residential uses. In addition, short-term DWLOCs were calculated and compared to the EECs for chronic exposure of imidacloprid in ground water and surface water. After calculating DWLOCs and comparing them to the EECs for surface water and ground water, EPA does not expect short-term aggregate exposure to exceed the Agency's level of concern, as shown in the following Table 4:

TABLE 4.—AGGREGATE RISK ASSESSMENT FOR SHORT-TERM EXPOSURE TO IMIDACLOPRID

Population Subgroup	Aggregate MOE (Food + Residential)	Aggregate LOC	Surface Water EEC (ppb)	Ground Water EEC (ppb)	Short-Term DWLOC (ppb)
U.S. population	310	100	17.24	2.09	2400
Children (1–2 years old)	170	100	17.24	2.09	400

4. *Intermediate-term risk*. Intermediate-term aggregate exposure takes into account non-dietary, non-occupational exposure plus chronic exposure to food and water (considered to be a background exposure level).

An intermediate-term aggregate risk assessment was not performed because, based on the current use patterns, the Agency does not expect residential exposure durations that would result in intermediate-term exposures.

5. *Aggregate cancer risk for U.S. population*. There is no evidence of carcinogenicity to humans based on carcinogenicity studies in male and female rats and mice. The Agency concludes that pesticidal uses of imidacloprid are not likely to pose a cancer risk to humans.

6. *Determination of safety*. Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, and to infants and children from aggregate exposure to imidacloprid residues.

V. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology (example—gas chromatography) is available to enforce the tolerance expression. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov*.

B. International Residue Limits

There are no CODEX, Canadian, or Mexican Maximum Residue Limits for imidacloprid on pomegranates.

VI. Conclusion

Therefore, the tolerance is established for the combined residues of imidacloprid, (1-[6-chloro-3-pyridinyl) methyl]-*N*-nitro-2-imidazolidinimine) and its metabolites containing the 6-chloropyridinyl moiety, all expressed as parent, in or on pomegrantes at 0.20 ppm.

VII. Objections and Hearing Requests

Under section 408(g) of the FFDCA, as amended by the FQPA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. EPA's procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. Although the procedures in those regulations require some modification to reflect the amendments made to the FFDCA by the FQPA, EPA will continue to use those procedures, with appropriate adjustments, until the necessary modifications can be made. The new section 408(g) of the FFDCA provides essentially the same process for persons to ''object'' to a regulation for an exemption from the requirement of a tolerance issued by EPA under new section 408(d) of the FFDCA, as was provided in the old sections 408 and 409 of the FFDCA. However, the period for filing objections is now 60 days, rather than 30 days.

A. What Do I Need to Do to File an Objection or Request a Hearing?

You must file your objection or request a hearing on this regulation in accordance with the instructions provided in this unit and in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number OPP–2005–0260 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before December 12, 2005.

1. *Filing the request*. Your objection must specify the specific provisions in the regulation that you object to, and the grounds for the objections (40 CFR 178.25). If a hearing is requested, the objections must include a statement of the factual issue(s) on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the objector (40 CFR 178.27). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

Mail your written request to: Office of the Hearing Clerk (1900L), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. You may also deliver your request to the Office of the Hearing Clerk in Suite 350, 1099 14th St., NW., Washington, DC 20005. The Office of the Hearing Clerk is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Office of the Hearing Clerk is (202) 564–6255.

2. *Copies for the Docket*. In addition to filing an objection or hearing request with the Hearing Clerk as described in Unit VII.A., you should also send a copy of your request to the PIRIB for its inclusion in the official record that is described in **ADDRESSES**. Mail your

copies, identified by the docket ID number OPP–2005–0260, to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. In person or by courier, bring a copy to the location of the PIRIB described in **ADDRESSES**. You may also send an electronic copy of your request via e-mail to: *opp-docket@epa.gov*. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

B. When Will the Agency Grant a Request for a Hearing?

A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issue(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

VIII. Statutory and Executive Order Reviews

This final rule establishes a time-limited [tolerance] under section 408 of the FFDCA. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this rule has been exempted from review under Executive Order 12866 due to its lack of significance, this rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). Nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). Since tolerances and exemptions that are established on the basis of a FIFRA section 18 exemption under section 408 of the FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. In addition, the Agency has determined that this action will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' This final rule directly regulates growers, food processors, food handlers, and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of the FFDCA. For these same reasons, the Agency has determined that this rule does not have any ''tribal implications'' as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Executive Order 13175, requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.'' This rule will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

IX. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and record keeping requirements.

Dated: September 27, 2005.

Donald R. Stubbs,

Acting Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.472 is amended by alphabetically adding the following commodity to the table in paragraph (b) to read as follows:

§ 180.472 Imidacloprid; tolerances for residues.

* * * * *

(b) * * *

Commodity	Parts per million	Expiration/revocation date
* * * * *		
Pomegranate	0.20	12/31/08

* * * * *

[FR Doc. 05–20209 Filed 10–11–05; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 5, 25, and 97

[IB Docket No. 02–54; FCC 04–130]

Mitigation of Orbital Debris

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: Pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13, the Federal Communications Commission received Office of Management and Budget (OMB) approval for the collection of orbital debris mitigation plans under 47 CFR 5.63(e), 25.114(d)(14), and 97.207(g) of the Commission's rules. Mitigation of Orbital Debris, IB Docket No. 02–54, OMB Control Number 3060–1013. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid control number.

DATES: Effective October 19, 2005.

FOR FURTHER INFORMATION CONTACT: Stephen Duall, Attorney Advisor, Satellite Division, International Bureau, at (202) 418–1103, or via the Internet at *Stephen.Duall@fcc.gov.*

SUPPLEMENTARY INFORMATION: The Federal Communications Commission has received OMB approval for the disclosures of orbital debris mitigation plans under 47 CFR 5.63(e), 25.114(d)(14), and 97.207(g) of the Commission's rules that were adopted in Mitigation of Orbital Debris, IB Docket No. 02–54, 69 FR 54581 (September 9, 2004). These rules require a satellite system operator requesting FCC space station authorization, or an entity requesting a Commission ruling for access to a non-U.S.-licensed space station under the Commission's satellite market access procedures, to submit an orbital debris mitigation plan to the Commission regarding spacecraft design and operation in connection with its request under parts 5, 25, and 97 of the Commission's rules. Through this document, the Commission confirms that it received OMB approval on April 13, 2005, OMB Control No. 3060–1013, and announces that the effective date of 47 CFR 5.63(e), 25.114(d)(14), and 97.207(g) is October 19, 2005.

Pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13, an agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. Notwithstanding any other provisions of law, no person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Questions concerning the OMB control number and expiration dates should be directed to Judith B. Herman at 202–418–0214, 445 12th Street, SW., Washington, DC 20554, or via the Internet at *Judith-B.Herman@fcc.gov.*

OMB Control No.: 3060–1013.

OMB Approval Date: 4/13/2005.

Expiration Date: 4/30/2008.

Title: Mitigation of Orbital Debris.

Form No.: N/A.

Estimated Annual Burden: 53 responses; 159 annual burden hours.

Needs and Uses: The Commission is revising this information collection to reflect the new and/or modified information collection requirements that resulted from the Second Report and Order, ''In the Matter of Mitigation of Orbital Debris.'' This Second Report and Order was released by the Commission on June 21, 2004. The Commission amended parts 5, 25, and 97 of the Commission's rules by adopting new rules concerning mitigation of orbital debris. Orbital debris consists of artificial objects orbiting the earth that are not functional spacecraft. Adoption of these rules will help preserve the United States' continued affordable access to space, the continued provision of reliable U.S. space-based services—including communications and remote sensing satellite services for U.S. commercial, government, and homeland security purposes—as well as the continued safety of persons and property in space and on the surface of the earth. Under the rules as amended today, a satellite system operator requesting FCC space station authorization, or an entity requesting a Commission ruling for access to a non-U.S.-licensed space station under the FCC's satellite market access procedures, must submit an orbital debris mitigation plan to the Commission regarding spacecraft design and operation in connection with its request. This Second Report and Order provides guidance for the preparation of such plans. Adoption of these rules will further the domestic policy objective of the United States to minimize the creation of orbital debris and is consistent with international policies and initiatives to achieve this goal. The information collection requirements accounted for in this collection are necessary to mitigate the potential harmful effects of orbital debris accumulation. Without such information collection requirements, the growth in the orbital debris may limit the usefulness of space for communications and other uses in the future by raising the costs and lowering the reliability of space-based systems.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–20446 Filed 10–11–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 25

[IB Docket 02–54; FCC 04–130]

Mitigation of Orbital Debris

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: Pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13, the Federal Communications Commission received Office of Management and Budget (OMB) approval for the collection of orbital debris mitigation plans under 47 CFR 25.114(d)(14) of the Commission's rules. Mitigation of Orbital Debris, IB Docket No. 02–54, OMB Control Number 3060–1013. By this document, we announce the revision or removal of redundant existing rules requiring the submission of orbital debris plans on a service-specific basis that are contained in 47 CFR 25.143(b)(1), 25.145(c)(3), 25.146(i)(4), and 25.217(d).

DATES: Effective October 19, 2005.

FOR FURTHER INFORMATION CONTACT: Stephen Duall, Attorney Advisor, Satellite Division, International Bureau, at (202) 418–1103, or by e-mail at *Stephen.Duall@fcc.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13, the Federal Communications Commission received Office of Management and Budget (OMB) approval for the collection of orbital debris mitigation plans under 47 CFR 25.114(d)(14) of the Commission's rules. Mitigation of Orbital Debris, IB Docket No. 02–54, OMB Control Number 3060–1013. As a result, any satellite system operator requesting FCC space station authorization, or an entity requesting a Commission ruling for access to a non-U.S.-licensed space station under the Commission's satellite market access procedures, must submit an orbital debris mitigation plan to the Commission regarding spacecraft design and operation in connection with its request. Because of the scope of this newly effective rule, the Commission eliminated redundant existing rules that require the submission of orbital debris plans on a service-specific basis. Mitigation of Orbital Debris, IB Docket No. 02–54, 69 FR 54581 (September 9, 2004). By this document, we announce the revision or removal of 47 CFR 25.143(b)(1), 25.145(c)(3), 25.146(i)(4), and 25.217(d).

Ordering Clauses

Part 25 of the Commission's rules *is amended* as set forth below.

List of Subjects in 47 CFR Part 25

Reporting and recordkeeping requirements, Satellites.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 25 as follows:

PART 25—SATELLITE COMMUNICATIONS

■ 1. The authority citation for part 25 continues to read as follows:

Authority: 47 U.S.C. 701–744. Interprets or applies secs. 4, 301, 302, 303, 307, 309 and 332 of the Communications Act, as amended, 47 U.S.C. 154, 301, 302, 303, 307, 309 and 332, unless otherwise noted.

■ 2. Revise § 25.143(b)(1) to read as follows:

§ 25.143 Licensing provisions for the 1.6/2.4 GHz mobile-satellite service and 2 GHz mobile-satellite service.

* * * * *

(b) *Qualification Requirements—(1) General Requirements.* Each application for a space station system authorization in the 1.6/2.4 GHz Mobile-Satellite Service or 2 GHz Mobile-Satellite Service shall describe in detail the proposed satellite system, setting forth all pertinent technical and operational aspects of the system, and the technical and legal qualifications of the applicant. In particular, each application shall include the information specified in § 25.114. Non-U.S. licensed systems shall comply with the provisions of § 25.137.

* * * * *

§ 25.145 [Amended]

■ 3. Remove and reserve § 25.145(c)(3).

§ 25.146 [Amended]

■ 4. Remove and reserve § 25.146(i)(4).

§ 25.217 [Amended]

■ 5. Remove and reserve § 25.217(d).

[FR Doc. 05–20445 Filed 10–11–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–2494; MB Docket No. 04–343; RM–10799]

Radio Broadcasting Services; Cridersville, OH

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document grants a petition filed by Dana J. Puopolo requesting the allotment of Channel 257A at Cridersville, Ohio, as its first local service. *See* 69 FR 54613, published September 9, 2004. Channel 257A can be allotted consistent with the Commission's minimum spacing requirements, provided there is a site restriction of 11.8 kilometers (7.3 miles) north at reference coordinates 40–45–20 NL and 84–06–39 WL. The site restriction is necessary to prevent short-spacing to the licensed site of Station WBYR(FM), Channel 255B, Van Wert, Ohio. This allotment is located with 320 kilometers (199 miles) of the U.S.-Canadian border. The Canadian government has accepted concurrence for this allotment.

DATES: Effective November 10, 2005.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order*, MB Docket No. 04–343, adopted September 23, 2005, and released September 26, 2005. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center, 445 Twelfth Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC, 20054, telephone 1–800–378–3160 or *http://www.BCPIWEB.com*. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Ohio, is amended by adding Cridersville, Channel 257A.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–20352 Filed 10–11–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–2504; MB Docket No. 05–152; RM–11204]

Radio Broadcasting Services; Clinton and Mayfield, Kentucky

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In response to a *Notice of Proposed Rule Making*, 70 FR 19401

(April 13, 2005), this *Report and Order* reallots Channel 271C3, Station WLLE(FM) (''WLLE''), Clinton, Kentucky, to Mayfield, Kentucky, upgrades Channel 271C3 to Channel 271C2, and modifies Station WLLE(FM)'s license accordingly. In addition, this *Report and Order* reallots Channel 234C2 from Mayfield to Clinton, Kentucky, and modifies Station WQQR(FM)'s license accordingly. The *Report and Order* also relocates the transmitter site of Station WLIE–FM, Channel 232A, Golconda, Illinois, to avoid short spacing to Channel 234C2 at Clinton, Kentucky. The coordinates for Channel 271C2 at Mayfield, Kentucky are 36–40–36 NL and 88–29–29 WL, with a site restriction of 14.9 kilometers (9.2 miles) southeast of Mayfield. The coordinates for Channel 234C2 at Clinton are 36–45–51 NL and 88–39–55 WL, with a site restriction of 31.2 kilometers (19.4 miles) east of Clinton. The new coordinates for the transmitter site of Station WLIE–FM, Channel 232A, Golconda, Illinois are 37–14–18 NL and 88–29–40 WL, with a site restriction of 14.3 kilometers (8.9 miles) south of Golconda, Illinois.

DATES: Effective November 10, 2005.

FOR FURTHER INFORMATION CONTACT: R. Barthen Gorman, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MB Docket No. 05–152, adopted September 23, 2005, and released September 26, 2005. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com*. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 reads as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Kentucky, is amended by removing Channel 271C3 and adding Channel 234C2 at Clinton, and removing Channel 234C2 and adding Channel 271C2 at Mayfield.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–20354 Filed 10–11–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–2498, MB Docket No. 04–248, RM–10990]

Radio Broadcasting Services; Big Pine Key, FL

AGENCY: Federal Communications Commission.

ACTION: Final rule, petition for reconsideration.

SUMMARY: This document grants the Petition for Reconsideration filed by Call Communications Group directed to the *Report and Order* in this proceeding by reserving Channel 239A at Big Pine Key, Florida for noncommercial educational use. *See* 70 FR 12832, published March 16, 2005. The reference coordinates for Channel *239A at Big Pine Key, Florida are 24–40–00 NL and 81–21–00 WL.

DATES: Effective November 10, 2005.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order*, MB Docket No. 04–248 adopted September 23, 2005, and released September 26, 2005. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center 445 Twelfth Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20054, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.* The Commission will send a copy of the *Memorandum Opinion and Order* in this proceeding in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Accordingly, FCC amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Florida, is amended by removing Channel 239A and by adding Channel *239A at Big Pine Key.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–20214 Filed 10–11–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–2507; MB Docket No.05–130, RM–11216, RM–11265*]

Radio Broadcasting Service; Cheyenne and Thomas, OK

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Audio Division, at the request of Roger Mills County Broadcasting in its counterproposal to a petition for rulemaking by Charles Crawford, allots Channel 247C3 at Cheyenne, Oklahoma, as the community's first local aural transmission service. *See* 70 FR 19403, published April 13, 2005. *See also* Public Notice, Report No. 2723, RM–11265*, issued July 29, 2005. Channel 247C3 can be allotted to Cheyenne in compliance with the Commission's minimum distance separation requirements. The reference coordinates for Channel 247C3 at Cheyenne are 35–37–25 North Latitude and 99–40–11 West Longitude with a site restriction of 1.1 kilometers (0.7 miles) north of Cheyenne. A filing window for Channel 247C3 at Cheyenne, Oklahoma will not be opened at this time. Instead, the issue of opening a filing window for this

channel will be addressed by the Commission in a subsequent order.

DATES: Effective November 10, 2005.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Helen McLean, Media Bureau, (202) 418–2738.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order,* MB Docket No. 05–130, adopted September 23, 2005, and released September 26, 2005. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 Twelfth Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.* The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Accordingly, FCC amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Oklahoma, is amended by adding Cheyenne, Channel 247C3.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–20213 Filed 10–11–05; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 70, No. 196
Wednesday, October 12, 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. 04–003–1]

Black Stem Rust; Movement Restrictions and Addition of Rust-Resistant Varieties

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the black stem rust quarantine and regulations by changing the movement restrictions in order to allow clonally propagated offspring of rust-resistant *Berberis* cultivars to move into or through a protected area without completing the currently required 2-year growth period. This change would lessen an unnecessarily strict movement requirement. We also propose to add 13 varieties to the list of rust-resistant *Berberis* species. This change would allow for the interstate movement of these newly developed varieties without unnecessary restrictions.

DATES: We will consider all comments that we receive on or before December 12, 2005.

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

- Federal eRulemaking Portal: Go to *http://www.regulations.gov* and, in the ''Search for Open Regulations'' box, select ''Animal and Plant Health Inspection Service'' from the agency drop-down menu, then click on ''Submit.'' In the Docket ID column, select APHIS–2005–0086 to submit or view public comments and to view supporting and related materials available electronically. After the close of the comment period, the docket can be viewed using the ''Advanced Search'' function in Regulations.gov.
- Postal Mail/Commercial Delivery: Please send four copies of your comment (an original and three copies) to Docket No. 04–003–1, 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. 04–003–1.

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: Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Vedpal Malik, Agriculturalist, Invasive Species and Pest Management, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737–1236; (301) 734–6774.

SUPPLEMENTARY INFORMATION:

Background

Black stem rust is one of the most destructive plant diseases of small grains that is known to exist in the United States. The disease is caused by a fungus that reduces the quality and yield of infected wheat, oat, barley, and rye crops by robbing host plants of food and water. In addition to infecting small grains, the fungus lives on a variety of alternate host plants that are species of the genera *Berberis, Mahoberberis,* and *Mahonia.* The fungus is spread from host to host by windborne spores.

The black stem rust quarantine and regulations, contained in 7 CFR 301.38 through 301.38–8 (referred to below as the regulations), quarantine the conterminous 48 States and the District of Columbia, and govern the interstate movement of certain plants of the genera *Berberis, Mahoberberis,* and *Mahonia,* known as barberry plants. The species of these plants are categorized as either rust-resistant or rust-susceptible. Rust-resistant plants do not pose a risk of spreading black stem rust or of contributing to the development of new races of the rust; rust-susceptible plants do pose such risks.

Clonally Propagated Material

Clonal propagation is a technique whereby the number of plants may be increased without using seeds (i.e, without sexual reproduction). The cloning process is often accomplished via cuttings of roots, stems, or leaves that have the ability to regenerate a complete plant. Cultivars produced clonally are considered genetically identical to the parental source. Clonal propagation is advantageous since exact replicas can be produced in large numbers and those plants produced via clonal propagation are typically disease-free. Conversely, since they are not clones, seeds, fruit, seedlings, and other seed-propagated materials can yield black stem rust sensitive segregants which, if infected, could spread black stem rust to protected areas if proper precautions are not observed.

The regulations in § 301.38–4(b) currently prohibit, among other things, all *Berberis* seedlings and plants of less than 2 years' growth from moving interstate into or through any protected area. This prohibition applies even to rust-resistant *Berberis* varieties because, as noted in the previous paragraph, seed-propagated plants could yield rust-sensitive segregants; the 2-year growth period is necessary to ensure that the plants are ''true to type,'' i.e., they are, in fact, rust-resistant plants.

Because clonally propagated plants are genetically identical to their parental source, it is not necessary to require a 2-year growth period to ensure that the plants are true to type. However, there is no distinction made in the current regulations between clonally propagated offspring and seedlings or seed-propagated material. Therefore, we are proposing to amend the regulations in § 301.38–4 to specify that clonally propagated offspring obtained from black stem rust resistant *Berberis* cultivars of more than 2 years' growth may move into or through protected areas without undergoing the 2-year growth period. All seed-propagated plants and seedlings of the genus *Berberis,* as well as any seeds, fruits, and other plant parts capable of propagation produced by those plants, would continue to be subject to the provisions regarding the 2-year growth period and subject to the current movement restrictions of § 301.38–4(b). We believe that allowing clonally propagated offspring of known rust-

resistant *Berberis* plants to be moved without first undergoing a 2-year growth period would provide producers and distributors relief from restrictions that are not necessary to prevent the spread of black stem rust.

In conjunction with this proposed change, we would also amend § 301.38–1 by adding a definition of *clonally propagated.* We would define the term as ''reproduced asexually through cuttings, tissue culture, suckers, or crown division. For the purposes of this subpart, a *Berberis* plant will be considered clonally propagated only if its parent stock is, or was derived from, a seed-propagated black stem rust-resistant plant of more than 2 years' growth.'' This definition would make it clear which *Berberis* plants would not be subject to the 2-year growth requirement.

Rust-Resistant Species

Section 301.38–2 of the regulations includes a listing of regulated articles and indicates species of the genera *Berberis, Mahoberberis,* and *Mahonia* known to be rust-resistant. Although rust-resistant species are included as regulated articles, they may be moved into or through protected areas if accompanied by a certificate. In this document, we are proposing to add 13 additional varieties of *Berberis thunbergii* (the varieties Admiration, Crimson Ruby, Golden Carpet, Golden Devine, Golden Rocket, Golden Ruby, Maria, Pow Wow, Red Carpet, Red Rocket, Rosy Rocket, Talago, and Tiny Gold) to the list of rust-resistant *Berberis* species in § 301.38–2(a).

In accordance with § 301.38–2(b), the nurseries that developed these rust-resistant species of *Berberis* have provided identification guides to the Animal and Plant Health Inspection Service (APHIS) and to the receiving States. The proposed addition of these species is based on recent testing to determine rust resistance conducted by the Agricultural Research Service of the United States Department of Agriculture (USDA) at its Cereal Disease Laboratory in St. Paul, MN.

The testing is performed in the following manner: In a greenhouse, the suspect plant or test subject is placed under a screen with a control plant—a known rust-susceptible species of *Berberis, Mahoberberis,* or *Mahonia.* Black stem rust infected stems are placed on top of the screen. The stems are moistened and maintained in 100 percent humidity. This causes the spores to swell and fall on the plants lying under the screen. The plants are then observed for 7 days at 20 to 80 percent relative humidity. If the rust-susceptible plant shows signs of infection after 7 days and the test plants do not, the test results indicate that the test plants are rust-resistant. This test must be performed 12 times, and all 12 tests must yield the same result before USDA can make a determination as to whether the test plants are rust-resistant. The test may be conducted on 12 individual plants, or it may be performed multiple times on fewer plants (*e.g.*, 6 plants tested twice or 3 plants tested 4 times). The tests must be performed on new growth, just as the leaves are unfolding. Therefore, the tests are usually conducted in the spring or fall, during the growing season. All 12 tests generally cannot be conducted on the same day because of the plants' different growth stages. Based on over 30 years of experience with this test, we believe that 12 is the reliable test sample size on which USDA can make its determination. We do not know of any plant that was subsequently discovered to be rust-susceptible after undergoing this procedure 12 times and being determined by the USDA to be rust-resistant.

Miscellaneous

We also propose to make several editorial and organizational changes to the regulations to improve their accuracy or clarity. First, in § 301.38–2, we would remove paragraph (a)(1), which designates all seedlings and plants of less than 2 years' growth of the genus *Berberis* as regulated articles. All rust-resistant *Berberis* plants, regardless of age, are designated as regulated articles under current paragraph (a)(2) of that section, and all rust-susceptible *Berberis* plants, regardless of age, are designated as regulated articles under current paragraph (a)(4) of that same section. Further, the age of the plants is an issue only with respect to the interstate movement restrictions of § 301.38–4(b), and we believe that paragraph adequately addresses the subject. Therefore, we do not believe it is necessary to specifically designate seedlings and plants of less than 2 years' growth of the genus *Berberis* as regulated articles.

Second, also in § 301.38–2, where reference is made to ''the following rust-resistant... species,'' we would refer to ''rust-resistant species and varieties,'' as not all the articles listed are distinct species.

Third, in the definitions of *rust-resistant plants* and *rust-susceptible plants,* the text refers to ''all plants of the genera *Berberis, Mahoberberis,* and *Mahonia* species.'' We would remove the word ''species,'' as it is not necessary when preceded by the word ''genera.''

Finally, in several places throughout the subpart, we would update references in the text to specific paragraphs to reflect either the changes proposed in this document or changes that were made in previous rules.

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.

Rust-Resistant Cultivars

This proposed rule would add 13 new varieties of *Berberis* to the list of species that have been determined to be resistant to black stem rust and thus eligible to be moved interstate into and through States or parts of States designated as protected areas in accordance with the requirements in the regulations. Based on the information provided to us, we have determined that this proposed rule, if adopted, would affect fewer than five nurseries that might propagate the new species and numerous retail sales nurseries that might purchase and resell the varieties. This proposed rule would enable those nurseries to move the species into and through protected areas and to propagate and sell the species in States or parts of States designated as protected areas.

Currently, 126 varieties of *Berberis* are listed as rust-resistant. Of those 126 varieties, many are no longer propagated for commercial sale. Many consumers are choosing newer varieties that are horticulturally more attractive. This rule would add 13 new varieties of *Berberis* to the current list of 126 varieties. The addition of these 13 new varieties would simply create a greater selection of barberry plant varieties from which consumers can choose. This proposed rule could encourage innovation by allowing nurseries that develop new rust-resistant barberry varieties the opportunity to market those varieties in protected areas; however, there is no indication that the periodic introduction of new varieties to the market has any effect on overall sales volumes. Therefore, we do not anticipate that there will be any significant economic impact on those nurseries that might handle the new varieties.

Clonally Propagated Cultivars

Additionally, this proposed rule would allow nurseries that produce clonally propagated offspring from rust-resistant *Berberis* cultivars to sell them

without first undergoing the currently required 2-year growth period.

The Regulatory Flexibility Act requires that agencies consider the economic impact of their rules on small entities and to use flexibility to provide regulatory relief when regulations create economic disparities between different-sized entities. According to the Small Business Administration's (SBA's) Office of Advocacy, regulations create economic disparities based on size when they have a significant economic impact on a substantial number of small entities.

Plant nursery farms and greenhouses are classified as small businesses if they receive less than $750,000 in annual sale receipts. According to the 1997 Census of Agriculture, an average U.S. nursery had annual sales of approximately $160,000. Therefore, it appears that the majority of U.S. nurseries qualify as small businesses by SBA standards.

Those nurseries that produce rust-resistant *Berberis* varieties would benefit from the proposed change in that they will not have to undergo a 2-year waiting period before they are able to sell the clonally propagated offspring of rust-resistant *Berberis* cultivars in protected areas or move those plants through protected areas. While we are unable to qualify those benefits without knowing the number of entities that may avail themselves of this proposed relaxation of movement restrictions for clonally propagated rust-resistant *Berberis* plants, we do not expect that the savings in production costs will be significant.

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

Executive Order 12372

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

Executive Order 12988

This 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 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 propose to amend 7 CFR part 301 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. Section 301.38–1 would be amended as follows:

a. By adding, in alphabetical order, a definition of *clonally propagated* to read as set forth below.

b. In the definition of *protected area,* by removing the citation ''§ 301.38–3(c)'' and adding the citation ''§ 301.38–3(d)'' in its place.

c. In the definition of *rust-resistant plants,* by removing the word ''species'' and by removing the citation ''§ 301.38–2(a)(2) and (a)(3)'' and adding the citation ''§ 301.38–2(a)(1) and (a)(2)'' in its place.

d. In the definition of *rust-susceptible plants,* by removing the word ''species'' and by removing the citation ''§ 301.38–2(a)(2) and (a)(3)'' and adding the citation ''§ 301.38–2(a)(1) and (a)(2)'' in its place.

e. In the definition of *regulated article,* by removing the words ''through (a)(4)'' and adding the words ''through (a)(3)'' in their place and by removing the citation ''§ 301.38–2(a)(5)'' and adding the citation ''§ 301.38–2(a)(4)'' in its place.

§ 301.38–1 Definitions.

* * * * *

Clonally propagated. Reproduced asexually through cuttings, tissue culture, suckers, or crown division. For the purposes of this subpart, a Berberis plant will be considered clonally propagated only if its parent stock is, or was derived from, a seed-propagated black stem rust-resistant plant of more than 2 years' growth.

* * * * *

3. Section 301.38–2 would be amended as follows:

a. By removing paragraph (a)(1) and redesignating paragraphs (a)(2) through (a)(5) as paragraphs (a)(1) through (a)(4), respectively.

b. In newly redesignated paragraph (a)(1), by adding the words ''and varieties'' after the word ''species'' and by adding, in alphabetical order, 13 new entries to the list of rust-resistant species to read as set forth below.

c. In newly redesignated paragraph (a)(2), by adding the words ''and varieties'' after the word ''species''.

d. By revising newly redesignated paragraph (a)(3) to read as set forth below.

e. In newly redesignated paragraph (a)(4), by removing the words ''through (a)(4)'' and adding the words ''through (a)(3)'' in their place.

f. In paragraph (b), in both the first and second sentences, by removing the words ''(a)(2) or (a)(3)'' and adding the words ''(a)(1) or (a)(2)'' in their place.

§ 310.38–2 Regulated articles.

(a) * * *

(1) * * *

B. thunbergii 'Admiration'

* * * * *

B. thunbergii 'Crimson Ruby'

* * * * *

B. thunbergii 'Golden Carpet'

B. thunbergii 'Golden Devine'

* * * * *

B. thunbergii 'Golden Rocket'

B. thunbergii 'Golden Ruby'

* * * * *

B. thunbergii 'Maria'

* * * * *

B. thunbergii 'Pow Wow'

B. thunbergii 'Red Carpet'

B. thunbergii 'Red Rocket'

B. thunbergii 'Rosy Rocket'

* * * * *

B. thunbergii 'Talago'

* * * * *

B. thunbergii 'Tiny Gold'

* * * * *

(3) All plants, seeds, fruits, and other plant parts capable of propagation from rust-susceptible species and varieties of the genera *Berberis, Mahoberberis,* and *Mahonia,* except *Mahonia* cuttings for decorative purposes.

* * * * *

§ 301.38–3 [Amended]

4. In § 301.38–3, paragraphs (a) and (f) would be amended by removing the words ''paragraph (c)'' and adding the words ''paragraph (d)'' in their place.

5. In § 301.38–4, paragraphs (a) and (b) would be revised to read as follows:

§ 301.38–4 Interstate movement of regulated articles.

(a) *Non-protected areas.* Interstate movement of regulated articles into or through any State or area that is not designated a protected area under § 301.38–3(d) is allowed without restriction under this subpart.

(b) *Protected areas.* (1) *Prohibited movement.* The following regulated articles are prohibited from moving interstate into or through any protected area:

(i) All rust-susceptible *Berberis*, *Mahoberberis*, and *Mahonia* plants, seeds, fruits, and other plant parts capable of propagation, except *Mahonia* cuttings for decorative purposes.

(ii) All seed-propagated plants of the *Berberis* species and varieties designated as rust-resistant in § 301.38–2(a)(1) of this subpart that are of less than 2 years' growth, and any seeds, fruits, and other plant parts capable of propagation from such plants.

(2) *Restricted movement.* The following regulated articles may be moved interstate into or through a protected area with a certificate issued and attached in accordance with §§ 301.38–5 and 301.38–7 of this subpart:

(i) Seed-propagated plants of at least 2 years' growth, clonally propagated plants of any age, seeds, fruits, and other plant parts capable of propagation of the *Berberis* species and varieties designated as rust-resistant in § 301.38–2(a)(1) of this subpart;

(ii) Plants, seeds, fruits, and other plant parts capable of propagation of the *Mahoberberis* and *Mahonia* species and varieties designated as rust-resistant in § 301.38–2(a)(2) of this subpart.

* * * * *

Done in Washington, DC, this 5th day of October 2005.

Elizabeth E. Gaston,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 05–20387 Filed 10–11–05; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 319

[Docket No. 05–003–1]

Importation of Peppers From Certain Central American Countries

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the regulations governing the importation of fruits and vegetables in order to allow certain types of peppers grown in approved registered production sites in Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua to be imported into the United States without treatment. The conditions to which the proposed importation of peppers would be subject, including trapping, pre-harvest inspection, and shipping procedures, are designed to prevent the introduction of quarantine pests into the United States. This action would allow for the importation of peppers from those countries in Central America while continuing to provide protection against the introduction of quarantine pests into the United States.

DATES: We will consider all comments that we receive on or before December 12, 2005.

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

- Federal eRulemaking Portal: Go to *http://www.regulations.gov* and, in the ''Search for Open Regulations'' box, select ''Animal and Plant Health Inspection Service'' from the agency drop-down menu, then click on ''Submit.'' In the Docket ID column, select APHIS–2005–0095 to submit or view public comments and to view supporting and related materials available electronically. After the close of the comment period, the docket can be viewed using the ''Advanced Search'' function in Regulations.gov.
- Postal Mail/Commercial Delivery: Please send four copies of your comment (an original and three copies) to Docket No. 05–003–1, 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. 05–003–1.

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: Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Donna L. West, Senior Import Specialist, Commodity Import Analysis and Operations, PPQ, APHIS, 4700 River Road Unit 140, Riverdale, MD 20737–1228; (301) 734–8262.

SUPPLEMENTARY INFORMATION:

Background

The regulations in ''Subpart—Fruits and Vegetables'' (7 CFR 319.56 though 319.56–8, referred to below as the regulations) prohibit or restrict the importation of fruits and vegetables into the United States from certain parts of the world to prevent the introduction and dissemination of plant pests that are new to or not widely distributed within the United States.

We are proposing to amend the regulations to allow the importation of peppers (*Capsicum* spp.) from Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua under certain conditions that would be set forth in a new § 319.56–2nn. The quarantine pests of concern for peppers from those countries, as identified in a pest risk assessment prepared for this proposed rule,[1] are the Mexican fruit fly (Mexfly, *Anastrepha ludens*) for certain types of peppers, Mediterranean fruit fly (Medfly, *Ceratitis capitata*), the weevil *Faustinus ovatipennis*, pea leafminer (*Liriomyza huidobrensis*), tomato fruit borer (*Neoleucinodes elegantalis*), banana moth (*Opogona sacchari*), latana mealybug (*Phenacoccus parvus*), passionvine mealybug (*Planococcus minor*), melon thrips (*Thrips palmi*), the rust fungus *Puccinia pampeana*, Andean potato mottle virus, and tomato yellow mosaic virus.

To mitigate the risks presented by Mexfly and Medfly, we have developed a specific systems approach, which is described below. The remaining pests exhibit symptoms that are macroscopic and detectable upon visual inspection in the production areas or during pre-export or port-of-entry inspections. Specifically:

- The weevil *Faustinus ovatipennis* feeds on leaves, stem, inflorescence, and fruit. Both larvae and adults are external feeders and, as a result, easily observed.
- Pea leafminers spend a majority of their life cycle in larval form, mining host leaves. These mines are easily detectable via visual inspection.
- Tomato fruit borer larvae penetrate the fruit and may cause the fruit to fall

[1] The pest risk assessment, titled ''Importation of Fresh Pepper Fruit with Stems (*Capsicum annuum* L., *C. frutescens* L., *C. baccatum* L., *C. pubescens* Ruiz & Pav., and *C. chinense* Jacq.) from Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua into the United States,'' may be viewed on the Regulations.gov site (see **ADDRESSES** above for instructions for accessing Regulations.gov) or on the APHIS Web site at *http://www.aphis.usda.gov/ppq/pra/draft/.*

or become otherwise unmarketable. More mature larvae create large exit holes in the fruit that can be easily detected. In addition, the screen size required by the systems approach as described below is too small to allow the entry of adult tomato fruit borers.

- The banana moth mines plant stems, causing leaf fall and allowing pathogens to colonize and destroy affected plants. Infected plants will not produce quality fruit suitable for export. In addition, the screen size required by the systems approach as described below is too small to allow the entry of adult banana moths.
- Latana mealybug and passionvine mealybug are both external pests that are white in color. They are easily detectable on the darker skin of the host. In addition, these pests may also cause deformities in the plant, making infestation obvious.
- Melon thrips cause leaves to yellow and die. Terminal bud growth may be arrested and fruits may be scarred or deformed.
- The rust fungus *Puccinia pampeana* causes yellow or orange rust pustules to form on the pepper fruit stem which are easily detectable via visual inspection.
- The Andean potato mottle virus and tomato yellow mosaic virus are easily observable on mature plants in the field. Symptoms include mottling of the plant, mosaic coloring, and other plant deformities. In many cases the fruit will not develop and the plants themselves may be dwarfed.

We have developed the following phytosanitary measures to guard against the entry of Medfly and Mexfly in shipments of peppers from those countries into the United States. The proposed measures vary, depending upon area freedom from Medfly and Mexfly. *Capsicum pubescens* (commonly referred to as rocoto pepper), a preferred host for Mexfly and Medfly, would be allowed entry only if grown in a certified pest-free greenhouse, whereas field-grown *Capsicum annuum* (*e.g.*, bell, wax, pimento, jalapeno), *Capsicum frutescens* (*e.g.*, tabasco, malagueta), *Capsicum baccatum* (*e.g.*, bird pepper, aji), and *Capsicum chinense* (*e.g.*, habanero, scotch bonnet) would be permitted under certain circumstances.

Areas Where Medfly Is Present

C. annuum, *C. frutescens*, *C. baccatum*, *C. chinense*, and *C. pubescens* grown in an area that has not been determined to be free of Medfly would be required to be grown in approved production sites registered with the national plant protection organization (NPPO) of the exporting country and would be subject to the systems approach detailed below. Initial approval of the production sites would be completed jointly by the exporting country's NPPO and the Animal and Plant Health Inspection Service (APHIS). Representatives of the exporting country's NPPO would have to visit and inspect the production sites monthly, starting 2 months before harvest and continuing through until the end of the shipping season. APHIS could monitor the production sites at any time during this period.

Pepper production sites would have to consist of pest exclusionary greenhouses with self-closing double doors. All additional openings would be required to be covered with 1.6 (or less) millimeter screening. Registered sites would have to contain traps with an approved protein bait for the detection of fruit flies within the greenhouses at a density of four traps per hectare, with a minimum of at least two traps per greenhouse. Traps would have to be serviced on a weekly basis. In addition, Medfly traps with an approved protein bait would have to be placed inside a buffer area 500 meters wide around the registered production site, at a density of 1 trap per 10 hectares. These traps would have to be checked at least once every 7 days. At least one trap would have to be near the greenhouse. Traps would have to be set for at least 2 months prior to export and trapping would have to continue to the end of harvest. Capture of 0.7 or more Medflies per trap per week within the buffer zone would suspend or delay the harvest, depending on whether the harvest had begun, for consignments of peppers from that production site until APHIS and the exporting country's NPPO determine that the pest risk has been mitigated.

If a single Medfly is detected inside a registered production site or in a consignment, the registered production site would lose its ability to export peppers to the United States until APHIS and the exporting country's NPPO mutually determine that risk mitigation has been achieved.

For the weevil *Faustinus ovatipennis*, pea leafminer, tomato fruit borer, banana moth, latana mealybug, passionvine mealybug, melon thrips, the rust fungus *Puccinia pampeana*, Andean potato mottle virus, and tomato yellow mosaic virus, the production site would have to be inspected prior to harvest, and if any of these pests or any other quarantine pests are found to be generally infesting the production site, the NPPO would not allow export from that production site until risk mitigation has been achieved. If the NPPO detects any quarantine pests in the consignment, the shipment would be deemed ineligible for export to the United States.

The exporting country's NPPO would have to maintain records of trap placement, checking of traps, and any Medfly captures. In addition, the exporting country's NPPO would have to maintain an APHIS-approved quality control program to monitor or audit the trapping program. The trapping records would have to be maintained for APHIS's review.

We would require that the peppers be packed within 24 hours of harvest in a pest exclusionary packinghouse. The peppers would have to be safeguarded by an insect-proof mesh screen or plastic tarpaulin while in transit from the production site to the packinghouse and while awaiting packing. The peppers would have to be packed in insect-proof cartons or containers, or covered with insect-proof mesh or plastic tarpaulin, for transit to the United States. These safeguards would have to remain intact until arrival in the United States or the shipment would not be allowed to enter the United States.

During the time the packinghouse is in use for exporting peppers to the United States, the packinghouse could accept peppers only from registered approved production sites.

The exporting country's NPPO would be responsible for export certification, inspection, and issuance of phytosanitary certificates. Each shipment of peppers would have to be accompanied by a phytosanitary certificate issued by the NPPO and bearing the declaration, ''These peppers were grown in an approved production site and the shipment has been inspected and found free of the pests listed in the requirements.'' The shipping box would have to be labeled with the identity of the production site.

Areas Where Mexfly Is Present

C. pubescens grown in an area that has not been determined to be free of Mexfly [2] would have to be grown in approved production sites registered with the NPPO of the exporting country and would be subject to the systems approach detailed below. Initial approval of the production sites would be completed jointly by the exporting country's NPPO and APHIS. Representatives of the exporting country's NPPO would have to visit and inspect the production sites monthly,

[2] Currently, there are no areas covered by this proposed rule that contain Mexfly free zones.

starting 2 months before harvest and continuing through until the end of the shipping season. APHIS could monitor the production sites at any time during this period.

Pepper production sites would have to consist of pest exclusionary greenhouses with self-closing double doors. All additional openings would be required to be covered with 1.6 (or less) millimeter screening. Registered sites would have to contain traps with an approved protein bait for the detection of fruit flies within the greenhouses at a density of four traps per hectare, with a minimum of at least two traps per greenhouse. Traps would have to be serviced on a weekly basis. In addition, Mexfly traps with an approved protein bait would have to be placed inside a buffer area 500 meters wide around the registered production site, at a density of 1 trap per 10 hectares. These traps would have to be checked at least once every 7 days. At least one trap would have to be near the greenhouse. Traps would have to be set for at least 2 months prior to export and trapping would have to continue to the end of harvest. Capture of 0.7 or more Mexflies per trap per week within the buffer zone would suspend or delay the harvest, depending on whether the harvest had begun, for consignments of peppers from that production site until APHIS and the exporting country's NPPO determine that the pest risk has been mitigated.

If a single Mexfly is detected inside a registered production site or in a consignment, the registered production site would lose its ability to export peppers to the United States until APHIS and the exporting country's NPPO mutually determine that risk mitigation is achieved. For the other pests of concern listed above, the greenhouse would have to be inspected prior to harvest, and if any of these pests or any other quarantine pests are found to be generally infesting the greenhouse, the NPPO would not allow export from that production site until risk mitigation has been achieved. If the NPPO detected any quarantine pests in the consignment, the shipment would be deemed ineligible for export to the United States.

The exporting country's NPPO would have to maintain records of trap placement, checking of traps, and any Mexfly captures. In addition, the exporting country's NPPO would have to maintain an APHIS-approved quality control program to monitor or audit the trapping program. The trapping records would have to be maintained for APHIS's review.

We would require that the peppers be packed within 24 hours of harvest in a pest exclusionary packinghouse. The peppers would have to be safeguarded by an insect-proof mesh screen or plastic tarpaulin while in transit from the production site to the packinghouse and while awaiting packing. The peppers would have to be packed in insect-proof cartons or containers, or covered with insect-proof mesh or plastic tarpaulin, for transit to the United States. These safeguards would have to remain intact until arrival in the United States or the shipment would not be allowed to enter the United States.

During the time the packinghouse is in use for exporting peppers to the United States, the packinghouse could accept peppers only from registered approved production sites.

The exporting country's NPPO would be responsible for export certification, inspection, and issuance of phytosanitary certificates. Each shipment of peppers would have to be accompanied by a phytosanitary certificate issued by the NPPO and bearing the declaration, ''These peppers were grown in an approved production site and the shipment has been inspected and found free of the pests listed in the requirements.'' The shipping box would have to be labeled with the identity of the production site.

Medfly Free Areas

We would allow *C. annuum*, *C. frutescens*, *C. baccatum*, and *C. chinense* grown in a Medfly-free area to be imported under conditions less stringent than those described above for peppers grown in areas where Medfly is present. The peppers would have to be grown and packed in an area that APHIS has determined to be free of Medfly in accordance with the procedures described in § 319.56–2(f); currently, Honduras and Guatemala are the only Central American countries covered by this proposal that contain such areas.

A pre-harvest inspection of the production site would be conducted by the NPPO for the detection of Medfly. If Medfly is found to be generally infesting the production site, the NPPO would not allow export from that production site until it is determined that risk mitigation is achieved. For the other pests of concern listed above (*i.e.*, those pests other than Medfly and Mexfly), the production site would have to be inspected prior to harvest, and if any of these pests or any other quarantine pests are found to be generally infesting the production site, the NPPO would not allow export from that production site until risk mitigation has been achieved. If the NPPO detected any quarantine pests in the consignment, the shipment would be deemed ineligible for export to the United States.

We would require that peppers be packed in insect-proof cartons or containers, or covered with insect-proof mesh or plastic tarpaulin, for transit to the United States. These safeguards would have to remain intact until arrival in the United States or the shipment would not be allowed to enter the United States. These measures would be necessary since, although the production area is Medfly-free, the peppers would need to be protected against infestation while in transit.

The exporting country's NPPO would be responsible for export certification, inspection, and issuance of phytosanitary certificates. Each shipment of peppers would have to be accompanied by a phytosanitary certificate issued by the NPPO and bearing the declaration, ''These peppers were grown in an area recognized to be free of Medfly and the shipment has been inspected and found free of the pests listed in the requirements.'' The shipping box would have to be labeled with the identity of the production site.

Executive Order 12866 and Regulatory Flexibility Act

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

The Regulatory Flexibility Act (RFA) requires that agencies consider the economic impact of their rules on small businesses, organizations, and governmental jurisdictions. In accordance with section 603 of the RFA, we have prepared an initial regulatory flexibility analysis describing the expected impact of the changes proposed in this document on small entities.

Under the Plant Protection Act (7 U.S.C. 7701–7772), the Secretary of Agriculture is authorized to regulate the importation of plants, plant products, and other articles to prevent the introduction of plant pests and noxious weeds.

We are proposing to amend the regulations governing the importation of fruits and vegetables in order to allow certain types of peppers grown in approved registered production sites in Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua to be imported into the United States without treatment. The conditions to which the proposed importation of peppers would

be subject, including trapping, pre-harvest inspection, and shipping procedures, are designed to prevent the introduction of quarantine pests into the United States. This action would allow for the importation of peppers from those countries in Central America while continuing to provide protection against the introduction of quarantine pests into the United States.

Central American Production and Exports

While agriculture is an important industry in the countries that would be affected by this rule, it does not account for the largest share of gross domestic product in any of the countries. Peppers do not appear to be major crops in those Central American countries. However, production and exports of both commodities are following upward trends.

Over the past four decades, pepper production in Central America has been on the rise. For the last 11 years, exports of peppers from this region have also increased. However, much of the increase in exports is a reflection of increased trade among the countries in this region. During this time period, an average of 62.23 percent of exports were intra-regional. Although this percentage has fluctuated substantially, the percentage of peppers exported from Central American countries to other Central American countries has been generally above 70 percent since 1997 with the exception of 2002. In 2003, approximately 96 percent of all Central American pepper exports were sent to other countries within the region.

It is estimated that about 31,040 metric tons of peppers may be imported into the United States each year from Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua as a result of the proposed rule.[3]

U.S. Production and Trade Levels

In 2004, U.S. total pepper production totaled 843,696 metric tons (Table 1). While domestic production has fluctuated from year to year and has declined or remained steady since 2000, there has been an upward trend in domestic pepper production over the last 9 years. Imports have also been on the rise, and these have been increasing at a rapid pace since 1996. Per capita consumption of bell peppers has remained fairly constant over the past nine years, while consumption of chile peppers has been growing at a steady pace since 1996, as seen in Table 1. Although the levels of production, imports, and per capita consumption are reported for all pepper varieties, information on exports and domestic consumption is not available. This is only reported in the case of bell peppers, and is shown in Table 2. This table shows that most production is consumed domestically, with approximately 10 percent devoted to exports. Additionally, as mentioned above, per capita consumption of bell peppers has been steady despite the overall increase in imports.

TABLE 1.—U.S. PRODUCTION, IMPORTS, AND PER CAPITA CONSUMPTION OF ALL PEPPERS, 1996–2004

Year	Production and imports (metric tons)		Per capita consumption (pounds)		
	Production	Imports	Bell peppers	Chili peppers	Total
1996	752,976	277,334	7.1	4.6	11.7
1997	680,400	290,557	6.4	4.5	10.9
1998	662,256	329,336	6.4	4.7	11.1
1999	707,616	342,128	6.7	4.7	11.4
2000	911,736	346,660	7.0	5.1	12.1
2001	857,304	366,514	6.9	5.1	12.0
2002	843,696	408,499	6.8	5.7	12.5
2003	843,696	426,197	6.9	5.5	12.4
2004	843,696	445,982	7.1	6.0	13.1

Source: USDA/ERS, ''Vegetables and Melons Yearbook,'' *http://usda.mannlib.cornell.edu/data-sets/specialty/89011/.*

TABLE 2.—U.S. SUPPLY AND UTILIZATION OF FRESH BELL PEPPERS, 2000–2004

Year	Supply			Utilization		
	Production	Imports	Total	Exports	Domestic	Per capita use (pounds)
	(Metric tons)					
1996	754,745	171,143	925,888	60,465	865,423	7.1
1997	678,540	179,217	857,758	60,692	797,066	6.4
1998	660,260	199,085	859,345	57,970	801,375	6.4
1999	705,892	206,524	912,416	66,309	846,107	6.7
2000	765,631	198,190	963,822	71,479	892,342	7.0
2001	748,168	215,596	963,764	73,347	890,417	6.9
2002	710,700	249,979	960,679	73,166	887,514	6.8
2003	731,112	245,715	976,828	72,077	904,751	6.9
2004	762,184	258,053	1,020,237	73,438	946,799	7.1

Source: USDA/ERS, ''Vegetables and Melons Yearbook,'' *http://usda.mannlib.cornell.edu/data-sets/specialty/89011/.*

[3] These estimates were provided by the proposed exporting countries and have been aggregated for the purpose of this analysis.

From 1995 to 2003, most of the peppers imported into the United States came from Mexico, Canada, and the Netherlands, with the majority supplied by Mexico. Given the close ties created by the North American Free Trade Agreement, these trading patterns are not surprising.

It is unlikely that the proposed changes would lead to dramatic increases in U.S. import levels of peppers. The amount of peppers expected to be imported from that region (31,040 metric tons) represents approximately 6.95 percent of the 2004 import level (445,982 metric tons). Thus, Central American imports are not expected to command a large portion of the U.S. imported pepper market.

Effects on Small Entities

This proposed rule would affect domestic producers of peppers as well as importers that deal with these commodities. It is likely that the entities affected would be small according to Small Business Administration (SBA) guidelines. As detailed below, information available to APHIS indicates that the effects on these small entities would not be significant.

Two alternatives to the proposed course of action are as follows: Maintaining the regulations as they are currently written regarding the importation of peppers from these Central American countries or allowing importation without establishing the proposed risk mitigations.

The first alternative would maintain current safeguards against the entry of quarantine pests. However, this option would also mean that those specified Central American countries as well as the United States would forgo the economic benefits expected to be afforded by the proposed trade.

Allowing importation of fresh peppers from certain Central American countries under phytosanitary requirements less restrictive than are proposed could potentially lead to the introduction of pests not currently found in the United States. This option could result in significant damage and costs to domestic production and is not desirable for those reasons.

Affected U.S. pepper producers are expected to be small based on the 2002 Census of Agriculture data and SBA guidelines for entities in two farm categories: Other Vegetable (except Potato) and Melon Farming (North American Industry Classification System [NAICS] number 111219) and Other Food Crops Grown Under Cover (NAICS number 111419). The SBA classifies producers in these farm categories as small entities if their total annual sales are no more than $750,000. APHIS does not have information on the size distribution of domestic pepper producers, but according to 2002 Census data, there were a total of 2,128,892 farms in the United States.[4] Of this number, approximately 97 percent had total annual sales of less than $500,000 in 2002, which is well below the SBA's small entity threshold for commodity farms.[5] This indicates that the majority of farms are considered small by SBA standards, and it is reasonable to assume that most of the 4,748 pepper farms that could be affected by the proposed rule would also qualify as small. In the case of fruit and vegetable wholesalers (NAICS number 422480),[6] those entities with fewer than 100 employees are considered small by SBA standards.[7] In 1997, there were a total of 4,811 fruit and vegetable wholesale trade farms in the United States.[8] Of these farms, 4,610 or 95.8 percent employed fewer than 100 employees and were considered small by SBA standards. Between 1997 and 2002 there is not likely to have been substantial changes in the industry. Therefore, domestic producers and importers that may be affected by this proposed rule are predominantly small entities.

Economic analysis of the expected increase in imports of peppers from Central America shows that the proposed importation of these commodities would lead to negligible changes in domestic prices. Based on historical consumption data, an increase in imports of this magnitude would lead to a decrease in price of approximately $0.01 to $0.02 per pound at the retail level, based on an average price of $1.15 per pound over the last 25 years.

Although domestic producers may face slightly lower prices as a result of the proposed increase in the pepper supply, these price changes are expected to be negligible. APHIS welcomes public comment on these preliminary estimates. Changes of the magnitude presented here should not have large repercussions for either domestic producers or importers of peppers.

This proposed rule contains information collection or recordkeeping requirements (see ''Paperwork Reduction Act'' below).

Executive Order 12988

This proposed rule would allow certain types of peppers from Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua to be imported into the United States. If this proposed rule is adopted, State and local laws and regulations regarding peppers imported under this rule would be preempted while the fruit is in foreign commerce. Fresh fruits and vegetables are generally imported for immediate distribution and sale to the consuming public and would remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other cases must be addressed on a case-by-case basis. If this proposed rule is adopted, no retroactive effect will be given to this rule, and this rule will not require administrative proceedings before parties may file suit in court challenging this rule.

National Environmental Policy Act

To provide the public with documentation of APHIS' review and analysis of any potential environmental impacts associated with the proposed importation of peppers from Central America, we have prepared an environmental assessment. The environmental assessment, entitled ''Proposed Rule for the Importation of Peppers from Central America,'' was prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

The environmental assessment may be viewed on the Regulations.gov Web site or in our reading room (see **ADDRESSES** above for instructions for accessing Regulations.gov and for information on the location and hours of the reading room). You may request paper copies of the environmental assessment by calling or writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. Please refer to the title of the environmental assessment when requesting copies.

[4] This number represents the total number of farms in the United States, thus including barley, buckwheat, corn, millet, oats, rice, soybean, and sugarcane farms.

[5] Source: SBA and 2002 Census of Agriculture.

[6] Note that this NAICS code relates to the 1997 Economic Census. The 2002 NAICS code for this group is 424480.

[7] For NAICS 424480, SBA guidelines state that an entity with not more than 100 employees should be considered small unless that entity is a government contractor. In this case, the size standard increases to 500 employees. However, in this instance, it is fair to assume that fruit and vegetable importers will not be under government contract since it is against regulations for imports to be used in relevant government programs (*e.g.,* school lunch programs).

[8] Source: SBA and 1997 Economic Census.

Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB). Please send written comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503. Please state that your comments refer to Docket No. 05–003–1. Please send a copy of your comments to: (1) Docket No. 05–003–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238, and (2) Clearance Officer, OCIO, USDA, Room 404–W, 14th Street and Independence Avenue, SW., Washington, DC 20250. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this proposed rule.

In this document, we are proposing to allow certain types of peppers grown in approved registered production sites in Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua to be imported into the United States without treatment, under certain conditions. Those conditions include trapping, pre-harvest inspection, and shipping procedures designed to prevent the introduction of quarantine pests into the United States. These precautions, along with other requirements, would allow for the importation of peppers from those countries in Central America while continuing to provide protection against the introduction of quarantine pests into the United States.

Allowing peppers to be imported would necessitate the use of certain information collection activities, including the completion of pre-harvest inspections, phytosanitary certificates, and fruit fly monitoring records.

We are soliciting comments from the public (as well as affected agencies) concerning our proposed information collection and recordkeeping requirements. These comments will help us:

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

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

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

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

Estimate of burden: Public reporting burden for this collection of information is estimated to average 0.0037537 hours per response.

Respondents: Importers, producers, national plant protection organizations.

Estimated annual number of respondents: 200.

Estimated annual number of responses per respondent: 3,994.625.

Estimated annual number of responses: 798,925.

Estimated total annual burden on respondents: 2,299 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

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

Government Paperwork Elimination Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. For information pertinent to GPEA compliance related to this proposed rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

List of Subjects in 7 CFR Part 319

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

Accordingly, we propose to amend 7 CFR part 319 as follows:

PART 319—FOREIGN QUARANTINE NOTICES

1. The authority citation for part 319 would continue to read as follows:

Authority: 7 U.S.C. 450 and 7701–7772 and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

2. A new § 319.56–2nn would be added as follows:

§ 319.56–2nn Administrative instructions: Conditions governing the entry of peppers from certain Central American countries.

Fresh peppers (*Capsicum* spp.) may be imported into the United States from Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua, only under the following conditions:

(a) For peppers of the species *Capsicum annuum, Capsicum frutescens, Capsicum baccatum,* and *Capsicum chinense* from areas free of Mediterranean fruit fly (Medfly), terms of entry are as follows:

(1) The peppers must be grown and packed in an area that has been determined by APHIS to be free of Mediterranean fruit fly (Medfly) in accordance with the procedures described in § 319.56–2(f) of this subpart.

(2) A pre-harvest inspection of the growing site must be conducted by the national plant protection organization (NPPO) of the exporting country for the weevil *Faustinus ovatipennis*, pea leafminer, tomato fruit borer, banana moth, latana mealybug, passionvine mealybug, melon thrips, the rust fungus *Puccinia pampeana*, Andean potato mottle virus, and tomato yellow mosaic virus, and if these pests are found to be generally infesting the growing site, the NPPO may not allow export from that production site until the NPPO has determined that risk mitigation has been achieved.

(3) The peppers must be packed in insect-proof cartons or containers or covered with insect proof mesh or plastic tarpaulin at the packinghouse for transit to the United States. These safeguards must remain intact until arrival in the United States.

(4) The exporting country's NPPO is responsible for export certification, inspection, and issuance of phytosanitary certificates. Each shipment of peppers must be accompanied by a phytosanitary certificate issued by the NPPO and bearing the declaration, ''These peppers were grown in an area recognized to be free of Medfly and the shipment has been inspected and found free of the pests listed in the requirements.''

(b) For peppers of the species *Capsicum annuum, Capsicum frutescens, Capsicum baccatum, Capsicum chinense,* and *Capsicum pubescens* from areas in which Medfly is considered to exist:

(1) The peppers must be grown in approved production sites registered with the NPPO of the exporting country. Initial approval of the production sites will be completed jointly by the exporting country's NPPO and APHIS. The exporting country's NPPO will visit

and inspect the production sites monthly, starting 2 months before harvest and continuing through until the end of the shipping season. APHIS may monitor the production sites at any time during this period.

(2) Pepper production sites must consist of pest exclusionary greenhouses, which must have self-closing double doors and have all other openings and vents covered with 1.6 (or less) mm screening.

(3) Registered sites must contain traps for the detection of Medfly both within and around the production site.

(i) Traps with an approved protein bait must be placed inside the greenhouses at a density of four traps per hectare, with a minimum of two traps per greenhouse. Traps must be serviced on a weekly basis.

(ii) If a single Medfly is detected inside a registered production site or in a consignment, the registered production site will lose its ability to export peppers to the United States until APHIS and the exporting country's NPPO mutually determine that risk mitigation is achieved.

(iii) Medfly traps with an approved protein bait must be placed inside a buffer area 500 meters wide around the registered production site, at a density of 1 trap per 10 hectares and a minimum of 10 traps. These traps must be checked at least every 7 days. At least one of these traps must be near the greenhouse. Traps must be set for at least 2 months before export and trapping must continue to the end of the harvest.

(iv) Capture of 0.7 or more Medflies per trap per week will delay or suspend the harvest, depending on whether harvest has begun, for consignments of peppers from that production site until APHIS and the exporting country's NPPO can agree that the pest risk has been mitigated.

(v) The greenhouse must be inspected prior to harvest for the weevil *Faustinus ovatipennis*, pea leafminer, tomato fruit borer, banana moth, latana mealybug, passionvine mealybug, melon thrips, the rust fungus *Puccinia pampeana*, Andean potato mottle virus, and tomato yellow mosaic virus. If any of these pests, or other quarantine pests, are found to be generally infesting the greenhouse, export from that production site will be halted until the exporting country's NPPO determines that the pest risk has been mitigated.

(4) The exporting country's NPPO must maintain records of trap placement, checking of traps, and any Medfly captures. The exporting country's NPPO must maintain an APHIS-approved quality control program to monitor or audit the trapping program. The trapping records must be maintained for APHIS's review.

(5) The peppers must be packed within 24 hours of harvest in a pest exclusionary packinghouse. The peppers must be safeguarded by an insect-proof mesh screen or plastic tarpaulin while in transit to the packinghouse and while awaiting packing. Peppers must be packed in insect-proof cartons or containers, or covered with insect-proof mesh or plastic tarpaulin, for transit to the United States. These safeguards must remain intact until arrival in the United States or the consignment will be denied entry into the United States.

(6) During the time the packinghouse is in use for exporting peppers to the United States, the packinghouse may accept peppers only from registered approved production sites.

(7) The exporting country's NPPO is responsible for export certification, inspection, and issuance of phytosanitary certificates. Each shipment of peppers must be accompanied by a phytosanitary certificate issued by the NPPO and bearing the declaration, ''These peppers were grown in an approved production site and the shipment has been inspected and found free of the pests listed in the requirements.'' The shipping box must be labeled with the identity of the production site.

(c) For peppers of the species *Capsicum pubescens* from areas in which Mexican fruit fly (Mexfly) is considered to exist:

(1) The peppers must be grown in approved production sites registered with the NPPO of the exporting country. Initial approval of the production sites will be completed jointly by the exporting country's NPPO and APHIS. The exporting country's NPPO must visit and inspect the production sites monthly, starting 2 months before harvest and continuing through until the end of the shipping season. APHIS may monitor the production sites at any time during this period.

(2) Pepper production sites must consist of pest exclusionary greenhouses, which must have self-closing double doors and have all other openings and vents covered with 1.6 (or less) mm screening.

(3) Registered sites must contain traps for the detection of Mexfly both within and around the production site.

(i) Traps with an approved protein bait must be placed inside the greenhouses at a density of four traps per hectare, with a minimum of two traps per greenhouse. Traps must be serviced on a weekly basis.

(ii) If a single Mexfly is detected inside a registered production site or in a consignment, the registered production site will lose its ability to ship under the systems approach until APHIS and the exporting country's NPPO mutually determine that risk mitigation is achieved.

(iii) Mexfly traps with an approved protein bait must be placed inside a buffer area 500 meters wide around the registered production site, at a density of 1 trap per 10 hectares and a minimum of 10 traps. These traps must be checked at least every 7 days. At least one of these traps must be near the greenhouse. Traps must be set for at least 2 months before export and trapping must continue to the end of the harvest.

(iv) Capture of 0.7 or more Mexflies per trap per week will delay or suspend the harvest, depending on whether harvest has begun, for consignments of peppers from that production site until APHIS and the exporting country's NPPO can agree that the pest risk has been mitigated.

(v) The greenhouse must be inspected prior to harvest for the weevil *Faustinus ovatipennis*, pea leafminer, tomato fruit borer, banana moth, latana mealybug, passionvine mealybug, melon thrips, the rust fungus *Puccinia pampeana*, Andean potato mottle virus, and tomato yellow mosaic virus. If any of these pests, or other quarantine pests, are found to be generally infesting the greenhouse, export from that production site will be halted until the exporting country's NPPO determines that the pest risk has been mitigated.

(4) The exporting country's NPPO must maintain records of trap placement, checking of traps, and any Mexfly captures. The exporting country's NPPO must maintain an APHIS-approved quality control program to monitor or audit the trapping program. The trapping records must be maintained for APHIS's review.

(5) The peppers must be packed within 24 hours of harvest in a pest exclusionary packinghouse. The peppers must be safeguarded by an insect-proof mesh screen or plastic tarpaulin while in transit to the packinghouse and while awaiting packing. Peppers must be packed in insect-proof cartons or containers, or covered with insect-proof mesh or plastic tarpaulin, for transit to the United States. These safeguards must remain intact until arrival in the United States or the consignment will be denied entry into the United States.

(6) During the time the packinghouse is in use for exporting peppers to the United States, the packinghouse may

accept peppers only from registered approved production sites.

(7) The exporting country's NPPO is responsible for export certification, inspection, and issuance of phytosanitary certificates. Each shipment of peppers must be accompanied by a phytosanitary certificate issued by the NPPO and bearing the declaration, ''These peppers were grown in an approved production site and the shipment has been inspected and found free of the pests listed in the requirements.'' The shipping box must be labeled with the identity of the production site.

Done in Washington, DC, this 6th day of October 2005.

N.E. Gutierrez,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 05–20388 Filed 10–11–05; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1910 and 1926

[Docket No. S–0215]

RIN 1218–AB67

Electric Power Generation, Transmission, and Distribution; Electrical Protective Equipment; Extension of Comment Period; Change in Date of Public Hearing

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice of hearing; extension of comment period; reopening of the period to file notices of intention to appear at an informal public hearing; additional issues for comment.

SUMMARY: This notice reschedules an informal hearing on the proposed standards on electric power generation, transmission, and distribution and on electrical protective equipment, which were published on June 15, 2005. It also reopens the period to file notices of intention to appear at the informal public hearing, extends the period for written comments on the proposal, extends the period to provide the complete text of testimony and documentary evidence, and identifies additional issues on which OSHA is seeking comment. These periods are extended 90 days with this notice.

DATES: *Comments.* Comments on the proposal must be submitted (postmarked or sent) by January 11, 2006.

Informal public hearing. OSHA will hold an informal public hearing in Washington, DC, beginning March 6, 2006. The hearing will commence at 1 p.m. on the first day, and at 9 a.m. on the second and subsequent days.

Notices of intention to appear. Parties who intend to present testimony at the informal public hearing must notify OSHA in writing of their intention to do so no later than November 11, 2005.

Hearing testimony and documentary evidence. Parties who request more than 10 minutes for their presentations at the informal public hearing and parties who will submit documentary evidence at the hearing must submit the full text of their testimony and all documentary evidence postmarked no later than February 1, 2006.

ADDRESSES: You may submit written comments, notices of intention to appear, hearing testimony, and documentary evidence—identified by docket number (S–215) or RIN number (1218–AB67)—by any of the following methods.

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- OSHA Web site: *http://dockets.osha.gov/.* Follow the instructions for submitting comments on OSHA's Web page.
- Fax: If your written comments are 10 pages or fewer, you may fax them to the OSHA Docket Office at (202) 693–1648.
- Regular mail, express delivery, hand delivery, and courier service: Submit three copies to the OSHA Docket Office, Docket No. S–215, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N2625, Washington, DC 20210; telephone (202) 693–2350. (OSHA's TTY number is (877) 889–5627.) OSHA Docket Office hours of operation are 8:15 a.m. to 4:45 p.m., e.s.t.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to *http://dockets.osha.gov/,* including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read comments and background documents that can be posted go to *http://dockets.osha.gov/.* Written comments received, notices of intention to appear, and all other material related to the development of the proposed standard will be available for inspection and copying in the public record in the Docket Office at the address listed previously.

Hearing: The hearing will be held in the auditorium of the U.S. Department of Labor, 200 Constitution Avenue, NW., Washington DC.

FOR FURTHER INFORMATION CONTACT:

General information and press inquiries: Mr. Kevin Ropp, Director, Office of Communications, Room N3647, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–1999.

Technical information: Mr. David Wallis, Director, Office of Engineering Safety, Room N3609, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2277 or fax (202) 693–1663.

Hearings: Ms. Veneta Chatmon, OSHA Office of Communications, Occupational Health and Safety Administration, Room N3647; 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–1999.

Electronic copies of this **Federal Register** notice, as well as news, are available at OSHA's Web page on the Internet at *http://www.osha.gov.*

SUPPLEMENTARY INFORMATION: On June 15, 2005, OSHA published a proposal that would update the standards on electric power generation, transmission, and distribution and on electrical protective equipment for general industry and construction (70 FR 34822). Interested parties were given until August 15, 2005, to submit notices of intention to appear at an informal hearing, and they were given until October 13, 2005, to submit written comments.

The Edison Electric Institute (EEI) requested that OSHA extend the rulemaking period by 90 days. EEI argued that an extension is warranted because of the involvement of their membership in electric power restoration following Hurricane Katrina, as follows:

> EEI is the association of the nation's investor owned electric companies. Many EEI member companies, their employees, and contractors they regularly engage, are now overwhelmingly occupied with providing assistance in the areas affected by Hurricane Katrina. This is especially so as to those involved in electric power transmission and distribution construction, as sister companies work to provide mutual aid, including restoration of electric power, to customers of those companies whose service territories include affected portions of southern states.

Stated simply, those involved in managing and performing such work are likely to have little, if any, time now or in the coming few months to focus on assisting EEI to prepare comments on the proposed rule.

OSHA has received similar requests from other organizations.

The Agency recognizes that many of the parties who would be interested in this rulemaking are heavily involved in responding to the destruction caused by Hurricane Katrina. The affected contractors and electric utilities, including utilities providing assistance directly affected areas, are likely to be spending significant resources on the restoration efforts, As EEI notes, these contractors and utilities will have little time in the next couple of months to respond to OSHA's request for comments on the proposed standards. Therefore, OSHA is extending the rulemaking period by 90 days.

Issues

In the preamble to the proposal, OSHA specifically requested comments in nearly seventy areas, involving such issues as safe work procedures and requirements for protective equipment. For instance, OSHA requested comments on how employees can be insulated or isolated from multiphase exposure (70 FR 34831) and on whether the standard should require the employer to provide automated external defibrillators (70 FR 34842). OSHA received over 30 notices of intention to appear (NOITA) in response to the notice of proposed rulemaking (NPRM). The NOITAs raised many issues related to the proposal, some of which went beyond those listed in the NPRM. OSHA will consider evidence introduced on these issues during the rulemaking and invites the public to comment on them:

- Whether the standard should include ground-to-ground, cradle-to-cradle, or lock-to-lock rubber glove and sleeve requirements;
- Whether the standard should include specific multicrew tagging requirements;
- Whether the standard should include tagging requirements for systems using supervisory control and data acquisition (SCADA) equipment; [1]
- Whether OSHA should revise the order of removal of protective grounds for the protection of employees as given in proposed § 1926.962(f)(2) and § 1910.269(n)(7);
- Whether the standard should include specific requirements for the creation of an equipotential zone;
- Whether the standard should include requirements for an information trail tracking the job briefing between all levels of employees associated with the job, for example, between the supervisor, employee-in-charge, and crewmember;
- Whether the standard should require fall arrest or work positioning equipment for employees transferring to another object while climbing; and
- Whether the provisions for the testing of fall protection equipment in proposed § 1926.954(b) and § 1910.269(g)(2) are appropriate.

OSHA is not limiting comments, hearing requests, and documentary evidence to only these areas. OSHA invites comments, hearing requests, and documentary evidence on all issues raised by the proposal.

Public Participation—Comments and Hearings

OSHA encourages members of the public to participate in this rulemaking by submitting comments on the proposal, and by providing oral testimony and documentary evidence at the informal public hearing that the Agency will convene after the comment period ends. In this regard, the Agency invites interested parties having knowledge of, or experience with, safety related to working on electric power generation, transmission, or distribution installations to participate in this process, and welcomes any pertinent data and cost information that will provide it with the best available evidence on which to develop the final standard.

This section describes the procedures the public must use to submit their comments to the docket in a timely manner, and to schedule an opportunity to deliver oral testimony and provide documentary evidence at the informal public hearings. Comments, notices of intention to appear, hearing testimony, and documentary evidence will be available for inspection and copying at the OSHA Docket Office. You also should read the earlier sections titled **DATES** and **ADDRESSES** for additional information on submitting comments, documents, and requests to the Agency for consideration in this rulemaking.

Written comments. OSHA invites interested parties to submit written data, views, and arguments concerning this proposal. In particular, OSHA encourages interested parties to comment on the various issues raised in the summary and explanation of the proposal (70 FR 34826–34893) and in this notice. When submitting comments, parties must follow the procedures specified earlier in the sections titled **DATES** and **ADDRESSES**. The comments must clearly identify the provision of the proposal you are addressing, the position taken with respect to each issue, and the basis for that position. Comments, along with supporting data and references, received by the end of the specified comment period will become part of the proceedings record, and will be available for public inspection and copying at the OSHA Docket Office.

Informal Public Hearing. Pursuant to section 6(b)(3) of the Occupational Safety and Health Act, members of the public will have an opportunity at an informal public hearing to provide oral testimony concerning the issues raised in this proposal. The hearings will connect at 1 p.m. on March 6, 2006. At that time, the presiding administrative law judge (ALJ) will resolve any procedural matters relating to the proceeding. The hearings will reconvene on subsequent days at 9 a.m.

The legislative history of section 6 of the OSH Act, as well as OSHA's regulation governing public hearings (29 CFR 1911.15), establishes the purpose and procedures of informal public hearings. Although the presiding officer of such hearings is an ALJ, and questioning by interested parties is allowed on crucial issues, the proceeding is informal and legislative in purpose. Therefore, the hearing provides interested parties with an opportunity to make effective and expeditious oral presentations in the absence of procedural restraints or rigid procedures that could impede or protract the rulemaking process. In addition, the hearing is an informal administrative proceeding, rather than an adjudicative one in which the technical rules of evidence would apply, because its primary purpose is to gather and clarify information. The regulations that govern public hearings, and the prehearing guidelines issued for this hearing, will ensure participants fairness and due process, and will facilitate the development of a clear, accurate, and complete record. Accordingly, application of these rules and guidelines will be such that questions of relevance, procedure, and participation generally will favor development of the record.

Conduct of the hearing will conform to the provisions of 29 CFR part 1911, ''Rules of Procedure for Promulgating, Modifying, or Revoking Occupational Safety and Health Standards.'' The regulation at 29 CFR 1911.4, ''Additional or Alternative Procedural Requirements,'' specifies that the Assistant Secretary may, on reasonable notice, issue alternative procedures to

[1] SCADA is a computer system for monitoring and controlling equipment (in this case, electric power transmission and distribution lines and equipment).

expedite proceedings or for other good cause. Although the ALJs who preside over these hearings make no decision or recommendations on the merits of OSHA's proposal, they do have the responsibility and authority to ensure that the hearing progresses at a reasonable pace and in an orderly manner. To ensure that interested parties receive a full and fair informal hearing as specified by 29 CFR part 1911, the ALJ has the authority and power to: Regulate the course of the proceedings; dispose of procedural requests, objections, and comparable matters; confine the presentations to matters pertinent to the issuers raised; use appropriate means to regulate the conduct of the parties who are present at the hearing; question witnesses, and permit others to question witnesses; and limit the time for such questioning. At the close of the hearing, the ALJ will establish a post-hearing comment period for parties who participated in the hearing. During the first part of this period, the participants may submit additional data and information to OSHA; during the second part of this period, they may submit briefs, arguments, and summations.

Notice of Intention to Appear to Provide Testimony at the Informal Public Hearing. Interested parties who intend to provide oral testimony at the informal public hearings must file a notice of intention to appear by using the procedures specified earlier in the sections titled **DATES** and **ADDRESSES.** This notice must provide the: name, address, and telephone number of each individual who will provide testimony, and their preferred hearing location; capacity (for example, the name of the establishment or organization the individual is representing and the individual's occupational title and position) in which each individual will testify; approximate amount of time required for each individual's testimony; specific issues each individual will address, including a brief statement of the position that the individual will take with respect to each of these issues; and a brief summary of any documentary evidence the individual intends to present.

OSHA emphasizes that the hearings are open to the public, and that interested parties are welcome to attend. However, only a party who files a complete notice of intention to appear may ask questions and participate fully in the proceedings. While a party who did not file a notice of intention to appear may be allowed to testify at the hearing if time permits, this determination is at the discretion of the presiding ALJ.

Hearing Testimony and Documentary Evidence. Any party requesting more than 10 minutes to testify at the informal public hearing, or who intends to submit documentary evidence at the hearing, must provide the complete text of the testimony and the documentary evidence as specified earlier in the sections listed **DATES** and **ADDRESSES.** The Agency will review each submission and determine if the information it contains warrants the amount of time requested. If OSHA believes the requested time is excessive, it will allocate an appropriate amount of time to the presentation, and will notify the participant of this action, and the reasons for the action, before the hearing. The Agency may limit to 10 minutes the presentation of any participant who fails to comply substantially with these procedural requirements; in such instances, OSHA may request the participant to return for questioning later.

Certification of the Record and Final Determination after the Informal Public Hearing. Following the close of the hearing and post-hearing comment period, the presiding ALJ will certify the record to the Assistant Secretary of Labor for Occupational Safety and Health; the record will consist of all of the written comments, oral testimony, and documentary evidence received during the proceeding. However, the ALJ does not make or recommend any decisions as to the content of the final standard. Following certification of the record, OSHA will review the proposed provisions in light of all the evidence received as part of the record, and then will issue the final rule based on the entire record.

Authority and Signature

This document was prepared under the direction of Jonathan L. Snare, Deputy Assistant Secretary of Labor of Occupational Safety and Health, 200 Constitution Avenue, NW., Washington, DC 20210.

This action is taken pursuant to sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), Secretary of Labor's Order No. 5–2002 (67 FR 65008), and 29 CFR part 1911.

Dated: Signed at Washington, DC this 6th day of October, 2005.

Jonathan L. Snare,

Acting Assistant Secretary of Labor.

[FR Doc. 05–20421 Filed 10–11–05; 8:45 am]

BILLING CODE 4510–26–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–2636; MB Docket No. 05–274, RM–11274; MB Docket No. 05–275, RM–11275]

Radio Broadcasting Services; Coalgate, OK; and Silver Springs Shores, FL

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document proposes new FM broadcast allotments at Coalgate, Oklahoma and Silver Springs Shores, Florida. The Audio Division, Media Bureau, requests comment on a petition filed by Charles Crawford, proposing the allotment of Channel 242A at Coalgate, Oklahoma, as the community's second local aural transmission service. Channel 242A can be allotted to Coalgate in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.9 kilometers (4.3 miles) south of Coalgate. The reference coordinates for Channel 242A at Coalgate are 34–35–00 North Latitude and 96–10–00 West Longitude. *See* **SUPPLEMENTARY INFORMATION**, *infra.*

DATES: Comments must be filed on or before November 25, 2005, and reply comments on or before December 12, 2005.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, his counsel, or consultant, as follows: Charles Crawford; 4553 Bordeaux Ave.; Dallas, Texas 75205; and Carrie Tutera Martin; 726 Stetson Street; Orlando, Florida 32804.

FOR FURTHER INFORMATION CONTACT: R. Barthen Gorman, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket Nos. 05–274, and 05–275, adopted September 29, 2005 and released October 3, 2005. The full text of this Commission document is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 Twelfth Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC,

20054, telephone 1–800–378–3160 or *http://www.BCPIWEB.com*. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506 (c)(4).

The Audio Division requests comments on a petition filed by Carrie Tutera Martin, proposing the allotment of Channel 259A at Silver Springs Shores, Florida, as the community's first local aural transmission service. Channel 259A can be allotted to Silver Springs Shores in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.0 kilometers (3.1 miles). The reference coordinates for Channel 259A at Silver Springs Shores are 29–08–09 North Latitude and 82–02–33 West Longitude.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR Section 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, see 47 CFR Sections 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Florida, is amended by adding Silver Springs Shores, Channel 259A.

3. Section 73.202(b), the Table of FM Allotments under Oklahoma, is amended by adding Channel 242A at Coalgate.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–20353 Filed 10–11–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–2516; MB Docket No. 05–267; RM–10365]

Radio Broadcasting Services; St. Simons Island, GA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a Petition for Rule Making filed by Nancy C. Harper requesting the allotment of Channel 229C3 at St. Simons Island, Georgia, and a mutually exclusive Petition for Rule Making filed by Murphy Broadcasting requesting the allotment of Channel 229A to St. Simons Island. Either allotment would provide that community with its second local aural transmission service. To accommodate Harper's requested allotment of Channel 229C3, Harper requests the reclassification of FM Station WOGK, Channel 229C, Ocala, Florida, to specify operation on Channel 229C0 pursuant to the reclassification procedures adopted by the Commission. *See 1998 Biennial Regulatory Review—Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules,* 65 FR 79773 (December 20, 2000). In response to an Order to Show Cause why Station WOGK should not be downgraded from Channel 229C to 229C0, the licensee of FM Station WOGK stated that it would file an acceptable application meeting minimum Class C FM standards within the period required by our rules. Since the licensee filed an application that was deficient, and since the deficient application filed has been dismissed for failure to prosecute the application, the Commission proposes to reclassify Station WOGK to Class C0. Channel 229C3 can be allotted with a site restriction 16.4 kilometers (10.2 miles) northwest of St. Simons Island, at reference coordinates 31–14–54 NL and 81–29–57 WL. To accommodate the proposed allotment, the Commission proposes the reclassification of FM Station WOGK to specify operation on Channel 229C0. Channel 229A can be allotted to St. Simons Island at reference coordinates of 31–09–01 NL and 81–22–11 WL, if FM Station WOGK is reclassified to specify operation on Channel 229C0.

DATES: Comments must be filed on or before November 18, 2005, and reply comments on or before December 5, 2005. Any counterproposal filed in this proceeding need only protect FM Station WOGK, Ocala, Florida, as a Class C0 allotment.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioners as follows: Nancy C. Harper, 490 Wright Road; Tignall, Georgia 30668; and Scott C. Cinnamon, Law Offices of Scott C. Cinnamon, PLLC; 1090 Vermont Ave, NW., Suite 800, #144; Washington, DC 20005 (Counsel for Murphy Broadcasting).

FOR FURTHER INFORMATION CONTACT: R. Barthen Gorman, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Notice of Proposed Rule Making,* MB Docket No. 05–267, adopted September 23, 2005, and released September 27, 2005. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC, 20054, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.* This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of l980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Florida, is amended by removing Channel 229C and by adding Channel 229C0 at Ocala.

3. Section 73.202(b), the Table of FM Allotments under Georgia, is amended by adding Channel 229C3 or Channel 229A at St. Simons Island.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–20211 Filed 10–11–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–2495; MB Docket No. 05–270; RM–11268; RM–11272]

Radio Broadcasting Services; Aguila, Apache Junction, Buckeye, Glendale, Peoria, Wenden, and Wickenburg, AZ

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rule making filed by Entravision Holdings, L.L.C. (''Petitioner''), licensee of Stations KVVA–FM, Apache Junction, Arizona; KDVA(FM), Buckeye, Arizona, and KLNZ(FM), Glendale, Arizona. Petitioner requests that the Commission upgrade Channel 296C3, Station KVVA–FM, to Channel 296C1 and reallot Channel 296C1 from Apache Junction to Peoria, Arizona, as Peoria's first local aural transmission service; substitute Channel 229C3 for vacant Channel 297C3 at Aguila, Arizona; upgrade Channel 295A, Station KDVA(FM), to Channel 295C3, and reallot Channel 295C3 to Wenden, Arizona, as Wenden's first local aural transmission service; and reallot Channel 278C, Station KLNZ(FM), from Glendale to Buckeye, Arizona. In addition, since Black Entrepreneur Association, Inc. (''BEA'') has filed a rulemaking petition to allot Channel 229C3 at Wickenburg, Arizona, that is mutually exclusive with Petitioner's proposal to substitute Channel 229C3 for Channel 297C3 at Aguila, the Commission shall compare BEA's proposal with Petitioner's entire proposal to determine which proposal should be granted.

The coordinates for proposed Channel 296C1 at Peoria, Arizona, are 33–35–47 NL and 112–05–31 WL, with a site restriction of 13.5 kilometers (8.4 miles) east of Peoria. The coordinates for proposed Channel 229C3 at Aguila, Arizona, are 33–56–34 NL and 113–10–24 WL. The coordinates for proposed Channel 295C3 at Wenden, Arizona, are 33–49–06 NL and 113–37–46 WL, with a site restriction of 8.2 kilometers (5.1 miles) west of Wenden. The proposed Channel 278C at Buckeye, Arizona, are 33–35–33 NL and 112–34–49 WL, with a site restriction of 24.7 kilometers (15.3 miles) north of Buckeye. Lastly, if BEA's proposal for Channel 229C3 at Wickenburg, Arizona is preferred over Petitioner's rulemaking proposal, Channel 229C3 can be allotted to Wickenburg at coordinates of 33–53–49 NL and 112–54–45 WL, with a site restriction of 18.7 kilometers (11.6 miles) southwest of Wickenburg, Arizona.

DATES: Comments must be filed on or before November 17, 2005, and reply comments on or before December 2, 2005.

ADDRESSES: Secretary, Federal Communications Commission, 445 12th Street, SW., Room TW–A325, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve Petitioner's counsel, as follows: Barry A. Friedman, Esq., Thompson Hine L.L.P.; 1920 N Street, NW., Suite 800; Washington, DC 20036; and Mark N. Lipp, Esq. and Scott Woodworth, Esq., Vinson & Elkins, L.L.P.; 1455 Pennsylvania, NW., Suite 600; Washington, DC 20004. Further, a copy of such comments should be served on counsel for Black Entrepreneur Association, Inc., as follows: Ernest T. Sanchez, Esq., The Sanchez Law Firm; 2300 M Street, NW., Suite 800; Washington, DC 20037.

FOR FURTHER INFORMATION CONTACT: R. Barthen Gorman, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 05–270, adopted September 23, 2005 and released September 26, 2005. The full text of this Commission decision is available for inspection and copying during regular business hours in the FCC's Reference Information Center at Portals II, 445 12th Street, SW., CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractors, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.*

The Federal Communications Commission granted a license for Station KVVA–FM, Apache Junction, Arizona, specifying operation on Channel 296C3, on May 8, 1997. See File No. BLH–19961025KB. Station KVVA–FM is still operating on Channel 296C3. Nevertheless, 47 CFR 73.202, The FM Table of Allotments, erroneously lists Channel 296C2 as being allotted to Apache Junction, Arizona.

The provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contracts.

This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act 0f 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506 (c)(4).

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Arizona, is amended

by removing Channel 297C3 and adding Channel 229C3 at Aguila; removing Apache Junction, Channel 296C2; removing Channel 295A and adding Channel 278C at Buckeye; removing Channel 278C at Glendale; adding Peoria, Channel 296C1; adding Wenden, Channel 295C3; or adding Channel 229C3 at Wickenburg.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–20444 Filed 10–11–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–2500; MB Docket No. 05–269; RM–11267]

Radio Broadcasting Services; Allegan, Mattawan and Otsego, MI

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Audio Division seeks comment on a petition filed by Forum Communications, Inc., licensee of FM Station WZUU, proposing the substitution of Channel 223A for Channel 222A at Allegan, reallotment of Channel 223A from Allegan to Mattawan, Michigan, as its first local service and modification of the FM Station WZUU license accordingly. To prevent removal of Allegan's sole local service, Petitioner also requests the reallotment of co-owned Station WQXC–FM, Channel 265A from Otsego to Allegan, Michigan and modification of the Station WQXC–FM license accordingly. A staff engineering analysis has determined that Channel 223A can be allotted to Mattawan in conformity with the Commission's rules, provided there is a site restriction of 10.6 kilometers (6.6 miles) southeast at reference coordinates 42–07–45 NL and 85–43–13 WL. Additionally, Channel 265A can be allotted to Allegan in compliance with the Commission's rules, at the Station WQXC(FM) existing transmitter site at coordinates 42–30–31 NL and 85–46–08 WL. Canadian concurrence has been requested because the proposed reallotments are both located within 320 kilometers (199 miles) of the U.S.-Canadian border. In accordance with the provisions of Section 1.420(i) of the Commission's rules, we shall not accept competing expressions of interest pertaining to the use of Channel 223A at Mattawan or Channel 265A at Allegan.

DATES: Comments must be filed on or before November 17, 2005, and reply comments on or before December 2, 2005.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, as follows: Matthew H. McCormick, Esq., Counsel for Forum Communications, Inc., Reddy, Begley & McCormick, LLP, 1156 15th Street, NW., Suite 610, Washington, DC 20005–1770.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, MB Docket No. 05–269, adopted September 23, 2005, and released September 26, 2005. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center 445 Twelfth Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20054, telephone 1–800–378–3160 or *http://www.BCPIWEB.com*. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Michigan, is amended by removing Channel 222A and by adding Channel 265A at Allegan, by adding Mattawan, Channel 223A, and by removing Otsego, Channel 265A.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–20212 Filed 10–11–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 05–2497; MB Docket No. 02–295; RM–10580; RM–11149]

Radio Broadcasting Services; Gonzales, LA, Hattiesburg, MS, Houma, LA, and Westwego, LA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; dismissal.

SUMMARY: In response to a *Notice of Proposed Rule Making* (''*Notice*''), 67 FR 64080 (October 17, 2002), this *Report and Order* dismisses a rulemaking proceeding requesting that Channel 279C, Station WUSW(FM), Hattiesburg, Mississippi, be downgraded to Channel 279C0, and reallotted to Westwego, Louisiana; and that Channel 281C, Station KHEV(FM), Houma, Louisiana, be downgraded to Channel 281C0 and reallotted to Gonzales, Louisiana. Clear Channel Broadcasting Licenses, Inc., the proponent of this rulemaking, requested Commission approval for the withdrawal of its Petition for Rule Making and its expressions of interest in implementing its rulemaking proposals. Clear Channel filed a declaration that neither it nor any of its principals has received or will receive any consideration in connection with the withdrawal of its expression of interest in this proceeding.

FOR FURTHER INFORMATION CONTACT: R. Barthen Gorman, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MB Docket No. 02–295, adopted September 23, 2005, and released September 26, 2005. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC, 20554. The document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com*. This document is not subject to the Congressional Review Act. (The Commission is, therefore, not required to submit a copy of this *Report and Order* to GAO pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A), because the proposed rule is dismissed.)

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–20210 Filed 10–11–05; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 050921244–5244–01; I.D. 091305A]

RIN 0648–AP38

Fisheries Off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Limited Entry Fixed Gear Sablefish Fishery Permit Stacking Program

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues this proposed rule to implement portions of Amendment 14 to the Pacific Coast Groundfish Fishery Management Plan (FMP) for 2007 and beyond. Amendment 14, approved by NOAA in August 2001, created a permit stacking program for limited entry permits with sablefish endorsements. This proposed rule would implement regulatory measures from Amendment 14 that the agency could not set in place in time for the 2001 through 2006 primary sablefish seasons. Amendment 14 was intended to improve safety in the primary sablefish fishery and to provide greater season flexibility for sablefish fishery participants.

DATES: Comments must be submitted in writing by December 12, 2005.

ADDRESSES: You may submit comments on the proposed rule to implement further limited entry sablefish permit stacking program regulations, identified by 091305A, by any of the following methods:

- E-mail: *Amendment14b.nwr@noaa.gov*. Include I.D 091305A in the subject line of the message.
- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Fax: 206–526–6736, Attn: Jamie Goen
- Mail: D. Robert Lohn, Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE., Seattle, WA 98115–0070

Copies of Amendment 14 and its Environmental Assessment/Regulatory Impact Review (EA/RIR) are available from Donald McIsaac, Executive Director, Pacific Fishery Management Council (Council), 7700 NE Ambassador Place, Portland, OR 97220. Copies of the Supplemental Initial Regulatory Flexibility Analysis (IRFA) are available from D. Robert Lohn, Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE., Seattle, WA 98115–0070.

Send comments on the reporting burden estimate or any other aspect of the collection-of-information requirements in this proposed rule to Jamie Goen or Kevin Ford, Northwest Region, NMFS, and to David Rostker, Office of Management and Budget (OMB), by e-mail at *David_Rostker@omb.gov*,or fax to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Jamie Goen or Kevin Ford (Northwest Region, NMFS), phone: 206–526–4646 or 206–526–6115; fax: 206–526–6736 and; e-mail: *jamie.goen@noaa.gov* or *kevin.ford@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Electronic Access

This **Federal Register** document is also accessible via the internet at the website of the Office of the **Federal Register**: *http://www.gpoaccess.gov/fr/index.html*.

NMFS is proposing this rule to implement those portions of Amendment 14 to the FMP that NMFS was unable to implement in time for the 2001 through 2006 primary sablefish seasons. Amendment 14 implemented a permit stacking program for limited entry permits with sablefish endorsements. This proposed rule is based on recommendations of the Council, under the authority of the Pacific Coast Groundfish FMP and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The portions of Amendment 14 that were implemented for the 2001 primary sablefish season significantly increased safety in the fishery, allowed individual fishery participants to more fully use their existing vessel capacity, and reduced overall capacity in the primary fixed gear sablefish fishery. This proposed rule would not change any of those benefits, but would further complete the implementation of Amendment 14 by preventing excessive fleet consolidation, ensuring processor access to sablefish caught in the primary season, and maintaining the character of the fleet through owner-on-board requirements. The background and rationale for the Council's recommendations are summarized below. The discussion below also explains why NMFS will not be implementing the Council's recommendation for a hail-in requirement for vessels delivering primary season sablefish. Furthermore, it summarizes some modifications to the permit stacking program that the Council is considering for future implementation.

Further detail appears in the EA/RIR prepared by the Council for Amendment 14 and in the proposed and final rule to implement Amendment 14 for the 2001 primary sablefish season. The proposed rule for the 2001 season was published on June 8, 2001 (66 FR 30869), the final rule was published on August 7, 2001 (66 FR 41152), and a correction to the final rule was published on August 30, 2001 (66 FR 45786).

Background

For many years, sablefish harvested by the limited entry, fixed gear fleet north of 36° N. lat. has been separated into a small, year-round daily trip limit fishery and a primary season fishery (from April 1 through October 31). Annually, about 85 percent of the limited entry fixed gear sablefish allocation has been taken in the primary season fishery. Before 1997, the Council managed harvest in the primary season fishery without vessel cumulative limits by setting the season length short enough to ensure that the fishery would not exceed its quota. Capitalization in the fixed gear sablefish fleet increased

over time and the Council needed to set ever shorter primary seasons to control catch levels. By 1996, the fleet was able to take the bulk of the primary season sablefish catch in a 5 day fishery.

This evolution to a derby-style fishery induced the Council to make a series of management changes intended to rationalize fishing effort and improve safety for primary season fishery participants. Amendment 9 to the FMP introduced a sablefish endorsement program that limited the number of vessels allowed to participate in the primary season fishery. Limited entry permit holders with at least 16,000 lb (7,257 mt) of sablefish landed in any one year from 1984 through 1994 received sablefish endorsements. This program was intended to restrict primary season fishery participation to those permit holders with historical participation in and dependence upon the sablefish fishery.

Following Amendment 9, the Council further separated participation in the primary season sablefish fishery by introducing the three-tier program in 1998. This program divided sablefish-endorsed permits into 3 tiers based on historical landings associated with those permits. Under the three-tier program, a participant in the primary season may land an amount of sablefish up to the cumulative limit associated with his/her permit. Qualifications for each of the 3 tiers were based on the cumulative sablefish landings associated with a permit over the same 1984 through 1994 period: at least 898,000 lb (407.33 mt) to qualify for Tier 1, less than 898,000 lb (407.33 mt) but more than 380,000 lb (172.36 mt) to qualify for Tier 2, and less than 380,000 lb (172.36 mt) but at least the minimum 16,000 lb (7,257 mt) to qualify for Tier 3. The three-tier system also set a between-tier ratio to describe the relationship between the cumulative limits that would be available to each tier during the primary season fishery. That ratio is 1 (Tier 3): 1.75 (Tier 2):3.85 (Tier 1). For example, if Tier 3 had a cumulative limit of 10,000 lb (4,536 mt), Tier 2 would have a corresponding cumulative limit of 17,500 lb (7,938 mt), and Tier 1 would have a corresponding cumulative limit of 38,500 lb (17,463 mt).

While the three-tier program somewhat slowed the pace of the primary season fishery, the season was still less than 10 days long in each of the primary seasons from 1998 to 2000. Even under the three-tier program, the Council had to set the seasons short enough to ensure that not all participants would be able to catch the full cumulative limits of sablefish associated with their permits. A fishery where all participants have the opportunity to catch a cumulative limit and all are able to catch that limit is an Individual Fishing Quota (IFQ) fishery as defined by the Magnuson-Stevens Act. At the time, the Magnuson-Stevens Act, as amended by Public Law 106–554, included a moratorium on the implementation of new IFQ programs through October 1, 2002. (The moratorium has since been lifted). However, via Public Law 106–554, Congress exempted from the moratorium a Pacific Council IFQ program for the fixed gear sablefish fishery that: (1) allows the use of more than one limited entry groundfish permit per vessel; and/or (2) sets cumulative trip limit periods, up to 12 months in any calendar year, that allow fishing vessels a reasonable opportunity to harvest the full amount of the associated trip limits. Amendment 14 to the FMP implements a permit stacking program that meets these moratorium exemption requirements.

Amendment 14

The Council approved Amendment 14 at its November 2000 meeting and clarified its intent on implementing Amendment 14 at its November 2001 and April 2002 meetings. Amendment 14 introduced a permit stacking program to the limited entry, fixed gear primary sablefish fishery. Under this permit stacking program, a vessel owner may register up to 3 sablefish-endorsed permits for use with their vessel to harvest each of the primary season sablefish cumulative limits associated with the stacked permits. By exempting the Pacific Coast fixed gear permit stacking program from the IFQ moratorium, Congress removed the need to set short seasons designed to prevent participants from catching their full cumulative limits. Amendment 14 allows a season up to 7 months long, from April 1 through October 31, which allows an ample period for vessels to pursue their primary season sablefish cumulative limits. Beginning in 2002, NMFS implemented the full April 1 through October 31 season via the Pacific Coast groundfish final specifications and management measures published on March 7, 2002 (67 FR 10490).

Provisions subject to the regulatory review process required under the Paperwork Reduction Act (PRA) and a longer NMFS application and permitting process were reserved for a second set of proposed regulations for 2002 and beyond. In its June 8, 2001, proposed rule, NMFS announced its intention to divide Amendment 14 implementation into two separate regulatory processes. Implementation of this latter portion of Amendment 14 was further postponed in 2002 to allow time for NMFS to return to the Council for further clarification. On February 14, 2002, NMFS notified fixed gear permit holders by letter to let them know the agency would be requesting further clarification from the Council. NMFS received further clarification at the Council's April 2002 meeting.

The regulatory changes proposed with this **Federal Register** document would implement permit stacking regulations that include the following provisions: permit owners and permit holders would be required to document their ownership interests in their permits to ensure that no person holds or has ownership interest in more than 3 permits; an owner-on-board requirement for permit owners who did not own sablefish-endorsed permits as of November 1, 2000; an opportunity for permit owners to add a spouse as co-owner; vessels that do not meet minimum frozen sablefish historic landing requirements would not be allowed to process sablefish at sea; permit transferors would be required to certify sablefish landings during mid-season transfers; and, a definition of the term ''base permit.''

Documenting Permit Ownership Interest and Adding a Spouse as Co-owner

Amendment 14 includes several ownership-related provisions. (1) No partnership or corporation may own a sablefish-endorsed limited entry permit unless that partnership or corporation owned a sablefish-endorsed permit as of November 1, 2000 (also referred to as grandfathered or first generation permit owner). NMFS announced this November 1, 2000, control date in an Advance Notice of Proposed Rulemaking on April 3, 2001 (66 FR 17681). Partnerships or corporations that owned permits as of November 1, 2000, may continue to have ownership interest in those same permits and may purchase or hold additional permits up to the 3–permit limit; however, partnerships or corporations that owned a permit before November 1, 2000, and subsequently sell all of their sablefish-endorsed permits, will lose the privilege of continuing to own sablefish-endorsed permits if they do not buy another permit within one year. Any permits sold after November 1, 2000, may only be sold to an individual person or to partnerships or corporations that had ownership interest in a sablefish-endorsed permit before November 1, 2000.

(2) No person, partnership, or corporation in combination may have ownership interest in or hold more than 3 sablefish-endorsed permits either simultaneously or cumulatively over the primary season, except for an individual person, or partnerships or corporations that had ownership interest in more than 3 sablefish-endorsed permits as of November 1, 2000. An individual person, or partnerships or corporations that had ownership interest in 3 or more sablefish-endorsed permits as of November 1, 2000, may not acquire additional permits either by purchase or holding beyond those sablefish-endorsed permits owned on November 1, 2000, until they own fewer than 3 permits; at that time they may acquire additional permits but may not exceed the ownership cap of 3 permits.

(3) A partnership or corporation will lose the exemptions provided in paragraphs (1) and (2) of this section on the effective date of any change in the ownership of a corporation or partnership from that which existed on November 1, 2000. [Note: In cases where multiple corporations or partnership are listed on a permit, NMFS will treat them as one new entity for purposes of the permit count and grandfathered status. For example, if Smith, Inc. and Jones, Inc. are listed as owning a permit together since before November 1, 2000, they will be grandfathered as ''Smith, Inc. and Jones, Inc.'' and this entity will be counted as owning that 1 permit. If Jones, Inc. did not also own a permit on its own before November 1, 2000, it would not be a grandfathered corporation and could not own a permit after November 1, 2000. Any change in Smith, Inc. and/or Jones, Inc. would affect ''Smith, Inc. and Jones, Inc.'' as listed on the permit.] A ''change'' in the partnership or corporation means the addition of a partner or shareholder to the corporate or partnership membership. This definition of ''change'' will apply to any person added to the corporation or partnership since November 1, 2000, including any family member of an existing shareholder or partner. A change in membership is not considered to have occurred if a member dies or becomes legally incapacitated and a trustee is appointed to act on his behalf, nor if the ownership of shares among existing members changes, nor if a member leaves the corporation or partnership and is not replaced. Changes in the ownership of publicly held stock will not be deemed changes in ownership of the corporation. Changes in the partnership or corporation must be reported to NMFS' Sustainable Fisheries Division (SFD) within 15 days of the addition of a new partner or shareholder.

(4) An individual person who did not own a sablefish-endorsed permit as of November 1, 2000, and who purchases a sablefish-endorsed permit after November 1, 2000, will be required to be on board the vessel registered for use with the permit when that vessel is fishing for sablefish against the primary sablefish tier limits associated with the permit(s) registered for use with that vessel. (Also known as the ''owner-on-board'' requirement.)

To implement these four major permit ownership provisions, NMFS will need to determine which individuals have an ownership interest in the partnerships and corporations that own and/or hold sablefish-endorsed permits. As of November 2000, about 40 partnerships or corporations were owners of sablefish-endorsed permits (this number only includes business entities denoted as corporation, general partnership, limited partnership, etc.). Similarly, about 40 partnerships or corporations were holders of sablefish-endorsed permits with seven of those being different from the partnerships or corporations that were given as permit owners. Once NMFS obtains the names of all of the individuals who had ownership interest in a sablefish-endorsed permit as of November 1, 2000, as well as all of the individuals that had ownership interest in or held a sablefish endorsed permit after November 1, 2000, the agency will be better able to implement the Amendment 14 provision that restricts the number of permits each person has ownership interest in or holds to three permits. If a person who has not owned all their permits since November 1, 2000, is found to have ownership interest in or hold more than 3 permits, NMFS will void all current permits, including any grandfathered permits owned or held by partnerships or corporations, and reissue all permits in an ''unidentified'' status meaning that the permits cannot be fished, until such time as that individual can prove they have ownership interest in or hold no more than 3 permits. [Note: A permit cannot be fished if it is in ''unidentified'' status. The permit must be registered for use with the vessel being used to land the groundfish as specified in 50 CFR 660.333(a).] For example, if a person is found to have ownership interest in five permits, three of which were owned as of November 1, 2000, NMFS will issue all five permits, including any permits shared with other individuals, partnerships or corporations, into ''unidentified'' status until that person sells at least two of their permits so that they own or hold no more than three permits. If a person had ownership interest in five permits as of November 1, 2000, and still has ownership interest in those five permits and does not own or hold additional permits, none of the permits would be moved into the ''unidentified'' status.

While the Council recommended that permit owners would be required to document their ownership interests in their permits to ensure that no person holds or has ownership interest in more than 3 permits, NMFS has determined that permit holders that are corporations or partnerships would also be required to document their ownership interests for purposes of the permit count which was implemented with the first round of permit stacking regulations in August 2001. Therefore, NMFS has interpreted the Council's recommendation to not just require permit owners, but also permit holders to document their ownership interests in their permits to ensure that no person holds or has ownership interest in more than 3 permits. For purposes of establishing the permit count for each permit owner and permit holder, each individual who is listed as owner on the permit or is listed as having an ownership interest as part of a corporation or partnership will be counted as owning or holding one permit. In cases where a husband and wife are listed as co-owners of the same permit, both individuals will be counted as owning one permit each. However, if the husband is listed on the permit as the sole owner of that permit, only the husband will be counted as owning that permit for purposes of restrictions and exemptions on the number of permits a person may own or hold.

If a permit owner who owned the permit as of November 1, 2000, conveys a permit to their spouse upon their death, the conveyed permit will count toward the permit ownership limits for that spouse. ''Spouse'' means a person who is legally married to another person as recognized by state law (i.e., one's wife or husband). If the spouse already owns or holds 3 permits, he/she will not be permitted to retain this additional permit, unless he/she conveys ownership of or no longer holds one of his/her existing permits.

If a couple were married as of November 1, 2000, but only one spouse was listed on the permit as the permit owner at that time, the spouse of the listed permit owner would not be exempt from the owner-on-board requirement. However, NMFS realizes permit owners could not have foreseen the implications of not listing their spouse under the detailed provisions of

the permit stacking program adopted by the Council. Therefore, permit owners who were married as of the control date (November 1, 2000) and who wish to add their spouse as co-owner on their permit(s) may correct NMFS' permit ownership records as of that control date. Permit owners may add a not-listed spouse as a co-owner without losing their grandfathered status. As previously mentioned, in cases where a couple, married as of November 1, 2000, are listed as co-owners of the same permit, both individuals will be counted as owning one permit each and will have grandfathered status as a partnership as defined at § 660.302. An individual within the married couple will not, however, be able to retain their exemption from owner-on-board requirements if they choose to buy another permit as an individual and did not own a permit as an individual as of the control date in NMFS ''corrected'' records (i.e., NMFS records after allowing a not-listed spouse to be added as co-owner). Members of partnerships and corporations will not be allowed to add their spouses to the corporate ownership listing as of November 1, 2000, for purposes of exempting them from the owner-on-board requirements. (Note: NMFS defines a ''partnership'' as two or more individuals, partnerships, or corporations, or combinations thereof, who have ownership interest in a permit, including married couples and legally recognized trusts and partnerships, such as limited partnerships (LP), general partnerships (GP), and limited liability partnerships (LLP).)

Upon publication of these regulations in the **Federal Register**, NMFS will send a form to permit owners with one individual listed as of November 1, 2000, to allow married individuals who wish to declare their spouses as having permit ownership interest as of November 1, 2000. If the permit owner fails to return the form by July 1, 2006, the permit name on record with SFD as of November 1, 2000, will remain on the permit. If the permit owner has been married since the control date, chooses not to add their spouse as a co-owner and the permit owner listed on the permit thereafter dies, the spouse will not be exempt from the owner-on-board requirement should the spouse inherit the permit. SFD will not accept any declarations to add a spouse as co-owner for couples married as of the control date after the July 1, 2006, deadline.

For corporations and partnerships, NMFS will send a form to legally recognized corporations and partnerships (i.e., permit owners other than individuals) that currently own or hold sablefish-endorsed permits that requests a listing of the names of all shareholders or partners as of November 1, 2000, and a second listing of that same information as of the current date in 2006. NMFS may require a copy of the United States Coast Guard Abstract of Title as proof of vessel ownership for permit holders and/or owners and may require articles of incorporation or other documentation deemed necessary for proof of corporate or partnership ownership. If a corporation or partnership fails to return the completed form by the deadline date of July 1, 2006, NMFS will send a second written notice to delinquent entities requesting the completed form be returned by a revised deadline date of August 1, 2006. If the permit owning entity fails to return the completed form by that second deadline date, August 1, 2006, NMFS will void their existing permit(s) and reissue the permit(s) with a vessel registration given as ''unidentified'' until such time that the completed form is provided to NMFS. For purposes of determining changes in partnerships/corporations in succeeding years, NMFS will send the form to corporations and partnerships as part of the annual permit renewal process.

Failure to report or false reporting of ownership interest in federal limited entry groundfish permits to NMFS may be subject to federal civil or criminal penalties.

Owner-on-board Requirement

As mentioned above, an individual person who owns sablefish-endorsed permits, but who did not have an ownership interest in a sablefish-endorsed permit as of November 1, 2000, would be required to be on board the vessel registered for use with that permit during any groundfish fishing operations within the primary season fishery while that permit's primary sablefish season limits are being taken. (Note: An individual person, or partnerships or corporations that hold(s) a sablefish-endorsed permit, but does not own a sablefish-endorsed permit, are not subject to the owner-on-board requirements.) The Council included this provision in Amendment 14 as a way of ensuring that the fixed gear sablefish fleet would maintain its character, by requiring that only fishermen control sablefish-endorsed permits and moving toward a fishery where permit owners are working onboard the vessel during fishing operations.

The sablefish permit stacking program is essentially an IFQ program. A concern about IFQ programs is that if fishing privileges are for sale, individuals or business entities who do not fish could buy those privileges. Allowing individuals or business entities who do not fish to own fishing privileges and then rent those privileges out to fishers is often referred to as ''share-cropping'' the fishing privileges. Members of the West Coast sablefish fleet were concerned that without an owner-on-board provision, permit ownership could flow out of fishing communities and into the hands of speculative non-fishing buyers. To ensure that only fishers could buy into the sablefish fleet, the Council included an owner-on-board provision in Amendment 14.

Under this proposed rule, an individual who purchased a sablefish-endorsed permit after November 1, 2000, would be required to be on board the vessel registered for use with that permit when the vessel is participating in any groundfish fishery during the primary season and fishing on that permit's sablefish limits until that vessel has taken that permit's primary sablefish season limits. Once the primary sablefish season starts, any sablefish landings made by a vessel registered for use with a sablefish-endorsed permit count against that vessel's primary season limit(s). This aspect of the owner-on-board requirement prevents unnecessary sablefish discard by ensuring that if sablefish is taken incidentally in fisheries targeting other groundfish, that sablefish will not be discarded and will count against the primary season fishery limits. All permit owners who are subject to the owner-on-board requirements would be notified in a letter from NMFS in 2006 and prior to the start of the primary sablefish season on April 1, 2007.

Permit owners who are subject to the owner-on-board requirement may request an emergency exemption from the requirement in cases of death, illness, or injury of the permit owner that prevents the permit owner from participating in the fishery. This exemption would ensure that a permit owner's family could receive the sablefish income associated with a permit if the permit owner himself is unable to participate in the groundfish fishery through death, illness, or injury. In the case of death of a permit owner, the estate of the deceased permit owner is afforded a grace period from the owner-on-board requirement for up to 3 years after the death of the individual or until such time as there is settlement of the permit owner's estate and the permit is transferred to the beneficiary, whichever is earlier. In the interim

before the estate is settled, if the deceased permit owner was subject to the owner-on-board requirements, the estate of the deceased permit owner can send a letter to NMFS with a copy of the death certificate, requesting an exemption from the owner-on-board requirements until either the estate is settled or for up to 3 years after the time of death, whichever is earlier. An exemption from the owner-on-board requirements would be conveyed in a letter from NMFS to the estate of the permit owner and this letter would be required to be on the vessel during fishing operations. This grace period allows the estate a period of time in which to transfer the permit to an individual and also allows the estate to hire a skipper to fish the permit while the estate is being settled. Once the permit is transferred, the new owner would be subject to the owner-on-board requirements. If, after the estate is settled, the spouse inherits and therefore owns the permit and the deceased permit owner was grandfathered, but the spouse was not listed on the permit as grandfathered, the spouse would be a second generation owner and would be required to be on board the vessel while the permit is being fished.

An exemption due to injury or illness would be effective only through the end of the calendar year in which it was granted. In order to receive an exemption due to injury or illness, the permit owner must submit a letter to NMFS requesting an exemption from the owner-on-board requirement, explaining the need for the exemption, and providing documentation from a certified medical practitioner detailing why the permit owner is unable to continue to be onboard a fishing vessel. In order to extend an emergency medical exemption for a succeeding year, the permit owner must submit a new request to NMFS and provide documentation from a certified medical practitioner detailing why the permit owner is still unable to be onboard a fishing vessel. An emergency exemption would be conveyed in a letter from NMFS to the permit owner and this letter would be required to be on the vessel during fishing operations. All emergency exemptions will be evaluated by NMFS and a decision will be made by SFD in writing to the permit owner within 60 days of receipt of the original exemption request. Emergency medical exemptions will be granted by NMFS for no more than three consecutive or total years. NMFS will consider any exemption granted for less than 12 months in a year to count as one year against the 3–year cap.

An individual person, or partnerships or corporations who continue to own at least one sablefish-endorsed permit that was owned as of November 1, 2000, would be exempt from the owner-on-board requirement. If a person, partnership, or corporation that is exempt from the owner-on-board requirement no longer owns at least one sablefish-endorsed permit for a period greater than one year, that permit owner would no longer be exempt from the owner-on-board requirement. However, a person, partnership, or corporation that is exempt from the owner-on-board requirement could sell all of its permits, buy another sablefish-endorsed permit within 1 year of the date the last permit was approved for transfer, and retain its exemption from the owner-on-board requirements. A person that is part of a grandfathered partnership or corporation could buy additional permits as an individual, up to the limit of three per individual, but the individual would not be exempt from the owner-on-board requirements with the new permit. However, if the individual was part of grandfathered partnership or corporation in which they were the only remaining individual (i.e., all other individuals with ownership interest had left the partnership or corporation), this individual would still be considered as a grandfathered partnership or corporation in NMFS records. Thus, permits owned by this individual under the partnership or corporation would be exempt from the owner-on-board requirements. This individual could also buy additional permits under the partnership or corporation, up to the limit of 3 per individual, and would remain exempt from the owner-on-board requirements with the additional permits.

Additionally, a person, partnership, or corporation that qualified for the owner-on-board exemption, but later divested their interest in a permit or permits, may retain rights to an owner-on-board exemption as long as that person, partnership, or corporation purchases another permit within one year of the date that the final rule for these owner-on-board requirements is implemented. A partnership or corporation could only purchase a permit if it has not added or changed individuals since November 1, 2000, excluding individuals that have left the partnership or corporation or that have died. NMFS would send out a letter to all individuals, partnerships or corporations who owned a permit as of November 1, 2000, and who no longer own a permit to notify them that they would qualify as a grandfathered permit owner if they choose to buy a permit within one year from the date the final rule for these owner-on-board requirements is effective.

If the individuals who have an ownership interest in the corporation or partnership change from those owning the partnership or corporation as of November 1, 2000, by adding another individual(s), that partnership or corporation will lose its exemption from both the owner-on-board requirements and from the provision that allows only an individual person to own a sablefish-endorsed permit. Thus, a husband and wife who own a permit could not add a sibling or child to the permit without losing their first generation status and losing their exemption from the provision that only allows an individual person to own permits. Similarly, a fisherman who wants to take on a new partner because an existing partner is retiring could not add that new partner without losing his first generation status and his exemption from the provision that only allows an individual to own permits. In the case of a grandfathered corporation such as ''Smith, Inc. and Jones, Inc.,'' viewed as one corporation in NMFS records, Jones, Inc. could not add a new member without causing ''Smith, Inc. and Jones, Inc.'' to lose it's grandfathered status. However, an individual person, or partnerships and corporations may continue to hold sablefish-endorsed permits (e.g., through a lease arrangement) from any permit owner (exempt from owner-on-board or not) and remain exempt from the owner-on-board requirements, even if their membership has changed or they did not hold a sablefish-endorsed permit as of November 1, 2000.

As mentioned above, if a couple was married as of November 1, 2000, but only one spouse was listed as the permit owner at that time, the spouse of the listed permit owner would not be exempt from the owner-on-board requirement. NMFS will allow an opportunity for those grandfathered permit owners who wish to add their spouses as co-owners on their permits to correct NMFS' permit ownership records as of that control date (November 1, 2000). Permit owners may then add not-listed spouses as co-owners without losing their grandfathered statuses. Their new grandfathered status will be as a partnership, as defined at § 660.302, which includes married couples. Individual permit owners will lose their individual grandfathered status when they add their not-listed spouse unless they also owned at least one permit as

an individual and did not retroactively add a spouse as co-owner on that permit. The process that NMFS will follow for adding a spouse as co-owner is described in the ownership interest section of this proposed rule. As previously mentioned, in cases where married couples are listed as co-owners of the same permit, both individuals will be counted as owning one permit each and will have grandfathered status as a partnership, as defined at § 660.302. An individual within the married couple will not, however, be able to retain their exemption from owner-on-board requirements if they choose to buy another permit as an individual and did not own a permit as an individual as of the control date in NMFS ''corrected'' records (i.e., NMFS records after allowing a not-listed spouse to be added as co-owner). Members of partnerships and corporations will not be allowed to add their spouses as of November 1, 2000, for purposes of exempting those spouses from the owner-on-board requirements or the provision that only allows individuals to own or hold permits.

Because only the owners of non-exempt permits that are being fished during the trip are required to be on board, enforcement agents must be able to determine which permits are being fished and which owner should be on board. In order to enforce the owner-on-board provision, NMFS is requesting that the states require that the groundfish Federal limited entry permit number be written on state fish landing receipts (i.e., fish tickets). At the April 2002 Council meeting in Portland, OR, the Council and NMFS requested that the States of Washington, Oregon, and California modify their fish tickets to require a space for recording the permit number under which a landing is made. The states agreed to consider modifying their fish tickets, but requested time to consider the implications of such a modification and could not guarantee that action would be taken in time for implementation of the second set of the permit stacking regulations. Currently, only the State of California has added a line for permit information on their state fish tickets and enters that information into the fish ticket database, PacFIN. Until a new fish ticket design is available, states should require that permit numbers be written somewhere on the fish ticket, as appropriate. Ultimately, it would be beneficial to have these Federal limited entry permit numbers entered into the PacFIN database so that enforcement could query a given permit number and their associated fish ticket landings. However, until such time, having the permit number on the paper fish ticket would allow hand searching of paper fish tickets for investigations. This request is also being made to aid in enforcement of mid-season transfers, discussed later in this proposed rule. Adding a permit number to the fish ticket is expected to aid enforcement by creating a record of which sablefish permit was being fished on a given fishing trip. Thus, if enforcement boarded a vessel at sea or as they were coming into port, enforcement could record which owners were on board. At a later time, they could then verify which permit the sablefish landings were credited to on the fish ticket and double check that the owner of that permit was on board if they were not exempt from the owner-on-board provisions.

At a minimum, the permit number associated with a landing should be recorded on the fish ticket and entered into the PacFIN database for tracking and enforcement reasons. If Washington and Oregon do not require that permit numbers be written on the fish tickets and entered into the PacFIN database, NMFS may require all permit owners who are subject to the owner-on-board requirement to be onboard the vessel when that vessel is fishing for groundfish until all sablefish tiers associated with that vessel during the primary season have been fished (e.g., even if landings are only being attributed to one permit at a time but all three permits are subject to the owner-on-board requirement, all three permit owners would be required to be onboard the vessel until that vessel has finished the primary season and completed their landings against all three permits). Conversely, if Washington and Oregon require the permit number on the fish ticket, only those permit owners who are subject to the owner-on-board requirement need to be onboard the vessel when that vessel is fishing for sablefish against a specific sablefish permit (e.g., if landings are only being attributed to one permit at a time and that permit is subject to the owner-on-board requirement, only that permit owner would be required to be onboard the vessel when that vessel is fishing against that permit).

Exemptions for Vessels Processing Sablefish at Sea

Sablefish caught off the West Coast are often processed and frozen for the Japanese market, but the manner of processing varies along the West Coast. Because of the varied ocean bottom topography, some sablefish fishing grounds are closer to shoreside processing plants than others. Larger-sized sablefish tend to bring higher prices, but those large fish are usually found in deep water farther offshore. In areas where the sablefish grounds are within a single day's round trip from port, fishers might bring their sablefish to the processor whole. Processors remove the landed fish's head and guts, then glaze and freeze the sablefish body as quickly as possible to ensure that the processed product meets the high standards of the Japanese fish market. Fishers who operate farther than a day's trip from port might remove the head and guts from their sablefish before landing them at the processor to preserve the quality of the fish's flesh throughout fishing and processing operations. Depending on the care that a fisher takes in heading and gutting his/her sablefish, the processor may have to re-clean the fish before freezing and glazing it for sale.

Because of the primary sablefish fishery's history as a short season, fishers have traditionally pulled sablefish out of the ocean as quickly as possible and have left most or all of the processing to the processors. With a longer primary sablefish season, fishers could operate at a more leisurely pace and do more of their own processing. If a significant portion of the sablefish-endorsed fishers were to begin operating as their own processors, however, the shoreside processing plants would be deprived of their traditional sablefish-generated income. The value of sablefish taken with fixed gear and sold as processed product by West Coast processors was $9–10 million in 1999 and $10–11 million in 2000. Those amounts include sablefish taken in the daily trip limit fisheries and are based on round weight of sablefish landed in 1999 and 2000 with a product recovery rate range of 56–60 percent of round weight. With implementation of a prohibition on processing sablefish at sea, revenues in sold sablefish product for shoreside processors would be expected to remain similar to those amounts reported before the control date of November 1, 2000.

To ensure that shoreside processing plants would continue to have access to sablefish landed from the primary sablefish fishery, the Council included a provision in Amendment 14 that prohibits vessels from processing their sablefish at sea. ''Processing'' is defined at 50 CFR 660.302 as, ''the preparation or packaging of groundfish to render it suitable for human consumption, retail sale, industrial uses or long-term storage, including, but not limited to, cooking, canning, smoking, salting, drying, filleting, freezing, or rendering

into meal or oil, but does not mean heading and gutting unless additional preparation is done.''

Although most West Coast sablefish vessels have not traditionally processed their sablefish catch, there are a few vessels that may have a history of processing sablefish. To acknowledge investments these vessel owners have made in on board freezing and processing equipment, Amendment 14 includes an exception to the at-sea processing prohibition for vessels that froze at least 2,000 lb (907.2 mt) round weight of sablefish landings in any one year of 1998, 1999, or 2000. Because the control date for this exemption is also November 1, 2000, frozen sablefish landings from 2000 would have to have occurred before that date. The best evidence of a vessel having made frozen sablefish landings would be state fish tickets for landed sablefish accompanied by receipts for frozen sablefish from fish buyers or exporters. The qualifying landings of frozen sablefish must have occurred during the primary sablefish fishery season, must have been taken in waters from 0–200 nautical miles offshore of the states of Washington, Oregon or California, and the vessel owner must have had a valid sablefish-endorsed limited entry permit at the time the qualifying fish were landed.

NMFS expects that fewer than five vessels owners will apply for an at-sea processing exemption. NMFS SFD will send a letter to sablefish-endorsed permit owners and/or fixed gear vessel owners announcing the qualification requirements for the at-sea processing exemption. Permit and/or vessel owners who believe that they qualify for an at-sea processing exemption would have at least 60 days to provide NMFS SFD with evidence of their frozen sablefish landings via an application to be provided by NMFS. The permit and/or vessel owner must submit an application and supporting evidence to SFD no later than July 1, 2006. The application will be available from NMFS in hard copy and online at *http://www.nwr.noaa.gov/1sustfsh/permits/prmits01.htm*. NMFS SFD would then have 30 days to review the submitted evidence and make determinations on whether an applicant vessel qualifies for the at-sea processing exemption. Persons whose vessels qualify for the at-sea processing exemption will be issued a letter from NMFS to carry aboard their vessels.

Permit and/or vessel owners who are initially denied the at-sea processing exemption but who believe that they have further evidence to demonstrate their qualifications for the exemption will have 30 days from the NMFS SFD denial decision to appeal the decision to the Regional Administrator. No appeals will be accepted after September 1, 2006. An at-sea processing exemption would be issued if the permit and/or vessel owner demonstrates that his vessel has met the exemption qualification requirements. Unlike the initial limited entry permitting process, there are no hardship allowances for appealing denials and there will be no industry appeal board to review appeals of exemption denials. A complete list of the vessels exempted from the at-sea processing prohibition would be published in the **Federal Register** in the fall of 2006. This exemption would apply only to the vessel while it is registered for use with a sablefish-endorsed limited entry permit. The exemption would not be associated with any of the permits registered for use with the vessel and would not be transferable to any other vessel, including other vessels belonging to that same permit and/or vessel owner. Further, the exemption would expire if the vessel itself is sold or otherwise transferred to a new owner.

Mid-season Transfers

With the longer season, there are more opportunities for permit owners to transfer their permits mid-season. Permit transfers will still be constrained by limited entry program regulations at 50 CFR 660.335(e) and (f), which allow a permit to be transferred between vessels only once per calendar year and which make all permit transfers effective on the first day of a major cumulative limit period. Major cumulative limit periods begin on January 1, March 1, May 1, July 1, September 1 and November 1. While permits may only be transferred between vessels once per calendar year, changes in the permit owner or holder may occur at any time during the calendar year and as often as necessary. However, regardless of whether there is a change in the vessel registered to the permit and the permit owner/holder or just a change in the permit owner/holder, any of these actions would require a certification from the permit owner of the amount of sablefish landings to date. If a permit owner wishes to transfer a sablefish-endorsed permit mid-season, he/she will have to certify the cumulative amount of sablefish taken to date with that permit on a NMFS permit transfer form. In addition, the individual either leasing or buying the permit (the transferee) must acknowledge the cumulative amount of sablefish landed to date by signing the transfer form and maintaining the permit onboard the vessel. Under already existing regulations at 660.303(c), the transferee would also be required to retain onboard any fish tickets associated with landings made against that transferred permit, including any landings made previously on the permit during the cumulative limit period (i.e., the primary sablefish season). This mid-season certification is required for enforcement purposes as it is a means to associate specific amounts of landings to date with an aggregate amount reported on fish tickets for a particular permit owner.

In addition to the certification of sablefish landings to date, a space will be provided on the landings certification portion of the permit transfer form that requests the sale or lease price of the permit. Providing this sale or lease price to NMFS is optional. This information is being requested so that NMFS may build a database on permit sale prices. This database would be useful in analyzing economic trends and the value of the sablefish fishery.

If during a post-season audit of landings associated with a permit, the landings exceed the amount available to be landed on the permit, enforcement measures may be taken against any party that had ownership interest in the permit during the calendar year. The vessel owner or operator may also be held liable. It is a violation of both state and Federal law to give false or incomplete information on fish tickets.

At the April 2002 Council meeting in Portland, OR, the Council and NMFS requested that the States of Washington, Oregon, and California modify their fish tickets to require a space for recording the permit number under which a landing is made. The states agreed to consider modifying their fish tickets, but requested time to consider the implications of such a modification and could not guarantee that action would be taken in time for implementation of the second set of the permit stacking regulations. Currently, only the State of California has added a line for permit information on their state fish tickets. Until a new fish ticket design is available, states should require that permit numbers be written somewhere on the fish ticket, as appropriate, and that the permit number be added into the PacFIN database. If Washington and Oregon do not require that permit numbers be written on the fish tickets and entered into the PacFIN database, NMFS may not allow mid-season transfers due to this provision being unenforceable.

Defining the Term ''Base Permit''

Under Amendment 14, each vessel participating in the primary sablefish fishery must be registered for use with at least one permit with a length endorsement appropriate to that vessel. Any additional permits need not match the vessel's length (50 CFR 660.334(c)). At Section 14.2.4, the FMP describes a base permit in a permit stacking program as the initial permit needed to participate in the limited entry fishery, and subject to all of the requirements for limited entry permit ownership qualifications, and permit gear and length endorsements. The FMP further allows that any requirements and additional privileges for permits stacked on to base permits may be authorized in a Federal rulemaking. Amendment 14 and its implementing regulations describe the requirements and privileges associated with stacking sablefish-endorsed limited entry permits.

This proposed rule would clarify that the permit registered for use with a vessel that is appropriate to that vessel's length is considered the ''base'' permit. If more than one permit registered for use with the vessel has an appropriate length endorsement for that vessel, NMFS SFD will designate a base permit by selecting the permit that has been registered to the vessel for the longest time. If the permit owner objects to NMFS selection of the base permit, the permit owner may send a letter to NMFS SFD requesting the change and the reasons why. If the permit requested to be changed to the base permit matches the length of the vessel, NMFS SFD will reissue the permit with the new base permit.

At least one sablefish-endorsed permit must match the length of the vessel that will be fishing against the permit's landing limits, as required by current regulations at 50 CFR 660.334(c). Outside of the primary season, the vessel would operate under the per vessel cumulative limit restrictions appropriate to the gear of the base permit. Defining this term would not change the effect of limited entry permit regulations, but would provide further clarity in the regulations for both NMFS and for the public.

Hail-in Requirement - Initial Council Recommendation not Proposed by NMFS

In adopting Amendment 14, the Council also recommended several regulatory measures to implement the permit stacking program. One of those recommendations was to require fishers to provide 6 hours advance notice to NMFS Enforcement when making a sablefish landing in the primary sablefish season. Fishers were to provide landings times, hail weights, and landings locations as part of the hail-in procedure. This hail-in requirement was based on a similar requirement in place for the sablefish/halibut fisheries off Alaska. For the Alaska fisheries, the hail-in requirement was intended to prevent quota landings violations by giving enforcement officers an opportunity to meet the incoming vessel to inspect its catch.

NMFS has subsequently determined that this hail-in requirement would be unnecessarily burdensome for fishers and less useful in enforcing West Coast fisheries regulations than it may be in Alaska waters. Over 1,000 vessels participate in the sablefish/halibut IFQ fisheries off Alaska, each landing a vessel-specific amount of fish based on that vessel's particular quota share amount with many landings occurring in remote locations. In the West Coast primary sablefish fishery, there are only 164 sablefish-endorsed permits, which means that no more than 164 vessels could participate in the fishery. Additionally, each permit is assigned to one of 3 tiers, which means that there is a limited number of possible landings amounts available to the vessels participating in the primary fishery. This relatively simple cumulative limit system and the small number of vessels involved make a hail-in requirement unnecessary. NMFS does not now have hail-in requirements for any other West Coast groundfish species or fishery and does not believe that primary sablefish season cumulative limit management differs significantly enough from the rest of the groundfish fishery's cumulative limit management to warrant this additional enforcement and reporting burden.

NMFS consulted with the Council on this issue at the Council's October 29 through November 2, 2001, meeting in Millbrae, CA. The Council, its Enforcement Consultants and its Groundfish Advisory Subpanel concurred with the NMFS decision to not propose the hail-in requirement for implementation in the West Coast sablefish fishery.

Owner-in-Board Requirement - Future Implementation

The Council is considering another qualifier to the owner-on-board exemptions for grandfathered individuals in partnerships or corporations based on the Groundfish Advisory Panel's recommendation. As previously mentioned, at the Council's April 2002 meeting, NMFS returned to the Council to seek clarification on the Council's intent with the owner-on-board requirement, including duration of owner-on-board exemptions, time allotted to settle the estate of deceased owners, loss of exemption, and joint ownership of permits. While clarifying these issues, the Council stated that it also wished to consider allowing a person who had 30 percent or greater ownership interest in a partnership or corporation that was a first generation owner to be exempt from the owner-on-board provision if he/she wishes to own a permit under his/her own name, even if he/she did not own a permit under his/her own name as of November 1, 2000. The EA for the permit stacking program, dated October 2000, did not analyze the effects of allowing exemptions from the owner-on-board requirement for those individuals who had only 30 percent or greater ownership interest in a permit. Thus, further analysis and Council discussion is required before NMFS could consider this provision for implementation.

NMFS is also considering implementing a phone-in declaration system to aid in enforcement of the owner-on-board requirement, if having the permit numbers on the fish tickets is not sufficient. The declaration system would require all sablefish endorsed permit owners, including those exempt from the owner-on-board requirement, to call into a phone-in system and declare which permit(s) they will be fishing. Fishers would not need to call back into the system until they change the sablefish permit(s) they are currently fishing. For any permits reported on the phone-in declaration system, if not exempt from the owner-on-board requirement, the permit owner(s) would be expected to be onboard the vessel while fishing for sablefish. In addition to having permit numbers on state fish tickets, this would aid enforcement to determine, in a more timely manner, if the appropriate person was onboard.

Cap on Number of Permits Held - Future Implementation

Under the Council's initial regulatory recommendations for implementing Amendment 14, no more than three sablefish-endorsed permits may be owned by an individual person, partnership or corporation, unless that individual person, partnership or corporation held more than 3 permits as of November 1, 2000. In June 2001, the Council clarified this recommendation, saying that it had intended to restrict each individual person, partnership or corporation to holding (owning or leasing) no more than 3 permits. The Council further clarified that the grandfathered exception to the three

permits restriction allowed only those individuals, partnerships or corporations that had owned more than 3 permits as of November 1, 2000, to continue to own those particular permits without acquiring (through owning or leasing) additional permits. This restriction was implemented through a final rule at 66 FR 41152, August 7, 2001.

In 2002, the Council and NMFS received a request from a limited entry permit owner to revisit the limit on the number of permits an entity may own or hold. This permit owner wished to hold (lease) additional permits beyond those he already owned. During the Council's April 2002 meeting, the Council's Groundfish Advisory Subpanel (GAP) discussed the issue and voted to retain the current regulations, which limits the number of permits that can be owned or held to no more than three permits, unless a person, partnership or corporation owned more than three permits as of November 1, 2000. An individual person, or partnerships or corporations that owned more than three permits as of November 1, 2000, are limited to the number of permits owned as of that date. Of the GAP members present, eight favored the current regulations (status quo), four favored recommending a regulatory change and four abstained. After the GAP meeting, this issue was brought before the Council. The Council requested that the GAP look into alternatives that would revise the accumulation cap on the total permits an individual person, partnership or corporation could hold through leasing and report back to the Council at a later meeting. Due to the busy agenda of the GAP and the Council, this issue has not yet been revisited and would require further analysis before it could be implemented.

Permit Stacking Program Fee - Future Implementation

NMFS is required under Section 304(d)(2) of the Magnuson-Stevens Act to collect fees from participants in an IFQ program to recover the actual costs directly related to the management and enforcement of the program. These fees shall not exceed 3 percent of the ex-vessel value of sablefish harvested under this IFQ program, to be collected as landings fees.

NMFS implemented a fee system for its sablefish/halibut IFQ fishery in Alaska on March 20, 2000 (65 FR 14919) after a lengthy consultation with the fishing industry and in a rulemaking specific just to fee implementation. NMFS would like an opportunity to assess the Alaska fee program and the analyses associated with its implementation before proposing a fee system for West Coast sablefish-endorsed limited entry permit holders.

NMFS has not yet analyzed the cost of managing and enforcing the sablefish endorsement program and will be better able to predict this cost once all of the other provisions of Amendment 14 are implemented. NMFS will issue a separate proposed rule to implement a fee system after assessing the applicability of the Alaska fee system to West Coast fisheries, estimating the NMFS cost of managing and enforcing the sablefish endorsement program, and consulting on the fee system with the Council and West Coast industry.

Classification

NMFS has determined that the proposed rule is consistent with the Pacific Coast Groundfish FMP and preliminarily determined that the rule is consistent with the Magnuson-Stevens Act and other applicable laws.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

As required by section 603 of the Regulatory Flexibility Act (RFA), NMFS prepared a supplement to the IRFA originally prepared by the Council as part of the EA. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A copy of this analysis is available from the NMFS (see **ADDRESSES**). A summary of the analysis follows.

This proposed rule would affect only the owners of the 164 limited entry permits with sablefish endorsements. These permit holders use longline or pot gear to participate in the limited entry, primary sablefish fishery. All of the permit owners and vessels in the Pacific Coast, limited entry, fixed gear fleet are considered small entities under Small Business Administration (SBA) standards.

NMFS and the SBA have already considered whether Amendment 14 would significantly affect the small entities involved in the limited entry, fixed gear sablefish fishery. The agencies concluded that while Amendment 14 would have significant effects on the limited entry, fixed gear sablefish fleet, those effects would be positive improvements in the safety of the fishing season, and in business planning flexibility. These conclusions were described in the final rule to implement Amendment 14 for the 2001 fishing season (August 7, 2001, 66 FR 41152) and in the Final Regulatory Flexibility Analysis prepared for that rule.

The regulatory changes proposed with this rule follow out of the regulations implementing Amendment 14 (August 7, 2001, final rule) for 2007 and beyond. The regulatory changes in the August 7, 2001, final rule brought greater operational safety and more business planning flexibility to the participants in both the primary sablefish fishery and the daily trip limit fishery for sablefish. It allowed participants with greater harvest capacity to better match their sablefish cumulative limits with individual vessel capacity, it reduced overall primary fishery capacity, and it allowed the fishermen to use the longer season to fish more selectively and to increase their incomes by improving the quality of their ex-vessel product.

The regulatory changes with this proposed rule will require permit owners and permit holders to document their ownership interests in sablefish-endorsed limited entry permits and is expected to have no effect on permit owners and permit holders beyond the time required to complete that documentation. The owner-on-board requirement will not affect the fishing behavior of persons who owned sablefish-endorsed permits before November 1, 2000, and will only affect those who consider purchasing permits after that time in that persons who do not wish to participate in fishing activities aboard a vessel may not wish to purchase sablefish-endorsed permits. Prohibiting vessels from processing sablefish at sea, if they do not meet minimum frozen sablefish historic landing requirements, is expected to simply maintain current sablefish landing and processing practices for both fishers and processors, therefore ensuring shore-based processors will continue to receive business from sablefish harvesters. Certification of current sablefish landings on a permit when conducting a mid-season permit transfer to another person is not expected to have any effect on permit owners or holders beyond the time required to complete the documentation. Defining the term ''base permit'' consistent with the FMP is not expected to have any effect on any participant in the groundfish fishery because it is only an administrative change. This rule is also not expected to have any effect on the 66 limited entry, fixed gear permit holders without sablefish endorsements because this program only applies to sablefish fishery participants with sablefish

endorsements (i.e., primary sablefish fishery participants). No Federal rules duplicate or conflict with these permit stacking regulations.

The criteria used to evaluate whether this proposed rule would impose ''significant economic impacts'' are disproportionality and profitability. Disproportionality means that the regulations place a substantial number of small entities at a significant competitive disadvantage to large entities. Profitability means that the regulation significantly reduces profit for a substantial number of small entities. These criteria relate to the basic purpose of the RFA, i.e., to consider the effect of regulations on small businesses and other small entities. This proposed rule will not impose disproportionate affects between small and large business entities because all limited entry fixed gear vessels, including the sablefish endorsed vessels affected by this rule, are small business entities. As described in the above paragraph, Amendment 14 to the FMP and implementing regulations, including the August 7, 2001, final rule, increased business planning flexibility and profitability overall for the affected small businesses. This rule further implements provisions of Amendment 14, making the regulations more enforceable and maintaining the small business character of the fleet, and, therefore, is not expected to change the overall increased profitability of the fleet gained through the August 7, 2001, final rule. However, the owner-on-board requirement may decrease the overall profitability gained from implementation of the initial permit stacking provisions from Amendment 14. An economic analysis of the owner-on-board provision from the supplemental IRFA (see **ADDRESSES**) shows that the owner-on-board requirement may cost second generation permit owners approximately $40,400 per person per year or approximately $15 million in lost income for all second generation permit owners collectively discounted over a 20 year period. In addition, the permit value may decrease over time due to the reduced flexibility associated with use of the permit. Overall, when considering all of the provisions associated with Amendment 14, those implemented with the August 7, 2001, final rule and those that would be implemented through this rulemaking, profitability is still expected to increase over the previous sablefish 3–tier management system.

The actions considered in this document are not expected to have significant impacts on small entities. Public comment is invited on adjustments that would reduce the impacts on small entities while achieving the regulatory objectives and on whether the analysis adequately takes into account impacts on small entities.

In the EA/RIR prepared by the Council for this action (see **ADDRESSES**), two main alternatives were considered, a no action alternative and a permit stacking regime alternative. The topics considered under each of these alternatives were permit stacking, accumulation, season length, at-sea processing, permit ownership/owner-on-board, and foreign control. Under the no action alternative, the primary limited entry, fixed gear sablefish fishery would continue under the 3–tier management program, with one permit associated with each participating vessel. In addition, permit stacking would not be allowed, the number of permits owned would not be limited, the season length would be 9–10 days and would likely shorten over time, vessels without sablefish endorsements would not be allowed to fish during the primary season, at-sea processing would be permitted, permit owners would not be required to be onboard their vessel during fishing operations, and any legal entity allowed to own a U.S. fishing vessel may own a permit.

Under the permit stacking regime alternative, 12 provisions, many of which include suboptions, were considered for the topics (permit stacking, accumulation, season length, etc.). Thus, the permit stacking regime alternative consists of many sub-alternatives, depending on the combination of provisions and suboptions adopted by the Council. Provisions 1 (allow a basic permit stacking program), 2 (gear usage), 4 (unstacking permits), and 8 (stacking non-sablefish limits and sablefish daily trip limits) address permit stacking. Provision 3 (accumulation limits) addresses accumulation. Provisions 5 (season duration), 9 (opportunities for unendorsed vessels), 11 (advanced notice of landings), and 12 (stacking deadline) address season length. Provision 6 (processing prohibition and freezer vessel length) addresses at-sea processing. Provision 7 (individual ownership only and owner-on-board requirement) addresses permit ownership/owner-on-board. Provision 10 (U.S. citizenship requirement) addresses foreign control. As mentioned previously, the final rule for Amendment 14 implemented most of these provisions. This proposed rule would implement parts of the following provisions: 2, 6, and 7. The preferred alternative recommended by the Council and implemented by NMFS was the permit stacking regime alternative with only certain options within each provisions being adopted as preferred.

The preferred alternative was selected because it best met the objectives of the action, which for the provisions implemented through this action (i.e., provisions 2, 6, and 7) included directing benefits towards fishing communities and preventing excessive concentration of harvest privileges. The EA/RIR for this action reviewed alternatives for their economic impacts. Of the provisions that would be implemented by this action, only provisions 6 and 7 may have economic effects. Provision 6 may prevent economic efficiencies from developing by restricting at-sea processing to vessels that processed at-sea as of November 1, 2000, and may limit a rise in permit prices from what they would have been if at-sea processing were allowed. Provision 7 may reduce flexibility which may in turn reduce efficiency and limit the rise in permit prices compared to if owner-on-board were not required and permits were not limited to ownership by individuals.

This proposed rule contains a collection-of-information requirement subject to the PRA. This collection-of-information requirement has been submitted to OMB for approval. Proposed regulations further implementing provisions of Amendment 14 will require information collections to determine ownership interests of corporations/partnerships that own or hold sablefish permits, to determine unlisted spouses wishing to be listed as co-owner of sablefish permits as of a prior date, to certify mid-season transfers and to determine eligibility of sablefish freezer longliner vessels to obtain an exemption from the ban on at-sea processing. A summary of the information requirements and burden estimates follows.

To determine ownership interests, SFD would send an ownership interest form to the limited entry sablefish-endorsed permits that are owned or held by a corporation or partnership. The business entity would be requested to provide a list of all individuals who have an ownership interest in the corporation or partnership. The ownership interest form would document all individuals with an ownership interest in the partnership or corporation that owned a permit as of the control date, November 1, 2000, and would request a list of all individuals with an ownership interest in the partnership or corporation that owned or held a permit as of the current date. An authorized individual representing

the corporation/partnership would certify (by signing/dating the form) that no additional individual with ownership interest had been added since the control date. The applicant would be required to provide a corporate resolution or other authorizing document that authorizes the person signing the form to do so on behalf of the business entity. NMFS may require a copy of the United States Coast Guard Abstract of Title as proof of ownership for permit holders and/or owners and may require articles of incorporation or other documentation deemed necessary for proof of corporate or partnership ownership. SFD would compare the ownership interest reported on the form from the two dates to determine if an additional individual(s) with ownership interest had been added to the business entity. If so, the business entity would lose its exempted status and be required to divest the permit to an individual owner or other eligible entity. Also, SFD staff would establish a permit count for every individual who owns or holds a sablefish endorsed permit as an individual or as part of a business entity to ensure limits on the number of permits that can be owned or held are not exceeded.

After this initial mailing, future forms would be included in the annual permit renewal packages for those business entities that continue to own or hold a sablefish endorsed permit or would be required whenever a change in permit owner, permit holder, or vessel registration is requested. The estimated burden for this collection is 70 respondents at 0.5 hours each, or 35 hours total. The U.S. Census Bureau's Nonemployer Statistics, 2001, is the most recent data available for determining burden costs for fishermen. Using an estimate from the U.S. Census Bureau's Nonemployer Statistics, 2001, as a proxy for annual income from sablefish fishing of $35,416 and breaking that into an hourly wage of $17.02, the burden for this collection would cost approximately $8.51 per respondent for the respondent's time, or $595.70 total.

For the provision to add a not-listed spouse as permit co-owner, SFD would mail a cover letter and form to those permit owners who list one person as owner and where the owner has continued to own a sablefish endorsed permit since November 1, 2000. SFD would afford the opportunity to add a spouse as a co-owner on a voluntary, one-time only basis. Members of partnerships and corporations who have an interest in a permit owned since November 1, 2000, would not be allowed to add their spouses as a co-owner of the permit. The current permit owner would be required to provide a copy of the marriage certificate. SFD would allow the addition of a spouse who was married according to state law to an exempted permit owner as of November 1, 2000. After review and approval of the application, SFD would reissue the permit in the names of both spouses. SFD would use this information to update the list of permit owners and the permit counts associated with these individuals. Additionally, SFD would revise the list of permit owners entitled to grandfather privileges (i.e.; exempt from owner on board requirements). Spouses listed as co-owner would be subject to the limits on the number of permits that can be owned or held. The estimated burden for this collection is 12 respondents at 0.33 hours each, or 4 hours total. Using an estimate from the U.S. Census Bureau's Nonemployer Statistics, 2001, as a proxy for annual income from sablefish fishing of $35,416 and breaking that into an hourly wage of $17.02, the burden for this collection would cost approximately $5.62 per respondent for the respondent's time, or $68.08 total.

For mid-season transfers of sablefish-endorsed permits, a new section would be added to the existing permit transfer form, also known as ''Change of Vessel Registration, Permit Owner/Holder Application'' (i.e.; transfer form). All permit owners are currently required to use this form to request these changes to their permit. The new section to the existing transfer form would require the permit owner to provide the cumulative amount of pounds of sablefish harvested on the permit during the current primary sablefish season. The permit owner would certify that the cumulative landing amount is correct by signing and dating the form. Similarly, the individual either buying the permit or seeking to hold the permit (if different from owner) will be required to sign an acknowledgment of the cumulative amount of sablefish landed as given in this section. Further, SFD would request on a voluntary basis the permit sale price or lease price and term of the lease. The estimated burden for this collection is 25 respondents at 0.5 hours each, or 12.5 hours total. Using an estimate from the U.S. Census Bureau's Nonemployer Statistics, 2001, as a proxy for annual income from sablefish fishing of $35,416 and breaking that into an hourly wage of $17.02, the burden for this collection would cost approximately $8.51 per respondent for the respondent's time, or $212.75 total.

For the sablefish at-sea processing exemption, SFD would prepare a one-time application for the purpose of determining which vessels are qualified for an exemption from the ban on at-sea processing. SFD would mail applications to all sablefish endorsed permit owners. Applicants would be required to provide evidence to support the number of pounds of sablefish processed at-sea as indicated on the form. Best evidence supporting the landings of processed sablefish would be state fish tickets for sablefish accompanied by sales receipts for frozen sablefish. A list of vessels that qualified for the exemption from the ban on processing and freezing sablefish at sea would be published in the **Federal Register**. The exemption would not be transferrable and would expire upon transfer of the vessel to a new owner. The estimated burden for this collection is 2 respondents at 30 minutes each, or 1 hour total. Using an estimate from the U.S. Census Bureau's Nonemployer Statistics, 2001, as a proxy for annual income from sablefish fishing of $35,416 and breaking that into an hourly wage of $17.02, the burden for this collection would cost approximately $8.51 per respondent for the respondent's time, or $17.02 total.

Operations and maintenance costs (copying, fax, mailing, notary) to the respondents are estimated to be less than $250 for all respondents on an annual basis. No fees will be charged to the respondents for any of the above information collections. Send comments regarding these burden estimates or any other aspect of the data requirements, including suggestions for reducing the burden, to NMFS (see **ADDRESSES**) and to David Rostker, OMB, by e-mail at *David_Rostker@omb.gov*,or fax to 202–395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

Public comment is sought regarding: Whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including the practical utility of the information collection; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology.

List of Subjects in 50 CFR Part 660

Administrative practice and procedure, American Samoa, Fisheries, Fishing, Guam, Hawaiian Natives, Indians, Northern Mariana Islands, Reporting and recordkeeping requirements.

Dated: October 4, 2005.

William T. Hogarth,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 660 is proposed to be amended as follows:

PART 660—FISHERIES OFF WEST COAST STATES AND IN THE WESTERN PACIFIC

1. The authority citation for part 660 continues to read as follows:

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

2. In § 660.302, new definitions for ''Base permit,'' ''Change in partnership or corporation,'' ''Corporation,'' ''Partnership,'' ''Spouse,'' and ''Stacking'' are added and the definition of ''Permit holder'' is revised in alphabetical order to read as follows:

§ 660.302 Definitions.

* * * * *

Base permit, with respect to a limited entry permit stacking program, means a limited entry permit described at § 660.333(a) registered for use with a vessel that meets the permit length endorsement requirements appropriate to that vessel, as described at § 660.334(c).

* * * * *

Change in partnership or corporation, means the addition of a new shareholder or partner to the corporate or partnership membership. This definition of a ''change'' will apply to any person added to the corporate or partnership membership since November 1, 2000, including any family member of an existing shareholder or partner. A change in membership is not considered to have occurred if a member dies or becomes legally incapacitated and a trustee is appointed to act on his behalf, nor if the ownership of shares among existing members changes, nor if a member leaves the corporation or partnership and is not replaced. Changes in the ownership of publicly held stock will not be deemed changes in ownership of the corporation.

* * * * *

Corporation, is a legal, business entity, including incorporated (INC) and limited liability corporations (LLC).

* * * * *

Partnership, is two or more individuals, partnerships, or corporations, or combinations thereof, who have ownership interest in a permit, including married couples and legally recognized trusts and partnerships, such as limited partnerships (LP), general partnerships (GP), and limited liability partnerships (LLP).

* * * * *

Permit holder means a vessel owner as identified on the United States Coast Guard form 1270 or state motor vehicle licensing document.

* * * * *

Spouse, means a person who is legally married to another person as recognized by state law (i.e., one's wife or husband).

* * * * *

Stacking, is the practice of registering more than one limited entry permit for use with a single vessel (See § 660.335(c)).

* * * * *

3. In § 660.303, paragraph (c) is revised to read as follows:

§ 660.303 Reporting and Recordkeeping.

* * * * *

(c) Any person landing groundfish must retain on board the vessel from which groundfish is landed, and provide to an authorized officer upon request, copies of any and all reports of groundfish landings containing all data, and in the exact manner, required by the applicable state law throughout the cumulative limit period during which a landing occurred and for 15 days thereafter. For participants in the primary sablefish season (detailed at § 660.372(b)), the cumulative limit period to which this requirement applies is April 1 through October 31.

* * * * *

4. In § 660.306, paragraph (b)(3) is added and paragraphs (e) and (g)(2) are revised to read as follows:

§ 660.306 Prohibitions.

* * * * *

(b) * * *

(3) Fail to retain on board a vessel from which sablefish caught in the primary sablefish season is landed, and provide to an authorized officer upon request, copies of any and all reports of sablefish landings against the sablefish endorsed permit's tier limit, or receipts containing all data, and made in the exact manner required by the applicable state law throughout the primary sablefish season during which such landings occurred and for 15 days thereafter.

* * * * *

(e) *Fixed gear sablefish fisheries.* (1) Take, retain, possess or land sablefish under the cumulative limits provided for the primary limited entry, fixed gear sablefish season, described in § 660.372, from a vessel that is not registered to a limited entry permit with a sablefish endorsement.

(2) Take, retain, possess or land sablefish in the primary sablefish season described at § 660.372(b) unless the owner of the limited entry permit registered for use with that vessel and authorizing the vessel to participate in the primary sablefish season is on board that vessel. Exceptions to this prohibition are provided at § 660.372(b)(4)(i) and (ii).

(3) Process sablefish taken in the limited entry primary sablefish fishery defined at § 660.372 at sea, from a vessel that does not have a sablefish at-sea processing exemption, defined at § 660.334(e).

* * * * *

(g) * * *

(2) Make a false statement on an application for issuance, renewal, transfer, vessel registration, replacement of a limited entry permit, or a declaration of ownership interest in a limited entry permit.

* * * * *

5. In § 660.334, paragraph (e) is redesignated as paragraph (f), and is revised; paragraphs (c)(3), d)(4)(ii) and (iii) are revised, and paragraphs (d)(4)(iv) through (vi) and new paragraph (e) are added to read as follows:

§ 660.334 Limited entry permits endorsements.

* * * * *

(c) * * *

(3) *Size endorsement requirements for sablefish-endorsed permits.* Notwithstanding paragraphs (c)(1) and (2) of this section, when multiple permits are ''stacked'' on a vessel, as described in § 660.335(c), at least one of the permits must meet the size requirements of those sections. The permit that meets the size requirements of those sections is considered the vessel's ''base'' permit, as defined in § 660.302. If more than one permit registered for use with the vessel has an appropriate length endorsement for that vessel, NMFS SFD will designate a base permit by selecting the permit that has been registered to the vessel for the longest time. If the permit owner objects to NMFS's selection of the base permit, the permit owner may send a letter to NMFS SFD requesting the change and the reasons for the request. If the permit requested to be changed to the base

permit is appropriate for the length of the vessel as provided for in paragraph (c)(2)(i) of this section, NMFS SFD will reissue the permit with the new base permit. Any additional permits that are stacked for use with a vessel participating in the limited entry primary fixed gear sablefish fishery may be registered for use with a vessel even if the vessel is more than 5 feet (1.5 meters) longer or shorter than the size endorsed on the permit.

* * * * *

(d) * * *

(4) * * *

(ii) No individual person, partnership, or corporation in combination may have ownership interest in or hold more than 3 permits with sablefish endorsements either simultaneously or cumulatively over the primary season, except for an individual person, or partnerships or corporations that had ownership interest in more than 3 permits with sablefish endorsements as of November 1, 2000. The exemption from the maximum ownership level of 3 permits only applies to ownership of the particular permits that were owned on November 1, 2000. An individual person, or partnerships or corporations that had ownership interest in 3 or more permits with sablefish endorsements as of November 1, 2000, may not acquire additional permits beyond those particular permits owned on November 1, 2000. If, at some future time, an individual person, partnership, or corporation that owned more than 3 permits as of November 1, 2000, sells or otherwise permanently transfers (not holding through a lease arrangement) some of its originally owned permits, such that they then own fewer than 3 permits, they may then acquire additional permits, but may not have ownership interest in or hold more than 3 permits.

(iii) A partnership or corporation will lose the exemptions provided in paragraphs ((d)(4) (i) and (ii) of this section on the effective date of any change in the corporation or partnership from that which existed on November 1, 2000. A ''change'' in the partnership or corporation is defined at § 660.302. A change in the partnership or corporation must be reported to SFD within 15 days of the addition of a new shareholder or partner.

(iv) During 2006 when a permit's ownership interest is requested for the first time, NMFS anticipates sending a form to legally recognized corporations and partnerships (i.e., permit owners or holders that do not include only individual's names) that currently own or hold sablefish-endorsed permits that requests a listing of the names of all shareholders or partners as of November 1, 2000, and a listing of that same information as of the current date in 2006. Applicants will be provided at least 60 days to submit completed applications. If a corporation or partnership fails to return the completed form by the deadline date of July 1, 2006, NMFS will send a second written notice to delinquent entities requesting the completed form by a revised deadline date of August 1, 2006. If the permit owning or holding entity fails to return the completed form by that second date, August 1, 2006, NMFS will void their existing permit(s) and reissue the permit(s) with a vessel registration given as ''unidentified'' until such time that the completed form is provided to NMFS. For the 2007 fishing year and beyond, any partnership or corporation with any ownership interest in or that holds a limited entry permit with a sablefish endorsement shall document the extent of that ownership interest or the individuals that hold the permit with the SFD via the Identification of Ownership Interest Form sent to the permit owner through the annual permit renewal process defined at § 660.335(a) and whenever a change in permit owner, permit holder, and/or vessel registration occurs as defined at § 660.335(d) and (e). SFD will not renew a sablefish-endorsed limited entry permit through the annual renewal process described at § 660.335(a) or approve a change in permit owner, permit holder, and/or vessel registration unless the Identification of Ownership Interest Form has been completed. Further, if SFD discovers through review of the Identification of Ownership Interest Form that an individual person, partnership, or corporation owns or holds more than 3 permits and is not authorized to do so under paragraph (d)(4)(ii) of this section, the individual person, partnership or corporation will be notified and the permits owned or held by that individual person, partnership, or corporation will be void and reissued with the vessel status as ''unidentified'' until the permit owner owns and/or holds a quantity of permits appropriate to the restrictions and requirements described in paragraph (d)(4)(ii) of this section. If SFD discovers through review of the Identification of Ownership Interest Form that a partnership or corporation has had a change in membership since November 1, 2000, as described in paragraph (d)(4)(iii) of this section, the partnership or corporation will be notified, SFD will void any existing permits, and reissue any permits owned and/or held by that partnership or corporation in ''unidentified'' status with respect to vessel registration until the partnership or corporation is able to transfer those permits to persons authorized under this section to own sablefish-endorsed limited entry permits.

(v) For permit owners with one individual listed and who were married as of November 1, 2000, and who wish to add their spouse as co-owner on their permit(s), NMFS will accept corrections to NMFS' permit ownership records. Permit owners may add a not-listed spouse as a co-owner without losing their exemption from the owner-on-board requirements (i.e., grandfathered status). Their new grandfathered status will be as a partnership, as defined at § 660.302 which includes married couples. Individual permit owners will lose their individual grandfathered status when they add their not-listed spouse unless they also owned at least one permit as an individual and did not retroactively add a spouse as co-owner on that permit. In cases where married couples are listed as co-owners of the same permit, both individuals will be counted as owning one permit each and will have grandfathered status as a partnership. An individual within the married couple will not, however, be able to retain their exemption from owner-on-board requirements if they choose to buy another permit as an individual and did not own a permit as an individual as of the control date in NMFS ''corrected'' records (i.e., NMFS records after allowing a not-listed spouse to be added as co-owner). Members of partnerships and corporations will not be allowed to add their spouses to the corporate ownership listing as of November 1, 2000, for purposes of exempting them from the owner-on-board requirements. NMFS will send a form to permit owners with one individual listed on the permit as of November 1, 2000, to allow married individuals who wish to declare their spouses as having permit ownership interest as of November 1, 2000. Applicants will be required to submit a copy of their marriage certificate as evidence of marriage. Applicants will be provided at least a 60 day period to submit an application to add a spouse as co-owner. Failure to return the completed form to NMFS SFD by July 1, 2006, will result in the individual listed on the permit in SFD records as of November 1, 2000, remaining on the permit. SFD will not accept any declarations to add a spouse as co-owner for couples married as of

November 1, 2000, postmarked after the July 1, 2006, deadline.

(vi) For an individual person, partnership, or corporation that qualified for the owner-on-board exemption, but later divested their interest in a permit or permits, they may retain rights to an owner-on-board exemption as long as that individual person, partnership, or corporation obtains another permit within one year from the date the final rule for these owner-on-board requirements is effective. An individual person, partnership or corporation could only obtain a permit if it has not added or changed individuals since November 1, 2000, excluding individuals that have left the partnership or corporation or that have died. NMFS would send out a letter to all individuals, partnerships or corporations who owned a permit as of November 1, 2000, and who no longer own a permit to notify them that they would qualify as a grandfathered permit owner if they choose to buy a permit within one year from the date the final rule is effective.

(e) *Sablefish at-sea processing prohibition and exemption*—

(1) *General.* Vessels are prohibited from processing sablefish at sea that were caught in the primary sablefish fishery without sablefish at-sea processing exemptions at § 660.306(e)(3). A permit and/or vessel owner may get an exemption to this prohibition if his/her vessel meets the exemption qualifying criteria provided in paragraph (e)(2) of this section. The sablefish at-sea processing exemption is issued to a particular vessel and the permit and/or vessel owner who requested the exemption. The exemption is not part of the limited entry permit. The exemption is not transferable to any other vessel, vessel owner, or permit owner for any reason. The sablefish at-sea processing exemption will expire upon transfer of the vessel to a new owner or if the vessel is totally lost, as defined at § 660.302.

(2) *Qualifying criteria.* A sablefish at-sea processing exemption will be issued to any vessel registered for use with a sablefish-endorsed limited entry permit that meets the sablefish at-sea processing exemption qualifying criteria and for which the owner submits a timely application. The qualifying criteria for a sablefish at-sea processing exemption are: at least 2,000 lb (907.2 mt), round weight, of frozen sablefish landed by the applicant vessel during any one calendar year in either 1998 or 1999, or between January 1 and November 1, 2000. The best evidence of a vessel having met these qualifying criteria will be receipts from frozen product buyers or exporters, accompanied by the fish tickets or landings receipts appropriate to the frozen product. Documentation showing investment in freezer equipment without also showing evidence of how poundage qualifications have been met is not sufficient evidence to qualify a vessel for a sablefish at-sea processing exemption. All landings of sablefish must have occurred during the regular and/or mop-up seasons and must have been harvested in waters managed under this part. Sablefish taken in tribal set aside fisheries or taken outside of the fishery management area, as defined at § 660.302, does not meet the qualifying criteria.

(3) *Issuance process for sablefish at-sea processing exemptions.*

(i) The SFD will mail sablefish at-sea processing exemption applications to all limited entry permit owners with sablefish endorsements and/or fixed gear vessel owners and will make those applications available online at *http://www.nwr.noaa.gov/1sustfsh/permits/prmits01.htm*. Permit and/or vessel owners will have at least 60 days to submit applications. A permit and/or vessel owner who believes that their vessel may qualify for the sablefish at-sea processing exemption will have until July 1, 2006, to submit evidence showing how their vessel has met the qualifying criteria described in this section at paragraph (e)(2) of this section. Paragraph (e)(4) of this section sets out the relevant evidentiary standards and burden of proof. SFD will not accept applications for the sablefish at-sea processing exemption postmarked after July 1, 2006.

(ii) Within 30 days of the deadline or after receipt of a complete application, the SFD will notify applicants by letter of determination whether their vessel qualifies for the sablefish at-sea processing exemption. A person who has been notified by the SFD that their vessel qualifies for a sablefish at-sea processing exemption will be issued an exemption letter by SFD that must be onboard the vessel at all times. After the deadline for the receipt of applications has expired and all applications processed, SFD will publish a list of vessels that qualified for the sablefish at-sea processing exemption in the **Federal Register**.

(iii) If a permit and/or vessel owner chooses to file an appeal of the determination under paragraph (e)(3)(ii) of this section, the appeal must be filed with the Regional Administrator within 30 days of the issuance of the letter of determination. The appeal must be in writing and must allege facts or circumstances, and include credible evidence demonstrating why the vessel qualifies for a sablefish at-sea processing exemption. The appeal of a denial of an application for a sablefish at-sea processing exemption will not be referred to the Council for a recommendation, nor will any appeals be accepted by SFD after September 1, 2006.

(iv) Absent good cause for further delay, the Regional Administrator will issue a written decision on the appeal within 30 days of receipt of the appeal. The Regional Administrator's decision is the final administrative decision of the Department of Commerce as of the date of the decision.

(4) *Evidence and burden of proof.* A permit and/or vessel owner applying for issuance of a sablefish at-sea processing exemption has the burden to submit evidence to prove that qualification requirements are met. The following evidentiary standards apply:

(i) A certified copy of the current vessel document (USCG or state) is the best evidence of vessel ownership and LOA.

(ii) A certified copy of a state fish receiving ticket is the best evidence of a landing, and of the type of gear used.

(iii) A copy of a written receipt indicating the name of their buyer, the date, and a description of the product form and the amount of sablefish landed is the best evidence of the commercial transfer of frozen sablefish product.

(iv) Such other relevant, credible evidence as the applicant may submit, or the SFD or the Regional Administrator request or acquire, may also be considered.

(f) *Endorsement and exemption restrictions.* ''A'' endorsements, gear endorsements, sablefish endorsements and sablefish tier assignments may not be transferred separately from the limited entry permit. Sablefish at-sea processing exemptions are associated with the vessel and not with the limited entry permit and may not be transferred at all.

* * * * *

6. In § 660.335, paragraphs (g)(2) through (g)(6) are redesignated as paragraphs (g)(3) through (g)(7) and a new paragraph (g)(2) is added; paragraphs, (c), (d)(1), (e)(1) and (e)(3) are revised; and paragraphs (a)(4) and (e)(4) are added to read as follows:

§ 660.335 Limited entry permits renewal, combination, stacking, change of permit owner or holder, and transfer.

(a) * * *

(4) Limited entry permits with sablefish endorsements, as described at

§ 660.334(d), will not be renewed until SFD has received complete documentation of permit ownership as required under § 660.334(d)(4)(iv).

* * * * *

(c) *Stacking limited entry permits.* ''Stacking'' limited entry permits, as defined at § 660.302, refers to the practice of registering more than one permit for use with a single vessel. Only limited entry permits with sablefish endorsements may be stacked. Up to 3 limited entry permits with sablefish endorsements may be registered for use with a single vessel during the primary sablefish season described at § 660.372. Privileges, responsibilities, and restrictions associated with stacking permits to participate in the primary sablefish fishery are described at § 660.372 and at § 660.334(d).

(d) * * *

(1) *General.* The permit owner may convey the limited entry permit to a different person. The new permit owner will not be authorized to use the permit until the change in permit ownership has been registered with and approved by the SFD. The SFD will not approve a change in permit ownership for limited entry permits with sablefish endorsements that does not meet the ownership requirements for those permits described at § 660.334 (d)(4). Change in permit owner and/or permit holder applications must be submitted to SFD with the appropriate documentation described at § 660.335(g).

* * * * *

(3) *Sablefish-endorsed permits.* If a permit owner submits an application to transfer a sablefish-endorsed limited entry permit to a new permit owner or holder (transferee) during the primary sablefish season described at § 660.372 (generally April 1 through October 31), the initial permit owner (transferor) must certify on the application form the cumulative quantity of primary season sablefish landed against that permit as of the application signature date for the then current primary season. The transferee must sign the application form acknowledging the amount of landings to date given by the transferor. This certified amount should match the total amount of primary season sablefish landings reported on state fish tickets. As required at § 660.303(c), any person landing sablefish must retain on board the vessel from which sablefish is landed, and provide to an authorized officer upon request, copies of any and all reports of sablefish landings from the primary season containing all data, and in the exact manner, required by the applicable state law throughout the primary sablefish season during which a landing occurred and for 15 days thereafter.

* * * * *

(e) * * *

(1) *General.* A permit may not be used with any vessel other than the vessel registered to that permit. For purposes of this section, a permit transfer occurs when, through SFD, a permit owner registers a limited entry permit for use with a new vessel. Permit transfer applications must be submitted to SFD with the appropriate documentation described at § 660.335(g). Upon receipt of a complete application, and following review and approval of the application, the SFD will reissue the permit registered to the new vessel. Applications to transfer limited entry permits with sablefish endorsements, as described at § 660.334(d), will not be approved until SFD has received complete documentation of permit ownership as required under § 660.334(d)(4)(iv).

* * * * *

(3) *Effective date.* Changes in vessel registration on permits will take effect no sooner than the first day of the next major limited entry cumulative limit period following the date that SFD receives the signed permit transfer form and the original limited entry permit. No transfer is effective until the limited entry permit has been reissued as registered with the new vessel.

(4) *Sablefish-endorsed permits.* If a permit owner submits an application to register a sablefish-endorsed limited entry permit to a new vessel during the primary sablefish season described at § 660.372 (generally April 1 through October 31), the initial permit owner (transferor) must certify on the application form the cumulative quantity of primary season sablefish landed against that permit as of the application signature date for the then current primary season. The new permit owner or holder (transferee) associated with the new vessel must sign the application form acknowledging the amount of landings to date given by the transferor. This certified amount should match the total amount of primary season sablefish landings reported on state fish tickets. As required at § 660.303(c), any person landing sablefish must retain on board the vessel from which sablefish is landed, and provide to an authorized officer upon request, copies of any and all reports of sablefish landings from the primary season containing all data, and in the exact manner, required by the applicable state law throughout the primary sablefish season during which a landing occurred and for 15 days thereafter.

* * * * *

(g) *Application and supplemental documentation.* * * *

(2) For a request to change a vessel registration and/or change in permit ownership or permit holder for sablefish-endorsed permits with a tier assignment for which a corporation or partnership is listed as permit owner and/or holder, an Identification of Ownership Interest Form must be completed and included with the application form.

* * * * *

7. In § 660.372, paragraph (b)(1) is revised and paragraph (b)(4) is added to read as follows:

§ 660.372 Fixed gear sablefish fishery management.

* * * * *

(b) * * *

(1) *Season dates.* North of 36E N. lat., the primary sablefish season for the limited entry, fixed gear, sablefish-endorsed vessels begins at 12 noon l.t. on April 1 and ends at 12 noon l.t. on October 31, unless otherwise announced by the Regional Administrator through the routine management measures process described at § 660.370(c).

* * * * *

(4) *Owner-on-Board Requirement.* Any person who owns or has ownership interest in a limited entry permit with a sablefish endorsement, as described at § 660.334(d), must be aboard the vessel registered for use with that permit at any time that the vessel has sablefish on board the vessel that count toward that permit's cumulative sablefish landing limit. This person must carry government issued photo identification while aboard the vessel. A permit owner is not obligated to be on board the vessel registered for use with the sablefish-endorsed limited entry permit during the primary sablefish season if:

(i) The person, partnership or corporation had ownership interest in a limited entry permit with a sablefish endorsement prior to November 1, 2000. A person who has ownership interest in a partnership or corporation that owned a sablefish-endorsed permit as of November 1, 2000, but who did not individually own a sablefish-endorsed limited entry permit as of November 1, 2000, is not exempt from the owner-on-board requirement when he/she leaves the partnership or corporation and purchases another permit individually. A person, partnership, or corporation that is exempt from the owner-on-board requirement may sell all of their permits, buy another sablefish-endorsed

permit within up to a year from the date the last permit was approved for transfer, and retain their exemption from the owner-on-board requirements. Additionally, a person, partnership, or corporation that qualified for the owner-on-board exemption, but later divested their interest in a permit or permits, may retain rights to an owner-on-board exemption as long as that person, partnership, or corporation purchases another permit within one year of the date the final rule for these owner-on-board requirements is effective. A person, partnership or corporation could only purchase a permit if it has not added or changed individuals since November 1, 2000, excluding individuals that have left the partnership or corporation, or that have died.

(ii) A person who owns or who has ownership interest in a sablefish-endorsed limited entry permit, in cases of death, illness, or injury of the permit owner, that prevents the permit owner from being onboard a fishing vessel. The person requesting the exemption must send a letter to NMFS requesting an exemption from the owner-on-board requirements, with appropriate evidence as described at § 660.372(b)(4)(ii)(A) or (B). All emergency exemptions for death, injury, or illness will be evaluated by NMFS and a decision will be made in writing to the permit owner within 60 days of receipt of the original exemption request.

(A) Evidence of death of the permit owner shall be provided to NMFS in the form of a copy of a death certificate. In the interim before the estate is settled, if the deceased permit owner was subject to the owner-on-board requirements, the estate of the deceased permit owner may send a letter to NMFS with a copy of the death certificate, requesting an exemption from the owner-on-board requirements. An exemption due to death of the permit owner will be effective only until such time that the estate of the deceased permit owner has conveyed the deceased permit owner's permit to a beneficiary or up to three years after the date of death as proven by a death certificate, whichever is earlier. An exemption from the owner-on-board requirements will be conveyed in a letter from NMFS to the estate of the permit owner and is required to be on the vessel during fishing operations.

(B) Evidence of illness or injury that prevents the permit owner from participating in the fishery shall be provided to NMFS in the form of a letter from a certified medical practitioner. This letter must detail the relevant medical conditions of the permit owner and how those conditions prevent the permit owner from being onboard a fishing vessel during the primary season. An exemption due to injury or illness will be effective only for the calendar year of the request for exemption, and will not be granted for more than three consecutive or total years. NMFS will consider any exemption granted for less than 12 months in a year to count as one year against the 3–year cap. In order to extend an emergency medical exemption for a succeeding year, the permit owner must submit a new request and provide documentation from a certified medical practitioner detailing why the permit owner is still unable to be onboard a fishing vessel. An emergency exemption will be conveyed in a letter from NMFS to the permit owner and is required to be on the vessel during fishing operations.

* * * * *

[FR Doc. 05–20344 Filed 10–11–05; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register

Vol. 70, No. 196

Wednesday, October 12, 2005

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Resource Advisory Committee Meeting

AGENCY: Modoc Resource Advisory Committee, Alturas, California, USDA Forest Service.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committees Act (Pub. L. 92–463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106–393) the Modoc National Forest's Modoc Resource Advisory Committee will meet Monday, November 7, 2005, January 9, 2006 and February 6, 2006 in Alturas, California for business meetings. The meetings are open to the public.

SUPPLEMENTARY INFORMATION: The business meeting November 7 begins at 6 p.m., at the Modoc National Forest Office, Conference Room, 800 West 12th St., Alturas. Agenda topics will include existing and future projects that meet the intent of Pub. Law 106–393. Time will also be set aside for public comments at the beginning of the meeting.

The business meeting January 9 begins at 6 p.m.; at the Modoc National Forest Office, Conference Room, 800 West 12th St., Alturas. Agenda topics will include existing and future projects that meet the intent of Public Law 106–393. Time will also be set aside for public comments at the beginning of the meeting.

The business meeting February 6 begins at 6 p.m.; at the Modoc National Forest Office, Conference Room, 800 West 12th St., Alturas. Agenda topics will include existing and future projects that meet the intent of Public Law 106–393. Time will also be set aside for public comments at the beginning of the meeting.

FOR FURTHER INFORMATION CONTACT: Stan Sylva, Forest Supervisor and Designated Federal Officer, at (530) 233–8700; or Public Affairs Officer Louis J. Haynes at (530) 233–8846.

Stanley G. Sylva,

Forest Supervisor.

[FR Doc. 05–20451 Filed 10–11–05; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 03–101–5]

Environmental Impact Statement; Petition for Deregulation of Genetically Engineered Glyphosate-Tolerant Creeping Bentgrass; Request for Additional Information

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service is seeking information to develop an environmental impact statement as part of its consideration of a petition received from Monsanto Company and The Scotts Company. The petition requests a determination of nonregulated status for engineered creeping bentgrass (*Agrostis stolonifera*) that is glyphosate tolerant. We are preparing this environmental impact statement in accordance with 7 CFR 372.5 and 40 CFR 1501.3 and 1501.4. We are seeking specific information about glyphosate use to control grasses. We are primarily interested in the details of those programs that focus on weed management in nonagricultural lands.

DATES: We will consider all comments that we receive on or before November 14, 2005.

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

- Federal eRulemaking Portal: Go to *http://www.regulations.gov* and, in the ''Search for Open Regulations'' box, select ''Animal and Plant Health Inspection Service'' from the agency drop-down menu, then click on ''Submit.'' In the Docket ID column, select APHIS–2005–0029 to submit or view public comments on APHIS Docket ID 03–101–5.
- Postal Mail/Commercial Delivery: Please send four copies of your comment (an original and three copies) to Docket No. 03–101–5, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road, Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 03–101–5.

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: Comments submitted in response to the previous notices cited in this document may be viewed on the Internet on the following Web sites; there is no need to resubmit those previously submitted comments in response to this notice. Comments on Docket No. 03–101–1 and Docket No. 03–101–2 are available at *https://web01.aphis.usda.gov/Bentgrass.nsf.* Comments on Docket No. 03–101–4 are available on the Regulations.gov Web site (see ''Federal eRulemaking Portal'' above) or at *http://docket.epa.gov/edkfed/do/EDKStaffCollectionDetailView?objectId=0b0007d4806fe549.*

FOR FURTHER INFORMATION CONTACT: Dr. Susan M. Koehler, BRS, APHIS, 4700 River Road, Unit 147, Riverdale, MD 20737–1238; (301) 734–4886.

SUPPLEMENTARY INFORMATION: The Animal and Plant Health Inspection Service (APHIS) is preparing an environmental impact statement (EIS) with respect to a possible decision to remove engineered creeping bentgrass with glyphosate resistance (Scotts/Monsanto event ASR368) from regulation under 7 CFR part 340. We are seeking specific information about glyphosate use to control grasses in vegetation management programs that focus on publicly or privately owned, non-agricultural lands. These locations may include areas like parks or recreation areas, highway roadsides, pipeline pumping stations, or electrical substations. The types of habitats in which we are most interested are

grasslands, riparian areas, or wetlands, because creeping bentgrass is best adapted for these areas. However, information on any habitats where *Agrostis*, *Polypogon*, or *Poa* sp. are present would also be useful.

The type of information that APHIS seeks is specific and detailed. We invite information about both your vegetation management program and how that program would change if glyphosate resistant grasses were established in the managed habitat. The specific types of information that we seek are listed below:

(I) An overall description of the management program.

(A) Whether the goals and purpose of the management program include:

1. The control of invasive or noxious weeds.

2. The recovery or management of habitat for federally listed threatened or endangered species or other wildlife or species of concern.

3. The restoration of ecosystem function.

4. The maintenance of public use areas or rights-of-way.

(B) If creeping bentgrass or its sexually compatible relatives are present in the managed area:

1. Herbicide combinations or formulations used that include glyphosate.

2. The total land area that is treated with glyphosate or a formulation containing glyphosate.

3. The method and frequency of application of these herbicide formulations in the management plan.

(II) How management programs would change if glyphosate resistant species were present.

(A) Include potential changes in management strategies.

(B) Changes in cost.

(C) Changes in focus of program.

(D) Legal restrictions on alternative vegetation management strategies.

Because the data and information that we seek is not generally available, we are requesting this information in response to this notice. Descriptive and application-specific information is most helpful. Floristic assessments showing the prevalence of the cited grasses or sexually compatible relatives are also of interest. Please let us know if we may contact you for further information about your management activities. Your contributions will be used within the EIS to evaluate possible environmental impacts from engineered creeping bentgrass.

Background

The Host Organism

Agrostis stolonifera (creeping bentgrass or CBG) is a cool-season, wind-pollinated, perennial species with about 13 relatives with which it can cross in the United States. CBG and about 33 other species of the genus occur naturally across the continental United States. The species occurs in wet meadows, seepage areas, ditches, on stream banks and along the margins of ponds and lakes, in moist disturbed areas, various grasslands (including upland prairies), mesic to rather dry upland forests, and on roadsides and railroad embankments. Bentgrasses can spread via dispersal of seed by wind, water, and animals, and vegetatively via above-ground runners (stolons). Common bentgrasses and rabbitsfoot grasses (e.g., *Polypogon monspeliensis*) may become glyphosate resistant if pollen transmits the genes to these other species, conferring resistance to glyphosate. Other grasses in other genera (such as *Poa*, bluegrasses) could become tolerant or resistant to glyphosate through selective processes following repeated use of the herbicide on golf courses.

The Regulatory History

On April 14, 2003, APHIS received petition 03–104–01p from Monsanto Company (St. Louis, MO) and The Scotts Company (Gervais, OR) (Monsanto/Scotts), requesting deregulation of a creeping bentgrass (*Agrostis stolonifera* L., synonym *A. palustris* Huds.) that has been genetically engineered for tolerance to the herbicide glyphosate. The Monsanto/Scotts petition states that the subject creeping bentgrass, designated as event ASR368, should not be regulated by APHIS because it does not present a plant pest risk. (The petition is available on the Internet at *http://www.aphis.usda.gov/brs/aphisdocs/03_10401p.pdf*.)

In a notice published in the **Federal Register** on January 5, 2004 (69 FR 315–317, Docket No. 03–101–1), APHIS announced the receipt of the Monsanto/Scotts petition and solicited comments on whether the subject creeping bentgrass would present a plant pest risk. We solicited comments concerning our notice for 60 days, ending March 5, 2004.

On September 24, 2004, APHIS published in the **Federal Register** (69 FR 57257–57260, Docket No. 03–101–2) a notice advising the public of our decision to prepare an EIS as part of our consideration of petition 03–104–01p. Our decision was based on several factors: (1) Data associated with the petition, (2) a report prepared by the Weed Science Society of America on the weed management implications associated with the potential deregulation and commercialization of glyphosate tolerant and glufosinate tolerant creeping bentgrass varieties (*http://www.wssa.net/society/bentgrass.pdf*), (3) our preliminary risk assessment (*http://www.aphis.usda.gov/brs/aphisdocs/03_10401p_ra.pdf*), and (4) public comments received in response to the January 5, 2004, **Federal Register** notice.

Pursuant to 40 CFR 1501.4(d), APHIS initiated the scoping process as mandated by the National Environmental Policy Act, beginning with the previously cited January 2004 **Federal Register** notice. The comment period for the September 2004 notice of intent was scheduled to close on October 24, 2004. However, in a document published in the **Federal Register** on November 18, 2004 (Docket No. 03–101–3, 69 FR 67532–67533), we reopened that comment period until December 2, 2004, to give interested parties additional time to respond.

On April 11, 2005, APHIS published a notice (70 FR 18352–18353, Docket No. 03–101–4) announcing public scoping meetings. The meetings were held in Chevy Chase, MD, on May 3, 2005, and in Corvallis, OR, on May 18, 2005.

All comments that we received in response to the January 2004, September 2004, November 2004, and April 2005 notices will be included as part of the scoping process and need not be resubmitted. You may read the previously submitted comments on the Internet or in our reading room (see **ADDRESSES** above). When the draft EIS is completed, we will publish a notice in the **Federal Register** announcing its availability and inviting the public to comment on it. Following our consideration of the comments received, APHIS will prepare a final EIS; its availability will also be announced in the **Federal Register** along with a public comment period, after which the Record of Decision will be issued.

Done in Washington, DC, this 5th day of October 2005.

Elizabeth E. Gaston,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E5–5579 Filed 10–11–05; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Southwest Idaho Resource Advisory Committee Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committee Act (Public Law 92–463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Public Law 106–393), the Boise and Payette National Forests' Southwest Idaho Resource Advisory Committee will conduct a business meeting, which is open to the public.

DATES: Wednesday, October 19, 2005, beginning at 10:30 a.m.

ADDRESSES: Idaho Counties Risk Management Program Building, 3100 South Vista Avenue, Boise, Idaho.

FOR FURTHER INFORMATION CONTACT: Doug Gochnour, Designated Federal Officer, at (208) 392–6681 or e-mail *dgochnour@fs.fed.us.*

SUPPLEMENTARY INFORMATION: Agenda topics will include review and approval of project proposals, and is an open public forum.

Dated: October 6, 2005.

Suzanne C. Rainville,

Deputy Forest Supervisor, Boise National Forest.

[FR Doc. 05–20487 Filed 10–11–05; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

Notice To Reinstate and Revise a Previously Approved Information Collection

AGENCY: Natural Resources Conservation Service (NRCS), USDA.

ACTION: Notice to reinstate and revise a previously approved information collection for review and comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of the Natural Resources Conservation Service (NRCS) to reinstate and revise a previously approved information collection. The collected information will help NRCS to match the skills of individuals who are applying for volunteer work that will further the Agency's mission. Information will be collected from potential volunteers who are 14 years of age or older.

DATES: Comments on this notice must be received within 60 days after publication in the **Federal Register** to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: Michele Eginoire, National Earth Team Office, Natural Resources Conservation Service, Suite C, 5140 Park Avenue, Des Moines, Iowa 50321; telephone: (515) 289–0325, extension 102; fax: (515) 289–4561; e-mail: *Michele.Eginoire@ia.usda.gov.*

SUPPLEMENTARY INFORMATION: Collection of this information is necessary to document the service of volunteers as required by Federal Personnel Manual Supplement 296–33, Subchapter 3. Agencies are authorized to recruit, train, and accept, with regard to civil service classification laws, rules or regulations, the services of individuals to serve without compensation. Volunteers may assist in any Agency program/project and may perform any activities which Agency employees are allowed to conduct. Volunteers must be at least 14 years of age. Persons interested in volunteering will have to write, call, e-mail, visit an NRCS office, or visit the E-Gov Web site to complete and submit the forms.

Description of Information Collection: NRCS–PER–001, Volunteer Application, and the NRCS–PER–003, Agreement for Sponsored Voluntary Services, are the volunteer application forms. After one of these forms is signed by the volunteer group leader and the NRCS representative, the individual or group is enrolled in the NRCS volunteer program. The forms provide contact information for the volunteer, emergency contact information, and a job description. This form is placed in a volunteer ''case file'' and will be destroyed 3 years after the volunteer has completed service. In the event that the volunteer is injured, the ''case file'' will be transferred to an Official Personnel Folder (OPF). NRCS–PER–002, Volunteer Interest and Placement Summary, is an optional form that assists the volunteer supervisor in placing the volunteer in a position that will benefit the Agency and the volunteer. The aforementioned form is placed in a volunteer ''case file'' and will be destroyed 3 years after the volunteer has completed service. In the event that the volunteer is injured, the ''case file'' will be transferred to an OPF. NRCS–PER–004, Time and Attendance, is an optional form that assists the volunteer supervisor in documenting hours worked by the volunteer, and may be used to substantiate a Workers' Compensation Claim. This form is placed in a volunteer ''case file'' and will be destroyed 3 years after the volunteer has completed service. In the event that the volunteer is injured, the ''case file'' will be transferred to an OPF.

Signed in Washington, DC on September 29, 2005.

Bruce I. Knight,

Chief.

[FR Doc. 05–20393 Filed 10–11–05; 8:45 am]

BILLING CODE 3410–16–P

ANTITRUST MODERNIZATION COMMISSION

Notice of Public Hearings

AGENCY: Antitrust Modernization Commission.

ACTION: Notice of public hearings.

SUMMARY: The Antitrust Modernization Commission will hold public hearings on October 26 and November 3, 2005. The topics of the hearings are State Antitrust Enforcement, Criminal Remedies, and Dual Federal Antitrust Enforcement.

DATES: October 26, 2005, 1:30 p.m. to 4 p.m. November 3, 2005, 9:30 to 11:30 a.m. and 1:15 to 4:30 p.m. Interested members of the public may attend. Registration is not required.

ADDRESSES: October 26: Federal Trade Commission, Headquarters Room 432, 600 Pennsylvania Avenue, NW., Washington, DC, November 3: Federal Trade Commission, Conference Center, 601 New Jersey Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Andrew J. Heimert, Executive Director & General Counsel, Antitrust Modernization Commission: telephone: (202) 233–0701; e-mail: *info@amc.gov.* Mr. Heimert is also the Designated Federal Officer (DFO) for the Antitrust Modernization Commission.

SUPPLEMENTARY INFORMATION: The purpose of these hearings is for the Antitrust Modernization Commission to take testimony and receive evidence regarding State Antitrust Enforcement, Criminal Remedies, and Dual Federal Antitrust Enforcement. The hearing on State Antitrust Enforcement will consist of one panel. It will be held on October 26, 2005, and will begin at 1:30 p.m. and conclude at 4 p.m. The hearing on Criminal Remedies will consist of one panel. It will be held on November 3, 2005, and will begin at 9:30 a.m. and conclude at 11:30 a.m. The hearing on Dual Federal Antitrust Enforcement will consist of two panels, taking place on November 3, 2005. The first panel will begin at 1:15 p.m. and run until 2:45 p.m. The second panel will run from 3

p.m. to 4:30 p.m. Materials relating to the hearings, including lists of witnesses and the prepared statements of the witnesses, will be made available on the Commission's Web site (*www.amc.gov*) in advance of the hearings.

Interested members of the public may submit written testimony on the subject of the hearing in the form of comments, pursuant to the Commission's request for comments. See 70 Fed. Reg. 28,902 (May 19, 2005). Members of the public will not be provided with an opportunity to make oral remarks at the hearings.

The AMC is holding this hearing pursuant to its authorizing statute. Antitrust Modernization Commission Act of 2002, Pub. L. No. 107–273, 11057(a), 116 Stat. 1758, 1858.

Dated: October 4, 2005.

By direction of the Antitrust Modernization Commission.

Andrew J. Heimert,

Executive Director & General Counsel, Antitrust Modernization Commission.

[FR Doc. 05–20368 Filed 10–11–05; 8:45 am]

BILLING CODE 6820–YH–P

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

(Docket 48–2005)

Foreign–Trade Zone 57 Charlotte, NC, Application for Subzone(Thermal Media and Digital Printer Cartridges and Components), Concord, North Carolina

An application has been submitted to the Foreign–Trade Zones Board (the Board) by the North Carolina Department of Commerce, grantee of FTZ 57, requesting special–purpose subzone status for the thermal media and digital printer cartridge and components manufacturing facility of DNP IMS America Corporation (DNP), a subsidiary of Dai Nippon Printing Company, Ltd., in Concord, North Carolina. The application was submitted pursuant to the provisions of the Foreign–Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on September 30, 2005.

The DNP facility (1 building, 103,550 sq. ft. on 14.7 acres) is located at 4524 Enterprise Drive, NW, in the International Business Park, Concord (Cabarrus County), North Carolina. The DNP plant (115 employees) would be used initially under FTZ procedures for slitting of master rolls of thermal transfer ribbon (TTR) and sublimation transfer ribbon (STR) and the assembly of digital printer cartridges and components, and warehousing and distribution of these products.

For DNP's current manufacturing, foreign–sourced materials account for some 70 to 96 percent of finished product value. The application lists STR and TTR master rolls, finished STR ribbon, photographic paper and STR printer components (HTSUS categories 3702.39, 3702.42, 3702.44, 3703.20.60 and 8473.30 - duty–free to 3.7%) as the primary material inputs which may be sourced from abroad.

Zone procedures would exempt DNP from Customs duty payments on foreign materials used in export production. Some eight percent of the plant's shipments are currently exported. On domestic sales, the company would be able to choose the lower duty rate that applies to the finished printer cartridges (HTSUS 8473.30, duty–free), rather than the duty rates that would otherwise apply to its foreign–sourced inputs noted above. On domestic sales of its other foreign–origin items, DNP would be able to defer duty until the products are shipped from its facility. The company would also be able to transfer STR products to other FTZs under zone procedures. Additionally, DNP would be able to avoid duty on foreign inputs which become scrap/waste, estimated at 9% of FTZ–related savings. It may also realize logistical/procedural and other benefits from subzone status. The application indicates that the savings from zone procedures will help improve the plant's international competitiveness.

In accordance with the Board's regulations, a member of the FTZ Staff has been designated examiner to investigate the application and report to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at one of the following addresses:

1. Submissions Via Express/Package Delivery Services: Foreign–Trade-Zones Board, U.S. Department of Commerce, Franklin Court Building - Suite 4100W, 1099 14th St. NW, Washington, D.C. 20005; or

2. Submissions Via the U.S. Postal Service: Foreign–Trade-Zones Board, U.S. Department of Commerce, FCB - Suite 4100W, 1401 Constitution Ave. NW, Washington, D.C. 20230.

The closing period for their receipt is December 12, 2005. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (December 27, 2005).

A copy of the application and accompanying exhibits will be available for public inspection at the Office of the Foreign–Trade Zones Board's Executive Secretary at address Number 1 listed above, and at the U.S. Department of Commerce Export Assistance Center, 521 East Morehead Street, Suite 435, Charlotte, NC 28202.

Dated: October 4, 2005.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 05–20449 Filed 10–11–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–570–867

Automotive Replacement Glass Windshields From The People's Republic of China: Notice of Rescission of the Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On May 27, 2004, in response to timely requests from an exporter of, and a U.S. importer of, merchandise subject to the order on certain automotive replacement glass (''ARG'') windshields from the People's Republic of China (''PRC''), in accordance with section 751(a) of the Tariff Act of 1930, as amended (''the Act''), the Department of Commerce (''Department'') published in the **Federal Register** a notice of initiation of this antidumping duty administrative review of sales by certain exporters/producers. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 70 FR 30694 (May 27, 2005) (''*Initiation Notice*''). Because Shenzhen CSG Automotive Glass Co., Ltd. (''CSG'') and Pilkington North America, Inc (''PNA'') have withdrawn their requests for administrative review and no other parties requested an administrative review of these entities, the Department is rescinding this review of sales by CSG and PNA in accordance with 19 CFR 351.213(d)(1).

EFFECTIVE DATE: October 12, 2005.

FOR FURTHER INFORMATION CONTACT: Jon Freed or Will Dickerson, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–3818 and (202) 482–1778, respectively.

SUPPLEMENTARY INFORMATION:

Background

On April 4, 2002, the Department published in the **Federal Register** the antidumping duty order on ARG windshields from the PRC. *See Antidumping Duty Order: Automotive Replacement Glass Windshields from the People's Republic of China*, 67 FR 16087 (April 4, 2002). On April 1, 2005, the Department published a notice of opportunity to request an administrative review of the antidumping duty order on ARG windshields from the PRC for the period April 1, 2004, through March 31, 2005. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation: Opportunity to Request Administrative Review*, 70 FR 16799 (April 1, 2005). On April 18, 2005, PNA, an importer of subject merchandise, requested an administrative review on behalf of Changchun Pilkington Safety Glass Company Limited and Wuhan Yaohua Pilkington Safety Glass Company Limited (collectively, ''the Pilkington JVs''), producers and exporters from which it imported the subject merchandise during the period of review (''POR''). On April 22, 2005, CSG, a producer and exporter of subject merchandise, requested an administrative review of its sales to the United States during the POR. On May 27, 2005, the Department published in the **Federal Register** a notice of the initiation of the antidumping duty administrative review of ARG windshields from the PRC for the POR. *See Initiation Notice*. On June 13, 2005, the Department issued antidumping duty questionnaires to CSG and PNA. On June 15, 2005, CSG submitted a letter to the Department withdrawing its request for an administrative review of sales and entries of subject merchandise it exported to the United States during the POR. On July 15, 2005, PNA submitted its Section A questionnaire response. On August 1, 2005, PNA submitted a letter to the Department withdrawing its request for an administrative review of sales and entries of subject merchandise it imported from the Pilkington JVs.

Rescission of Review

Pursuant to 19 CFR 351.213(d)(1), the Department will rescind an administrative review, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. CSG and PNA withdrew their respective requests for review within the 90-day time limit and no other party requested reviews with respect to these companies. Accordingly, we are rescinding this administrative review as to these companies and will issue appropriate assessment instructions to the U.S. Bureau of Customs and Border Protection with respect to exports from CSG and exports from the Pilkington JVs to PNA for the period April 1, 2004, through March 31, 2005.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's assumption that reimbursement of antidumping duties occurred and subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3) of the Department's regulations. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This notice is in accordance with 19 CFR 351.213(d)(4) of the Department's regulations.

Dated: October 4, 2005.

Barbara E. Tillman,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. E5–5588 Filed 10–11–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

United States-Egypt Business Council: Membership

AGENCY: International Trade Administration, Commerce Department.

ACTION: Notice.

SUMMARY: The International Trade Administration of the U.S. Department of Commerce has reestablished and will monitor the activities of the U.S.-Egypt Business Council. This notice announces membership opportunities for American business representatives on the U.S. Section of the Council.

DATES: In order to receive full consideration, requests must be received no later than: Friday, November 18, 2005.

ADDRESSES: Please send your requests for consideration to Ms. Maram Talaat, Egypt Desk Officer, Office of the Middle East, U.S. Department of Commerce either by fax on 202–482–0878 or by mail to Room H–2029B, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC 20230.

FOR FURTHER INFORMATION, CONTACT: Ms. Maram R. Talaat, Office of the Middle East, Room H–2029B, Department of Commerce, Washington, DC 20230, Phone 202–482–3752.

SUPPLEMENTARY INFORMATION: The Department of Commerce established the U.S.-Egypt Presidents' Council in April 1995 as part of the U.S.-Egypt Partnership for Economic Growth and Development. Following their April 2001 meeting at the White House, President Bush and Egyptian President Mubarak agreed to continue the Presidents' Council, and in October 2001 the two governments agreed to rename the Council as the U.S.-Egypt Business Council. The purpose of the Council is to provide a forum through which American and Egyptian private sector representatives can offer advice and counsel to their respective governments that reflect their views, needs and concerns regarding private sector business development in Egypt and enhanced bilateral commercial ties. The Council exchanges information and encourages bilateral discussions that address the following areas:

—Factors that affect the growth of private sector business in both countries, including disincentives to trade and investment, and regulatory obstacles to optimal job creation and economic growth;

—Initiatives that both governments might take to promote joint private sector business growth in Egypt;

—Identification and promotion of business opportunities in both countries;

—Attracting U.S. businesses to opportunities in Egypt and serving as a catalyst for Egyptian private sector growth.

The U.S. Section of the Council, chaired by the Secretary of Commerce, consists of up to fifteen members, all drawn from the private sector. They represent the diversity of American business with emphasis on: agribusiness and food processing, tourism, banking and insurance, energy, pharmaceuticals, services (such as accounting, management, engineering/construction), information technology, electronics and

other high technology industries, and manufacturing industries. Private sector members will serve in a representative capacity presenting the views and interests of their particular industry and as senior business representatives whose expertise on international business issues can be shared. Private sector members are not special government employees, and will receive no compensation for their participation in Council activities. Members participating in Council meetings and events will be responsible for their travel, lodging, and other personal expenses. Only appointed members may attend official Council meetings. Council members serve for three-year terms at the discretion of the Department of Commerce.

In order to be eligible for membership in the U.S. section, potential candidates should be:

—A U.S. citizen residing in the United States, or able to travel to the United States to attend official Council meetings;
—The President or CEO (or comparable level of responsibility) of a private sector company (or, in the case of very large private sector companies, the head of a sizeable operating unit), or head of a non-profit organization such as a trade or industry association that has a unique technical expertise and outstanding reputation; and
—Not a registered foreign agent under the Foreign Agents Registration Act of 1938, as amended.

In reviewing eligible candidates, the Department of Commerce will consider such selection factors as:

—Experience and interest in the Egyptian market;
—Industry or service sector represented;
—Export/investment experience;
—Contribution to diversity based on industry sector, company size, location, and demographics; and
—Readiness to initiate and be responsible for activities in which the Business Council will be active.

Members will be selected on the basis of who will best carry out the objectives of the Council as stated in the Terms of Reference establishing the U.S.-Egypt Business Council.

To be considered for membership, please provide the following: name or names and title(s) of the individual(s) requesting consideration; name and address of the company or organization sponsoring each individual; company's product, service or technical expertise; size of the company or organization; export trade, investment, or international program experience and major markets; and a brief statement of why the candidate(s) should be considered for membership on the Council.

Dated: October 4, 2005.

Cherie Loustaunau,

Director, Office of the Middle East.

[FR Doc. E5–5577 Filed 10–11–05; 8:45 am]

BILLING CODE 3510–DA–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 100505B]

Fisheries of the South Atlantic; Meeting to refine South Atlantic Fishery Management Council's Internet Mapping System.

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

ACTION: Notice of meeting to refine Internet Mapping System

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold a meeting to refine its Internet Mapping System in St. Petersburg, FL. See **SUPPLEMENTARY INFORMATION**.

DATES: The workshop will take place October 25, 2005. See **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The meeting will be held at the Florida Fish and Wildlife Research Institute, 100 Eighth Avenue, S.E., St. Petersburg, FL 33701; phone: (727) 896–8626; fax: (727)893–2947.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, South Atlantic Fishery Management Council, One Southpark Circle, Suite 306, Charleston, SC 29407–4699; phone: (843) 571–4366 or toll free (866)SAFMC–10; fax: (843) 769–4520; email: *kim.iverson@safmc.net*.

SUPPLEMENTARY INFORMATION: The meeting will take place from 8:30 a.m. – 5 p.m. on October 25, 2005. Invited participants representing scientific and mapping expertise, will meet to continue to refine the Council's Internet Mapping System (IMS) with additional datasets and improved functionality.

The meeting is a follow up to one held in 2004. The Council's IMS, as designed through a contract with the Florida's Fish and Wildlife Research Institute, incorporates datasets, metadata, and images provided through cooperative efforts of several agencies. Continued collection and refinement of the IMS will assist the Council in the development of its Fishery Ecosystem Plan. Information provided on the site is accessible to the public at *http://map.mapwise.com/safmc.*

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Note: The times and sequence specified in this agenda are subject to change.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the council office (see **ADDRESSES**) 3 days prior to the meetings.

Dated: October 6, 2005.

Emily Menashes,

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

[FR Doc. E5–5575 Filed 10–11–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 100505C]

Fisheries of the South Atlantic; Workshop to finalize the South Atlantic Fishery Management Council's Deepwater Coral Research and Monitoring Plan.

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

ACTION: Notice of Workshop to finalize Deepwater Coral Research and Monitoring Plan.

SUMMARY: The South Atlantic Fishery Management Council (Council) will conduct a workshop to finalize the Council's Deepwater Coral Research and Monitoring Plan in St. Petersburg, FL.

DATES: The workshop will take place October 26 and 27, 2005. See **SUPPLEMENTARY INFORMATION** for specific dates, times and agenda.

ADDRESSES: The workshop will be held at the Florida Fish and Wildlife Research Institute, 100 Eighth Avenue, S.E., St. Petersburg, FL 33701;

telephone: (727) 896–8626; fax: (727) 893–2947.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, South Atlantic Fishery Management Council, One Southpark Circle, Suite 306, Charleston, SC 29407–4699; telephone: (843) 571–4366 or toll free: (866) SAFMC–10; fax: (843) 769–4520; email: *kim.iverson@safmc.net*.

SUPPLEMENTARY INFORMATION: Invited workshop participants will meet from 8:30 a.m. – 5 p.m. on October 26, 2005, and from 8:30 a.m. – 1 p.m. on October 27, 2005, to complete a draft of the Council's Deepwater Coral Research and Monitoring Plan. This workshop is a follow up to one held in 2004. The workshop is designed to consolidate and refine sections of the draft document that have been developed through the use of a web portal. When completed, the detailed research and monitoring plan will be integrated into the Council's developing Fishery Ecosystem Plan and support long-term research needs for the proposed deepwater Lophelia coral Habitat Areas of Particular Concern. In addition, the research plan will also comprise the South Atlantic component of NOAA's national strategy for research and monitoring of deepwater coral communities.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Note: The times and sequence specified in this agenda are subject to change.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the Council office (see **ADDRESSES**) 3 days prior to the meetings.

Dated: October 6, 2005.

Emily Menashes,

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

[FR Doc. E5–5576 Filed 10–11–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 083105B]

Endangered Species; File No. 1377

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

ACTION: Notice; issuance of permit modification.

SUMMARY: Notice is hereby given that Dr. Anton Tucker, Mote Marine Laboratory, 1600 Ken Thompson Parkway, Sarasota, FL 34236, has been issued a modification to scientific research Permit No. 1377.

ADDRESSES: The modification and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521; and

Southeast Region, NMFS, 263 13th Ave South, St. Petersburg, FL 33701; phone (727)824–5312; fax (727)824–5309.

FOR FURTHER INFORMATION CONTACT: Carrie Hubard or Patrick Opay, (301)713–2289.

SUPPLEMENTARY INFORMATION: On January 14, 2004, notice was published in the Federal Register (69 FR 3568) that a modification of Permit No. 1377, issued December 4, 2002 (67 FR 76727), had been requested by the above-named organization. The requested modification has been granted under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

Modification No. 1 to Permit No. 1377 will allow the holder to expand the study area to include the Florida Keys and Sarasota Bay, and allow the capture, flipper and PIT tagging, and collection of blood and tissue samples from an additional 150 juvenile and subadult green (*Chelonia mydas*), 150 juvenile and sub-adult Kemp's ridley (*Lepidochelys kempii*), 100 juvenile and sub-adult loggerhead (*Caretta caretta*), and 5 juvenile and sub-adult hawksbill (*Eretmochelys imbricata*) sea turtles. The holder will perform additional sampling techniques for all captured turtles including scute scraping for heavy metal analysis, bioelectrical impedance analysis to determine fat content, and laparoscopic surgery to determine sex and reproductive status. Gastric lavage will be conducted on green sea turtles to obtain dietary samples. The permit holder will utilize additional telemetry instruments and attachment methods, including radio tags, sonic tags, time depth recorders, animal-borne video, audio and environmental data collection systems (AVEDS), and receiver tags (e.g., bioacoustic probe). Instruments will be attached to a subset of turtles in Charlotte Harbor or Sarasota Bay, and a subset of turtles in the Florida Keys. The amended permit expires December 31, 2007.

Issuance of this modification, as required by the ESA was based on a finding that such permit (1) was applied for in good faith, (2) will not operate to the disadvantage of any endangered or threatened species, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: October 6, 2005.

Stephen L. Leathery,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 05–20452 Filed 10–11–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 100405B]

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Application and requests for modification of scientific research permits.

SUMMARY: Notice is hereby given that NMFS has received one scientific research permit application and 18 modification requests relating to Pacific salmon. The proposed research is intended to increase knowledge of species listed under the Endangered Species Act (ESA) and to help guide management and conservation efforts.

DATES: Comments or requests for a public hearing on the applications must be received at the appropriate address or fax number (see **ADDRESSES**) no later than 5 p.m. Pacific daylight-saving time on November 14, 2005.

ADDRESSES: Written comments on the applications should be sent to Protected

Resources Division, NMFS, 1201 NE Lloyd Blvd., Suite 1100, Portland, OR 97232–1274. Comments may also be sent via fax to 503–230–5441 or by e-mail to *resapps.nwr@NOAA.gov*.

FOR FURTHER INFORMATION CONTACT: Garth Griffin, Portland, OR (ph.: 503–231–2005, Fax: 503–230–5441, e-mail: *Garth.Griffin@noaa.gov*). Permit application instructions are available at *http://www.nwr.noaa.go*.

SUPPLEMENTARY INFORMATION:

Species Covered in This Notice

The following listed species (evolutionarily significant units) are covered in this notice:

Lower Columbia River (LCR) coho salmon (*Oncorhynchus kisutch*)

LCR steelhead (*O. mykiss*)

LCR Chinook salmon (*O. tshawytscha*).

Authority

Scientific research permits are issued in accordance with section 10(a)(1)(A) of the ESA (16 U.S.C. 1531 et. seq) and regulations governing listed fish and wildlife permits (50 CFR 222-226). NMFS issues permits based on findings that such permits: (1) are applied for in good faith; (2) if granted and exercised, would not operate to the disadvantage of the listed species that are the subject of the permit; and (3) are consistent with the purposes and policy of section 2 of the ESA. The authority to take listed species is subject to conditions set forth in the permits.

Anyone requesting a hearing on an application listed in this notice should set out the specific reasons why a hearing on that application would be appropriate (see **ADDRESSES**). Such hearings are held at the discretion of the Assistant Administrator for Fisheries, NMFS.

Applications Received

Permit 1550

The U.S. Fish and Wildlife Service (FWS) is asking for a 5-year research permit to take LCR coho salmon and LCR Chinook salmon in Abernathy Creek, Washington a tributary to the Lower Columbia River. The research is designed to determine the natural reproductive success and mean relative fitness of hatchery-origin and natural-origin steelhead and assess the overall demographic effects of hatchery fish supplementation in Abernathy Creek relative to two adjacent control streams, Germany and Mill Creeks. The study will benefit listed coho salmon by providing information on abundance and distribution that could be used over the long-term to protect important habitat. The FWS proposes to capture using backpack electrofishing equipment handle, and release listed salmonids. The FWS does not intend to kill any fish being captured but some may die as an unintentional result of the research activities.

Modification Requests Received

For permits 1252, 1290, 1318, 1322, 1338, 1379, 1386, 1410, 1421, 1427, 1461, 1478, 1479, 1484, 1487, 1519, and 1525, the activities would only be modified to include take of LCR coho salmon; no other changes are proposed. Further information on the actions covered by these permits may be obtained from previous notices and on the web site *http://www.nwr.noaa.gov/1salmon/salmesa/permit.htm*.

Permit 1330 currently authorizes the Weyerhaeuser Company to take juvenile LCR steelhead in the Toutle River Basin, Washington. They are asking to modify their permit to add LCR coho salmon take and increase the annual number of LCR steelhead taken in the research. The purpose of the research is to increase understanding of the relationship between aquatic organisms and their habitat, determine how forest management and restoration influence the aquatic ecosystem, and produce data to help develop forest management practices that better protect aquatic resources. The research would benefit listed salmonids by producing data on their natural habitat recovery processes and by identifying the effects that various stressors have on listed species. Weyerhaeuser proposes to observe (during snorkeling surveys), capture (using backpack electrofishing), anesthetize, identify, measure, weigh, and release the fish. Weyerhaeuser does not intend to kill any fish being captured but some may die as an unintentional result of the research activities.

This notice is provided pursuant to section 10(c) of the ESA. NMFS will evaluate the application, associated documents, and comments submitted to determine whether the application meets the requirements of section 10(a) of the ESA and Federal regulations. The final permit decisions will not be made until after the end of the 30-day comment period. NMFS will publish notice of its final action in the **Federal Register**.

Dated: October 5, 2005.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 05–20453 Filed 10–11–05; 8:45 am]

BILLING CODE 3510–22–S

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities: Notice of Intent to Renew Collection 3038–0048, Off-Exchange Agricultural Trade Options

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: The Commodity Futures Trading Commission (CFTC) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on requirements relating to off-exchange agricultural trade options.

DATES: Comments must be submitted on or before December 12, 2005.

ADDRESSES: Comments may be mailed to David Van Wagner, Division of Market Oversight, U.S. Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581.

FOR FURTHER INFORMATION CONTACT: David Van Wagner, (202) 418–5481; FAX: (202) 418–5527; e-mail: *dvanwagner@cftc.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA, 44 U.S.C. 3506(c)(2)(A), requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the CFTC is publishing notice of the proposed collection of information listed below.

With respect to the following collection of information, the CFTC invites comments on:

- Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;

• The accuracy of the Commission's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Ways to enhance the quality, usefulness, and clarity of the information to be collected; and

• Ways to minimize the burden of 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.

Off-Exchange Agricultural Trade Options, OMB Control Number 3038–0048—Extension

In April 1998, the CFTC removed the prohibition on off-exchange trade options on the enumerated agricultural commodities subject to a number of regulatory requirements 63 FR 18821 (Apr. 16, 1998). Thereafter, the Commission streamlined the regulatory and paperwork burdens in order to increase the utility of agricultural trade options while maintaining basic customer protections. 64 FR 68011 (Dec. 6, 1999). Based on its experience in administering this program, the Commission has determined that its estimates of the burden of this collection of information remains unchanged based on the number of firms and individuals that may apply for registration. Responses to the collection of information are mandatory pursuant to section 4c(b) of the Commodity Exchange Act.

The Commission estimates the burden of this collection of information as follows:

ESTIMATED ANNUAL REPORTING BURDEN

17 CFR	Annual number of respondents	Frequency of response	Total annual responses	Hours per response	Total hours
17 CFR Part 32	360	On occasion	411	5.59	2,391

There are no capital costs or operating and maintenance costs associated with this collection.

Dated: October 6, 2005.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 05–20434 Filed 10–11–05; 8:45 am]

BILLING CODE 6351–01–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Nationwide TRICARE Demonstration Project

AGENCY: Office of the Secretary of Defense for Health Affairs/TRICARE Management Activity, DoD.

ACTION: Notice extending deadline for Demonstration Project.

SUMMARY: On November 5, 2001, the Department of Defense (DoD) published a notice of a Nationwide TRICARE Demonstration Project (66 FR 55928–55930). On October 1, 2004, the Department of Defense (DoD) published a notice (69 FR 58895) to extend the Demonstration through October 31, 2005. The Demonstration is also referred to as the Operation Noble Eagle/Enduring Freedom Reservist and National Guard Benefits Demonstration. This notice is to advise interested parties of the continuation of the Demonstration in which the DoD Military Health System addresses unreasonable impediments to the continuity of healthcare encountered by certain family members of Reservists and National Guardsmen called to active duty in support of a Federal/contingency operation. The Demonstration scheduled to end on October 31, 2005, is now extended through October 31, 2007.

FOR FURTHER INFORMATION CONTACT: Office of the Assistance Secretary of Defense for Health Affairs, TRICARE Management Activity, TRICARE Operations Directorate at (703) 681–0039.

SUPPLEMENTARY INFORMATION: Continuing levels of about 170,000 Reserve Component members activated in support of Noble Eagle/Operation Enduring Freedom and Operation Iraqi Freedom in FY 2005 warrants the continuation of the Demonstration to support the healthcare needs and morale of family members of activated reservists and guardsmen. The National Defense Authorization Act of 2005 amended existing statutes that will enable the Secretary of Defense to provide these benefits permanently by regulation. The Demonstration needs to be extended to provide sufficient time for the rule-making process to establish the new regulation. The impact if the Demonstration is not extended, before permanent regulation is promulgated, includes higher out-of-pocket costs and potential inability to continue to use the same provider for ongoing care. There are three separate components to the demonstration. First, those who participate in TRICARE Standard will not be responsible for paying the TRICARE Standard deductible. By law, the TRICARE Standard deductible for active duty dependents is $150 per individual, $300 per family ($50/$150 for E–4's and below). The second component extends TRICARE payments up to 115 percent of the TRICARE maximum allowable charge, less the applicable patient co-payment, for care received from a provider that does not participate (accept assignment) under TRICARE to the extent necessary to ensure timely access to care and clinically appropriate continuity of care. Third, the Demonstration authorizes a waiver of the non-availability statement requirement of non-emergency inpatient care. This Demonstration project is being conducted under the authority of 10 U.S.C. 1092. This Demonstration is extended through October 31, 2007.

Dated: October 5, 2005.

L. M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 05–20391 Filed 10–11–05; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Membership of the Performance Review Board

AGENCY: Defense Finance and Accounting Service, DOD.

ACTION: Notice.

This notice announces the appointment of the members of the Performance Review Board (PRB) of the Defense Finance and Accounting Service. The publication of PRB membership is required by 5 U.S.C. 4314(C)(4).

The PRB provides fair and impartial review of Senior Executive Service

performance appraisals and makes recommendations regarding performance ratings and performance bonuses to the Director, DFAS.

DATES: *Effective date:* November 9, 2005.

FOR FURTHER INFORMATION CONTACT: Jerry Hovey, DFAS SES Program Manager, Defense Finance and Accounting Service, Arlington, Virginia, (863) 815–3709.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 4314(C)(4), the following executives are appointed to the Defense Finance and Accounting Service PRB: Brigadier General Jan Eakle, Patrick T. Shine, Leon J. Krushinski, Jerry S. Hinton, Kathleen D. Noe.

Executives listed will service a one-year renewable term, effective November 9, 2005.

Dated: October 4, 2005.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 05–20392 Filed 10–11–05; 8:45am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Intent To Prepare an Environmental Impact Statement (EIS) for an Annex to the Fort Rosecrans National Cemetery at Marine Corps Air Station Miramar, San Diego, CA

AGENCY: Department of the Navy, DOD.

ACTION: Notice.

SUMMARY: In accordance with Section 102(2)(c) of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4332(2)(c)), as implemented by the Council on Environmental Quality Regulations (40 CFR parts 1500–1508), the Department of the Navy, Marine Corps Air Station Miramar (MCAS Miramar) and Department of Veterans Affairs intend to prepare an environmental impact statement (EIS) and conduct a public scoping meeting for the proposed development and operation of a national veteran's cemetery at MCAS Miramar in San Diego, California. The cemetery will be an annex to the Department of Veterans Affairs Fort Rosecrans National Cemetery.

DATES: All written scoping comments must be received by Friday, November 18, 2005. A public meeting to receive comments on the scope of the EIS will be held on Wednesday, November 2, 2005, from 6 p.m. to 8 p.m.

ADDRESSES: Written comments should be directed to: Ms. Hiphil S. Clemente (Code OPCE.HC), Southwest Division, Naval Facilities Engineering Command, 1220 Pacific Highway, San Diego, California, 92132. The public scoping meeting will be held at the Holiday Inn Select Miramar, 9335 Kearny Mesa Road, San Diego, CA.

FOR FURTHER INFORMATION CONTACT: Ms. Hiphil S. Clemente, Southwest Division, Naval Facilities Engineering Command at telephone 619–532–3781, fax 619–532–4160, or E-mail: *hiphil.clemente@navy.mil*.

SUPPLEMENTARY INFORMATION: The Department of Veterans Affairs operates the Fort Rosecrans National Cemetery, located on the Point Loma Submarine Base. It is the only national cemetery in San Diego County and has been closed to casketed burials since 1966. It will be closed to cremated remains burials by 2008. About 7 acres of additional land was acquired from the Point Loma Submarine Base in 2002. The National Cemetery Administration constructed columbarium niches to provide a limited number of cremation burial options to the San Diego veteran population. Demand for these columbarium niches as a burial option has been high, resulting in Fort Rosecrans National Cemetery being ranked the tenth busiest national cemetery, according to interment workload within the National Cemetery Administration. Accordingly, with this high demand, these columbarium niches are rapidly being depleted at this cemetery and will only provide space until 2008. No additional land is available for expansion at Fort Rosecrans or Point Loma Submarine Base.

The Department of Veterans Affairs National Cemetery Administration has identified a need for additional burial space for the 253,000 San Diego area military veterans. The Department of the Navy offered four potential sites at MCAS Miramar for consideration.

A Siting Study was prepared by the Department of the Navy and Department of Veterans Affairs to evaluate the suitability of the four potential MCAS Miramar cemetery sites. Based on the Siting Study, two sites were determined feasible for use and will be evaluated in detail in the EIS.

The proposed action is development and operation of a national veterans cemetery at MCAS Miramar as part of an annex to the Department of Veterans Affairs Fort Rosecrans National Cemetery. The proposal includes a land use agreement between the Department of the Navy and Department of Veterans Affairs for development and operation of the cemetery. The proposed site, identified as Site 2, is a 327-acre site located in the northwestern corner of MCAS Miramar across Miramar Road. The site is bounded by Miramar Road to the north, the commuter railway to the south and east, and the western boundary of MCAS Miramar to the west.

An alternative site, identified as Site 4, is a 279-acre site located in the south-central portion of MCAS Miramar in the former Camp Elliott area. The site is completely surrounded by freeways with State Route 163 to the west, State Route 52 to the south, and Interstate 15 to the east. Kearny Villa Road traverses the site in a north-south direction.

The EIS will evaluate potential environmental effects associated with action alternatives and the no action alternative. Potential issues include, but are not limited to, biological resources, historic and archaeological resources, geology and soils, hydrology, air quality, explosive safety and traffic. Relevant and reasonable measures that could alleviate environmental effects will be considered.

The Department of the Navy and the Department of Veterans Affairs will jointly undertake necessary consultations with regulatory entities pursuant to the Endangered Species Act, Clean Water Act, National Historic Preservation Act, and any other applicable law or regulation. Consultation will include but is not limited to the following Federal, state, and local agencies: U.S. Fish and Wildlife Service; State Historic Preservation Officer; U.S. Army Corps of Engineers; U.S. Environmental Protection Agency; San Diego Regional Water Quality Control Board; California Department of Transportation; San Diego Air Pollution Control District; California Department of Toxic Substance Control; and the County of San Diego, Department of Environmental Health.

The public scoping period begins with the publication of this Notice of Intent and ends November 18, 2005. All scoping comments must be received by November 18, 2005. A public scoping meeting will be held on Wednesday, November 2, 2005, from 6 p.m. to 8 p.m. at the Holiday Inn Select Miramar, 9335 Kearny Mesa Road, San Diego, California. The public scoping meeting will follow an informal open house format. The public is invited to attend the meeting at their convenience during the meeting hours and can view project-related displays and speak with Department of the Navy and Department of Veterans Affairs representatives. A

court reporter will be available at the meeting to accept oral comments.

Dated: October 4, 2005.

I.C. Le Moyne Jr.,

Lieutenant, Judge Advocate General's Corps, U.S. Navy, Alternate Federal Register Liaison Officer.

[FR Doc. 05–20436 Filed 10–11–05; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

Office of Postsecondary Education; Overview Information; Business and International Education Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2006

Catalog of Federal Domestic Assistance (CFDA) Number: 84.153A

Dates: Applications Available: October 12, 2005.

Deadline for Transmittal of Applications: See the chart listed under section IV. Application and Submission Information, 3. *Submission Dates and Times* (chart). Deadline for Intergovernmental Review: See chart.

Eligible Applicants: Institutions of higher education that enter into agreements with business enterprises, trade organizations or associations that are engaged in international economic activity—or a combination or consortium of these enterprises, organizations, or associations—for the purposes of pursuing the activities authorized under this program.

Estimated Available Funds: The Administration has requested $2,268,066 for new awards for this program for FY 2006. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Estimated Range of Awards: $50,000—$110,000.

Estimated Average Size of Awards: $84,000.

Maximum Award: We will reject any application that proposes a budget exceeding $110,000 for a single budget period of 12 months. The Assistant Secretary for Postsecondary Education may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 27.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 24 months.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Business and International Education program provides grants to enhance international business education programs and to expand the capacity of the business community to engage in international economic activities.

Priority: In accordance with 34 CFR 75.105(b)(2)(ii), this priority is from the regulations for this program (34 CFR 661.32).

Invitational Priority: For FY 2006 this priority is an invitational priority. Under 34 CFR 75.105(c)(1) we do not give an application that meets this invitational priority a competitive or absolute preference over other applications.

This priority is:

Applications from institutions of higher education that propose educational projects that include activities focused in the targeted world areas of Central and South Asia, the Middle East, Russia, the Independent States of the former Soviet Union, and Africa. These projects should be integrated into the curricula of the home institution or institutions.

Program Authority: 20 U.S.C. 1130—1130b.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99. (b) The regulations in 34 CFR parts 655 and 661.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: The Administration has requested $2,268,066 for this program for FY 2006. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Estimated Range of Awards: $50,000—$110,000.

Estimated Average Size of Awards: $84,000.

Maximum Award: We will reject any application that proposes a budget exceeding $110,000 for a single budget period of 12 months. The Assistant Secretary for Postsecondary Education may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 27.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 24 months.

III. Eligibility Information

1. *Eligible Applicants:* Institutions of higher education that enter into agreements with business enterprises, trade organizations or associations that are engaged in international economic activity—or a combination or consortium of these enterprises, organizations, or associations—for the purposes of pursuing the activities authorized under this program.

2. *Cost Sharing or Matching:* The matching requirement is described in section 613(d) of the Higher Education Act of 1965, as amended (20 U.S.C. 1130a) (HEA). The HEA provides that the applicant's share of the total cost of carrying out a program supported by a grant under this program must be no less than 50 percent of the total cost of the project in each fiscal year. The non-Federal share of the cost may be provided either in-kind or in cash.

IV. Application and Submission Information

1. *Address to Request Application Package:* Ms. Tanyelle Richardson, International Education Programs Service, U.S. Department of Education, 1990 K Street, NW., room 6017, Washington, DC 20006–8521. Telephone: (202) 502–7626 or by e-mail: *tanyelle.richardson@ed.gov* or visit *http://www.ed.gov/HEP/iegps* to download an application.

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:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

Page Limit: The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the section of the narrative that addresses the selection criteria to the equivalent of no more than 40 pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the

application narrative, including titles, headings, footnotes, quotations, references, and captions. However, you may single space all text in charts, tables, figures and graphs.

• Use a font that is either 12-point or larger or no smaller than 10 pitch (characters per inch). However, you may use a 10-point font in charts, tables, figures, and graphs.

• Use one of the following fonts: Times New Roman, Courier, Courier New or Arial. Applications submitted in any other font (including Times Roman, Arial Narrow) will not be accepted.

The page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; the one-page abstract; or the appendices. However, you must include your complete response to the selection criteria in the application narrative.

We will reject your application if—

• You apply these standards and exceed the page limit; or

• You apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times:*

Applications Available: October 12, 2005.

Deadline for Transmittal of Applications: In light of the damage caused by Hurricanes Katrina and Rita we are establishing two separate deadlines for the submission of applications for grants under this competition to permit potential applicants affected by Hurricanes Katrina and/or Rita additional time to submit their applications. We are establishing a *General Deadline* for all applicants, and an *Extended Deadline* for potential applicants who have been affected by Hurricanes Katrina and/or Rita and are located in Louisiana, Texas, Alabama, Mississippi, and Florida. Specifically, the *Extended Deadline* applies only to: (1) Institutions of higher education, SEAs, LEAs, non-profit organizations and other public or private organization applicants that are located in a federally-declared disaster area as determined by the Federal Emergency Management Agency (FEMA) (see *http://www.fema.gov/news/disasters.fema*) and that were adversely affected by Hurricanes Katrina and/or Rita, and (2) individual applicants who reside or resided, on the disaster declaration date, in a federally-declared disaster area as determined by FEMA (see *http://www.fema.gov/news/disasters.fema*) and were adversely affected by Hurricanes Katrina and/or Rita. These applicants must provide a certification in their application that they meet the criteria for submitting an application on the *Extended Deadline,* and be prepared to provide appropriate supporting documentation, if requested. If the applicant is submitting the application electronically, submission of the application serves as the applicant's attestation that they meet the criteria for submitting an application on the *Extended Deadline.*

The following chart provides the applicable deadlines for the submission of applications. If this program is subject to Executive Order 12372, the relevant deadline for intergovernmental review is also indicated in the chart.

	Transmittal of applications	Intergovernmental review
General Deadline	11/15/05	1/16/06
Extended Deadline	12/1/05	2/1/06

Applications for grants under this program must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically or by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 6. *Other Submission Requirements* in this notice.

Deadline for Intergovernmental Review: See chart.

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 package for this program.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:* Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Business and International Education program must be submitted electronically using the Grants.gov Apply site at: *http://www.grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for The Business and International Education program at: *http://www.grants.gov/.* You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search.

Please note the following:

• 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.

• Applications received by Grants.gov are time and date stamped. Your application must be fully uploaded and submitted, and must be date/time stamped by the Grants.gov system no later than 4:30 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not consider your application if it is date/time stamped by the Grants.gov system later than 4:30 p.m., Washington, DC time, on the application deadline date. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date/time stamped by the Grants.gov system after 4:30 p.m.,

Washington, DC time, on the application deadline date.

• The amount of time it can take to upload an application will vary depending on a variety of factors including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.

• You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this program to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov at: *http://e-Grants.ed.gov/help/GrantsgovSubmissionProcedures.pdf.*

• To submit your application via Grants.gov, you must complete all the steps in the Grants.gov registration process (see *http://www.Grants.gov/GetStarted*) and provide on your application the same D-U-N-S Number used with this registration. Please note that the registration process may take five or more business days to complete.

• You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.

• You must submit all documents electronically, including all information typically included on the Application for Federal Assistance (SF 424), Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. You must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified above or submit a password protected file, we will not review that material.

• Your electronic application must comply with any page limit requirements described in this notice.

• After you electronically submit your application, you will receive an automatic acknowledgement from Grants.gov that contains a Grants.gov tracking number. The Department will retrieve your application from Grants.gov and send you a second confirmation by e-mail that will include a PR/Award number (an ED-specified identifying number unique to your application).

• We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically, or by hand delivery. You also may mail your application by following the mailing instructions as described elsewhere in this notice. If you submit an application after 4:30 p.m., Washington, DC time, on the deadline date, please contact the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT**, and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number (if available). We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: Extensions referred to in this section apply only to the unavailability of or technical problems with the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the Grants.gov system; and

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application. If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Ms. Tanyelle Richardson, U.S. Department of Education, 1990 K Street, NW., 6th Floor, Washington, DC 20006–8521. FAX: (202) 502–7691.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the applicable following address:

By mail through the U.S. Postal Service:
U.S. Department of Education, Application Control Center, Attention: 84.153A, 400 Maryland Avenue, SW., Washington, DC 20202–4260; or

By mail through a commercial carrier:
U.S. Department of Education, Application Control Center—Stop 4260, Attention: 84.153A, 7100 Old Landover Road, Landover, MD 20785–1506.

Regardless of which address you use, 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 qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: 84.153A, 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department:

(1) You must indicate on the envelope and—if not provided by the Department—in Item 4 of the Application for Federal Education Assistance (SF 424) the CFDA number—and suffix letter, if any—of the competition under which you are submitting your application.

(2) The Application Control Center will mail a grant application receipt acknowledgment to you. If you do not receive the grant application receipt acknowledgment within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

Selection Criteria: The selection criteria for this program are in 34 CFR 661.31 and are as follows: (a) Need for the project (25 points); (b) plan of operation (20 points); (c) qualifications of the key personnel (10 points); (d) budget and cost effectiveness (15 points); (e) evaluation plan (25 points); and (f) adequacy of resources (5 points).

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. The applicant is required to use the electronic data instrument Evaluation of Exchange, Language, International and Areas Studies (EELIAS) system to complete the final report.

VII. Agency Contact

For Further Information Contact: Ms. Tanyelle Richardson, International Education Programs Service, U.S. Department of Education, 1990 K Street, NW., room 6017, Washington, DC 20006–8521. Telephone: (202) 502–7626 or by e-mail: *tanyelle.richardson@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) on request to the program contact person listed in this section.

VIII. Other Information

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: October 5, 2005.

Sally L. Stroup,

Assistant Secretary for Postsecondary Education.

[FR Doc. 05–20394 Filed 10–11–05; 8:45 am]

BILLING CODE 4000–01–U

DEPARTMENT OF EDUCATION

Office of Postsecondary Education; Overview Information; Undergraduate International Studies and Foreign Language Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2006

Catalog of Federal Domestic Assistance (CFDA) Number: 84.016A

Dates: Applications Available: October 12, 2005. Deadline for Transmittal of Applications: See the chart listed under section IV. Application and Submission Information, 3. *Submission Dates and Times* (chart). Deadline for Intergovernmental Review: See chart.

Eligible Applicants: (1) Institutions of higher education (IHEs); (2) combinations of IHEs; (3) partnerships between nonprofit educational organizations and IHEs; and (4) public and private nonprofit agencies and organizations, including professional and scholarly associations.

Estimated Available Funds: The Administration has requested $1,926,721 for new awards for this program for FY 2006. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Estimated Range of Awards:

Single Institution: $50,000–$90,000.

Consortial/Organization/Associations: $80,000–$140,000.

Estimated Average Size of Awards:

Single Institution: $77,069.

Consortial/Organization/Associations: $110,000.

Maximum Award: We will reject any application that proposes a budget exceeding $90,000 for a single budget period of 12 months for a single institution application and $140,000 for a single budget period of 12 months for a consortial/organization/association application. The Assistant Secretary for Postsecondary Education may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 25.

Note: The Department is not bound by any estimates in this notice.

Project Period:

Single Institution: Up to 24 months.

Consortial/Organization/Associations: Up to 36 months.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Undergraduate International Studies and Foreign Language (UISFL) Program provides grants to strengthen and improve undergraduate instruction in international studies and foreign languages.

Priorities: This notice contains one competitive preference priority and two invitational priorities. In accordance with 34 CFR 75.105(b)(2)(ii), the competitive preference priority is from the regulations for this program (34 CFR 658.35).

Competitive Preference Priority: For FY 2006 this priority is a competitive preference priority. Under 34 CFR 75.105(c)(2)(i) we award up to an additional five points to an application, depending on the extent to which the application meets this priority.

This priority is:

Applications that: (a) Require entering students to have successfully completed at least two years of secondary school foreign language instruction; (b) require each graduating student to earn two years of postsecondary credit in a foreign language or have demonstrated equivalent competence in the foreign language; or (c) in the case of a two-year degree granting institution, offer two years of postsecondary credit in a foreign language.

Under this competition we are particularly interested in applications that address the following priorities.

Invitational Priorities: For FY 2006 these priorities are invitational priorities. Under 34 CFR 75.105(c)(1) we do not give an application that meets these invitational priorities a competitive or absolute preference over other applications.

These priorities are:

Invitational Priority 1

Applications that propose projects that provide in-service training for K–12 teachers in foreign languages and international studies and that strengthen instruction in international studies and foreign languages in teacher education programs.

Invitational Priority 2

Applications that propose educational projects that include activities that are focused on the targeted world areas of Central and South Asia, the Middle East, Russia, the Independent States of the former Soviet Union, and Africa and that are integrated into the curricula of the home institutions or organizations.

Program Authority: 20 U.S.C. 1124.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 82, 84, 85, 86, 97, 98 and 99. (b) The regulations in 34 CFR parts 655 and 658.

Note: The regulations in 34 CFR part 79 apply to all applications except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to IHEs only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: The Administration has requested $1,926,721 for new awards for this program for FY 2006. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process, if Congress appropriates funds for this program.

Estimated Range of Awards:

Single Institution: $50,000–$90,000.

Consortial/Organization/Associations: $80,000–$140,000.

Estimated Average Size of Awards:

Single Institution: $77,069.

Consortial/Organization/Associations: $110,000.

Maximum Award: We will reject any application that proposes a budget exceeding $90,000 for a single budget period of 12 months for a single institution application and $140,000 for a single budget period of 12 months for a consortial/organization/association application. The Assistant Secretary for Postsecondary Education may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 25.

Note: The Department is not bound by any estimates in this notice.

Project Period:

Single Institutions: Up to 24 months.

Consortial/Organization/Associations: Up to 36 months.

III. Eligibility Information

1. *Eligible Applicants:* (1) IHEs; (2) combinations of IHEs; (3) partnerships between nonprofit educational organizations and IHEs; and (4) public and private nonprofit agencies and organizations, including professional and scholarly associations.

2. *Cost Sharing or Matching:* This program has a matching requirement under title VI, part A, section 604(a)(3) of the Higher Education Act of 1965, as amended, 20 U.S.C. 1124(a)(3) (HEA), and the regulations for this program in 34 CFR 658.40. UISFL Program grantees must provide matching funds in either of the following ways: (a) Cash contributions from private sector corporations or foundations equal to one-third of the total project costs; or (b) a combination of institutional and non-institutional cash or in-kind contributions including State and private sector corporation or foundation contributions, equal to one-half of the total project costs. The Secretary may waive or reduce the required matching share for institutions that are eligible to receive assistance under part A or part B of title III or under title V of the HEA.

IV. Application and Submission Information

1. *Address to Request Application Package:* Christine Corey, International Education Programs Service, U.S. Department of Education, 1990 K Street, NW., room 6069, Washington, DC 20006–8521. Telephone: (202) 502–7629 or by e-mail: *christine.corey@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:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

Page Limit: The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the narrative to the equivalent of no more than 40 pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions. However, you may single space all text in charts, tables, figures and graphs.
- Use a font that is either 12-point or larger or no smaller than 10 pitch (characters per inch). However, you may use a 10-point font in charts, tables, figures, and graphs.

The page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and

certifications; the one-page abstract; or the appendices. However, you must include your complete response to the selection criteria in the application narrative.

We will reject your application if—

• You apply these standards and exceed the page limit; or

• You apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times:*

Applications Available: October 12, 2005.

Deadline for Transmittal of Applications: In light of the damage caused by Hurricanes Katrina and Rita we are establishing two separate deadlines for the submission of applications for grants under this competition to permit potential applicants affected by Hurricanes Katrina and/or Rita additional time to submit their applications. We are establishing a *General Deadline* for all applicants, and an *Extended Deadline* for potential applicants who have been affected by Hurricanes Katrina and/or Rita and are located in Louisiana, Texas, Alabama, Mississippi, and Florida. Specifically, the *Extended Deadline* applies only to: (1) Institutions of higher education, SEAs, LEAs, non-profit organizations and other public or private organization applicants that are located in afederally-declared disaster area as determined by the Federal Emergency Management Agency (FEMA) (see *http://www.fema.gov/news/disasters.fema*) and that were adversely affected by Hurricanes Katrina and/or Rita, and (2) individual applicants who reside or resided, on the disaster declaration date, in a federally-declared disaster area as determined by FEMA (see *http://www.fema.gov/news/disasters.fema*) and were adversely affected by Hurricanes Katrina and/or Rita. These applicants must provide a certification in their application that they meet the criteria for submitting an application on the Extended Deadline, and be prepared to provide appropriate supporting documentation, if requested. If the applicant is submitting the application electronically, submission of the application serves as the applicant's attestation that they meet the criteria for submitting an application on the Extended Deadline.

The following chart provides the applicable deadlines for the submission of applications. If this program is subject to Executive Order 12372, the relevant deadline for intergovernmental review is also indicated in the chart.

	Transmittal of applications	Intergovernmental review
General Deadline	11/17/05	1/17/06
Extended Deadline	12/1/05	2/1/06

Applications for grants under this program must be submitted electronically using the Electronic Grant Application System (e-Application) available through the Department's e-Grants system. For information (including dates and times) about how to submit your application electronically or by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to Section IV.6. *Other Submission Requirements* in this notice.

Deadline for Intergovernmental Review: See chart.

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 package for this program.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:* Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Undergraduate International Studies and Foreign Language Program—CFDA Number 84.016A must be submitted electronically using e-Application available through the Department's e-Grants system, accessible through the e-Grants portal page at: *http://e-grants.ed.gov*

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

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:

• 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 program 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 qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.

• You must submit all documents electronically, including the Application for Federal Education Assistance (ED 424), Budget Information—Non-Construction Programs (ED 524, and all necessary assurances and certifications. You must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified above or submit a password protected file, we will not review that material.

• 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 acknowledgment that will include a PR/Award number (an identifying number unique to your application).

• Within three working days after submitting your electronic application, fax a signed copy of the ED 424 to the Application Control Center after following these steps:

(1) Print ED 424 from e-Application.

(2) The applicant's Authorizing Representative must sign this form.

(3) Place the PR/Award number in the upper right hand corner of the hard-copy signature page of the ED 424.

(4) Fax the signed ED 424 to the Application Control Center at (202) 245–6272.

• We may request that you provide us original signatures on other forms at a later date.

Application Deadline Date Extension in Case of e-Application 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 acknowledgment 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.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the e-Application system because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the Department's e-Application system; and

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application. If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Ms. Christine Corey, U.S. Department of Education, 1990 K Street, NW., 6th Floor, Washington, DC 20006–8521. Fax: (202) 502–7859.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the applicable following address:

By mail through the U.S. Postal Service:

U.S. Department of Education, Application Control Center, Attention: 84.016A, 400 Maryland Avenue, SW., Washington, DC 20202–4260 or

By mail through a commercial carrier:

U.S. Department of Education, Application Control Center—Stop 4260, Attention: 84.016A, 7100 Old Landover Road, Landover, MD 20785–1506.

Regardless of which address you use, 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 qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application, by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: 84.016A, 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 p.m., Washington, DC, time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department:

(1) You must indicate on the envelope and—if not provided by the Department—in Item 4 of the ED 424 the CFDA number—and suffix letter, if any—of the competition under which you are submitting your application.

(2) The Application Control Center will mail a grant application receipt acknowledgment to you. If you do not receive the grant application receipt acknowledgment within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

Selection Criteria: The selection criteria for this program are from 34 CFR 658.31 through 658.34. The following criteria are used to evaluate all applications: (a) Plan of operation (15 points); (b) quality of key personnel (10

points); (c) budget and cost effectiveness (10 points); (d) adequacy of resources (5 points); (e) evaluation plan (20 points). The following additional criteria are applied to applications submitted by an IHE or a combination of IHEs: (a) Commitment to international studies (10 points); (b) elements of the proposed international studies program (10 points); and (c) need for and prospective results of the proposed program (10 points). The following additional criterion is applied to applications from organizations and associations: need for and potential impact of the proposed project in improving international studies and the study of modern foreign languages at the undergraduate level (30 points).

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. The applicant is required to use the electronic data instrument Evaluation of Exchange, Language, International, and Area Studies (EELIAS), to complete the final report.

VII. Agency Contact

For Further Information Contact: Christine Corey, International Education Programs Service, U.S. Department of Education, 1990 K Street, NW., room 6069, Washington, DC 20006–8521. Telephone: (202) 502–7629 or by e-mail: *christine.corey@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) on request to the program contact person listed in this section.

VIII. Other Information

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: October 5, 2005.

Sally L. Stroup,

Assistant Secretary for Postsecondary Education.

[FR Doc. 05–20395 Filed 10–11–05; 8:45 am]

BILLING CODE 4000–01–U

DEPARTMENT OF EDUCATION

Office of Postsecondary Education; Overview Information, Centers for International Business Education Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2006

Catalog of Federal Domestic Assistance (CFDA) Number: 84.220A.

Dates:

Applications Available: October 12, 2005.

Deadline for Transmittal of Applications: See the chart listed under section IV. Application and Submission Information, 3. *Submission Dates and Times* (chart). Deadline for Intergovernmental Review: See chart.

Eligible Applicants: Institutions of higher education or consortia of such institutions.

Estimated Available Funds: The Administration has requested $10,775,000 for new awards under this program for FY 2006. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Estimated Range of Awards: $200,000–$450,000.

Estimated Average Size of Awards: $360,000.

Maximum Award: We will reject any application that proposes a budget exceeding $450,000 for a single budget period of 12 months. The Assistant Secretary for Postsecondary Education may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 30.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 48 months.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the Centers for International Business Education (CIBE) Program is to provide grants to pay the Federal share of the cost of planning, establishing and operating Centers for International Business Education that will—

1. Be national resources for the teaching of improved business techniques, strategies, and methodologies that emphasize the international context in which business is transacted;

2. Provide instruction in critical foreign languages and international fields needed to provide an understanding of the cultures and customs of United States trading partners;

3. Provide research and training in the international aspects of trade, commerce, and other fields of study;

4. Provide training to students enrolled in the institution, or combinations of institutions, in which a center is located;

5. Serve as regional resources to businesses proximately located by offering programs and providing research designed to meet the international training needs of these businesses; and

6. Serve other faculty, students and institutions of higher education located within their region.

Under this competition, we are particularly interested in applications that address the following priorities.

Invitational Priorities: For FY 06 these priorities are invitational priorities. Under 34 CFR 75.105(c)(1) we do not give an application that meets these

invitational priorities a competitive or absolute preference over other applications.

These priorities are:

Invitational Priority 1

Applications that propose innovative approaches to improving the teaching of foreign languages in a business or professional context, including the less commonly taught languages.

Invitational Priority 2

Applications that propose programs or activities focused on homeland security and U.S. international competitiveness.

Program Authority: 20 U.S.C. 1130–1.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 82, 84, 85, 86, 97, 98, and 99.

As there are no program-specific regulations, we encourage each potential applicant to read the authorizing statute for the CIBE program in section 612 of title VI, part B, of the Higher Education Act of 1965, as amended (HEA), 20 U.S.C. 1130–1.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: The Administration has requested $10,775,000 for new awards under this program for FY 2006. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress awards funds for this program.

Estimated Range of Awards: $200,000–$450,000.

Estimated Average Size of Awards: $360,000.

Maximum Award: We will reject any application that proposes a budget exceeding $450,000 for a single budget period of 12 months. The Assistant Secretary for Postsecondary Education may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 30.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 48 months.

III. Eligibility Information

1. *Eligible Applicants:* Institutions of higher education or consortia of such institutions.

2. *Cost Sharing or Matching:* The matching requirement is described in section 612(e) of the HEA. The statute requires that the Federal share of the cost of planning, establishing and operating centers under this program shall be—

a. not more than 90 percent for the first year in which Federal funds are received;

b. not more than 70 percent for the second year and

c. not more than 50 percent for the third year and for each year thereafter.

The non-Federal share of the cost of planning, establishing, and operating centers under this section may be provided either in cash or in-kind.

Waiver of non-Federal share: In the case of an institution of higher education receiving a grant under the CIBE program and conducting outreach or consortia activities with another institution of higher education in accordance with section 612(c)(2)(E) of the HEA, the Secretary may waive a portion of the requirements for the non-Federal share equal to the amount provided by the institution of higher education receiving the grant to the other institution of higher education for carrying out the outreach or consortia activities. Any such waiver is subject to the terms and conditions the Secretary deems necessary for carrying out the purposes of the program.

IV. Application and Submission Information

1. *Address to Request Application Package:* Mrs. Susanna Easton, International Education Programs Service, U.S. Department of Education, 1990 K Street, NW., Room 6093, Washington, DC 20006–8521. Telephone: (202) 502–7628 or by e-mail: *susanna.easton@ed.gov* or visit *http://www.ed.gov/HEP/iegps* to download an application.

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:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit Part III to the equivalent of no more than 55 pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions. However, you may single space all text in charts, tables, figures and graphs.
- Use one of the following fonts: Times New Roman, Courier, Courier New or Arial. Applications submitted in any other font (including Times Romas, Arial Narrow) will not be accepted. Use a font that is either 12-point or larger or no smaller than 10 pitch (characters per inch). However, you may use a 10-point font in charts, tables, figures, and graphs.

The page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; or the one-page abstract or the appendices. However, you must include your complete response to the selection criteria in the application narrative.

We will reject your application if—

- You apply these standards and exceed the page limit; or
- You apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times:*

Applications Available: October 12, 2005.

Deadline for Transmittal of Applications: In light of the damage caused by Hurricanes Katrina and Rita we are establishing two separate deadlines for the submission of applications for grants under this competition to permit potential applicants affected by Hurricanes Katrina and/or Rita additional time to submit their applications. We are establishing a *General Deadline* for all applicants, and an *Extended Deadline* for potential applicants who have been affected by Hurricanes Katrina and/or Rita and are located in Louisiana, Texas, Alabama, Mississippi, and Florida. Specifically, the *Extended Deadline* applies only to: (1) institutions of higher education, SEAs, LEAs, non-profit organizations and other public or private organization applicants that are located in a federally-declared disaster area as determined by the Federal Emergency Management Agency (FEMA) (see *http://www.fema.gov/news/disasters.fema*) and that were adversely affected by Hurricanes Katrina and/or Rita, and (2) individual applicants who reside or resided, on the disaster declaration date, in a federally-declared disaster area as determined by FEMA (see *http://www.fema.gov/news/*

disasters.fema) and were adversely affected by Hurricanes Katrina and/or Rita. These applicants must provide a certification in their application that they meet the criteria for submitting an application on the *Extended Deadline*, and be prepared to provide appropriate supporting documentation, if requested. If the applicant is submitting the application electronically, submission of the application serves as the applicant's attestation that they meet the criteria for submitting an application on the *Extended Deadline.*

The following chart provides the applicable deadlines for the submission of applications. If this program is subject to Executive Order 12372, the relevant deadline for intergovernmental review is also indicated in the chart.

	Transmittal of applications	Intergovernmental review
General Deadline	11/15/05	1/16/06
Extended Deadline	12/1/05	2/1/06

Applications for grants under this program must be submitted electronically using the Electronic Grant Application System (e-Application) available through the Department's e-Grants system. For information (including dates and times) about how to submit your application electronically or by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to Section IV. 6. *Other Submission Requirements* in this notice.

Deadline for Intergovernmental Review: See chart.

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 package for this program.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:* Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Centers for International Business Education program—84.220A must be submitted electronically using e-Application available through the Department's e-Grants system, accessible through the e-Grants portal page at: *http://e-grants.ed.gov*

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

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:

- 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 program 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 qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including the Application for Federal Education Assistance (ED 424), Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. You must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified above or submit a password protected file, we will not review that material.
- 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 acknowledgment that will include a PR/Award number (an identifying number unique to your application).
- Within three working days after submitting your electronic application, fax a signed copy of the ED 424 to the Application Control Center after following these steps:

(1) Print ED 424 from e-Application.

(2) The applicant's Authorizing Representative must sign this form.

(3) Place the PR/Award number in the upper right hand corner of the hard-copy signature page of the ED 424.

(4) Fax the signed ED 424 to the Application Control Center at (202) 245–6272.

- We may request that you provide us original signatures on other forms at a later date.

Application Deadline Date Extension in Case of e-Application 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 acknowledgment 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.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the e-Application system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the Department's e-Application system; *and*
- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application. If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Susanna Easton, U.S. Department of Education, 1990 K Street, NW., Room 6093, Washington, DC 20006–8521. FAX: (202) 502–7860.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier), your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the applicable following address:

By mail through the U.S. Postal Service: U.S. Department of Education, Application Control Center, Attention: CFDA Number 84.220A, 400 Maryland Avenue, SW., Washington, DC 20202–4260. or

By mail through a commercial carrier: U.S. Department of Education, Application Control Center—Stop 4260, Attention: CFDA Number 84.220A, 7100 Old Landover Road, Landover, MD 20785–1506.

Regardless of which address you use, 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 qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application, by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: CFDA Number 84.220A, 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department:

(1) You must indicate on the envelope and—if not provided by the Department—in Item 4 of the Application for Federal Education Assistance (ED 424) the CFDA number—and suffix letter, if any—of the competition under which you are submitting your application.

(2) The Application Control Center will mail a grant application receipt acknowledgment to you. If you do not receive the grant application receipt acknowledgment within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program from EDGAR (34 CFR 75.209 and 75.210) are as follows: (a) meeting the purpose of the authorizing statute (20 points), (b) significance (18 points), (c) quality of the project design (10 points), (d) quality of the management plan (10 points), (e) quality of project personnel (10 points), (f) quality of project services (2 points), (g) adequacy of resources (10 points), and (h) quality of the project evaluation (20 points).

Note: Applicants should address these selection criteria only in the context of the program requirements in section 612 of the HEA.

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. The applicant is required to use the electronic data instrument Evaluation of Exchange, Language, International, and Area Studies to complete the final report.

VII. Agency Contact

For Further Information Contact: Mrs. Susanna Easton, International Education Programs Service, U.S. Department of Education, 1990 K Street, NW., 6th floor, Washington, DC 20006–8521.

Telephone: (202) 502–7628 or by e-mail: *susanna.easton@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) on request to the program contact person listed in this section.

VIII. Other Information

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: October 5, 2005.

Sally L. Stroup,

Assistant Secretary for Postsecondary Education.

[FR Doc. 05–20396 Filed 10–11–05; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

October 5, 2005.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER00–826–004; ER00–828–004; ER98–421–015; ER98–4055–012; ER01–1337–007; ER04–288–001; ER02–177–008; ER03–1212–006; ER01–1820–007.

Applicants: Brownsville Power I, L.L.C.; Caledonia Power I, L.L.C.; CinCap IV, LLC; CinCap V, LLC; Cinergy Capital & Trading, Inc.; Cincinnati Gas & Electric Co.; Cinergy Power Investments, Inc.; St. Paul Cogeneration, LLC; Cinergy Operating Companies.

Description: Cinergy Entities submit a correction to the 7/21/05 compliance filing pursuant to Commission Order issued 7/15/05.

Filed Date: 09/28/2005.

Accession Number: 20051004–0067.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 19, 2005.

Docket Numbers: ER01–205–010; ER98–2640–008; ER98–4590–006; ER99–1610–013; EL05–115–000

Applicants: Xcel Energy Services, Inc.; Northern States Power Company and Northern States Power Company (Wisconsin); Public Service Company of Colorado; Southwestern Public Service Company; and Xcel Energy Services Inc., *et al.*

Description: Xcel Energy Services Inc, on behalf of itself & the Xcel Energy Operating Companies, submits revisions to the market-based rate tariffs of XES, SPS, & PSCol.

Filed Date: 09/30/2005.

Accession Number: 20051005–0032.

Comment Date: 5 p.m. Eastern Time on Friday, October 21, 2005.

Docket Numbers: ER04–691–062; EL04–104–059; ER04–106–017.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc submits proposed revisions to its Open Access Transmission and Energy Markets Tariff.

Filed Date: 09/29/2005.

Accession Number: 20051004–0061.

Comment Date: 5 p.m. Eastern Time on Thursday, October 20, 2005.

Docket Numbers: ER05–1259–001.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator Inc submits inadvertently omitted information from the Transmittal Letter accompanying its 7/28/05 filing of an Interconnection Agreement with the City of Lebanon, OH.

Filed Date: 09/29/2005.

Accession Number: 20051005–0027.

Comment Date: 5 p.m. Eastern Time on Thursday, October 20, 2005.

Docket Numbers: ER05–1260–001.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc submits information inadvertently omitted from the 7/28/05 filing of an Interconnection Agreement with Hooiser Energy Rural Electric Cooperative, Inc.

Filed Date: 09/29/2005.

Accession Number: 20051004–0062.

Comment Date: 5 p.m. Eastern Time on Thursday, October 20, 2005.

Docket Numbers: ER05–1520–000.

Applicants: California Independent System Operator Corporation.

Description: California Independent System Operator Corp submits Amendement No. 3 to the Interconnected Control Area Operating Agreement with the Sacramento Municipal Utility District.

Filed Date: 09/29/2005.

Accession Number: 20051004–0073.

Comment Date: 5 p.m. Eastern Time on Thursday, October 20, 2005.

Docket Numbers: ER05–795–000.

Applicants: ISO New England Inc.

Description: ISO New England Inc submits advance notice of an 10/1/05 effective date for the Market Rule Changes to the Re-Offer Period bidding flexibility elements of Phase I of the Ancillary Services Market project filed on 9/16/05 under Accession No. 20050929–0107.

Filed Date: 09/19/2005.

Accession Number: 20050929–0105.

Comment Date: 5 p.m. Eastern Time on Friday, October 14, 2005.

Docket Numbers: ER05–856–002.

Applicants: Virginia Electric and Power Company.

Description: *Virginia Electric and Power Co submits an Agreement for the purchase of electricity for resale with the Town of Windsor, N.C.*

Filed Date: 09/30/2005.

Accession Number: 20051004–0058.

Comment Date: 5 p.m. Eastern Time on Friday, October 21, 2005.

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 (18 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 log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., 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 for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*. or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E5–5572 Filed 10–11–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

October 5, 2005.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: *ER05–1513–000*
Applicants: Virginia Electric and Power Company
Description: *Virginia Electric & Power Co submits a notice of cancellation of certain service agreements with the Town of Windsor, North Carolina.*
Filed Date: 09/30/2005
Accession Number: *20051004–0006*
Comment Date: 5 p.m. Eastern Time on Friday, October 21, 2005.

Docket Numbers: *ER05–1519–000*
Applicants: Southwest Power Pool, Inc.
Description: *Southwest Power Pool, Inc submits an executed Service Agreement for Network Integration Transmission Service with American Electric Power Service Corporation.*
Filed Date: 09/30/2005
Accession Number: *20051004–0008*
Comment Date: 5 p.m. Eastern Time on Friday, October 21, 2005.

Docket Numbers: *ER05–1521–000*
Applicants: California Independent System Operator Corporation
Description: *California Independent System Operator Corp submits Amendment No. 1 to the Letter Agreement with the Bonneville Power Administration Transmission Business Line re their role as an intermediary control area.*
Filed Date: 09/30/2005
Accession Number: *20051004–0010*
Comment Date: 5 p.m. Eastern Time on Friday, October 21, 2005.

Docket Numbers: *ER05–1522–000*
Applicants: California Independent System Operator Corporation
Description: *California Independent System Operator Corp submits the California-Oregon Intertie Control Area Operating Agreement with the Sacramento Municipal Utility District.*
Filed Date: 09/30/2005
Accession Number: *20051004–0007*
Comment Date: 5 p.m. Eastern Time on Friday, October 21, 2005.

Docket Numbers: *ER05–1523–000*
Applicants: Xcel Energy Services Inc.
Description: *Xcel Energy Services Inc submits the Interconnection Agreement dated 5/1/04 for the Olivia Substation Point of Connection with the City Olivia, Minnesota.*
Filed Date: 09/30/2005
Accession Number: *20051004–0009*
Comment Date: 5 p.m. Eastern Time on Friday, October 21, 2005.

Docket Numbers: *ER05–1524–000*
Applicants: Xcel Energy Serivces Inc.
Description: *Xcel Energy Services Inc on behalf of Northern States Power Co submits a Generation Interconnection Agreement with DanMar Transmission LLC.*
Filed Date: 09/30/2005
Accession Number: *20051004–0011*
Comment Date: 5 p.m. Eastern Time on Friday, October 21, 2005.

Docket Numbers: *ER05–1526–000*
Applicants: NorthWestern Corporation
Description: *NorthWestern Corp submits an amendment to the Firm Point-to-Point Transmission Service Agreement 17–SD with the City of Bryant, South Dakota.*
Filed Date: 09/30/2005
Accession Number: *20051004–0060*
Comment Date: 5 p.m. Eastern Time on Friday, October 21, 2005.

Docket Numbers: *ER05–1527–000*
Applicants: NorthWestern Corporation
Description: *NorthWestern Corp submits a Notice of Cancellation of its Service Agreement 2–SD with the City of Bryant, South Dakota.*
Filed Date: 09/30/2005
Accession Number: *20051004–0059*
Comment Date: 5 p.m. Eastern Time on Friday, October 21, 2005.

Docket Numbers: *ER05–1528–000*
Applicants: Wisconsin Electric Power Company
Description: *Wisconsin Electric Power Co submits a notice of cancellation of an Interconnection Agreement dated 11/18/65, as subsequently amended by supplements, with Northern States Power Company.*
Filed Date: 09/30/2005
Accession Number: *20051004–0005*
Comment Date: 5 p.m. Eastern Time on Friday, October 21, 2005.

Docket Numbers: *ER05–1529–000*
Applicants: Duke Energy Corporation
Description: *Duke Energy Corp on behalf Duke Power submits proposed revisions to FERC Rate Schedule No. 10–A pursuant to section 205 of the Federal Power Act.*
Filed Date: 09/30/2005
Accession Number: *20051004–0004*
Comment Date: 5 p.m. Eastern Time on Friday, October 21, 2005.

Docket Numbers: *ER05–1530–000*
Applicants: Wisconsin River Power Company
Description: *Wisconsin River Power Co submits a new Combustion Turbine Power Purchase Contract with Wisconsin Public Service Corp et al designated as Original Rate Schedule No. 4.*
Filed Date: 09/30/2005
Accession Number: *20051004–0003*
Comment Date: 5 p.m. Eastern Time on Friday, October 21, 2005.

Docket Numbers: *ER05–1531–000*
Applicants: ISO New England Inc.
Description: *ISO New England Inc submits materials which establish Hydro-Quebec Interconnection Capability Credit values for Power Year 2006/2007.*
Filed Date: 09/30/2005
Accession Number: *20051004–0002*
Comment Date: 5 p.m. Eastern Time on Friday, October 21, 2005.

Docket Numbers: *ER05–1534–000*
Applicants: American Electric Power Service Corporation
Description: *AEP, as agent for Appalachian Power Co, submits revisions to the Interconnection and Local Delivery Service Agreement No. 1252 between Blue Ridge Power Agency, Inc and AEP.*
Filed Date: 09/30/2005
Accession Number: *20051004–0213*
Comment Date: 5 p.m. Eastern Time on Friday, October 21, 2005.

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 (18 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 and 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 log on and submit the intervention or protests.

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Magalie R. Salas,

Secretary.

[FR Doc. E5–5573 Filed 10–11–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

Desert Southwest Customer Service Region-Rate Order No. WAPA–127

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of Proposed Network Integration Transmission and Ancillary Services Rates.

SUMMARY: The Western Area Power Administration (Western) is proposing revised rate methodologies for network integration transmission service (network service) for the Parker-Davis Project (PDP), and the Pacific Northwest-Pacific Southwest Intertie Project (Intertie) and for ancillary services from the PDP, Boulder Canyon Project (BCP), and part of the Colorado River Storage Project (CRSP) located in the Desert Southwest Customer Service Region's (DSWR) Balancing Authority and Transmission Operations Area (BATO). Current rates, under Rate Schedules DSW–SD1, DSW–RS1, DSW–FR1, DSW–EI1, DSW–SPR1, DSW–SUR1, PD–NTS1, and INT–NTS1, extend through March 31, 2006. The proposed rates will provide sufficient revenue to pay all annual costs, including interest expense and repayment of required investment within the allowable period. Western will prepare a brochure that provides detailed information on the rates. The proposed rates, under Rate Schedules DSW–SD2, DSW–RS2, DSW–FR2, DSW–EI2, DSW–SPR2, DSW–SUR2, PD–NTS2, INT–NTS2, WS–NTS1, are scheduled to go into effect on April 1, 2006, and will remain in effect through March 31, 2011. Publication of this **Federal Register** notice begins the formal process for the proposed rates.

DATES: The consultation and comment period begins today and will end January 10, 2006. Western will present a detailed explanation of the proposed rates at a public information forum to be held on November 2, 2005, 1 p.m. MST, Phoenix, AZ. Western will accept oral and written comments at the public comment forum. The public comment forum will be held on November 29, 2005, 1 p.m. MST, Phoenix, AZ. Western will accept written comments any time during the consultation and comment period.

ADDRESSES: Send written comments to Mr. J. Tyler Carlson, Regional Manager, Desert Southwest Customer Service Region, Western Area Power Administration, P.O. Box 6457, Phoenix, AZ 85005–6457, e-mail *carlson@wapa.gov.* Western will post information about the rate process on its external Web site at *http://www.wapa.gov/dsw/dsw.htm.* Western will post official comments received via letter and e-mail to its Web site after the close of the comment period. Western must receive written comments by the end of the consultation and comment period to ensure they are considered in Western's decision process. The location for the Public Information and Public Comment Forums is Desert Southwest Regional Office, 615 South 43rd Avenue, Phoenix, AZ.

FOR FURTHER INFORMATION CONTACT: Mr. Jack Murray, Rates Team Lead, Desert Southwest Customer Service Region, Western Area Power Administration, P.O. Box 6457, Phoenix, AZ 85005–6457; telephone (602) 605–2442, e-mail *jmurray@wapa.gov.*

SUPPLEMENTARY INFORMATION: The proposed rates for DSWR network service for the PDP and the Intertie and ancillary services for the Western Area Lower Colorado (WALC) BATO are designed to recover an annual revenue requirement that includes investment repayment, interest, operation and maintenance expense, and other expenses. The ancillary services apply to specified transmission service in the WALC BATO including firm point-to-point, non-firm and network services on the PDP, the Intertie, the Central Arizona Project (CAP), and the portions of the CRSP in WALC. All firm point-to-point and non-firm transmission service and network service on the CAP and CRSP are defined under existing Rate Orders and are not a part of the proposed rates.

The Deputy Secretary of Energy approved Rate Schedules DSW–SD1, DSW–RS1, DSW–FR1, DSW–EI1, DSW–SPR1, DSW–SUR1, PD–NTS1, and INT–NTS1 for the DSWR network service for PDP and Intertie and ancillary services for the WALC BATO on May 3, 1999 (Rate Order No. WAPA–84, 64 FR 25323, May 11, 1999), and the Federal Energy Regulatory Commission (Commission) confirmed and approved the rate schedules on January 20, 2000, under FERC Docket No EF99–5041–000, (90 FERC 62,032). Approval for Rate Schedules DSW–SD1, DSW–RS1, DSW–FR1, DSW–EI1, DSW–SPR1, DSW–SUR1, PD–NTS1, and INT–NTS1 covered 5 years beginning on April 1, 1999, and ending on March 31, 2004. These rate schedules were extended by a series of Rate Orders through March 31, 2006, with the most recent Rate Order being Rate Order No. WAPA–121 (70 FR 15622, March 28, 2005). The rate schedules were extended to accommodate the DSWR Multi-System Transmission Rate (MSTR) process. An MSTR has not been approved. However, Rate Schedule WS–NTS1 is structured to allow multi-system network service on the DSWR System if and when an MSTR is approved.

Under Rate Schedules PD–NTS2, INT–NTS2, and WS–NTS1, the methodology for calculating the customer's monthly charge is the product of the transmission customer's load-ratio share times one-twelfth of the

annual transmission revenue requirement. The customer's load-ratio share is equal to the network transmission customer's coincidental peak (CP), which is the load coincident with the appropriate Project's monthly transmission system peak averaged with the previous 11 months (12 CP) divided by the resultant value of the appropriate Project's average monthly transmission system load at the hour of the system peak in each month.

The monthly hour of the system peak is determined as the hour that the sum of the network customers' metered loads is the greatest. The system load at the peak hour is determined by adding the point-to-point firm transmission reservations to the sum of the network customer's metered loads. The point-to-point firm transmission reservations can include the Open Access Transmission Tariff (OATT) firm point-to-point reservations, the PDP Firm Electric Service (FES) contract rates of delivery (CROD), the pre-OATT Firm Transmission Service (FTS) and the Salt Lake City Area Integrated Project FES with delivery points on the PDP.

The methodology to determine the network service charges is the same for the single system (PDP–NTS2 and INT–NTS2) and the whole system (WS–NTS1) services. One complication is that under WS–NTS1, the determinants (system load, peak hour, and revenue requirement) apply to the combined PDP, Intertie and CAP system (CRSP is excluded from this calculation).

Under Rate Schedule DSW–SD2, Scheduling, Dispatch, and System Control Ancillary Service, the rate is calculated as an annual cost of all personnel, capital costs (such as the dispatch center building), and other expenses incurred in providing the service for DSWR customers. These costs are recovered through a rate applied on a per tag basis. That rate is determined in two major steps: First, the yearly costs associated with capital improvements are determined and divided by the number of tags issued during the year; second, the average labor cost per tag is determined and added to the capital cost per tag. This rate design differs from the previous methodology in two ways: (1) The proposed rates are based on tags rather than schedules, and (2) the proposed methodology does not differentiate as to new vs. existing tags or as to whether or not a tag involves an intra-bus transfer.

Under Schedule DSW–RS2, Reactive Supply and Voltage Control Service (Var Support) from generation sources, the rate is determined by dividing the revenue requirement for the service by the reservations requiring the service. The revenue requirement for the service is one minus the power factor (1–PF) times the combined generation revenue requirement of the PDP, BCP and CRSP. The previous methodology used the factor ($1–PF^2$) to determine the Var Support revenue requirement for BCP and PDP, and used an amount for the CRSP Var Support revenue requirement supplied by the CRSP Management Center.

Under Schedule DSW–FR2, Regulation and Frequency Response Service (Regulation), the rate is determined using the revenue requirement for the service divided by the load in the WALC requiring the service. The revenue requirement for the service is the product of the generation capacity that is used for regulation and the capacity rate of the Project, plus any regulation purchases the transmission provider must make. This total is multiplied by a use factor, which takes into consideration the customer load in the WALC BATO. The denominator in the equation and the load in the BATO requiring the service includes a portion of the CRSP load and the DSWR load.

Regulation is not available from DSWR resources on a long-term basis. However, if necessary, DSWR will purchase regulation on the open market for a charge that covers the cost of procuring and supplying the service. Regulation will be supplied from DSWR resources only on a short-term basis, if such resources are available. Under Rate Schedule DSW–FR1, Western also indicated that this service would only be supplied under short-term sales, but set the charge equal to the capacity rate of the Project supplying the service rather than basing the charge on a formula as with the proposed rate methodology.

Non-standard load refers to large, volatile loads (such as those associated with certain smelters and arc furnaces), which can require a BATO to acquire significant amounts of generation capacity for regulation. Such non-standard loads require separate metering of their moment-to-moment load values to accurately calculate their effects on the system, and will not be covered under the proposed regulation rate.

For this rate order, DSWR is defining a non-standard load as either a single plant or site: (1) With a regulation capacity requirement of 5 megawatts (MW) or greater on a recurring basis, and (2) whose capacity requirement is equal to 10 percent or greater of their average load. Regulation for non-standard loads, as determined by Western, must be delineated in a service agreement, which recognizes the additional burden required to supply this service.

Rate Schedule DSW–EI2, Energy Imbalance Service, proposes a different bandwidth for on-peak and for off-peak, because Western's ability to supply this service is different for these two scenarios, especially during periods of low water. The bandwidth for on-peak is proposed to be plus or minus 1.5 percent of the customer's load with a minimum of 5 MW of either over- or under-delivery. The off-peak bandwidth is 1.5 percent to a negative 3 percent of a customer's load with a minimum of 2 MW of over-delivery and 5 MW of under-delivery.

The settlement with the customer will be different for excursions within the bandwidth than for excursions outside the bandwidth. However, in all cases it is at Western's discretion whether to require a scheduled return of energy or a financial settlement. If the customer's Imbalance Energy is within the bandwidth for either on-peak or off-peak, the customer will be either charged or credited 100 percent of a weighted index price chosen by Western or a scheduled return of an equal amount of energy.

For energy outside the bandwidth during the on-peak hours, the methodology proposes 110 percent of a weighted index price for under-deliveries and 90 percent of the weighted index price for over-deliveries. For energy outside the bandwidth during the off-peak hours, the methodology proposes 110 percent of a weighted index price for under-deliveries. However, for over-deliveries in the off-peak hours, the methodology proposes the lesser of 60-percent of a weighted index price, or a WALC weighted sales price. In lieu of a financial settlement for energy outside the bandwidth, an amount of energy equivalent to the financial settlement will be scheduled.

The proposed rate methodology differs from the previous methodology in that previously DSWR used the FERC pro-forma methodology to define the service. Better metering and data sorting capabilities and the drought, which persists in the southwest, have shown that Western is disadvantaged when using the FERC pro-forma methodology. Under the previous methodology, a 3-percent bandwidth with a 2 MW deviation was used, and under-deliveries were assessed 100 mills per kilowatthour penalty and over-deliveries were credited at 50 percent of market value.

Under Schedule DSW–SPR2, Operating Reserves-Spinning Reserve Service is not available from DSWR

resources on a long-term firm basis. If a customer cannot self-supply or purchase this service from another provider, Western may obtain the reserves on the open market for a charge that covers the cost of procuring the service. The transmission customer will be responsible for the transmission service to get these reserves to their destination.

Under Schedule DSW–SUR2, Operating Reserves-Supplemental Reserve Service is not available from DSWR resources on a long-term firm basis. If a customer cannot self-supply or purchase this service from another provider, at the customer's request, Western may obtain the reserves on the open market for a charge that covers the cost of procuring the service. The transmission customer will be responsible for the transmission service to get these reserves to their destination. Spinning and Supplemental Reserve Services were handled in the same way in the previous rate methodology as in this proposal.

Legal Authority

Since the proposed rates constitute a major rate adjustment as defined by 10 CFR part 903, Western will hold both a public information forum and a public comment forum. After review of public comments, and possible amendments or adjustments, Western will recommend the Deputy Secretary of Energy approve the proposed rates on an interim basis.

Western is establishing network service for the PDP and the Intertie and ancillary services for the PDP, Intertie, CAP, and the part of the CRSP located in the WALC BATO under the Department of Energy Organization Act (42 U.S.C. 7152); the Reclamation Act of 1902 (ch. 1093, 32 Stat. 388), as amended and supplemented by subsequent laws, particularly section 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. 485h(c)); and other acts that specifically apply to the projects involved.

By Delegation Order No. 00–037.00, effective December 6, 2001, the Secretary of Energy delegated: (1) The authority to develop power and transmission rates to Western's Administrator; (2) the authority to confirm, approve, and place such rates into effect on an interim basis to the Deputy Secretary of Energy; and (3) the authority to confirm, approve, and place into effect on a final basis, to remand, or to disapprove such rates to the Commission. Existing Department of Energy (DOE) procedures for public participation in power rate adjustments (10 CFR part 903) were published on September 18, 1985.

Availability of Information

All brochures, studies, comments, letters, memorandums, or other documents that Western initiates or uses to develop the proposed rates are available for inspection and copying at the Desert Southwest Regional Office, 615 South 43rd Avenue, Phoenix, Arizona. Many of these documents and supporting information are also available on DSWR's external Web site *http://www.wapa.gov/dsw/dsw.htm*.

Regulatory Procedure Requirements

Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601, *et seq.*) requires Federal agencies to perform a regulatory flexibility analysis if a final rule is likely to have a significant economic impact on a substantial number of small entities, and there is a legal requirement to issue a general notice of proposed rulemaking. This action does not require a regulatory flexibility analysis since it is a rulemaking of particular applicability involving rates or services applicable to public property.

Environmental Compliance

In compliance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321, *et seq.*); Council on Environmental Quality Regulations (40 CFR parts 1500–1508); and DOE NEPA Regulations (10 CFR part 1021), Western has determined this action is categorically excluded from preparing an environmental assessment or an environmental impact statement.

Determination Under Executive Order 12866

Western has an exemption from centralized regulatory review under Executive Order 12866; accordingly, no clearance of this notice by the Office of Management and Budget is required.

Small Business Regulatory Enforcement Fairness Act

Western has determined that this rule is exempt from congressional notification requirements under 5 U.S.C. 801 because the action is a rulemaking of particular applicability relating to rates or services and involves matters of procedure.

Dated: September 30, 2005.

Michael S. Hacskaylo,

Administrator.

[FR Doc. 05–20433 Filed 10–11–05; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[Petition IV–2002–1; FRL–7982–7]

Clean Air Act Operating Permit Program; Petition for Objection to State Operating Permit for Oglethorpe Power Company—Wansley Combined Cycle Energy Facility; Roopville (Heard County), GA

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of final order denying petition to object to a state operating permit in response to remand.

SUMMARY: On September 15, 2005, the Administrator issued an Order Responding to Remand denying a petition to object to a state operating permit issued to Oglethorpe Power Company (Oglethorpe)—Wansley Combined Cycle Energy Facility (Block 8) located in Roopville, Heard County, Georgia, pursuant to title V of the Clean Air Act (the Act), 42 U.S.C. 7661–7661f. On February 4, 2002, Sierra Club had filed a petition seeking EPA's objection to the title V operating permit for Block 8 issued by the Georgia Environmental Protection Division (EPD). The Administrator denied the petition in an Order dated November 15, 2002. Pursuant to Section 502(b) of the Act, Sierra Club appealed to the U.S. Court of Appeals for the Eleventh Circuit (the Court), arguing that Oglethorpe was not entitled to a permit for Block 8 (in accordance with Georgia's Statewide Compliance Rule) because it owns part of another major stationary source that has been cited for non-compliance with the Act. On May 5, 2004, the Court granted Sierra Club's petition for review, vacated the November 12, 2002, Order, and remanded to EPA for further explanation of the manner in which the Georgia rule should be applied in cases of partial ownership. After considering the issues raised by the Court, the Order Responding to Remand reaches the same conclusion as EPA's original Order, but provides a more detailed explanation.

ADDRESSES: Copies of the Order Responding to Remand, the petition, and all pertinent information relating thereto are on file at the following location: EPA Region 4, Air, Pesticides and Toxics Management Division, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. The remanded final order is also available electronically at the following address: *http://www.epa.gov/region7/programs/artd/air/title5/petitiondb/petitions/*

opcwansley_decision2002(remanded) .pdf.

FOR FURTHER INFORMATION CONTACT: Art Hofmeister, Air Permits Section, EPA Region 4, at (404) 562–9115 or *hofmeister.art@epa.gov*.

SUPPLEMENTARY INFORMATION: The Georgia Center for Law in the Public Interest originally submitted a petition on behalf of the Sierra Club (Petitioner) to the Administrator on February 4, 2002, requesting that EPA object to a state title V operating permit issued by the EPD to Oglethorpe. Other inconsistencies (with the Act) alleged by the Petitioner were: (1) That the permit failed to require a case-by-case maximum achievable control technology determination for the emissions of hazardous air pollutants; (2) that the permit failed to include adequate monitoring of carbon monoxide; (3) that the permit impermissibly limited the enforceability of a federal stack height provision; and (4) that the permit failed to include short-term best available control technology limits. EPA's responses to the above issues in the November 12, 2002, Order were upheld by the Court; therefore, sections IV.B. through IV.E. of the November 12, 2002, Order are incorporated by reference into the Order Responding to Remand.

Dated: October 5, 2005.

J. I. Palmer, Jr.,

Regional Administrator, Region 4.

[FR Doc. 05–20416 Filed 10–11–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[A–1–FRL–7982–5]

Approval of Air Quality Implementation Plan Commitment to Submit Mid-Course Review; Massachusetts, New Hampshire and Rhode Island

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of commitment fulfillment.

SUMMARY: Notice is hereby given that the states of Massachusetts, New Hampshire and Rhode Island have fulfilled the enforceable commitment each state made to EPA to complete a mid-course review (MCR) assessing whether their respective nonattainment area was or was not making sufficient progress toward attainment of the one-hour ozone standard under the Clean Air Act (CAA). EPA has reviewed the MCR documents submitted by Massachusetts, New Hampshire and Rhode Island and has determined that each state has adequately met its commitment to perform a MCR. EPA has sent a letter to each state approving their respective MCR as fulfilling the commitment made by each state in their 1-hour ozone attainment demonstration.

ADDRESSES: Copies of each state's MCR submittal, EPA's approval letters and EPA's technical support document (TSD) are available for public inspection during normal business hours (9 a.m. to 4 p.m.) at the following address: U.S. Environmental Protection Agency, Region 1 (New England), One Congress St., 11th Floor, Boston, Massachusetts, telephone (617) 918–1664, please telephone in advance before visiting.

FOR FURTHER INFORMATION CONTACT: Richard P. Burkhart, Air Quality Planning, Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, One Congress Street, 11th floor, (CAQ), Boston, MA 02114–2023. Phone: 617–918–1664, Fax: (617) 918–0664, E-mail: *burkhart.richard@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information-Copies of Documents

EPA's approval letters and TSD and each State's MCR submittal are available at the Regional Office, which is identified in the **ADDRESSES** section above. Copies of these same items are also available for public inspection during normal business hours, by appointment at the respective State Air Agency Division of Air Quality Control, Department of Environmental Protection, One Winter Street, 8th Floor, Boston, MA 02108; Air Resources Division, Department of Environmental Services, 6 Hazen Drive, P.O. Box 95, Concord, NH 03302–0095; and Office of Air Resources, Department of Environmental Management, 235 Promenade Street, Providence, RI 02908–5767.

II. Further Information

A. Background

EPA's 1996 modeling guidance recognized the need to perform a mid-course review as a means for addressing uncertainty in the modeling results. In its December 16, 1999 proposed rulemakings on the 1-hour ozone attainment demonstrations for ten ozone nonattainment areas (see one example at 64 FR 70348), EPA stated that because of the uncertainty in long-term projections, it believes that an attainment demonstration that relies on weight of evidence needs to contain provisions for periodic review of monitoring, emissions, and modeling data to assess the extent to which refinements to emission control measures are needed. In those December 16, 1999 proposed rulemakings, EPA set forth its framework for reviewing and processing 1-hour ozone attainment demonstrations and one element of that framework was a commitment for a MCR.

A MCR provides an opportunity for the state and EPA to assess if a nonattainment area is or is not making sufficient progress toward attainment of the one-hour ozone standard. The MCR should utilize the most recent monitoring and other data to assess whether the control measures relied on in a SIP's attainment demonstration have resulted in adequate improvement of the ozone air quality. The EPA believes that a MCR is a critical element in any attainment demonstration that employs a long-term projection period and relies on a weight-of-evidence test. The commitment to perform a MCR was required before EPA would approve most 1-hour ozone attainment demonstrations. Moreover, even though the 1-hour ozone standard has been revoked by EPA (70 FR 44470, June 15, 2005), the anti-backsliding provisions of EPA's 8-hour ozone implementation rule (69 FR 23951, April 30, 2004) continue to require areas with outstanding commitments to perform a 1-hour MCR to do so.

The three 1-hour ozone nonattainment areas in New England that are the subject of this notice are as follows: (1) The Massachusetts portion of the Boston-Lawrence-Worcester, MA–NH area, (2) the New Hampshire portion of the Boston-Lawrence-Worcester, MA–NH area, and (3) the Providence, Rhode Island area. EPA's final approval of the attainment demonstrations for both portions of the Boston-Lawrence-Worcester, MA–NH 1-hour ozone nonattainment area, each with a commitment to perform a MCR, was published on December 6, 2002 (67 FR 72574 and 67 FR 72576). EPA's final approval of the attainment demonstration for the Providence, Rhode Island 1-hour ozone nonattainment area with the commitment to perform a MCR was published on April 7, 2003 (68 FR 16721).

B. MCR Guidance

On March 28, 2002, EPA issued a memorandum entitled ''Mid-Course Review Guidance for the 1-Hour Ozone Nonattainment Areas that Rely on Weight-of-Evidence for Attainment Demonstration.'' Attached to that

memorandum was a technical guidance document dated January 2002 entitled ''Recommended Approach For Performing Mid-course Review of SIP's To Meet the 1-hour NAAQS for Ozone.''

The technical guidance contains three basic steps: (1) Perform an administrative test (*e.g.*, demonstrate whether the appropriate emission limits were adopted and implemented); (2) analyze available air quality, meteorology, emissions and modeling data and document findings; and (3) document conclusions regarding whether progress toward attainment is being made using a weight of evidence determination (which may or may not include new modeling analyses).

C. Review of MCR Submittals from Massachusetts, New Hampshire and Rhode Island

This section compares the content of each state's MCR submittal to the requirements in EPA's January 2002 technical guidance. A TSD with more detail on EPA's review has been prepared and is available from EPA at the address provided in the **ADDRESSES** section above.

1. Massachusetts MCR Submittal

The MCR for the Massachusetts portion of the Boston–Lawrence–Worcester, MA–NH 1-hour ozone nonattainment area was submitted by the Massachusetts Department of Environmental Protection (DEP) on December 23, 2004.

i. Administrative Review

The Massachusetts DEP lists measures adopted to meet CAA mandates and rate-of-progress (ROP) requirements. The MCR lists the name of the control strategy or measure, whether it is a state or federal program, the rule approval date, and regulatory citation. Massachusetts also lists additional control measures that were not part of the Massachusetts SIP and that Massachusetts had not yet committed to adopt, but that it anticipates will be adopted in time to provide additional reductions prior to the 2007 ozone season. The administrative review analysis prepared by MA DEP satisfies EPA requirements.

ii. Air Quality, Meteorology, Emissions and Modeling Data Analysis

The Massachusetts DEP submittal analyzes ozone and precursor emissions trends, and looks at trajectory analysis of ozone exceedances in eastern Massachusetts. The results of the ozone data analysis show a downward trend in the ozone design values for eastern Massachusetts. The results show that eastern Massachusetts has had ozone design values below the now-revoked NAAQS since the end of the 2003 ozone season. Since the ozone design values are already below the NAAQS for 1-hour ozone, eastern Massachusetts is obviously on track to reach attainment by its 2007 deadline. Precursor emission data for eastern Massachusetts for both Nitrogen Oxides (NO_X) and Volatile Organic Compounds (VOC) also show a substantial downward trend since 1990. This along with the ozone trends discussed above definitely shows the eastern Massachusetts area is on track to achieve attainment of the 1-hour ozone standard by 2007. In summary, the air quality, meteorology, and emissions analysis prepared by Massachusetts DEP satisfies EPA requirements, and shows eastern Massachusetts is on target to achieve attainment by 2007.

iii. Document Conclusions Regarding Whether Progress Toward Attainment Is Being Made Using a Weight of Evidence Determination

The Massachusetts MCR document states that ''Massachusetts is fully implementing all control programs identified in the 2002 attainment demonstration. All regional and federal programs from which additional reductions were anticipated are being implemented according to schedule. Trajectory analyses results continue to demonstrate that high ozone concentrations at the Fairhaven and Truro monitors in EMA [eastern Massachusetts] are largely due to ozone transport from upwind areas.'' The document goes on to state that ozone design values and 1-hour ozone levels continue to trend downward in eastern Massachusetts, furthermore ozone precursor trends are also downward, and provides data to back up these claims. EPA agrees with the Massachusetts DEP analysis.

After reviewing the Massachusetts MCR with respect to EPA guidance, EPA concludes that the Massachusetts DEP has submitted an acceptable MCR fulfilling the commitment Massachusetts made in its one-hour attainment demonstration for the Massachusetts portion of the Boston–Lawrence–Worcester, MA–NH serious 1-hour zone nonattainment area.

2. New Hampshire MCR Submittal

The MCR for the New Hampshire portion of the Boston–Lawrence–Worcester MA–NH 1-hour ozone nonattainment area was submitted by the New Hampshire Department of Environmental Services (DES) on December 30, 2004.

i. Administrative Review

The New Hampshire MCR lists all the measures that have been implemented and approved by EPA into the NH SIP. The document goes on to list additional control measures that will impact ozone precursor emissions in New Hampshire in a positive way. This section fulfills the required administrative review.

ii. Air Quality, Meteorology, Emissions and Modeling Data Analysis

The New Hampshire MCR contains air quality, meteorology, and emissions analysis for southern New Hampshire. New Hampshire states and EPA agrees that 1-hour design values in all areas of New Hampshire have been below the level of the 1-hour ozone standard since 1998. However, this nonattainment area is a part of the eastern Massachusetts 1-hour nonattainment area so air quality in the entire multi-state area should be reviewed. Based on the Massachusetts MCR discussed above, it appears that the entire area (both the Massachusetts portion and the New Hampshire portion) is on target to achieve attainment by 2007.

New Hampshire also examined emission trends for the four counties in southern New Hampshire. The trends in both VOC and NO_X between 1996 and 2007 are both downward. The trends in both VOC and NO_X between 2002 and 2007 are also downward. Based on New Hampshire's ozone and precursors emission analysis coupled with Massachusetts' similar analysis, this area is on target to attain by 2007 and thus this requirement is fulfilled.

iii. Document Conclusions Regarding Whether Progress Toward Attainment Is Being Made Using a Weight of Evidence Determination

New Hampshire documents several key parameters that show the State is on track to achieve attainment by 2007. First, all portions of New Hampshire, not just the nonattainment area, are currently meeting the 1-hour NAAQS for ozone. One-hour ozone design values continue to trend even lower. Ozone precursor emissions within New Hampshire continue to trend downward. New Hampshire uses trajectory modeling and references to additional photochemical ozone grid-point modeling to add additional evidence to their MCR demonstration. The trajectories show that at the two sites in Eastern Massachusetts that have 1-hour air quality near the 1-hour NAAQS, New Hampshire emissions have no impact. The photochemical modeling referenced by New Hampshire also shows that lower ozone values are

forecast for 2007. The New Hampshire submittal meets this requirement.

The New Hampshire DES has submitted an acceptable MCR and has fulfilled the commitment it made in its one-hour ozone attainment demonstration for the Boston–Lawrence–Worcester MA–NH serious 1-hour zone nonattainment area.

3. Rhode Island MCR Submittal

The MCR for the Rhode Island 1-hour ozone nonattainment area was submitted on June 16, 2005.

i. Administrative Review

The Rhode Island MCR states that Rhode Island is on track to implement all of the state and federal emission control measures required by the CAA. The section goes further to state that Rhode Island has already achieved attainment for the one-hour ozone standard, and states that with the additional ozone precursor reductions that will occur both in Rhode Island and upwind of Rhode Island, one-hour ozone concentrations will continue to decline into the future.

ii. Air Quality, Meteorology, Emissions and Modeling Data Analysis

As stated above, Rhode Island presents evidence that it has already achieved attainment of the one-hour ozone standard. All design values for one-hour ozone are below 124 ppb. Rhode Island also provides ozone trends and trajectory analyses that support the findings that ozone in Rhode Island is below the 1-hour NAAQS and will continue to decline in the future. The trajectories show that upwind emissions affect ozone in Rhode Island and these emissions will continue to decline in the future lowering ozone in Rhode Island even more.

iii. Document Conclusions Regarding Whether Progress Toward Attainment Is Being Made Using a Weight of Evidence Determination

Rhode Island has already achieved attainment of the one-hour standard. This requirement is met.

After reviewing Rhode Island's MCR submittal, EPA agrees with Rhode Island that it has already achieved attainment of the one-hour ozone NAAQS and approves the Rhode Island submittal as fulfilling the commitment Rhode Island made in its one-hour attainment demonstration.

III. Final Action

EPA has reviewed the MCR documents submitted by Massachusetts, New Hampshire and Rhode Island and has determined that each state has adequately met its commitment to perform a MCR. This action is being taken for the following one-hour nonattainment areas: (1) The Massachusetts portion of the Boston–Lawrence–Worcester, MA–NH area, (2) the New Hampshire portion of the Boston–Lawrence–Worcester, MA–NH area, and (3) the Providence, Rhode Island area. EPA has sent a letter to each state approving their respective MCR as fulfilling the commitment made by each state in their 1-hour ozone attainment demonstration. Copies of these letters are available from EPA at the address provided in the **ADDRESSES** section above.

IV. Statutory and Executive Order Reviews

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

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

In reviewing SIP submissions as well as submission of reports that fulfill a state commitment, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the state to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission or a SIP commitment for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission or a SIP commitment, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Authority: 42 U.S.C. 7401 *et seq.*

Dated: September 26, 2005.

Robert W. Varney,

Regional Administrator, EPA New England.

[FR Doc. 05–20420 Filed 10–11–05; 8:45 am]

BILLING CODE 6560–50–U

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2005–0101; FRL–7740–9]

Pesticide Program Dialogue Committee Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Pursuant to the Federal Advisory Committee Act, EPA gives notice of a public meeting of the Pesticide Program Dialogue Committee (PPDC) on October 20 and 21, 2005. A draft agenda has been developed and is posted on EPA's web site. Agenda topics will include: Pesticide performance measures; human studies; farmworker safety; spray drift; Pesticide Registration Improvement Act Workgroup on Process Improvements Update; integrated testing strategy and vision; updates on

registration review, reregistration/tolerance reassessment; status of rulemaking activities; and discussion of the PPDC Committee renewal activities. This document also gives notice of the PPDC Work Group on Performance Measures meeting on October 19, 2005.

DATES: The PPDC meeting will be held on Thursday, October 20, 2005, from 9 a.m. to 5 p.m., and on Friday, October 21, 2005, from 9 a.m. to noon.

The PPDC Work Group on Performance Measures will meet on Wednesday, October 19, 2005, from 2 p.m. to 5 p.m.

ADDRESSES: The PPDC meeting will be held at the Georgetown University Conference Center, 3800 Reservoir Road, NW., (Entrance #4), Washington, DC in the Leavey Center, Main Floor, Salon ''H''; telephone number: (202) 687–3242. The Georgetown University Transportation Shuttle, between the Leavey Center and Metro Stops at Dupont Circle and Rosslyn, runs every 15 minutes from 7 a.m. to 9:30 a.m. and from 3:30 p.m. to 7 p.m., Monday through Friday.

The PPDC Work Group on Performance Measures will meet at EPA's offices in Crystal Mall #2, 1801 S. Bell St., Arlington, VA.

FOR FURTHER INFORMATION CONTACT: Margie Fehrenbach, Office of Pesticide Programs (7501C), Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460–0001; telephone number: (703) 308–4775; fax number: (703) 308–4776; e-mail address:*fehrenbach.margie@epa.gov*.

For information on facilities or services for the handicapped or to request special assistance for the handicapped at the meetings, contact the Designated Federal Officer, Margie Fehrenbach, at (703) 308–4775 as soon as possible.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of particular interest to persons who work in agricultural settings or persons who are concerned about implementation of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); Federal Food, Drug, and Cosmetic Act (FFDCA); and the amendments to both of these major pesticide laws by the Food Quality Protection Act (FQPA) of 1996. Potentially affected entities may include, but are not limited to: Agricultural workers and farmers; pesticide industry and trade associations; environmental, consumer, and farmworker groups; pesticide users and growers; pest consultants; State, local and Tribal governments; academia; public health organizations; food processors; and the public. If you have questions regarding the applicability of this action to a particular entity, consult the person 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–2005–0101. 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, to 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.

A draft agenda has been developed and is posted on EPA's web site at*http://www.epa.gov/pesticides/ppdc/*.

II. Background

The Office of Pesticide Programs (OPP) is entrusted with responsibility to help ensure the safety of the American food supply, the education and protection from unreasonable risk of those who apply or are exposed to pesticides occupationally or through use of products, and general protection of the environment and special ecosystems from potential risks posed by pesticides.

PPDC was established under the Federal Advisory Committee Act (FACA), Public Law 92–463, in September 1995, for a 2–year term and has been renewed every 2 years since that time. PPDC provides advice and recommendations to OPP on a broad range of pesticide regulatory, policy, and program implementation issues that are associated with evaluating and reducing risks from use of pesticides. The following sectors are represented on the PPDC: Pesticide industry and trade associations; environmental/public interest and consumer groups; farm worker organizations; pesticide user, grower, and commodity groups; Federal and State/local/Tribal governments; the general public; academia; and public health organizations.

Copies of the PPDC Charter are filed with appropriate committees of Congress and the Library of Congress and are available upon request.

III. How Can I Request to Participate in this Meeting?

PPDC meetings are open to the public and seating is available on a first-come basis. Persons interested in attending the meeting do not need to register in advance.

List of Subjects

Environmental protection, Agricultural workers, Agriculture, Chemicals, Farmworker safety, Foods, Human studies, Pesticides and pests, Public health, Registration.

Dated: October 5, 2005.

James Jones,

Director, Office of Pesticide Programs.

[FR Doc. 05–20490 Filed 10–7–05; 10:33 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0381; FRL–7738–9]

Pyrazon Reregistration Eligibility Decision for Low Risk Pesticide; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's Reregistration Eligibility Decision (RED) for the pesticide pyrazon, and opens a public comment period on this document. The Agency's risk assessments and other

related documents also are available in the pyrazon Docket. Pyrazon [5-amino-4-chloro-2-phenyl-3(2H)-pyridazinone], also known as chloridazon, is an herbicide belonging to the pyridazinone class of pesticides, and is used for weed control on sugar beets, red table beets, and ornamentals. EPA has reviewed pyrazon through the public participation process that the Agency uses to involve the public in developing pesticide reregistration and tolerance reassessment decisions. Through these programs, EPA is ensuring that all pesticides meet current health and safety standards.

DATES: Comments must be received on or before December 12, 2005

ADDRESSES: Comments identified by docket identification (ID) number OPP–2004–0381 may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Stephanie Plummer, Special Review and Reregistration Division (7508C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460–0001; telephone number: (703) 305–0076; fax number: (703) 308–7042; e-mail address: plummer.stephanie@*epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may 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 person 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 ID number OPP–2004–0381. 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 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 in the system, select ''search,'' then key in the appropriate docket ID number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. 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. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically*. If you submit an electronic comment as prescribed in this unit, 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 this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties

and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets*. Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select ''search,'' and then key in docket ID number OPP–2004–0381. The system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail*. Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID Number OPP–2004–0381. 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 comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM*. You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail*. Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number OPP–2004–0381.

3. *By hand delivery or courier*. Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA, Attention: Docket ID Number OPP–2004–0381. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at your estimate.
5. Provide specific examples to illustrate your concerns.
6. Offer alternatives.
7. Make sure to submit your comments by the comment period deadline identified.
8. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

II. Background

A. What Action is the Agency Taking?

Under section 4 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is reevaluating existing pesticides to ensure that they meet current scientific and regulatory standards. EPA has completed a Reregistration Eligibility Decision (RED) for the pesticide pyrazon under section 4(g)(2)(A) of FIFRA. Pyrazon [5-amino-4-chloro-2-phenyl-3(2H)-pyridazinone], also known as chloridazon, is an herbicide belonging to the pyridazinone class of pesticides, and is used for weed control on sugar beets, red table beets, and ornamentals. EPA has determined that the data base to support reregistration is substantially complete and that products containing pyrazon are eligible for reregistration. Upon submission of any required product-specific data under section 4(g)(2)(B) and any necessary changes to the registration and labeling (either to address concerns identified in the RED or as a result of product-specific data), EPA will make a final reregistration decision under section 4(g)(2)(C) for products containing pyrazon.

EPA must review tolerances and tolerance exemptions that were in effect when the Food Quality Protection Act (FQPA) was enacted in August 1996, to ensure that these existing pesticide residue limits for food and feed commodities meet the safety standard established by the new law. Tolerances are considered reassessed once the safety finding has been made or a revocation occurs. EPA has reviewed and made the requisite safety finding for the pyrazon tolerances included in this notice.

EPA is applying the principles of public participation to all pesticides undergoing reregistration and tolerance reassessment. The Agency's Pesticide Tolerance Reassessment and Reregistration; Public Participation Process, published in the **Federal Register** on May 14, 2004(69 FR 26819) (FRL–7357–9), explains that in conducting these programs, EPA is tailoring its public participation process to be commensurate with the level of risk, extent of use, complexity of issues, and degree of public concern associated with each pesticide. Due to limited use patterns its lower risks, and other factors, pyrazon was reviewed through the modified 1-Phase process.

The reregistration program is being conducted under Congressionally mandated time frames, and EPA recognizes the need both to make timely decisions and to involve the public. The Agency is issuing the pyrazon RED for public comment. This comment period is intended to provide an opportunity for public input and a mechanism for initiating any necessary amendments to the RED. All comments should be submitted using the methods in Unit I. of the **SUPPLEMENTARY INFORMATION**, and must be received by EPA on or before the closing date. These comments will become part of the Agency Docket for

pyrazon. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

The Agency will consider all comments received by the closing date and will provide a Response to Comments Memorandum in the Docket and electronic EDOCKET. If any comment significantly affects the document, EPA also will publish an amendment to the RED in the **Federal Register**. In the absence of substantive comments requiring changes, the pyrazon RED will be implemented as it is now presented.

B. What is the Agency's Authority for Taking this Action?

Section 4(g)(2) of FIFRA as amended directs that, after submission of all data concerning a pesticide active ingredient, ''the Administrator shall determine whether pesticides containing such active ingredient are eligible for reregistration,'' before calling in product-specific data on individual end-use products and either reregistering products or taking other ''appropriate regulatory action.''

Section 408(q) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(q), requires EPA to review tolerances and exemptions for pesticide residues in effect as of August 2, 1996, to determine whether the tolerance or exemption meets the requirements of section 408(b)(2) or (c)(2) of FFDCA. This review is to be completed by August 3, 2006.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: September 28, 2005.

Debra Edwards,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. 05–20419 Filed 10–11–05; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget

September 28, 2005.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before November 14, 2005. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Leslie F. Smith, Federal Communications Commission, Room 1–A804, 445 12th Street, SW., DC 20554 or via the Internet to *Leslie.Smith@fcc.gov.* If you would like to obtain or view a copy of this new or revised information collection, you may do so by visiting the FCC PRA Web page at: *http://www.fcc.gov/omd/pra.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Leslie F. Smith at (202) 418–0217 or via the Internet at *Leslie.Smith@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0057.

Title: Application for Equipment Authorization, FCC Form 731.

Form Number: FCC 731.

Type of Review: Revision of currently approved collection.

Respondents: Business or other for profit entities.

Estimated Number of Respondents: 280 (multiple responses annually).

Estimated Time per Response: 25 hours (average).

Frequency of Response: On occasion reporting requirements; Third party disclosure.

Total Annual Burden: 200,000 hours.

Total Annual Costs: $8,244,000.

Privacy Act Impact Assessment: Not Applicable.

Needs and Uses: On July 8, 2004, the Commission adopted a *Report and Order*, Modification of Parts 2 and 15 of the Commission's Rules for Unlicensed Devices and Equipment Approval, ET Docket No. 03–201, FCC 04–165. The change requires that all paper filings required in 47 CFR Sections 2.913(c), 2.926(c), 2.929(c), and 2.929(d) of the rules are outdated and now must be filed electronically via the Internet on FCC Form 731. The Commission believes that electronic filing speeds up application processing and supports the Commission in further streamlining to reduce cost and increase efficiency. Information on the procedures for electronically filing equipment authorization applications can be obtained from the Commission's rules, and from the Internet at: *https://gullfoss2.fcc.gov/prod/oet/cf/eas/index.cfm.*

Designated Telecommunications Certification Body (TCB). The basic authorization process has not changed. Respondents are only being required to file the same information electronically.

The Commission is merging FCC Form 731–TC into FCC Form 731.

Federal Communications Commission

Marlene H. Dortch,

Secretary.

[FR Doc. 05–20215 Filed 10–11–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority.

October 3, 2005.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law No. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary

for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before December 12, 2005. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: You may submit all your Paperwork Reduction Act (PRA) comments by e-mail or U.S. postal mail. To submit your comments by e-mail send them to *PRA@fcc.gov.* To submit your comments by U.S. mail, mark them to the attention of Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s) send an e-mail to *PRA@fcc.gov* or contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0473.

Title: Section 74.1251, Technical and Equipment Modifications.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions.

Number of Respondents: 100.

Estimated Time per Response: 0.50 hours.

Frequency of Response: Recordkeeping requirement; On occasion reporting requirement.

Total Annual Burden: 50 hours.

Total Annual Cost: None.

Privacy Impact Assessment: No impact(s).

Needs and Uses: 47 CFR 74.1251 requires licensees to certify compliance with technical requirements upon replacement of a transmitter that can be completed without FCC approval. The certification provides to prospective users information of the modified equipment. If no such information exists, any future problems could prove difficult to solve and could result in electronic frequency interference for long periods of time. The notification of changes in the primary FM station is used by FCC staff to keep records up-to-date and to ensure compliance with FCC rules and regulations.

Federal Communications Commission

Marlene H. Dortch,

Secretary.

[FR Doc. 05–20347 Filed 10–11–05; 8:45 am]

BILLING CODE 6712–10–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

October 6, 2005.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law No. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before December 12, 2005. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: You may submit your all Paperwork Reduction Act (PRA) comments by e-mail or U.S. postal mail. To submit your comments by e-mail send them to *PRA@fcc.gov.* To submit your comments by U.S. mail, mark them to the attention of Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s) send an e-mail to *PRA@fcc.gov* or contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0214.

Title: Section 73.3526, Local Public Inspection Files for Commercial Stations; Section 73.3527, Local Public Inspection File of Noncommercial Educational Stations; Section 76.1701, Political File; Section 73.1943, Political File.

Form Number: Not applicable.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; Not for-profit institutions.

Number of Respondents: 37,126.

Estimated Time per Response: 2.5 hours—160 hours per year.

Frequency of Response: Recordkeeping requirement; Third party disclosure requirement.

Total Annual Burden: 1,779,333 hours.

Total Annual Cost: None.

Privacy Impact Assessment: No impact(s).

Needs and Uses: 47 CFR 73.3526 and 47 CFR 73.3527 require that licensees and permittees of commercial and noncommercial AM, FM and TV stations maintain a file for public inspection at its main studio or at another accessible location in its community of license. The contents of the file vary according to type of service and status. The contents include, but are not limited to, copies of certain applications tendered for filing, a statement concerning petitions to deny filed against such applications, copies of ownership reports, statements certifying compliance with filing announcements in connection with renewal applications, and a list of community issues addressed by the station's programming.

These rules also specify the length of time, which varies by document type, that each record must be retained in the public file. The public and FCC use the data to evaluate information about the licensee's performance and to ensure that station is addressing issues concerning the community to which it is licensed to serve.

47 CFR 73.1943 and 47 CFR 76.1701 require licensees of broadcast stations and cable television systems, respectively, to keep and permit public inspection of a complete record

(political file) of all requests for broadcast time made by or on behalf of candidates for public office, together with an appropriate notation showing the disposition made by the licensee of such requests. The data is used by the public to assess money expended and time allotted to a political candidate and to ensure that equal access was afforded to other legally qualified candidates. 47 CFR 76.1701 also requires that, when an entity sponsors origination cable casting material that concerns a political matter or a discussion of a controversial issue of public importance, a list must be maintained in the public file of the system that includes the sponsoring entity's chief executive officers, or members of its executive committee or of its board of directors.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–20526 Filed 10–11–05; 8:45 am]

BILLING CODE 6712–10–P

FEDERAL COMMUNICATIONS COMMISSION

[CG Docket No. 03–123; DA 05–2417]

Reminder That Video Relay Service (VRS) Provides Access to the Telephone System Only and Cannot Be Used as a Substitute for ''In-Person'' Interpreting Services or Video Remote Interpreting (VRI)

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Commission reminds Video Relay Service (VRS) providers, consumers, and businesses that VRS cannot be used as a substitute for ''in-person'' interpreting services or for Video Remote Interpreting (VRI). The Commission will continue to carefully scrutinize the provision and use of VRS to ensure that it is being used only as a means of accessing the telephone system, not as a substitute for VRI or as a means to gain free ''in-person'' interpreting services. Also, in this document, the Commission encourages persons requiring interpreting services and providing interpreting services, as well as VRS providers, to report any improper use of VRS to the Commission so that it may ensure that the Interstate Telecommunications Relay Service (TRS) Fund is compensating only legitimate VRS calls. The Commission continues to closely monitor alleged instances of the wrongful use of VRS, and will take whatever enforcement action is necessary and appropriate against such misuse.

FOR FURTHER INFORMATION CONTACT: Thomas Chandler, Consumer & Governmental Affairs Bureau at (202) 418–1475 (voice), (202) 418–0597 (TTY) or e-mail *Thomas.Chandler@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document DA 05–2417, released September 7, 2005 in CG Docket No. 03–123. The complete text of document DA 05–2417 and copies of any subsequently filed documents relating to this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. Document DA 05–2417 and copies of subsequently filed documents in this matter may also be purchased from the Commission's duplicating contractor at Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact the Commission's duplicating contractor at its Web site: *http://www.bcpiweb.com* or call 1–800–378–3160. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). Document DA 05–2417 can also be downloaded in Word and Portable Document Format (PDF) at: *http://www.fcc.gov/cgb/dro.*

Synopsis

On September 7, 2005, the Commission issued a Public Notice to remind VRS providers, consumers, and businesses that VRS cannot be used as a substitute for ''in-person'' interpreting services or for Video Remote Interpreting (VRI). VRS, as a form of telecommunications relay service (TRS), is a means of giving persons with hearing disabilities access to the telephone system. The obligation of telephone companies to offer TRS is required by Congress under Title IV of the Americans with Disabilities Act of 1990 (ADA). VRS allows people with hearing disabilities whose primary language is American Sign Language (ASL) to use the Internet or another broadband connection to contact a communications assistant (CA) via video equipment. The CA then makes an outbound telephone call to a hearing person and relays the call between the two parties. Currently, the costs for VRS calls are reimbursed from the Interstate TRS Fund, which is overseen by the Commission, making VRS calls free for consumers. By contrast, sign language interpreters facilitate communication between individuals who use sign language to communicate and those who do not. An interpreter may be used in many situations—*e.g.*, in classrooms, during medical appointments, at staff meetings, or for business transactions—when the parties are together at the same location. Generally, interpreters are contracted and paid for on a fee-for-service basis. Video Remote Interpreting (VRI) is a service that is used when an interpreter cannot be physically present to interpret for two or more persons who are together at the same location. This service uses a video connection to provide access to an interpreter who is at a remote location. As with ''in-person'' interpreters, VRI services are generally contracted and paid for on a fee-for-service basis. VRS is to be used only when a person with a hearing disability, who absent such disability would make a voice telephone call, desires to make a call through the telephone system (or when, in the reverse situation, the hearing person desires to make such a call to a person with a hearing disability). *See* 47 CFR 64.601(17) of the Commission's rules. VRS may not be used as a substitute for an ''in-person'' interpreter or a VRI service.

Although the Commission has previously cautioned about the misuse of VRS as a substitute for ''in-person'' sign language interpreting services or VRI, it continues to receive reports that this is occurring. *See, e.g.*, *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* CC Docket No. 98–67, Order on Reconsideration, FCC 00–200, 16 FCC Rcd 4054–4058, paragraph 10 (June 5, 2000); *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* CC Docket Nos. 90–571 and 98–67, CG Docket No. 03–123, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 04–137, 19 FCC Rcd 12475–12537, note 466 (June 30, 2004), published at 69 FR 53346 (September 1, 2004), 69 FR 53382 (September 1, 2004); *Federal Communications Commission Clarifies That Certain Telecommunications Relay Services (TRS) Marketing and Call Handling Practices Are Improper and Reminds That Video Relay Service (VRS) May Not Be Used as a Video Remote Interpreting Service,* CC Docket No. 98–67, CG Docket No. 03–123, Public Notice, DA 05–141, 20 FCC Rcd 1471 (January 26, 2005), published at 70 FR

8034 (February 17, 2005); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* CC Docket No. 98–67, CG Docket No. 03–123, Order on Reconsideration, FCC 05–139, note 109 (July 19, 2005), published at 70 FR 51643 (August 31, 2005). The Commission is concerned that the misuse of VRS may be partially responsible for the large increase in minutes of use of VRS. The Interstate TRS Fund reimbursed 869,003 minutes of VRS usage for June 2004 and 2,136,657 minutes for June 2005. The Commission understands that VRS providers generally have procedures in place to terminate calls where VRS is being used as a way to obtain free interpreting services. However, the Commission also understands that persons misusing VRS may be doing so in ways to avoid detection, and are also publicizing these methods via consumer bulletin boards and other means.

The Commission is mindful that employers, State and local government entities, and public accommodations are required under the ADA to provide persons with hearing disabilities a reasonable accommodation, and that the accommodation may entail the use of a sign language interpreter. However, VRS cannot be used as a substitute for using an in-person interpreter or VRI in situations that would not, absent one of the parties' hearing disability, entail the use of the telephone. The Commission will continue to carefully scrutinize the provision and use of VRS to ensure that it is being used only as a means of accessing the telephone system, not as a substitute for VRI or as a means to gain free ''in-person'' interpreting services. The Commission encourages persons requiring interpreting service and providing interpreting services, as well as VRS providers, to report any improper use of VRS to the Commission so that it may ensure that the Interstate TRS Fund is compensating only legitimate VRS calls. The Commission will continue to closely monitor alleged instances of the wrongful use of VRS, and take whatever enforcement action is necessary and appropriate against such misuse.

Federal Communications Commission.

Jay Keithley,

Deputy Chief, Consumer & Governmental Affairs Bureau.

[FR Doc. 05–20133 Filed 10–11–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[WC Docket No. 05–276; DA 05–2514]

Access Charges for IP-Transported Calls

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document seeks comment on petitions for declaratory ruling filed by SBC and VarTec. SBC seeks a declaratory ruling that wholesale transmission providers using Internet protocol (IP) technology to transport long distance calls are liable for access charges. VarTec seeks a declaratory ruling that it is not required to pay access charges to terminating local exchange carriers (LECs) when enhanced service providers or other carriers deliver calls directly to the terminating LECs for termination. VarTec also seeks a declaratory ruling that such calls are exempt from access charges when they are originated by a commercial mobile radio service (CMRS) provider and do not cross metropolitan trading area (MTA) boundaries. VarTec also seeks a declaratory ruling that terminating LECs are required to pay VarTec for the transiting service VarTec provides when terminating LECs terminate intraMTA calls originated by a CMRS provider.

DATES: Comments due November 10, 2005, and reply comments due December 12, 2005.

ADDRESSES: You may submit comments, identified by WC Docket No. 05–276, by any of the following methods:

Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

Federal Communications Commission's Web Site: *http://www.fcc.gov/cgb/ecfs.* Follow the instructions for submitting comments.

E-mail: Include the docket number in the subject line of the message.

Mail: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

People with Disabilities: Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Jennifer McKee, Wireline Competition Bureau, Pricing Policy Division, (202) 418–1530, *jennifer.mckee@fcc.gov.*

SUPPLEMENTARY INFORMATION: On September 21, 2005, the SBC incumbent local exchange carriers (SBC) filed a petition for declaratory ruling that wholesale transmission providers using Internet protocol (IP) technology to transport long distance calls are liable for access charges. SBC filed its petition after the United States District Court for the Eastern District of Missouri dismissed without prejudice SBC's claims seeking payment of access charges for long distance calls that were transported using IP technology. The court found it appropriate to defer the issues raised by SBC to the primary jurisdiction of the FCC. In its petition, SBC seeks a declaratory ruling that wholesale transmission providers using IP technology to carry long distance calls that originate and terminate on the public switched telephone network (PSTN) are liable for access charges under § 69.5 of the Commission's rules, 47 CFR 69.5, and applicable tariffs. SBC seeks a ruling that providers meeting these criteria are interexchange carriers.

VarTec filed a petition for declaratory ruling on related issues. Specifically, VarTec seeks a declaratory ruling that it is not required to pay access charges to terminating local exchange carriers (LECs) when enhanced service providers or other carriers deliver calls directly to the terminating LECs for termination. VarTec also seeks a declaratory ruling that such calls are exempt from access charges when they are originated by a commercial mobile radio service (CMRS) provider and do not cross major trading area (MTA) boundaries. VarTec also seeks a declaratory ruling that terminating LECs are required to pay VarTec for the transiting service VarTec provides when terminating LECs terminate intraMTA calls originated by a CMRS provider.

Interested parties may file comments on or before November 10, 2005, and reply comments on or before December 12, 2005. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/cgb/ecfs/.* Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number, in this case WC Docket No. 05–276. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions

for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov,* and should include the following words in the body of the message, ''get form.'' A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). Parties are strongly encouraged to file comments electronically using the Commission's Electronic Comment Filing System (ECFS).

The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002.

—The filing hours at this location are 8 a.m. to 7 p.m.
—All hand deliveries must be held together with rubber bands or fasteners.
—Any envelopes must be disposed of before entering the building.
—Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
—U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554.

All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. Parties should also send a copy of their filings to Jennifer McKee, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, Room 5–A263, 445 12th Street, SW., Washington, DC 20554, or by e-mail to *jennifer.mckee@fcc.gov.* Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, (202) 488–5300, or via e-mail to *fcc@bcpiweb.com.*

Documents in WC Docket No. 05–276, including the SBC Petition and the VarTec Petition, are available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th St. SW., Room CY–A257, Washington, DC 20554. The documents may also be purchased from BCPI, telephone (202) 488–5300, facsimile (202) 488–5563, TTY (202) 488–5562, e-mail *fcc@bcpiweb.com.*

This matter shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's ex parte rules. Persons making oral ex parte presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally is required. Other requirements pertaining to oral and written ex parte presentations in permit-but-disclose proceedings are set forth in section 1.1206(b) of the Commission's rules.

Federal Communications Commission.

Donald Stockdale,

Acting Deputy Chief, Wireline Competition Bureau.

[FR Doc. 05–20527 Filed 10–11–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 11:30 a.m., Monday, October 17, 2005.

PLACE: Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

FOR FURTHER INFORMATION CONTACT: Michelle A. Smith, Director, Office of Board Members; 202–452–2955.

SUPPLEMENTARY INFORMATION: You may call 202–452–3206 beginning at approximately 5 p.m. two business days before the meeting for a recorded announcement of bank and bank holding company applications scheduled for the meeting; or you may contact the Board's Web site at *http://www.federalreserve.gov* for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Board of Governors of the Federal Reserve System, October 7, 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 05–20568 Filed 10–7–05; 3:25 pm]

BILLING CODE 6210–01–S

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Sunshine Act Notice

TIME AND DATE: 9 a.m. (EDT), October 17, 2005.

PLACE: 4th Floor Conference Room, 1250 H Street, NW, Washington, DC.

STATUS: Parts will be open to the public and parts closed to the public.

MATTERS TO BE CONSIDERED:

Parts Open to the Public

1. Approval of the minutes of the September 19, 2005, Board member meeting.
2. Thrift Savings Plan activity report by the Executive Director.
3. Quarterly Investment Policy report.
4. Quarterly Vendor Financial Statement report.
5. Old business. Resolution to require Executive Director to consult Board.
6. Mid-year financial audit report from Deloitte & Touche.

Parts Closed to the Public

7. Procurement.
8. Personnel.

CONTACT PERSON FOR MORE INFORMATION: Thomas J. Trabucco, Director, Office of External Affairs, (202) 942–1640.

Dated: October 6, 2005.

Elizabeth S. Woodruff,

Secretary to the Board, Federal Retirement Thrift Investment Board.

[FR Doc. 05–20482 Filed 10–6–05; 5:02 pm]

BILLING CODE 6760–01–P

GENERAL SERVICES ADMINISTRATION

Notice of a Deviation; Motor Vehicle Management

AGENCY: Office of Governmentwide Policy, General Services Administration (GSA).

ACTION: Notice of a deviation.

SUMMARY: This notice announces that the General Services Administration (GSA), Office of Governmentwide Policy (M), is granting a deviation from the Federal Management Regulation (FMR) to all agencies whose purchase of gasoline for motor vehicles has been impacted by Hurricanes Katrina and

Rita. This deviation will allow Federal agencies to purchase premium gasoline for government owned and leased vehicles when lower grade gasoline is not available. This deviation can be found at www.gsa.gov/vehiclepolicy and clicking on ''Deviation from 41 CFR 102–34.335''.

DATES: The deviation announced in this notice is effective September 8, 2005.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact General Services Administration, Office of Governmentwide Policy, Office of Travel, Transportation and Asset Management, at (202) 501–1777 and cite the deviation regarding motor vehicle management dated September 30, 2005.

SUPPLEMENTARY INFORMATION:

A. Background

Federal Management Regulation (FMR) section 102–34.335 (41 CFR 102–34.335) prohibits the use of premium grade gasoline in any motor vehicle owned or leased by the Government unless the motor vehicle specifically requires premium grade gasoline. This section states that drivers are to use the grade (octane rating) of gasoline recommended by the motor vehicle manufacturer when fueling motor vehicles owned or leased by the Government.

As a result of the catastrophic destruction caused by Hurricanes Katrina and Rita, agencies have reported that their vehicles operators are unable to purchase lower octane gasoline for their vehicles to complete their missions. In many areas, agencies have only been able to procure premium gasoline for use in their motor vehicles. The original intent of section 102–34.335 was to reduce fuel costs and eliminate the unnecessary use of premium gasoline in vehicles capable of being operated on lower grade gasoline.

A notice announcing this deviation was published in the **Federal Register** on September 16, 2005 (70 FR 54747) as a result of Hurricane Katrina. This notice amends that notice by including all agencies whose purchase of gasoline for motor vehicles has been impacted by both Hurricanes Katrina and Rita.

B. Procedures

This deviation is located on the Internet at *www.gsa.gov/vehiclepolicy* and clicking on ''Deviation from 41 CFR 102–34.335''.

Dated: September 30, 2005.

Becky Rhodes,

Deputy Associate Administrator.

[FR Doc. 05–20375 Filed 10–11–05; 8:45 am]

BILLING CODE 6820–14–S

GENERAL SERVICES ADMINISTRATION

Federal Travel Regulation (FTR)

Maximum Per Diem Rates for Florida and Ohio

AGENCY: Office of Governmentwide Policy, General Services Administration (GSA).

ACTION: Notice of Per Diem Bulletin 06–2, revised continental United States (CONUS) per diem rates.

SUMMARY: The General Services Administration (GSA) is making a technical correction to the lodging rates of certain locations in the States of Florida and Ohio. The per diems prescribed in Bulletin 06–2 may be found at *www.gsa.gov/perdiem.*

DATES: This notice is effective [enter date of publication in the **Federal Register**] and applies to travel performed on or after October 1, 2005.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Lois Mandell, Office of Governmentwide Policy, Travel Management Policy, at (202) 501–2824. Please cite FTR Per Diem Bulletin 06–2.

SUPPLEMENTARY INFORMATION:

A. Background

After an analysis of the per diem rates established for FY 2006 (see the **Federal Register** notices at 70 FR 52100, September 1, 2005), a technical correction is being made to the per diem rates in the following locations:

State of Florida

- Brevard County

State of Ohio

- Cuyahoga County

B. Procedures

Per diem rates and the FTR Per Diem Bulletin are published on the Internet at *www.gsa.gov/perdiem.* A Federal Notice is published in the **Federal Register** on a periodic basis. This process ensures timely increases or decreases in per diem rates established by GSA for Federal employees on official travel within CONUS. Notices published periodically in the **Federal Register**, such as this one, now constitute the only notification of revisions in CONUS per diem rates to agencies.

Dated: October 5, 2005.

Rebecca Rhodes,

Deputy Associate Administrator.

[FR Doc. 05–20374 Filed 10–11–05; 8:45 am]

BILLING CODE 6820–14–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

Statement of Organization, Functions, and Delegations of Authority

Part T (Agency for Toxic Substances and Disease Registry) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (50 FR 25129–25130, dated June 17, 1985, as amended most recently at 69 FR 60629, dated October 12, 2004) is amended to reflect the reorganization of the Agency for Toxic Substances and Disease Registry (ATSDR).

Section T–B, Organization and Functions, is hereby amended as follows:

Delete in its entirety the functional statements for the *Division of Health Studies (TB8),* and insert the following:

Division of Health Studies (TB8). (1) Coordinates all activities associated with human health studies, surveillance activities, and registries; (2) provides medical epidemiologic, and biostatistical assistance and consultation; (3) implements extramural research programs that involve human health investigations.

Office of the Director (TB81). (1) Plans, directs, coordinates, and manages the operations of the Division of Health Studies; (2) develops goals and objectives and provides leadership, policy formulation, and guidance in program planning and development; (3) facilitates the science, including analytic support of the division and undertakes special scientific activities; (4) coordinates division activities with other components of ATSDR and other federal agencies.

Surveillance and Registries Branch (TB82). (1) Designs and conducts surveillance and registry programs to evaluate the adverse health effects on persons exposed to hazardous substances; (2) conducts health follow-up activities resulting from surveillance and registries; (3) implements extramural research programs that involve surveillance and registries.

Health Investigations Branch (TB84). (1) Designs and conducts human health, including epidemiologic, studies to evaluate the association between exposure to hazardous substances and adverse health effects; (2) provides expert medical and environmental epidemiologic consultation; (3) implements extramural research programs that involve human health investigations.

Dated: June 3, 2005.

William H. Gimson,

Chief Operating Officer, Centers for Disease Control and Prevention (CDC).

[FR Doc. 05–20369 Filed 10–11–05; 8:45 am]

BILLING CODE 4160–70–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Advisory Committee on Immunization Practices

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 Federal Committee meeting.

Name: Advisory Committee on Immunization Practices (ACIP).

Times and Dates:

8:30 a.m.–5:15 p.m., October 26, 2005.
8 a.m.–3:30 p.m., October 27, 2005.

Place: Atlanta Marriott Century Center, 2000 Century Boulevard, N.E., Atlanta, Georgia 30345–3377.

Status: Open to the public, limited only by the space available.

Purpose: The Committee is charged with advising the Director, CDC, on the appropriate uses of immunizing agents. In addition, under 42 United States Code 1396s, the Committee is mandated to establish and periodically review and, as appropriate, revise the list of vaccines for administration to vaccine-eligible children through the Vaccines for Children (VFC) program, along with schedules regarding the appropriate periodicity, dosage, and contraindications applicable to the vaccines.

Matters to Be Discussed: The agenda will include discussions on influenza; recommendations for use of Hepatitis A vaccine among children; VFC vote on Hepatitis A; adult Hepatitis B vaccine recommendation; varicella zoster immune globulin; recommended childhood and adolescent immunization schedules; use of Tdap vaccine; prevention of rotavirus gastroenteritis; Measles, Mumps, Rubella Vaccine (MMRV) recommendation; VFC vote on MMRV; Human Papailloma Virus vaccine; general recommendations on immunization; herpes zoster; and Departmental updates.

Agenda items are subject to change as priorities dictate.

Contact Person for More Information: Demetria Gardner, Epidemiology and Surveillance Division, National Immunization Program, CDC, 1600 Clifton Road, NE., (E–61), Atlanta, Georgia 30333, telephone 404/639–8096, fax 404/639–8616.

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 the CDC and ATSDR.

Dated: October 5, 2005.

Alvin Hall,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 05–20381 Filed 10–11–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2005N–0393]

Agency Information Collection Activities; Proposed Collection; Comment Request; Investigational New Drug Regulations

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on requirements under which the clinical investigation of the safety and effectiveness of unapproved new drugs and biological products can be conducted.

DATES: Submit written or electronic comments on the collection of information by December 12, 2005.

ADDRESSES: Submit electronic comments on the collection of information to:*http://www.fda.gov/dockets/ecomments*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Karen Nelson, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1482.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Investigational New Drug Regulations—21 CFR Part 312 (OMB Control Number 0910–0014)—Extension

FDA is requesting OMB approval for the reporting and recordkeeping requirements contained in the FDA regulation ''Investigational New Drug Application'' in part 312 (21 CFR part 312). This regulation implements provisions of section 505(i) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 355(i)) to issue regulations under which the clinical investigation of the safety and effectiveness of unapproved new drugs and biological products can be conducted.

FDA is charged with implementing statutory requirements that drug products marketed in the United States be shown to be safe and effective, properly manufactured, and properly labeled for their intended uses. Section 505(a) of the act provides that a new drug may not be introduced or delivered for introduction into interstate commerce in the United States unless FDA has previously approved a new drug application (NDA). FDA approves

an NDA only if the sponsor of the application first demonstrates that the drug is safe and effective for the conditions prescribed, recommended, or suggested in the product's labeling. Proof must consist, in part, of adequate and well-controlled studies, including studies in humans, that are conducted by qualified experts. The IND regulations establish reporting requirements that include an initial application as well as amendments to that application, reports on significant revisions of clinical investigation plans, and information on a drug's safety or effectiveness. In addition, the sponsor is required to give FDA an annual summary of the previous year's clinical experience. Submissions are reviewed by medical officers and other agency scientific reviewers assigned responsibility for overseeing the specific study. The IND regulations also contain recordkeeping requirements that pertain to the responsibilities of sponsors and investigators. The detail and complexity of these requirements are dictated by the scientific procedures and human subject safeguards that must be followed in the clinical tests of investigational new drugs.

The IND information collection requirements provide the means by which FDA can do the following: (1) Monitor the safety of ongoing clinical investigations; (2) determine whether the clinical testing of a drug should be authorized; (3) ensure production of reliable data on the metabolism and pharmacological action of the drug in humans; (4) obtain timely information on adverse reactions to the drug; (5) obtain information on side effects associated with increasing doses; (6) obtain information on the drug's effectiveness; (7) ensure the design of well-controlled, scientifically valid studies; (8) obtain other information pertinent to determining whether clinical testing should be continued and information related to the protection of human subjects. Without the information provided by industry in response to the IND regulations, FDA cannot authorize or monitor the clinical investigations which must be conducted prior to authorizing the sale and general use of new drugs. These reports enable FDA to monitor a study's progress, to assure subject safety, to assure that a study will be conducted ethically, and to increase the likelihood that the sponsor will conduct studies that will be useful in determining whether the drug should be marketed and available for use in medical practice.

There are two forms that are required under part 312. The first is Form FDA–1571 ''Investigational New Drug Application.'' A person who intends to conduct a clinical investigation submits this form to FDA. It includes the following information: (1) A cover sheet containing background information on the sponsor and investigator, (2) a table of contents, (3) an introductory statement and general investigational plan, (4) an investigator's brochure describing the drug substance, (5) a protocol for each planned study, (6) chemistry, manufacturing, and control information for each investigation, (7) pharmacology and toxicology information for each investigation, and (8) previous human experience with the investigational drug.

The second form required under part 312 is Form FDA–1572 ''Investigator Statement.'' Before permitting an investigator to begin participation in an investigation, the sponsor must obtain and record this form. It includes background information on the investigator and the investigation, and a general outline of the planned investigation and the study protocol.

FDA is requesting OMB approval for the following reporting and recordkeeping requirements in part 312:

TABLE 1.

REPORTING REQUIREMENTS	
21 CFR Section	Requirements
312.7(d)	Applications for permission to sell an investigational new drug.
312.10(a)	Applications for waiver of requirements under part 312. Estimates for this requirement are included under §§ 312.23 and 312.31.
312.20(c)	Applications for investigations involving an exception from informed consent under § 50.24 (21 CFR 50.24). Estimates for this requirement are included under § 312.23.
312.23	INDs (content and format).
(a)(1)	Cover sheet FDA–1571.
(a)(2)	Table of contents.
(a)(3)	Investigational plan for each planned study.
(a)(5)	Investigator's brochure.
(a)(6)	Protocols—phases 1, 2, and 3.
(a)(7)	Chemistry, manufacturing, and control information.
(a)(7)(iv)(*a*), (a)(7)(iv)(*b*), and (a)(7)(iv)(*c*)	A description of the drug substance, a list of all components, and any placebo used.
(a)(7)(iv)(*d*)	Labeling: Copies of labels and labeling to be provided each investigator.
(a)(7)(iv)(*e*)	Environmental impact analysis regarding drug manufacturing and use.
(a)(8)	Pharmacological and toxicology information.
(a)(9)	Previous human experience with the investigational drug.
(a)(10)	Additional information.
(a)(11)	Relevant information.
(f)	Identification of exception from informed consent.
312.30	Protocol amendments.
(a)	New protocol.
(b)	Change in protocol.
(c)	New investigator.
(d)	Content and format.
(e)	Frequency.
312.31	Information amendments.

TABLE 1.—Continued

REPORTING REQUIREMENTS	
21 CFR Section	Requirements
(b)	Content and format. Chemistry, toxicology, or technical information.
312.32	Safety reports.
(c)(1)	Written reports to FDA and to investigators.
(c)(2)	Telephone reports to FDA for fatal or life-threatening experience.
(c)(3)	Format or frequency.
(d)	Followup submissions.
312.33	Annual reports.
(a)	Individual study information.
(b)	Summary information.
(b)(1)	Adverse experiences.
(b)(2)	Safety report summary.
(b)(3)	List of fatalities and causes of death.
(b)(4)	List of discontinuing subjects.
(b)(5)	Drug action.
(b)(6)	Preclinical studies and findings.
(b)(7)	Significant changes.
(c)	Next year general investigational plan.
(d)	Brochure revision.
(e)	Phase I protocol modifications.
(f)	Foreign marketing developments.
312.35	Treatment use of investigational new drugs.
(a)	Treatment protocol submitted by an investigational new drug sponsor.
(b)	Treatment investigational new drug application (IND) submitted by licensed practitioner.
312.36	Requests for emergency use of an investigational new drug.
312.38(b) and (c)	Notification of withdrawal of an investigational new drug.
312.42(e)	Sponsor requests that a clinical hold be removed and submits a complete response to the issues identified in the clinical hold order.
312.44(c) and (d)	Opportunity for sponsor response to FDA when an investigational new drug is terminated.
312.45(a) and (b)	Sponsor request for, or response to, inactive status determination of an investigational new drug.
312.47(b)	''End-of-Phase 2'' meetings and ''Pre-NDA'' meetings.
312.53(c)	Investigator information. Investigator report (Form FDA–1572) and narrative; Investigator's background information; phase 1 outline of planned investigation; and phase 2 outline of study protocol; financial disclosure information.
312.54(a) and (b)	Sponsor submissions concerning investigations involving an exception from informed consent under § 50.24.
312.55(b)	Sponsor reports to investigators on new observations, especially adverse reactions and safe use. Only ''new observations'' are estimated under this section; investigator brochures are included under § 312.23.
312.56(b), (c), and (d)	Sponsor monitoring of all clinical investigations, investigators, and drug safety; notification to FDA.
312.58(a)	Sponsor's submission of records to FDA on request.
312.64	Investigator reports to the sponsor.
(a)	Progress reports.
(b)	Safety reports
(c)	Final reports.
(d)	Financial disclosure reports.
312.66	Investigator reports to Institutional Review Board. Estimates for this requirement are included under § 312.53.
312.70(a)	Investigator disqualification; opportunity to respond to FDA.
312.83	Sponsor submission of treatment protocol. Estimates for this requirement are included under §§ 312.34 and 312.35.
312.85	Sponsors conducting phase 4 studies. Estimates for this requirement are included under § 312.23 in OMB control number 0910–0014, and §§ 314.50, 314.70, and 314.81 (21 CFR 314.50, 314.70, and 314.81) in OMB control number 0910–0001.
312.110(b)	Request to export an investigational drug.
312.120(b) and (c)(2)	Sponsor's submission to FDA for use of foreign clinical study to support an IND. Estimates for this requirement are included under §§ 312.23 and 312.30 in OMB control number 0910–0014, and §§ 314.50, 314.60, and 314.70 (21 CFR 314.60) in OMB control number 0910–0001.
312.120(c)(3)	Sponsor's report to FDA on findings of independent review committee on foreign clinical study. Estimates for this requirement are included under §§ 312.23 and 312.30 in OMB control number 0910–0014, and §§ 314.50, 314.60, and 314.70 in OMB control number 0910–0001.

TABLE 1.—Continued

REPORTING REQUIREMENTS	
21 CFR Section	Requirements
312.130(d)	Request for disclosable information for investigations involving an exception from informed consent under § 50.24.
RECORDKEEPING REQUIREMENTS	
21 CFR Section	Requirements
312.52(a)	Transfer of obligations to a contract research organization.
312.57(a) and (b)	Sponsor recordkeeping.
312.59	Sponsor recordkeeping of disposition of unused supply of drugs. Estimates for this requirement are included under § 312.57.
312.62(a)	Investigator recordkeeping of disposition of drugs.
312.62(b)	Investigator recordkeeping of case histories of individuals.
312.160(a)(3)	Records maintenance: shipment of drugs for investigational use in laboratory research animals or in vitro tests.
312.160(c)	Shipper records of alternative disposition of unused drugs.

In tables 2 and 3 of this document, the estimates for ''No. of Respondents,'' ''No. of Responses per Respondent,'' and ''Total Annual Responses'' were obtained from the Center for Drug Evaluation and Research (CDER) and the Center for Biologics Evaluation and Research (CBER) reports and data management systems for submissions received in 2004 and from other sources familiar with the number of submissions received under part 312. The estimates for ''Hours per Response'' were made by CDER and CBER individuals familiar with the burden associated with these reports and from estimates received from the pharmaceutical industry.

FDA estimates the burden of this collection of information as follows:

TABLE 2.—ESTIMATED ANNUAL REPORTING AND RECORDKEEPING BURDEN FOR HUMAN DRUGS[1]

REPORTING BURDEN					
21 CFR Section	No. of Respondents	No. of Responses per Respondent	Total Annual Responses	Hours per Response	Total Hours
312.7(d)	9	1.4	13	24	7,488
312.23(a) through (f)	1,245	1.3	1,597	1,600	2,555,200
312.30(a) through (e)	1,257	13.3	16,687	284	4,739,108
312.31(b)	1,116	7.4	8,298	100	829,800
312.32(c) and (d)	649	24.7	16,052	32	513,664
312.33(a) through (f)	1,821	2.5	4,516	360	1,625,760
312.35(a) and (b)	5	1.2	6	300	1,800
312.36	109	1.1	121	16	1,936
312.38(b) and (c)	536	1.3	677	28	18,965
312.42(e)	97	1.2	118	284	33,512
312.44(c) and (d)	44	1	45	16	720
312.45(a) and (b)	185	1.5	271	12	3,252
312.47(b)	215	1.7	355	160	56,800
312.53(c)	21,194	1	21,194	80	1,695,520
312.54(a) and (b)	0	0	0	48	0
312.55(b)	807,400	1	807,400	48	38,755,200
312.56(b), (c), and (d)	13	1	13	80	1,040

TABLE 2.—ESTIMATED ANNUAL REPORTING AND RECORDKEEPING BURDEN FOR HUMAN DRUGS[1]—Continued

REPORTING BURDEN					
21 CFR Section	No. of Respondents	No. of Responses per Respondent	Total Annual Responses	Hours per Response	Total Hours
312.58(a)	88	3.8	340	8	2,720
312.64(a) through (d)	31,791	1	31,791	24	762,984
312.70(a)	4	1	4	40	160
312.110(b)	33	8.3	276	75	20,700
312.130(d)	5	1	5	8	40
Total reporting burden					51,626,369

RECORDKEEPING BURDEN					
21 CFR Section	No. of Recordkeepers	No. of Records per Recordkeeper	Total Annual Records	Hours per Record	Total Hours
312.52(a)	335	1.5	488	2	976
312.57(a) and (b)	335	119.8	40,148	100	4,014,800
312.62(a)	20,074	1	20,074	40	802,960
312.62(b)	200,740	1	200,740	40	8,029,600
312.160(a)(3)	372	1.5	542	.5	271
312.160(c)	372	1.5	542	.5	271
Total recordkeeping burden					12,848,878
Human drugs total burden hours					64,475,247

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 3.—ESTIMATED ANNUAL REPORTING AND RECORDKEEPING BURDEN FOR BIOLOGICS[1]

REPORTING BURDEN					
21 CFR Section	No. of Respondents	No. of Responses per Respondent	Total Annual Responses	Hours per Response	Total Hours
312.7(d)	41	1.4	58	24	1,392
312.23(a) through (f) and 312.120(b), (c)(2), and (c)(3)	433	1.3	557	1,808	1,007,056
312.30(a) through (e)	590	6.8	4,014	284	1,139,976
312.31(b)	263	29.3	7,700	100	770,000
312.32(c) and (d) and 312.56(c)	294	13.7	4,042	32	129,344
312.33(a) through (f) and 312.56(c)	647	2.3	1,473	360	530,280
312.35(a) and (b)	1	1	1	300	300
312.36	6	1	6	16	96
312.38(b) and (c)	117	1.3	153	28	4,284
312.42(e)	74	1.5	108	284	30,672
312.44(c) and (d)	17	1.1	18	16	288
312.45(a) and (b)	60	1.8	107	12	1,284
312.47(b)	43	1.5	66	160	10,560
312.53(c)	348	6.6	2,303	80	184,240

TABLE 3.—ESTIMATED ANNUAL REPORTING AND RECORDKEEPING BURDEN FOR BIOLOGICS[1]—Continued

REPORTING BURDEN

21 CFR Section	No. of Respondents	No. of Responses per Respondent	Total Annual Responses	Hours per Response	Total Hours
312.54(a) and (b)	1	1	1	48	48
312.55(b)	138	2.5	347	48	16,656
312.56(b) and (d)	14	1.6	23	80	1,840
312.58(a)	8	1	8	8	64
312.64(a) through (d)	6,003	3.5	21,185	24	508,440
312.70(a)	6	1	6	40	240
312.110(b)	21	1	21	75	1,575
312.130(d)	1	1	1	8	8
Total reporting burden					4,338,643

RECORDKEEPING BURDEN

21 CFR Section	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records	Hours per Record	Total Hours
312.52(a)	139	1.4	200	2	400
312.57(a) and (b)	433	2.6	1,114	100	111,400
312.62(a)	5,570	1	5,570	40	222,800
312.62(b)	5,570	10	55,700	40	2,228,000
312.160(a)(3)	146	1.4	211	0.5	105.5
312.160(c)	146	1.4	211	0.5	105.5
Total recordkeeping burden					2,562,811
Total biologics burden hours					6,901,454

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 4.—ESTIMATED ANNUAL REPORTING AND RECORDKEEPING BURDEN FOR HUMAN DRUGS AND BIOLOGICS[1]

Total human drugs burden hours	64,475,247
Total biologics burden hours	6,901,454
Total burden hours	71,376,701

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: October 3, 2005.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 05–20362 Filed 10–11–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel. ''Review of an Unsolicited P01.''

Date: October 26, 2005.

Time: 10 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge 6700, 6700B Rockledge Drive, Bethesda, MD 20817, (Telephone Conference Call).

Contact Person: Cheryl K. Lapham, PhD, Scientific Review Administrator, Scientific Review Program, National Institute of Allergy and Infectious Diseases, DEA/NIH/DHHS, 6700–B Rockledge Drive, MSC 7616, Room 3127, Bethesda, MD 20892–7616, 301–402–4598, *clapham@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: October 3, 2005.

Anthony M. Coelho, Jr.,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–20431 Filed 10–11–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel. Research Training in Pediatric Gastroenterology.

Date: October 26, 2005.

Time: 11 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Xiaodu Guo, MD, PhD, Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institutes of Health, Room 705, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–4719, *guox@extra.niddk.nih.gov*.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel. Sphincter of Oddi Dysfunction.

Date: November 1, 2005.

Time: 1:30 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Atul Sahai, PhD, Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institues of Health, Room 772, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–2242, *sahaia@extra.niddk.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: October 02, 2005.

Anthony M. Coelho, Jr.,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–20432 Filed 10–11–05; 8:45am]

BILLING CODE Code 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Board of Scientific Counselors, National Library of Medicine, October 25, 2005, 9 a.m. to October 25, 2005, 5 p.m., National Library of Medicine, Building 38, Board Room, 2nd Floor, 8600 Rockville Pike, Bethesda, MD 20892 which was published in the **Federal Register** on August 16, 2005, 70 FR 48166.

In addition to the October 25, 2005 meeting, there will be a meeting on October 24, 2005 from 5 p.m. to 7 p.m. at the Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, Maryland 20892. The meeting is partially closed to the public.

Dated: October 3, 2005.

Anthony M. Coelho, Jr.,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–20430 Filed 10–11–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Current List of Laboratories Which Meet Minimum Standards To Engage in Urine Drug Testing for Federal Agencies

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) notifies Federal agencies of the laboratories currently certified to meet the standards of Subpart C of the Mandatory Guidelines for Federal Workplace Drug Testing Programs (Mandatory Guidelines). The Mandatory Guidelines were first published in the **Federal Register** on April 11, 1988 (53 FR 11970), and subsequently revised in the **Federal Register** on June 9, 1994 (59 FR 29908), on September 30, 1997 (62 FR 51118), and on April 13, 2004 (69 FR 19644).

A notice listing all currently certified laboratories is published in the **Federal Register** during the first week of each month. If any laboratory's certification is suspended or revoked, the laboratory will be omitted from subsequent lists until such time as it is restored to full certification under the Mandatory Guidelines.

If any laboratory has withdrawn from the HHS National Laboratory Certification Program (NLCP) during the past month, it will be listed at the end, and will be omitted from the monthly listing thereafter.

This notice is also available on the Internet at *http://workplace.samhsa.gov* and *http://www.drugfreeworkplace.gov.*

FOR FURTHER INFORMATION CONTACT: Mrs. Giselle Hersh or Dr. Walter Vogl, Division of Workplace Programs, SAMHSA/CSAP, Room 2–1035, 1 Choke Cherry Road, Rockville, Maryland 20857; (240) 276–2600 (voice), (240) 276–2610 (fax).

SUPPLEMENTARY INFORMATION: The Mandatory Guidelines were developed in accordance with Executive Order 12564 and section 503 of Public Law 100–71. Subpart C of the Mandatory Guidelines, ''Certification of Laboratories Engaged in Urine Drug Testing for Federal Agencies,'' sets strict standards that laboratories must meet in order to conduct drug and specimen validity tests on urine specimens for Federal agencies. To become certified, an applicant laboratory must undergo three rounds of performance testing plus an on-site inspection. To maintain that certification, a laboratory must participate in a quarterly performance testing program plus undergo periodic, on-site inspections.

Laboratories which claim to be in the applicant stage of certification are not to be considered as meeting the minimum requirements described in the HHS Mandatory Guidelines. A laboratory must have its letter of certification from HHS/SAMHSA (formerly: HHS/NIDA) which attests that it has met minimum standards.

In accordance with Subpart C of the Mandatory Guidelines dated April 13, 2004 (69 FR 19644), the following laboratories meet the minimum

standards to conduct drug and specimen validity tests on urine specimens:

ACL Laboratories
8901 W. Lincoln Ave.
West Allis, WI 53227
414–328–7840/800–877–7016
(Formerly: Bayshore Clinical Laboratory).

ACM Medical Laboratory, Inc.
160 Elmgrove Park
Rochester, NY 14624
585–429–2264.

Advanced Toxicology Network
3560 Air Center Cove, Suite 101
Memphis, TN 38118
901–794–5770/888–290–1150.

Aegis Analytical Laboratories, Inc.
345 Hill Ave.
Nashville, TN 37210
615–255–2400.

Baptist Medical Center-Toxicology Laboratory
9601 I–630, Exit 7
Little Rock, AR 72205–7299
501–202–2783
(Formerly: Forensic Toxicology Laboratory Baptist Medical Center).

Clinical Reference Lab
8433 Quivira Road
Lenexa, KS 66215–2802
800–445–6917.

Diagnostic Services, Inc., dba DSI
12700 Westlinks Drive
Fort Myers, FL 33913
239–561–8200/800–735–5416.

Doctors Laboratory, Inc.
2906 Julia Drive
Valdosta, GA 31602
229–671–2281.

DrugScan, Inc.
P.O. Box 2969
1119 Mearns Road
Warminster, PA 18974
215–674–9310.

Dynacare Kasper Medical Laboratories*
10150–102 St., Suite 200
Edmonton, Alberta
Canada T5J 5E2
780–451–3702/800–661–9876.

ElSohly Laboratories, Inc.
5 Industrial Park Drive
Oxford, MS 38655
662–236–2609.

Express Analytical Labs
3405 7th Ave., Suite 106
Marion, IA 52302
319–377–0500.

Gamma-Dynacare Medical Laboratories*
A Division of the Gamma-Dynacare Laboratory Partnership
245 Pall Mall Street
London, ONT, Canada N6A 1P4
519–679–1630.

General Medical Laboratories
36 South Brooks St.
Madison, WI 53715
608–267–6225.

LabOne, Inc.
10101 Renner Blvd.
Lenexa, KS 66219
913–888–3927/800–873–8845
(Formerly: Center for Laboratory Services, a Division of LabOne, Inc.).

Laboratory Corporation of America Holdings
7207 N. Gessner Road
Houston, TX 77040
713–856–8288/800–800–2387.

Laboratory Corporation of America Holdings
69 First Ave.
Raritan, NJ 08869
908–526–2400/800–437–4986
(Formerly: Roche Biomedical Laboratories, Inc.).

Laboratory Corporation of America Holdings
1904 Alexander Drive
Research Triangle Park, NC 27709
919–572–6900/800–833–3984
(Formerly: LabCorp Occupational Testing Services, Inc., CompuChem Laboratories, Inc.; CompuChem Laboratories, Inc., A Subsidiary of Roche Biomedical Laboratory; Roche CompuChem Laboratories, Inc., A Member of the Roche Group).

Laboratory Corporation of America Holdings
10788 Roselle St.
San Diego, CA 92121
800–882–7272
(Formerly: Poisonlab, Inc.).

Laboratory Corporation of America Holdings
550 17th Ave., Suite 300
Seattle, WA 98122
206–923–7020 / 800–898–0180
(Formerly: DrugProof, Division of Dynacare/Laboratory of Pathology, LLC; Laboratory of Pathology of Seattle, Inc.; DrugProof, Division of Laboratory of Pathology of Seattle, Inc.).

Laboratory Corporation of America Holdings
1120 Main Street
Southaven, MS 38671
866–827–8042 / 800–233–6339
(Formerly: LabCorp Occupational Testing Services, Inc.; MedExpress/National Laboratory Center).

Marshfield Laboratories
Forensic Toxicology Laboratory
1000 North Oak Ave.
Marshfield, WI 54449
715–389–3734 / 800–331–3734.

MAXXAM Analytics Inc.*
6740 Campobello Road
Mississauga, ON
Canada L5N 2L8
905–817–5700
(Formerly: NOVAMANN (Ontario), Inc.).

MedTox Laboratories, Inc.
402 W. County Road D
St. Paul, MN 55112
651–636–7466 / 800–832–3244.

MetroLab-Legacy Laboratory Services
1225 NE 2nd Ave.
Portland, OR 97232
503–413–5295 / 800–950–5295.

Minneapolis Veterans Affairs Medical Center
Forensic Toxicology Laboratory
1 Veterans Drive
Minneapolis, MN 55417
612–725–2088.

National Toxicology Laboratories, Inc.
1100 California Ave.
Bakersfield, CA 93304
661–322–4250 / 800–350–3515.

Northwest Toxicology, a LabOne Company
2282 South Presidents Drive, Suite C
West Valley City, UT 84120
801–606–6301 / 800–322–3361
(Formerly: LabOne, Inc., dba Northwest Toxicology; NWT Drug Testing, NorthWest Toxicology, Inc.; Northwest Drug Testing, a division of NWT Inc.).

One Source Toxicology Laboratory, Inc.
1213 Genoa-Red Bluff
Pasadena, TX 77504
888–747–3774
(Formerly: University of Texas Medical Branch, Clinical Chemistry Division; UTMB Pathology-Toxicology Laboratory).

Oregon Medical Laboratories
P.O. Box 972
722 East 11th Ave.
Eugene, OR 97440–0972
541–687–2134.

Pacific Toxicology Laboratories
9348 DeSoto Ave.
Chatsworth, CA 91311
800–328–6942
(Formerly: Centinela Hospital Airport Toxicology Laboratory).

Pathology Associates Medical Laboratories
110 West Cliff Dr.
Spokane, WA 99204
509–755–8991 / 800–541–7897x7.

Physicians Reference Laboratory
7800 West 110th St.
Overland Park, KS 66210
913–339–0372 / 800–821–3627.

Quest Diagnostics Incorporated
3175 Presidential Dr.
Atlanta, GA 30340
770–452–1590 / 800–729–6432
(Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories).

Quest Diagnostics Incorporated
4770 Regent Blvd.
Irving, TX 75063

800–824–6152
(Moved from the Dallas location on 03/31/01; Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories).

Quest Diagnostics Incorporated
4230 South Burnham Ave., Suite 250
Las Vegas, NV 89119–5412
702–733–7866 / 800–433–2750
(Formerly: Associated Pathologists Laboratories, Inc.).

Quest Diagnostics Incorporated
400 Egypt Road
Norristown, PA 19403
610–631–4600 / 877–642–2216
(Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories).

Quest Diagnostics Incorporated
506 E. State Pkwy.
Schaumburg, IL 60173
800–669–6995 / 847–885–2010
(Formerly: SmithKline Beecham Clinical Laboratories; International Toxicology Laboratories).

Quest Diagnostics Incorporated
7600 Tyrone Ave.
Van Nuys, CA 91405
818–989–2520 / 800–877–2520
(Formerly: SmithKline Beecham Clinical Laboratories).

Scientific Testing Laboratories, Inc.
450 Southlake Blvd.
Richmond, VA 23236
804–378–9130.

Sciteck Clinical Laboratories, Inc.
317 Rutledge Road
Fletcher, NC 28732
828–650–0409

S.E.D. Medical Laboratories
5601 Office Blvd.
Albuquerque, NM 87109
505–727–6300 / 800–999–5227.

South Bend Medical Foundation, Inc.
530 N. Lafayette Blvd.
South Bend, IN 46601
574–234–4176 x276.

Southwest Laboratories
4645 E. Cotton Center Boulevard
Suite 177
Phoenix, AZ 85040
602–438–8507 / 800–279–0027.

Sparrow Health System
Toxicology Testing Center, St. Lawrence Campus
1210 W. Saginaw
Lansing, MI 48915
517–364–7400
(Formerly: St. Lawrence Hospital & Healthcare System).

St. Anthony Hospital Toxicology Laboratory
1000 N. Lee St.
Oklahoma City, OK 73101
405–272–7052.

Toxicology & Drug Monitoring Laboratory
University of Missouri Hospital & Clinics
301 Business Loop 70 West, Suite 208
Columbia, MO 65203
573–882–1273.

Toxicology Testing Service, Inc.
5426 N.W. 79th Ave.
Miami, FL 33166
305–593–2260.

US Army Forensic Toxicology Drug Testing Laboratory
2490 Wilson St.
Fort George G. Meade, MD 20755–5235
301–677–7085.

As a result of hurricane Katrina, the following laboratory's certification is suspended because extensive damage to the New Orleans area has prevented the laboratory from testing specimens and fully participating in the National Laboratory Certification Program:

Kroll Laboratory Specialists, Inc.
1111 Newton St.
Gretna, LA 70053
504–361–8989 / 800–433–3823
(Formerly: Laboratory Specialists, Inc.).

Anna Marsh,

Director, Office Program Services, SAMHSA.

[FR Doc. 05–20488 Filed 10–11–05; 8:45 am]

BILLING CODE 4160–20–U

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, U.S. Department of Homeland Security.

ACTION: Notice and request for comments.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed continuing information collections. In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)), this notice seeks comments concerning the application for participation in the National Flood Insurance Program (NFIP).

SUPPLEMENTARY INFORMATION: The NFIP is authorized by Public Law 90–448 (1968) and expanded by Public Law 93–234 (1973). Communities must make application for eligibility in the program by submitting the items listed on the enclosed ''prerequisites for the sale of flood insurance'' which is taken from section 59.22 CFR 44 of the NFIP regulations. Section 201 of the Flood Disaster Protection Act of 1973 requires all flood-prone communities throughout the country to apply for participation one year after their flood prone identification or submit to the prohibition of certain types of Federal and Federally-related financial assistance for use in their floodplains.

Collection of Information

Title: Application for Participation in the National Flood Insurance Program.

Type of Information Collection: Reinstatement.

OMB Number: 1660–0004.

Form Numbers: FEMA Form 81–64.

Abstract: The NFIP provides flood insurance to communities that apply for participation and make a commitment to adopt and enforce land use control measures that are designed to protect development from future flood damages. The application form will enable FEMA to continue to rapidly process new community applications and to thereby more quickly provide flood insurance protection to the residents of the communities. Participation in the NFIP is mandatory in order for flood related Presidentially-declared communities to receive Federal disaster assistance.

Affected Public: State, Local or Tribal Governments.

Estimated Total Annual Burden Hours: 600 hours.

* The Standards Council of Canada (SCC) voted to end its Laboratory Accreditation Program for Substance Abuse (LAPSA) effective May 12, 1998. Laboratories certified through that program were accredited to conduct forensic urine drug testing as required by U.S. Department of Transportation (DOT) regulations. As of that date, the certification of those accredited Canadian laboratories will continue under DOT authority. The responsibility for conducting quarterly performance testing plus periodic on-site inspections of those LAPSA-accredited laboratories was transferred to the U.S. HHS, with the HHS' NLCP contractor continuing to have an active role in the performance testing and laboratory inspection processes. Other Canadian laboratories wishing to be considered for the NLCP may apply directly to the NLCP contractor just as U.S. laboratories do.

Upon finding a Canadian laboratory to be qualified, HHS will recommend that DOT certify the laboratory (**Federal Register**, July 16, 1996) as meeting the minimum standards of the Mandatory Guidelines published in the **Federal Register** on April 13, 2004 (69 FR 19644). After receiving DOT certification, the laboratory will be included in the monthly list of HHS-certified laboratories and participate in the NLCP certification maintenance program.

FEMA forms	Number of respondents (A)	Frequency of response (B)	Hours per response (C)	Annual burden hours (AxBxC)
FF 81–64	150	1	4	600
Total	150	1	4	600

Estimated Cost: With an estimated 150 applications per year, the total annual cost is $10,752 for all respondents.

Comments: Written comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. Comments should be received within 60 days of the date of this notice.

ADDRESSES: Interested persons should submit written comments to Chief, Records Management Section, Information Resources Management Branch, Information Technology Services Division, Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security, 500 C Street, SW., Room 316, Washington, DC 20472.

FOR FURTHER INFORMATION CONTACT: Contact William Lesser, Lead Program Specialist at 202–646–2807 for additional information. You may contact the Records Management Branch for copies of the proposed collection of information at facsimile number (202) 646–3347 or e-mail address: *FEMA–Information–Collections@dhs.gov.*

Dated: October 4, 2005.

Darcy Bingham,

Branch Chief, Information Resources Management Branch, Information Technology Services Division.

[FR Doc. 05–20424 Filed 10–11–05; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3263–EM]

Delaware; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of Delaware (FEMA–3263–EM), dated September 30, 2005, and related determinations.

EFFECTIVE DATE: September 30, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated September 30, 2005, the President declared an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the emergency conditions in the State of Delaware, resulting from the influx of evacuees from states impacted by Hurricane Katrina beginning on August 29, 2005, and continuing, are of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). Therefore, I declare that such an emergency exists in the State of Delaware.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act to save lives and protect public health and safety, or to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide emergency protective measures (Category B), including direct Federal assistance, under the Public Assistance program, at 100 percent Federal funding. This assistance excludes regular time costs for subgrantees' regular employees. In addition, you are authorized to provide such other forms of assistance under Title V of the Stafford Act as you may deem appropriate.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal emergency assistance and administrative expenses.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Patricia G. Arcuri, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

I do hereby determine the following areas of the State of Delaware to have been affected adversely by this declared emergency:

All 3 counties in the State of Delaware for Public Assistance Category B (emergency protective measures), including direct Federal assistance, at 100 percent Federal funding.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program—Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–20429 Filed 10–11–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3259–EM]

Florida; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of Florida (FEMA–3259–EM), dated September 20, 2005, and related determinations.

EFFECTIVE DATE: September 20, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated September 20, 2005, the President declared an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the emergency conditions in certain areas of the State of Florida resulting from Tropical Storm Rita beginning on September 18, 2005, and continuing are of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (Stafford Act). Therefore, I declare that such an emergency exists in the State of Florida.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act to save lives, protect public health and safety, and property or to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide emergency protective measures, (Category B), including direct Federal assistance, under the Public Assistance program. This assistance excludes regular time costs for subgrantees' regular employees. In addition, you are authorized to provide such other forms of assistance under Title V of the Stafford Act as you may deem appropriate.

Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance will be limited to 75 percent of the total eligible costs. For a period of up to 72 hours, assistance for emergency protective measures, including direct Federal assistance, will be provided at 100 percent Federal funding of the total eligible costs.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Acting Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Justin DeMello, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

I do hereby determine the following areas of the State of Florida to have been affected adversely by this declared emergency:

Broward, Collier, Miami-Dade, and Monroe Counties for Public Assistance Category B (emergency protective measures), including direct Federal assistance, at 75 percent Federal funding of the total eligible costs.

For a period of up to 72 hours, assistance for emergency protective measures, including direct Federal assistance, will be provided at 100 percent Federal funding of the total eligible costs.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program—Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–20427 Filed 10–11–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1607–DR]

Louisiana; Amendment No. 6 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Louisiana (FEMA–1607–DR), dated September 24, 2005, and related determinations.

EFFECTIVE DATE: October 3, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Louisiana is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of September 24, 2005:

The parishes of Evangeline, Jefferson, and Plaquemines for Individual Assistance (already designated for debris removal and emergency protective measures [Categories A and B] under the Public Assistance program, including direct Federal assistance.)

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program-Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–20426 Filed 10–11–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3262–EM]

New York; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of New York (FEMA–3262–EM), dated September 30, 2005, and related determinations.

EFFECTIVE DATE: September 30, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal

Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated September 30, 2005, the President declared an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the emergency conditions in the State of New York, resulting from the influx of evacuees from states impacted by Hurricane Katrina beginning on August 29, 2005, and continuing, are of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). Therefore, I declare that such an emergency exists in the State of New York.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act to save lives and protect public health and safety, or to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide emergency protective measures (Category B), including direct Federal assistance, under the Public Assistance program, at 100 percent Federal funding. This assistance excludes regular time costs for subgrantees' regular employees. In addition, you are authorized to provide such other forms of assistance under Title V of the Stafford Act as you may deem appropriate.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal emergency assistance and administrative expenses.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Kathryn G. Rise Humphrey, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

I do hereby determine the following areas of the State of New York to have been affected adversely by this declared emergency:

All 62 counties in the State of New York for Public Assistance Category B (emergency protective measures), including direct Federal assistance, at 100 percent Federal funding.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program-Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–20428 Filed 10–11–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1606–DR]

Texas; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Texas (FEMA–1606–DR), dated September 24, 2005, and related determinations.

EFFECTIVE DATE: October 3, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Texas is hereby amended to include Categories C through G under the Public Assistance program for the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of September 24, 2005:

Chambers, Galveston, Hardin, Jasper, Jefferson, Liberty, Newton, Orange, and Tyler Counties for Public Assistance [Categories C—G] (already designated for Individual Assistance and debris removal and emergency protective measures [Categories A and B] under the Public Assistance program, including direct Federal assistance.)

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program-Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–20425 Filed 10–11–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4975–N–33]

Notice of Proposed Information Collection: Comment Request; Assistance Payment Contract—Notice of Termination, Suspension, or Reinstatement

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* December 12, 2005.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Wayne Eddins, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, SW., L'Enfant Plaza Building, Room 8001, Washington, DC 20410 or *Wayne_Eddins@hud.gov.*

FOR FURTHER INFORMATION CONTACT: Joe McCloskey, Director, Office of Single Family Asset Management, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 708–1672 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed

collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Assistance Payment Contract—Notice of (1) Termination, (2) Suspension, or (3) Reinstatement.

OMB Control Number, if applicable: 2502–0094.

Description of the need for the information and proposed use: Form HUD–93114 documents the conditions for termination, suspension, or reinstatement of the assistance payment contract for Section 235 mortgages. The form is prepared by the lender and submitted to HUD. The lender also retains the original in the servicing file for HUD's review and audit. HUD uses the form to review a lender's servicing of Section 235 mortgages and for auditing the Section 235 assistance payments contract. The form must be prepared for each Section 235 mortgage terminated, suspended, or reinstated.

Agency form numbers, if applicable: HUD–93114.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The estimated total number of hours needed to prepare the information collection is 650, the number of respondents is 50 generating 1,300 annual responses, the frequency of response is on occasion, and the number of hours per response is 30 minutes.

Status of the proposed information collection: This is an extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: October 6, 2005.

Frank L. Davis,

General Deputy Assistant Secretary for Housing-Deputy Federal Housing Commissioner.

[FR Doc. E5–5571 Filed 10–11–05; 8:45 am]

BILLING CODE 4210–27–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4971–N–52]

Notice of Submission of Proposed Information Collection to OMB; Multifamily Financial Management Template

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The Uniform Financial Reporting Standards (UFRS) regulation requires HUD's multifamily housing program participants to submit financial data electronically, using generally accepted accounting principles, in a prescribed format. Electronic submissions of this data require use of a template. HUD uses this information to monitor the owners' compliance with regulatory requirements and to assess fiscal performance.

DATES: *Comments Due Date:* November 14, 2005.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0551) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Wayne Eddins, Reports Management Officer, AYO, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail *Wayne_Eddins@HUD.gov;* or Lillian Deitzer at *Lillian_L_Deitzer@HUD.gov* or telephone (202) 708–2374. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Mr. Eddins or Ms. Deitzer or from HUD's Web site at *http://hlannwp031.hud.gov/po/i/icbts/collectionsearch.cfm.*

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice Also Lists the Following Information

Title of Proposal: Multifamily Financial Management Template.

OMB Approval Number: 2502–0551.

Form Numbers: None.

Description of the Need for the Information and Its Proposed Use: The Uniform Financial Reporting Standards (UFRS) regulation requires HUD's multifamily housing program participants to submit financial data electronically, using generally accepted accounting principles, in a prescribed format. Electronic submissions of this data require use of a template. HUD uses this information to monitor the owners' compliance with regulatory requirements and to assess fiscal performance.

Frequency of Submission: Annually.

REPORTING BURDEN

Number of respondents	Annual responses	x	Hours per response	=	Burden hours
21,505	1	....	2.58	....	55,676

Total Estimated Burden Hours: 55,676.

Status: Revision if a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Date: October 5, 2005.

Wayne Eddins,

Departmental Paperwork Reduction Act Officer, Office of the Chief Information Officer.

[FR Doc. E5–5589 Filed 10–11–05; 8:45 am]

BILLING CODE 4210–27–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4950–N–04B]

Notice of HUD's Fiscal Year (FY) 2005 Notice of Funding Availability (NOFA) Policy Requirements and General Section to SuperNOFA for HUD's Discretionary Grant Programs (SuperNOFA); Youthbuild Program, Notice of Extension of Application Submission Date for Areas in South Florida Affected by Hurricane Katrina

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice of extension of application submission date for applicants submitting applications from areas affected by Hurricane Katrina in south Florida.

SUMMARY: This notice announces the extension of submission deadline dates for one program announced in the Fiscal Year 2005 SuperNOFA, the Youthbuild NOFA, for those applicants located within four counties of south Florida that were significantly affected by the initial impact of Hurricane Katrina, including the counties of Broward, Collier, Miami-Dade, and Monroe. The submission deadline for this funding opportunity was August 25, 2005, the same day that Hurricane Katrina affected south Florida. For those applicants located in one of these four counties, the revised submission date is October 17, 2005. For applicants not in one of these four counties in south Florida, the submission deadline remains unchanged.

DATES: For applicants located in the four affected counties, the submission date is October 17, 2005.

FOR FURTHER INFORMATION CONTACT: Mark A. Horwath, Director, Grants Management, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–7000; telephone (202) 708–2035 (this is not a toll-free number). Hearing-or speech-impaired persons may access these telephone numbers by calling the toll-free Federal Information Relay Service on (800) 877–8339.

SUPPLEMENTARY INFORMATION: On March 21, 2005 (70 FR 13575), HUD published its FY2005 SuperNOFA, which announced the availability of approximately $2.26 billion in HUD assistance. In a **Federal Register** notice published on July 26, 2005 (70 FR 43168), HUD reopened the NOFA competition for the Youthbuild program and extended the deadline to August 25, 2005, the day that Hurricane Katrina affected south Florida.

Due to Hurricane Katrina, which caused widespread power outages and flooding in south Florida, the Department is extending the deadline for the Youthbuild NOFA to October 17, 2005. This extension affects only applicants located in one of the four counties in south Florida that were significantly affected including Broward, Collier, Miami-Dade, and Monroe. HUD will accept applications to the Youthbuild program NOFA from applicants in the four affected counties in south Florida, either through Grants.gov, or in hard copy (paper) submission consistent with the instructions in the March 21, 2005, SuperNOFA General Section, except that these affected applicants are not required to obtain a waiver from the electronic submission requirement and HUD recommends applicants use an overnight delivery method to ensure timely receipt of paper applications. Hard copy submissions should be sent to the appropriate address listed as follows: Youthbuild Program Department of Housing and Urban Development, Attn: Mark A. Horwath, 451 Seventh Street, SW., Room 7149, Washington, DC 20410–5000.

(Applicants to the Youthbuild Program should submit an original and two copies of the application.)

Dated: October 4, 2005.

Pamela H. Patenaude,

Assistant Secretary for Community Planning and Development

[FR Doc. E5–5587 Filed 10–11–05; 8:45 am]

BILLING CODE 4210–27–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Endangered Species Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications.

SUMMARY: The following applicants have applied for a scientific research permit to conduct certain activities with endangered species pursuant to section 10(a)(1)(A) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*). The U.S. Fish and Wildlife Service (Awe@) solicits review and comment from local, State, and Federal agencies, and the public on the following permit requests.

DATES: Comments on these permit applications must be received on or before November 14, 2005.

ADDRESSES: Written data or comments should be submitted to the U.S. Fish and Wildlife Service, Chief, Endangered Species, Ecological Services, 911 NE. 11th Avenue, Portland, Oregon 97232–4181 (telephone: (503) 231–2063; fax: (503) 231–6243). Please refer to the respective permit number for each application when submitting comments. All comments received, including names and addresses, will become part of the official administrative record and may be made available to the public.

FOR FURTHER INFORMATION CONTACT: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to the address above. Please refer to the respective permit number for each application when requesting copies of documents.

SUPPLEMENTARY INFORMATION:

Permit No. TE–063247.

Applicant: Sarah C. Powell, Sacramento, California.

The permittee requests an amendment to take (capture and collect and sacrifice) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the vernal pool tadpole shrimp (*Lepidurus packardi*), the Riverside fairy shrimp (*Streptocephalus wootoni*), and the San Diego fairy shrimp (*Branchinecta sandiegonensis*) in conjunction with surveys throughout the range of each species for the purpose of enhancing their survival.

Permit No. TE–111827.

Applicant: Tamra M. Nunes, Fresno, California.

The applicant requests a permit to take (capture and collect and sacrifice) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the vernal pool tadpole

shrimp (*Lepidurus packardi*), the Riverside fairy shrimp (*Streptocephalus wootoni*), and the San Diego fairy shrimp (*Branchinecta sandiegonensis*) in conjunction with surveys throughout the range of each species for the purpose of enhancing their survival.

Permit No. TE–101743.

Applicant: Daniel Edelstein, Novato, California.

The applicant requests a permit to take (capture and collect and sacrifice) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the vernal pool tadpole shrimp (*Lepidurus packardi*), the Riverside fairy shrimp (*Streptocephalus wootoni*), and the San Diego fairy shrimp (*Branchinecta sandiegonensis*) in conjunction with surveys throughout the range of each species for the purpose of enhancing their survival.

Permit No. TE–108099.

Applicant: Jane Higginson, Lakeside, California.

The applicant requests a permit to take (survey by pursuit) the Quino checkerspot butterfly (*Euphydryas editha quino*) in conjunction with surveys throughout the range of the species for the purpose of enhancing its survival.

Permit No. TE–005956.

Applicant: U.S. Geological Survey Biological Resources Division, Western Fisheries Research Center, Reno, Nevada.

The permittee requests an amendment to take (harass by survey, capture, handle, and release) the Clover Valley speckled dace (*Rhinichthys osculus oligoporus*) in conjunction with population and distribution surveys throughout the range of the species for the purpose of enhancing its survival.

Permit No. TE–108093.

Applicant: Danielle Tannourji, San Diego, California.

The applicant requests a permit to take (capture and collect and sacrifice) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the vernal pool tadpole shrimp (*Lepidurus packardi*), the Riverside fairy shrimp (*Streptocephalus wootoni*), and the San Diego fairy shrimp (*Branchinecta sandiegonensis*); and take (survey by pursuit) the Quino checkerspot butterfly (*Euphydryas editha quino*) in conjunction with surveys throughout the range of each species for the purpose of enhancing their survival.

Permit No. TE–108683.

Applicant: Austin J. Pearson, Coarsegold, California.

The applicant requests a permit to take (capture and collect and sacrifice) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the vernal pool tadpole shrimp (*Lepidurus packardi*), the Riverside fairy shrimp (*Streptocephalus wootoni*), and the San Diego fairy shrimp (*Branchinecta sandiegonensis*) in conjunction with surveys throughout the range of each species for the purpose of enhancing their survival.

Permit No. TE–106344.

Applicant: The California Department of Parks and Recreation, Sacramento, California.

The applicant requests a permit to take (capture and collect and sacrifice) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the vernal pool tadpole shrimp (*Lepidurus packardi*), the Riverside fairy shrimp (*Streptocephalus wootoni*), and the San Diego fairy shrimp (*Branchinecta sandiegonensis*) in conjunction with surveys throughout the range of each species for the purpose of enhancing their survival.

Permit No. TE–110382.

Applicant: Ava Rosales, Mission Viejo, California.

The applicant requests a permit to take (capture and collect and sacrifice) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the vernal pool tadpole shrimp (*Lepidurus packardi*), the Riverside fairy shrimp (*Streptocephalus wootoni*), and the San Diego fairy shrimp (*Branchinecta sandiegonensis*) in conjunction with surveys throughout the range of each species for the purpose of enhancing their survival.

Permit No. TE–108681.

Applicant: Melissa M. Denena, San Jose, California.

The applicant requests a permit to take (capture and collect and sacrifice) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the vernal pool tadpole shrimp (*Lepidurus packardi*), the Riverside fairy shrimp (*Streptocephalus wootoni*), and the San Diego fairy shrimp (*Branchinecta sandiegonensis*) in conjunction with surveys throughout the range of each species for the purpose of enhancing their survival.

Permit No. TE–110095.

Applicant: John H. Davis IV, San Luis Obispo, California.

The applicant requests a permit to take (capture and collect and sacrifice) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the vernal pool tadpole shrimp (*Lepidurus packardi*), the Riverside fairy shrimp (*Streptocephalus wootoni*), and the San Diego fairy shrimp (*Branchinecta sandiegonensis*); and take (capture, relocate, and release) the Morro shoulderband snail (*Helminthoglypta walkeriana*) in conjunction with surveys and habitat enhancement activities throughout the range of each species for the purpose of enhancing their survival.

We solicit public review and comment on each of these recovery permit applications.

Dated: September 16, 2005.

Michael Fris,

Acting Manager, California/Nevada Operations Office, U.S. Fish and Wildlife Service.

[FR Doc. 05–20378 Filed 10–11–05; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Endangered Species Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications.

SUMMARY: The following applicants have applied for a survival enhancement permit to conduct certain activities with endangered species pursuant to section 10(a)(1)(A) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*). The U.S. Fish and Wildlife Service (''we'') solicits review and comment from the public, and from local, State, and Federal agencies on the following permit requests.

DATES: Comments on these permit applications must be received on or before November 14, 2005.

ADDRESSES: Written data or comments should be submitted to the U.S. Fish and Wildlife Service, Chief, Endangered Species, Ecological Services, 911 NE. 11th Avenue, Portland, Oregon 97232–4181 (telephone: 503–231–2063; fax: 503–231–6243). Please refer to the respective permit number for each application when submitting comments. All comments received, including

names and addresses, will become part of the official administrative record and may be made available to the public.

FOR FURTHER INFORMATION CONTACT: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to the address above. Please refer to the respective permit number for each application when requesting copies of documents.

SUPPLEMENTARY INFORMATION:

Permit No. TE–108679.

Applicant: Oregon Department of Transportation, Salem, Oregon.

The applicant requests a permit to take (survey by pursuit, harass, and kill) the Fender's blue butterfly (*Icaricia icarioides fenderi*) in conjunction with surveys and habitat restoration activities in Polk, Benton, Yamhill, and Lane Counties, Oregon; and take (harass by survey and translocate) the Oregon chub (*Oregonichtys crameri*) in conjunction with habitat creation and maintenance activities throughout the range of the species in Oregon for the purpose of enhancing their survival.

Permit No. TE–108680.

Applicant: EcoAnalysts, Inc., Moscow, Idaho.

The applicant requests a permit to take (capture and collect and sacrifice) the Snake River physa (*Physa natracina*), the Bruneau Hot springsnail (*Pyrgulopsis bruneauensis*), and the Banbury Springs limpet (*Lanx* sp.) in conjunction with surveys and population studies throughout the range of each species in Idaho for the purpose of enhancing their survival.

We solicit public review and comment on each of these recovery permit applications.

Dated: September 20, 2005.

David J. Wesley,

Regional Director, Region 1, U.S. Fish and Wildlife Service.

[FR Doc. 05–20379 Filed 10–11–05; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Availability of Revised Comprehensive Conservation Plan for the Alaska Peninsula and Becharof National Wildlife Refuges

AGENCY: U.S. Fish and Wildlife Service, Department of the Interior.

ACTION: Notice of availability.

SUMMARY: The U.S. Fish and Wildlife Service announces that a Revised Comprehensive Conservation Plan (Conservation Plan) and Environmental Impact Statement for the Alaska Peninsula and Becharof National Wildlife Refuge is available for review and comment. This Conservation Plan was prepared pursuant to the Alaska National Interest Lands Conservation Act, the National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997, and the National Environmental Policy Act of 1969. It describes how the Service intends to manage these refuges over the next 15 years.

DATES: Please submit comments on the Conservation Plan and Environmental Impact Statement on or before 30 days from the date of publication of this Notice.

ADDRESSES: The Conservation Plan is available on compact diskette or over the Internet. You may obtain a copy of the CD by writing: Peter Wikoff, Planing Team Leader, U.S. Fish and Wildlife Service, 1011 East Tudor Road, MS 231, Anchorage, AK 99503. You may access or download the Conservation Plan at *http://www.r7.fws.gov/nwr/planning/plans.htm.* Comments may be sent to the above address or to *fw7__apb__planing@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Peter Wikoff, (907) 786–3837.

SUPPLEMENTARY INFORMATION: The Alaska National Interest Lands Conservation Act (ANILCA) requires a conservation plan for all refuges in Alaska. We developed this Conservation Plan consistent with § 304(g) of ANILCA and the National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997. The purpose in developing conservation plans is to provide refuge managers with a 15-year strategy for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife science, conservation, legal mandates, and Service policies. In addition to outlining broad management direction on conserving wildlife and their habitats, conservation plans identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We review and update these plans in accordance with planning direction in § 304(g) of ANILCA, the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370d), and Service planning policy.

Background: The Conservation Plan and Environmental Impact Statement is a revision of plans which were adopted in 1985 and 1987. It combines plans for the Becharof NWR and portions of the Alaska Peninsula and Alaska Maritime NWRs, which are managed jointly as the Alaska Peninsula and Becharof National Wildlife Refuges. This plan provides broad general direction for managing the Refugees for the next 15 years and contains the vision, goals, and objectives of the Refuges. Except for alternative ways of addressing the issues, this plan substantially follows the direction of the original plans. Traditional means of access and uses of the Refuges would be maintained under all alternatives.

The Alaska Peninsula and Becharof National Wildlife Refuges are comprised of the Becharof NWR, the Ugashik and Chignik Units of the Alaska Peninsula NWR, and the Seal Cape Unit of the Alaska Maritime NWR. The Refuges encompass approximately 4,240,000 acres along the Pacific side of the Alaska Peninsula starting about 10 miles south of the Refuge headquarters in King Salmon and extending for approximately 250 miles.

The Alaska Peninsula is a land of towering mountains, active volcanoes, broad valleys, fjords, tundra, and glacially formed lakes. From the coastal lowlands on the Bristol Bay side of the Refuges the land rises to steep glaciated mountains and volcanoes, then plunges to cliffs and sandy beaches on the Pacific side. The Bristol Bay side of the Refuges consists primarily of rolling moist to wet tundra, lakes, and wetlands. The snow-covered, heavily glaciated Aleutian Mountain Range bisects the Refuges with volcanic peaks rising to more than 8,200 feet. The Pacific coastline is rugged, with sea cliffs rising hundreds of feet from the water. Numerous streams and several large rivers originate within the Refuges.

The Becharof National Wildlife Refuge contains the 300,000-acre Becharof Lake, the second largest lake in Alaska, and the 503,000-acre Becharof Wilderness Area. Mt. Peulik, a 4,800-foot volcano with lava flows reaching to Becharof Lake is a prominent landmark.

The Alaska Peninsula National Wildlife Refuge contains the culturally and economically important Ugashik Lakes. The area around Mother Goose Lake provides important habitat for moose and a number of bird species. Volcanoes have been active in the recent past. Mt. Veniaminof, a stratovolcano

with a base 30 miles in diameter and a summit crater 20 miles in circumference, last erupted in 2004. Mt. Veniaminof has the most extensive crater glacier in the United States and is the only known glacier on the continent with an active volcanic vent in its center. The 800,000-acre Mt. Veniaminof National Natural Landmark recognizes the unique qualities of this area.

The Alaska Maritime National Wildlife Refuge includes Federally-owned islands, sea stacks, columns, islets, and rocks off the coast of Alaska. Seal Cape, a 9,900-acre headland, is the only part of the Alaska Maritime Refuge included in this Conservation Plan. Narrow bays cut Seal Cape into two main arms which rise to peaks of more than 2,000 feet.

More than 2,000 people live in 12 communities located near the Refuges. The region is characterized by a mixed cash-subsistence economy. The cash economy is dominated by commercial fishing, tourism, and government employment. The Refuges sustain nearly 1,500 local jobs and contribute $70 million in income annually to the local economy, nearly all through supporting the commercial fishery by providing salmon spawning and rearing habitat.

Issues raised during scoping and addressed in this Revised Conservation Plan are: (1) Access to remote and sensitive areas; (2) conflicts between Refuge user groups.

This Revised Conservation Plan identifies and evaluates four alternatives for managing the Refuges for the next 15 years. These alternatives follow the same general management direction but provide different ways of addressing the issues.

Alternative 1: No Action: Management of the Refuge would continue to follow the current course of action as identified and described in the existing plans and Records of Decision for these refuges. The ranges and intensities of management activities would be maintained. Private and commercial uses of the Refuges would be unchanged. Refuge management would continue to reflect existing laws, executive orders, regulations, and policies governing Service administration and operation of the National Wildlife Refuge System. Helicopter access/landing for recreational purposes, outside of designated Wilderness, would be evaluated on a case-by-case basis.

Alternative 2: There would be no change in the way lands are managed or in how the public can access the Refuges. Research and monitoring provide goals and objectives for increasing our knowledge of wildlife and habitat needs and relationships. Public use monitoring would facilitate wildlife dependent recreation, subsistence, and other traditional uses. Helicopter landings for recreational purposes would not be allowed in sensitive resource areas, at sensitive times, or where remoteness was a primary quality of the area. Landings could be considered in other areas. The Service would develop a process for identifying sensitive areas, in cooperation with the State of Alaska and other interested parties.

Alternative 3: Research and monitoring provide goals and objectives for increasing our knowledge of wildlife and habitat needs and relationships. Public use monitoring would facilitate wildlife dependent recreation, subsistence, and other traditional uses. Helicopter access/landing for recreational access would not be allowed. The boundary of the Yantarni Bay Moderate Management Area would be adjusted to coincide with geographically identifiable features while including ORV trails and areas of moderate use.

Alternative 3a: Preferred Alternative: Research and monitoring provide goals and objectives for increasing our knowledge of wildlife and habitat needs and relationships. Public use monitoring would facilitate wildlife dependent recreation, subsistence, and other traditional uses. Helicopter access/landing for recreational purposes, outside of designated Wilderness, would be evaluated on a case-by-case basis. The boundary of the Yantarni Bay Moderate Management Area would be adjusted to coincide with geographically identifiable features while including ORV trails and areas of moderate use.

Comment Period: 30 days from date of publication of this notice.

Availability of Documents: This Revised Conservation Plan may be obtained on compact diskette by writing to the U.S. Fish and Wildlife Service, Attn: Peter Wikoff, 1011 East Tudor Road, MS 231, Anchorage, AK 99503; telephone (907) 786–3837; fax (907) 786–3965; e-mail *peter_wikoff@fws.gov.* Copies of the Conservation Plan may be viewed at the Refuge Office in King Salmon, AK, local libraries, and the U.S. Fish and Wildlife Service Regional Office, Anchorage, AK. The Conservation Plan is also available online at *http://www.r7.fws.gov/planning/plans.htm.*

Your Comments: Comments may be addressed to Peter Wikoff, U.S. Fish and Wildlife Services, 1011 East Tudor Road, MS 231, Anchorage, AK 99503 or *fw7_apb_planning@fws.gov.*

Dated: July 21, 2005.

Rowan Gould,

Regional Director, U.S. Fish and Wildlife Service, Anchorage, Alaska.

[FR Doc. 05–20380 Filed 10–11–05; 8:45 am]

BILLING CODE 4310–55–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Issuance of Permits

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of issuance of permits for marine mammals.

SUMMARY: The following permits were issued.

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203; fax (703) 358–2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone (703) 358–2104.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on the dates below, as authorized by the provisions of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the Fish and Wildlife Service issued the requested permits subject to certain conditions set forth therein. For each permit for an endangered species, the Service found that (1) the application was filed in good faith, (2) the granted permit would not operate to the disadvantage of the endangered species, and (3) the granted permit would be consistent with the purposes and policy set forth in Section 2 of the Endangered Species Act of 1973, as amended.

Marine Mammals

Permit number	Applicant	Receipt of application FEDERAL REGISTER notice	Permit issuance date
102916	Larry D. Atkinson	70 FR 51838; August 31, 2005	September 20, 2005.

Permit number	Applicant	Receipt of application FEDERAL REGISTER notice	Permit issuance date
105483	John L. Pouleson	70 FR 41782; July 20, 2005	September 20, 2005.

Dated: September 23, 2005.

Michael L. Carpenter,

Senior Permit Biologist, Branch of Permits, Division of Management Authority.

[FR Doc. 05–20373 Filed 10–11–05; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–020–1020–PK]

Notice of Public Meeting, Eastern Montana Resource Advisory Council Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM), Eastern Montana Resource Advisory Council will meet as indicated below.

DATES: A meeting will be held November 16, 2005, at the Bureau of Land Management Montana State Office, 5001 Southgate Drive, Billings, Montana 59101, beginning at 8 a.m. The public comment period will begin at 11:30 a.m.

SUPPLEMENTARY INFORMATION: The 15-member Council advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in eastern Montana. All meetings are open to the public. The public may present written comments to the Council. Each formal Council meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation, or other reasonable accommodations, should contact the BLM as provided below. The Council will hear updates on the Miles City Resource Management Plan, the Pryor Mountain PZP appeal, and other issues.

FOR FURTHER INFORMATION CONTACT: Mary Apple, Resource Advisory Council Coordinator, Montana State Office, 5001 Southgate Drive, Billings, Montana 59101, telephone 406–896–5258 or Sandra S. Brooks, Field Manager, Billings Field Office, telephone 406–896–5013.

Dated: October 4, 2005.

Sandra S. Brooks,

Field Manager.

[FR Doc. 05–20384 Filed 10–11–05; 8:45 am]

BILLING CODE 4210–$$–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV–050–5853–ES; N–79029]

Notice of Realty Action: Lease/conveyance for Recreation and Public Purposes (R&PP) Act Classification of Public Lands in Clark County, NV

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action.

SUMMARY: The BLM examined and found suitable for classification for lease or conveyance under the provisions of the Recreation and Public Purposes Act (R&PP), as amended (43 U.S.C. 869 et seq.) approximately 5 acres of public land in Clark County, Nevada. The Church of Jesus Christ of Latter Day Saints (LDS Church) proposes to use the land for a church and related facilities.

FOR FURTHER INFORMATION CONTACT: Sharon DiPinto, Bureau of Land Management, Las Vegas Field Office, at (702) 515–5062.

SUPPLEMENTARY INFORMATION: On September 2, 2004, the LDS Church filed an R&PP application for 5 acres of public land to be developed as a church with related facilities. These related facilities include a multipurpose building (a worship center, offices, classrooms, nursery, kitchen, restrooms, utility/storage rooms and a lobby), with sidewalks, landscaped areas, paved parking areas, and off site improvements. The LDS Church is a qualified nonprofit entity. Additional detailed information pertaining to this application, plan of development, and site plans is on file in case file N–79029 located in the BLM Las Vegas Field Office. The LDS Church proposes to use the following described public land for a church and related facilities.

Mount Diablo Meridian, Nevada

T 22. S., R. 60 E., Sec 24: SE4NE4NE4SE4, NE4SE4NE4SE4.

Containing 5 acres, more or less.

Churches are a common applicant under the ''public purposes'' provision of the R&PP Act. The LDS Church is an IRS registered non-profit organization and it therefore, a qualified applicant under the R&PP Act.

The lease/conveyance is consistent with current Bureau planning for this area and would be in the public interest. The lease/patent, when issued, will be subject to the provisions of the Recreation and Public Purposes Act and applicable regulations of the Secretary of the Interior, and will contain the following reservations to the United States.

1. A right-of-way thereon for ditches or canals constructed by the authority of the United States, Act of August 30, 1890 (43 U.S.C. 945).

2. All minerals shall be reserved to the United States, together with the right to prospect for, mine and remove such deposits from the same under applicable law and such regulations as the Secretary of the Interior may prescribe and will be subject to:

1. An easement in favor of Clark County for roads, public utilities and flood control purposes.

2. All valid existing rights documented on the official public land records at the time of lease/patent issuance.

ADDRESSES: Send written comments to the Field Manager, Las Vegas Field Office, 4701 N. Torrey Pines Drive, Las Vegas, Nevada 89130. Detailed information concerning this action is available for review at the office of the Bureau of Land Management, Las Vegas Field Office, 4701 N. Torrey Pines Drive, Las Vegas, Nevada, 89130–2301.

On October 12, 2005, the land described below will be segregated from all other forms of appropriation under the public land laws, including the general mining laws, except for lease/conveyance under the Recreation and Public Purposes Act, leasing under the mineral leasing laws and disposals under the mineral material disposal laws. Interested parties may submit comments regarding the proposed lease/conveyance or classification of the lands until November 28, 2005.

Classification Comments

Interested parties may submit comments involving the suitability of the land for a church meeting house.

Comments on the classification are restricted to whether the land is physically suited for the proposal, whether the use will maximize the future use or uses of the land, whether the use is consistent with local planning and zoning, or if the use is consistent with State and Federal programs.

Application Comments

Interested parties may submit comments regarding the specific use proposed in the application and plan of development, whether the BLM followed proper administrative procedures in reaching the decision, or any other factor not directly related to the suitability of the land for R&PP use.

Any adverse comments will be reviewed by the State Director. In the absence of any adverse comments, the classification of the land described in this notice will become effective December 12, 2005. The lands will not be offered for lease/conveyance until after the classification becomes effective.

Authority: 43 CFR part 2741

Sharon DiPinto,

Assistant Field Manager, Division of Lands, Las Vegas, NV.

[FR Doc. 05–20398 Filed 10–11–05; 8:45 am]

BILLING CODE 4310–HC–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–957–05–1420–BJ]

Notice of Filing of Plats of Survey, Wyoming

AGENCY: Bureau of Land Management, Interior.

SUMMARY: The Bureau of Land Management (BLM) has filed the plats of survey of the lands described below in the BLM Wyoming State Office, Cheyenne, Wyoming, on September 29, 2005

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, 5353 Yellowstone Road, P.O. Box 1828, Cheyenne, Wyoming 82003.

SUPPLEMENTARY INFORMATION: These surveys were executed at the request of the Bureau of Land Management, and are necessary for the management of resources. The lands surveyed are:

The plat and field notes representing the dependent resurvey of a portion of the Seventh Standard Parallel North in Range 107 West, the east and north boundaries and the subdivisional lines, and the subdivision of sections 13 and 14, Township 29 North, Range 107 West, Sixth Principal Meridian, Wyoming, was accepted September 29, 2005.

The plat and field notes representing the dependent resurvey of a portion of the Fifth Standard Parallel North, through Ranges 94 and 95 West, and the subdivisional lines, Township 20 North, Range 95 West, Sixth Principal Meridian, Wyoming, was accepted September 29, 2005.

The plat and field notes representing the dependent resurvey of portions of the Ninth Guide Meridian West, through Township 41 North, between Ranges 72 and 73 West, and the subdivisional lines, Township 41 North, Range 72 West, Sixth Principal Meridian, Wyoming, was accepted September 29, 2005.

The plat and field notes representing the dependent resurvey of a portion of the Sixth Standard Parallel North, through Range 86 West, a portion of the subdivisional lines, and the subdivision of sections 2 and 3, Township 24 North, Range 86 West, Sixth Principal Meridian, Wyoming, was accepted September 29, 2005.

The plat and field notes representing the corrective dependent resurvey of portions of the subdivisional lines, Township 47 North, Range 76 West, Sixth Principal Meridian, Wyoming, was accepted September 29, 2005.

The plat and field notes representing the dependent resurvey of a portion of the subdivisional lines, and the subdivision of section 2, Township 52 North, Range 71 West, Sixth Principal Meridian, Wyoming, was accepted September 29, 2005.

The plat and field notes representing the dependent resurvey of a portion of the subdivisional lines, and the subdivision of sections 14 and 23, Township 47 North, Range 89 West, Sixth Principal Meridian, Wyoming, was accepted September 29, 2005.

The plat and field notes representing the dependent resurvey of a portion of the Thirteenth Guide Meridian West, through Township 43 North, between Ranges 104 and 105 West, portions of the subdivisional lines, and the adjusted meander line of the right bank of the East Fork Wind River, and the subdivision of section 31, Township 43 North, Range 104 West, Sixth Principal Meridian, Wyoming, was accepted September 29, 2005.

The plat and field notes representing the dependent resurvey of portions Tracts 44 and 47, Township 52 North, Range 104 West, Sixth Principal Meridian, Wyoming, was accepted September 29, 2005.

Copies of the preceding described plats and field notes are available to the public at a cost of $1.10 per page.

Dated: October 4, 2005.

John P. Lee,

Chief Cadastral Surveyor, Division of Support Services.

[FR Doc. 05–20382 Filed 10–11–05; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–957–05 1910–BJ–5RK4]

Notice of Filing of Plats of Survey, Wyoming

AGENCY: Bureau of Land Management, Interior.

SUMMARY: The Bureau of Land Management (BLM) is scheduled to the plats of surveys of the lands described below thirty (30) calendar days from the date of this publication in the BLM Wyoming State Office, Cheyenne, Wyoming.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, 5353 Yellowstone Road, P.O. Box 1828, Cheyenne, Wyoming 82003.

SUPPLEMENTARY INFORMATION: These surveys were executed at the request of the Bureau of Indian Affairs and are necessary for the managements. The lands surveyed are:

The plat and field notes representing the dependent resurvey of a portion of the south boundary, a portion of the subdivisional lines, the subdivision of certain sections, the survey of a portion of the present right bank of the Wind River, and the metes and bounds Survey of Parcel A, section 33, Township 4 North, Range 3 West, Wind River Meridian, Wyoming, was accepted September 29, 2005.

Copies of the preceding described plat and field notes are available to the public at a cost of $1.10 per page.

Dated: October 4, 2005.

John P. Lee,

Chief Cadastral Surveyor, Division of Support Services.

[FR Doc. 05–20383 Filed 10–11–05; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Notice of revision of an information collection (1010–0164).

SUMMARY: To comply with the Paperwork Reduction Act of 1995 (PRA), MMS is inviting comments on a collection of information that we will submit to the Office of Management and Budget (OMB) for review and approval. The information collection request (ICR) concerns the paperwork requirements in the regulations under 30 CFR part 250, subpart I, Platforms and Structures, Notice to Lessees and Operators (NTL)—Damage Caused by Hurricane(s). MMS is consolidating, renewing, and expanding upon OMB approved Emergency Requests 1010–0163 and 1010–0164. MMS is consolidating the burden hours from NTL— Damage Caused by Hurricane Katrina into this collection. We are also renewing this collection because information needs to be collected for a longer period than allowed by the Emergency OMB Requests. After a major hurricane, lessees need to keep reporting and submitting new information to MMS until all facilities that are able, are back to normal. We are expanding this ICR to include all damage due to any hurricane(s) that may occur in the Gulf of Mexico (GOM) over the next 3 years.

DATES: Submit written comments by December 12, 2005.

ADDRESSES: You may submit comments by any of the following methods listed below. Please use the Information Collection Number 1010–0164 as an identifier in your message.

- E-mail MMS at *rules.comments@mms.gov.* Identify with Information Collection Number 1010–0164 in the subject line.
- Fax: 703–787–1093. Identify with Information Collection Number 1010–0164.
- Mail or hand-carry comments to the Department of the Interior; Minerals Management Service; Attention: Rules Process Team (RPT); 381 Elden Street, MS–4024; Herndon, Virginia 20170–4817. Please reference ''Information Collection 1010–0164'' in your comments.

FOR FURTHER INFORMATION CONTACT: Cheryl Blundon, Rules Processing Team at (703) 787–1600. You may also contact Cheryl Blundon to obtain a copy, at no cost, of the regulation and the NTL that requires the subject collection of information.

SUPPLEMENTARY INFORMATION:

Title: 30 CFR part 250, subpart I, Platforms and Structures, NTL—Damage Caused by Hurricane(s).

OMB Control Number: 1010–0164.

Abstract: The Outer Continental Shelf (OCS) Lands Act, as amended (43 U.S.C. 1331 *et seq.* and 43 U.S.C. 1801 *et seq.*), authorizes the Secretary of the Interior (Secretary) to prescribe rules and regulations to administer leasing of the OCS. Such rules and regulations will apply to all operations conducted under a lease. Operations on the OCS must preserve, protect, and develop oil and natural gas resources in a manner which is consistent with the need to make such resources available to meet the Nation's energy needs as rapidly as possible; to balance orderly energy resource development with protection of human, marine, and coastal environments; to ensure the public a fair and equitable return on the resources of the OCS; preserve and maintain free enterprise competition; and ensure that the extent of oil and natural gas resources of the OCS is assessed at the earliest practicable time. Section 43 U.S.C. 1332(6) states that ''operations in the outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health.''

To carry out these responsibilities, the Minerals Management Service (MMS) issues regulations to ensure that operations in the OCS will meet statutory requirements; provide for safety and protect the environment; and result in diligent exploration, development, and production of OCS leases. In addition, we also issue Notices to Lessees and Operators (NTLs) that provide clarification, explanation, and interpretation of our regulations. These NTLs are used to convey purely informational material and to cover situations that might not be adequately addressed in our regulations. The latter is the case for the information collection required in the NTL. Because of the unusual nature of this information collection, issuing a temporary NTL is the appropriate means to collect the information.

The subject of this information collection request (ICR) is an NTL titled, ''Damage Caused by Hurricane(s)'' to be issued to lessees and operators in the MMS Gulf of Mexico OCS (GOM) Region after a hurricane occurs. This ICR is a merging of two OMB approved Emergency Requests relating to hurricanes, 1010–0163 and 10101–0164. MMS is also renewing this ICR because information will need to be collected for a longer period than the 180 days allowed under an emergency request. Also, we are expanding this submission to now include all damage due to any hurricane(s) that occurred in the 2005 season, as well as any future hurricanes that may occur in the GOM. Once this ICR is approved by OMB, MMS will reissue the NTL for each new hurricane that, in the future, impacts operations in the GOM with MMS inserting the appropriate hurricane name, longitudes, and dates of submittal, etc.

Currently, there are over 4,000 facilities/structures in the GOM OCS. MMS anticipates that potential major hurricanes may impact 40 percent or more of the platforms in the GOM (1,600 facilities) during any one event. For example, at the time of this writing, Hurricanes Katrina and Rita combined affected approximately 2,900 OCS facilities—only 10 facilities were affected by both storms; they each followed different paths and had their own specific meteorological anomalies (deviation or departure from the normal phenomena of the atmosphere). It needs to be stressed that the information we propose to collect under this NTL is information that a prudent lessee/operator would prepare in the event of a major hurricane. The primary authority for this submission is 30 CFR 250, Subpart I, information collection approved under the OMB Control Number 1010–0149. However, in connection with this subpart, MMS thinks that the burden hour requirements in the proposed NTL are in addition to the currently approved paperwork burden under those requirements.

With regard to the ''OCS Pipelines'' section of this NTL, MMS has the authority to collect the information requested under 30 CFR 250, Subpart J, Pipelines and Pipeline Rights-of-Way. The OMB has already approved the collection of pipeline information under OMB Control Number 1010–0050.

Emergency NTLs were issued relating to this same subject—structural damage caused by hurricanes—in 2003 after Hurricane Lili, in 2004 after Hurricane Ivan, and in 2005 after Hurricanes Katrina and Rita. Due to the nature of these incidents and their increasing occurrences, immediately after Hurricane Ivan, proposed rulemaking was started to require lessees to submit to MMS information about structure damage on the OCS due to natural phenomena, e.g., hurricanes, earthquakes. It is currently in the surnaming process and OMB has issued Regulatory Identification Number 1010-AD18.

We will protect information from respondents considered proprietary under the Freedom of Information Act (5 U.S.C. 552) and its implementing

regulations (43 CFR part 2) and under regulations at 30 CFR 250.196, ''Data and information to be made available to the public.'' No items of a sensitive nature are collected. Responses are mandatory.

Frequency: Monthly; and as specified in the NTL.

Estimated Number and Description of Respondents: Approximately 110 Federal OCS oil and gas lessees.

Estimated Reporting and Recordkeeping ''Hour'' Burden: The approved reporting burdens for the current collections are 202,320 hours for 1010–0164, and 73,920 hours for 1010–0163. We expect the new burden hours to be approximately 26,880 which is an adjustment decrease of 249,360 burden hours. This decrease is a result of number of responses submitted. Even though there were approximately 1,600 facilities affected by Hurricane Rita, and 1,300 facilities affected by Hurricane Katrina in the GOM, usually respondents will submit only one or more reports listing the damage to their facilities thereby making the number of responses significantly lower than what was previously estimated. The following chart details the individual components and respective hour burden estimates of this ICR. In calculating the burdens, we assumed that respondents perform certain requirements in the normal course of their activities. We consider these to be usual and customary and took that into account in estimating the burden.

Reporting requirement	Hour burden	Number of responses	Annual burden hours
Prepare and submit to MMS (1) list of impacted OCS structures, (2) timetable for inspections, and (3) inspection plan for each listed platform describing work to determine condition of structure	12	150	1,800
Submit amendments to list and inspection plans.	12	90	1,080
Submit report to MMS describing detected damage that may adversely affect structural integrity, including assessment of ability to withstand anticipated environmental storm conditions, and any remediation plans	120	200	24,000

Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden: We have identified no cost burdens for this collection.

Public Disclosure Statement: The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond.

Comments: Before submitting an ICR to OMB, PRA section 3506(c)(2)(A) requires each agency ''* * * to provide notice * * * and otherwise consult with members of the public and affected agencies concerning each proposed collection of information * * *''. Agencies must specifically solicit comments to: (a) Evaluate whether the proposed collection of informtion is necessary for the agency to perform its duties, including whether the information is useful; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) enhance the quality, usefulness, and clarity of the information to be collected; and (d) minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

Agencies must also estimate the ''non-hour cost'' burdens to respondents or recordkeepers resulting from the collection of information. Therefore, if you have costs to generate, maintain, and disclose this information, you should comment and provide your total capital and startup cost components or annual operation, maintenance, and purchase of service components. You should describe the methods you use to estimate major cost factors, including system and technology acquisition, expected useful life of capital equipment, discount rate(s), and the period over which you incur costs. Capital and startup costs include, among other items, computers and software you purchase to prepare for collecting information, monitoring, and record storage facilities. You should not include estimates for equipment or services purchased: (i) Before October 1, 1995; (ii) to comply with requirements not associated with the information collection; (iii) for reasons other than to provide information or keep records for the Government; or (iv) as part of customary and usual business or private practices.

We will summarize written responses to this notice and address them in our submission for OMB approval. As a result of your comments, we will make any necessary adjustments to the burden in our submission to OMB.

Public Comment Procedure: MMS's practice is to make comments, including names and addresses of respondents, available for public review. If you wish your name and/or address to be withheld, you must state this prominently at the beginning of your comment. MMS will honor this request to the extent allowable by law; however, anonymous comments will not be considered. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public inspection in their entirety.

MMS Information Collection Clearance Officer: Arlene Bajusz (202) 208–7744.

Dated: October 3, 2005.

E.P. Danenberger,

Chief, Office of Offshore Regulatory Programs.

[FR Doc. 05–20435 Filed 10–11–05; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

National Park Service

Draft Environmental Impact Statement; Reconstruction of the Furnace Creek Water Collection System; Death Valley National Park; Inyo County, CA; Notice of Availability

Summary: Pursuant to § 102(2)(C) of the National Environmental Policy Act (Pub. L. 91–190, 42U.S.C. 4321–4347, January 1, 1970, as amended), and the Council on Environmental Quality regulations (40CFR Part 1500–1508), the U.S. Department of the Interior, National Park Service and its cooperating agency have completed a draft Environmental Impact Statement (EIS) for the proposed reconstruction of the Furnace Creek water collection system at Death Valley National Park in Inyo County, California. The proposed project would rebuild the outdated water collection system in the Furnace Creek area to deliver a safe and reliable potable and nonpotable water supply to the park's main visitor use area. The draft EIS also describes and analyzes three alternatives and appropriate

mitigation measures, and identifies an ''environmentally preferred'' alternative.

Background: The National Park Service (NPS), Xanterra Parks and Resorts (Xanterra), and the Timbisha Shoshone Tribe (cooperating agency) are the primary water user groups in the Furnace Creek area. The Texas-Travertine Springs complex in the Furnace Creek area may be the most critical water resource in Death Valley National Park. This series of springs provides water for all of the human use needs in the park headquarters area; infrastructure in this area includes the primary NPS administrative offices and three campgrounds, two private resort/visitor services facilities owned and operated by Xanterra, and the offices and residences for the Timbisha Shoshone Tribe. The Texas-Travertine Springs complex also provides water that supports a riparian area, a biological community that includes habitat for a minimum of eight endemic special-status species, and a biologically and culturally-important mesquite bosque.

The current water collection system consists of four water collection boxes at Travertine Springs, a collection gallery in Furnace Creek Wash, a tunnel for water collection constructed similar to a mine adit at Texas Springs, and a tunnel for water collection constructed similar to a mine adit at the Furnace Creek Inn. All water distributed by the existing collection system is potable, although much of the water is used for irrigation and other nonpotable purposes. The existing water collection system installed in the 1970's has become unreliable, subject to failure, and is nearing the end of its useful life-span. Many of the existing collection galleries have intermittently tested positive for *coliform* or *E. coli* bacteria, experienced unpredictable inputs of soil or organic matter, intermittently and unpredictably produced reduced volumes of water, and collected groundwater that does not meet state drinking water standards. When the system was installed approximately 30 years ago, there was an incomplete understanding of the Furnace Creek area's unique biological resource values and water conservation strategies were not a priority.

Proposal and Alternatives: The NPS proposes to rebuild the antiquated water collection system in the Furnace Creek area to deliver safe and reliable drinking water to the park's main visitor use area, and provide separate delivery systems for potable and nonpotable water. Desired redevelopment of the Furnace Creek water collection system includes efforts to restore historic wetland and riparian habitat, and ensure the long-term conservation of species endemic to the Furnace Creek area. The draft EIS identifies and analyzes four alternatives for reconstructing the Furnace Creek water collection system.

Alternative 1 (''no action'') would result in continued operation and maintenance of the existing water collection system. Under this alternative, the Furnace Creek water collection system would remain in its existing condition. Necessary maintenance and repairs would continue, but no major undertakings (e.g., maintenance activities) would occur. *Alternative 1* would provide potable water from collection galleries at Travertine Springs Lines 2, 3, and 4, and Furnace Creek Wash. Nonpotable water would be provided from the Inn Tunnel. Riparian water would be released from Travertine Springs Line 1, Texas Springs, and the Inn Tunnel. *Alternative 1* would continue to store water in the existing 2-million gallon and 500,000 gallon storage tanks. Potable water would continue to be disinfected at the 2-million gallon tank with chlorine.

All three ''action'' alternatives would separate the potable and nonpotable water system in the project area, and provide nonpotable water from the Inn Tunnel and a Furnace Creek Wash collection gallery. These alternatives primarily differ in terms of how each would provide potable water to the Furnace Creek area. *Alternative 2* would provide potable water from rebuilt collection galleries at Travertine Springs Line 3 and Line 4, and two to three new groundwater wells in the Texas Springs Syncline. *Alternative 2* would treat potable water using a reverse osmosis water treatment plant. Riparian water would be released from Travertine Springs Line 1 and Line 2 and Texas Springs to restore historic wetland and riparian habitat. The restoration effort would include the incorporation of riparian water release measures that would reduce erosion and promote groundwater infiltration.

Alternative 3 (agency preferred) would provide potable water from 4 to 6 new groundwater wells in the Texas Springs Syncline, and would treat potable water using a reverse osmosis water treatment plant. Riparian water would be released from all of Travertine Springs and Texas Springs to restore historic wetland and riparian habitat. The restoration effort would include the incorporation of riparian water release measures that would reduce erosion and promote groundwater infiltration.

Alternative 4 would provide potable water from Travertine Springs Lines 2, 3, and 4 and Texas Springs, and would treat water using a reverse osmosis water treatment plant with supplemental water disinfection. Since the NPS would treat all potable water under this alternative (including bypass water), Travertine Springs would not require reconstruction of spring collection boxes or clearing and grubbing of vegetation from the spring area. Riparian water would be released from Travertine Springs Line 1 and Texas Springs to restore historic wetland and riparian habitat. The restoration effort would include the incorporation of riparian water release measures that would reduce erosion and promote groundwater infiltration.

The draft EIS identifies and evaluates a full range of mitigation strategies, project design elements, and other measures to minimize environmental harm. In addition to identifying the agency-preferred alternative, based on the environmental impact analysis detailed in the draft EIS an ''environmentally preferred'' alternative is also evaluated.

Scoping: Early public and agency participation has been incorporated in this conservation planning process. Death Valley National Park held public scoping and informal meetings in 2001 through 2004 to solicit ideas and concerns from park visitors, park staff, Native American groups, scientists, and government agencies. A notice of intent to prepare the Reconstruction of the Furnace Creek Water Collection System Draft Environmental Impact Statement was published in the **Federal Register** on November 20, 2000; the formal public scoping phase concluded on March 14, 2001. The public was notified about the public scoping process through the **Federal Register** announcement, local press releases, website postings, mailings, and the Furnace Creek Visitor Center newsletter.

During 2001 the NPS held three public scoping meetings on January 30 (in Pahrump, Nevada), January 31 (in Death Valley National Park), and February 1 (in Independence, California). The purpose of these meetings was to: (1) Provide participants with an overview of existing conditions and the proposed action; (2) ask participants to identify key issues that should be analyzed during the environmental review and compliance process; and (3) provide an opportunity for participants to ask questions regarding project alternatives and the overall environmental review and compliance process. As a result of the public scoping process, two letters were received via U.S. mail. Issues identified during the public scoping process are summarized in the EIS

under the Planning Issues section, in Chapter I, Purpose and Need. All comments received during the public scoping process have been duly considered in this EIS. In addition to public scoping, the park and its cooperating agency have also consulted with the Fish and Wildlife Service, Army Corps of Engineers, California State Historic Preservation Office, and Lahontan Regional Water Quality Control Board.

Comments: The draft EIS is now available for public review during a 60-day comment period. Persons wishing to express any new concerns about water management, facilities development, resource protection, or other pertinent aspects of the proposal are encouraged to do so; all responses should be sent to James T. Reynolds, Superintendent, Death Valley National Park, Death Valley, California 92328. Faxed or electronic comments are also acceptable (such transmittals may be sent to the park superintendent's attention at *Deva_Superintendent@nps.gov* or FAX (760) 786–3283). Written comments will also be accepted at NPS public meetings which are to be held November 15 and 16, 2005 at Pahrump, Nevada, and Death Valley, California. As soon as meeting venues are confirmed, details will be posted on the park's Web site and publicized via local and regional press (and may be obtained by contacting the park at (769) 786–3243).

All written comments must be postmarked (or transmitted) no later than 60 days from the date that the Environmental Protection Agency posts its notice of filing in the **Federal Register** (immediately upon confirmation, this date will be announced on the park's Web site and via local and regional press media; this information will also be available at the park's telephone contact at (760) 786–3243). 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.

Printed or compact disk copies of the draft EIS will both be available. Please specify which document format you would like to receive when calling, e-mailing, or faxing Death Valley National Park. The draft EIS also can be viewed on the internet at *www.nps.gov/deva/pphtml/documents.html* or reviewed at several public libraries.

Decision Process: Following careful consideration of all comments as may be received, a final EIS will be prepared. Not sooner than 30 days following release of the final EIS a Record of Decision would be prepared. At this time its anticipated that project construction may begin during winter, 2007. As a delegated EIS the approving official is the Regional Director, Pacific West Region of the National Park Service; subsequently the official responsible for project implementation would be the Superintendent, Death Valley National Park.

Dated: March 1, 2005.

Jonathan B. Jarvis,

Regional Director, Pacific West Region.

Editorial Note: This document was received at the Office of the Federal Register October 6, 2005.

[FR Doc. 05–20423 Filed 10–11–05; 8:45 am]

BILLING CODE 4312–EF–P

DEPARTMENT OF THE INTERIOR

National Park Service

Committee for the Preservation of the White House; Notice of Public Meeting

AGENCY: Department of the Interior, National Park Service.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given in accordance with the Federal Advisory Committee Act that a meeting of the Committee for the Preservation of the White House will be held at the White House at 11 a.m. on Friday, October 28, 2005.

DATES: October 28, 2005.

FOR FURTHER INFORMATION CONTACT: Executive Secretary, Committee for the Preservation of the White House, 1100 Ohio Drive, SW., Washington, DC 20242. (202) 619–6344.

SUPPLEMENTARY INFORMATION: It is expected that the meeting agenda will include policies, goals, and long range plans. The meeting will be open, but subject to appointment and security clearance requirements. Clearance information, which includes full name, date of birth and social security number, must be received by October 21, 2005. Due to the present mail delays being experienced, clearance information should be faxed to (202) 619–6353 in order to assure receipt by deadline. Inquiries may be made by calling the Committee for the Preservation of the White House between 9 a.m. to 4 p.m. weekdays at (202) 619–6344. Written comments may be sent to the Executive Secretary, Committee for the Preservation of the White House, 1100 Ohio Drive, SW., Washington, DC 20242.

Dated: September 26, 2005.

Ann Bowman Smith,

Executive Secretary, Committee for the Preservation of the White House.

[FR Doc. 05–20422 Filed 10–11–05; 8:45 am]

BILLING CODE 4312–54–M

INTERNATIONAL TRADE COMMISSION

[USITC SE–05–032]

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: October 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. 731–TA–298 and 299 (Second Review) (Porcelain-on-Steel Cooking Ware from China and Korea) and 701–TA–267 and 268 and 731–TA–304 and 305 (Second Review) Top-of-the-Stove Stainless Steel Cooking Ware from Korea and Taiwan)—briefing and vote. (The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before October 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.

Issued: October 6, 2005.

By order of the Commission:

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 05–20570 Filed 10–7–05; 3:45 pm]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review: Records and Supporting Data: Daily Summaries, Records of Production, Storage, and Disposition, and Supporting Data by Licensed Explosives Manufacturers.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 70, Number 161, page 48977 on August 22, 2005, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until November 14, 2005. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—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 agencies 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.

Overview of this Information Collection:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Records and Supporting Data: Daily Summaries, Records of Production, Storage, and Disposition, and Supporting Data by Licensed Explosives Manufacturers.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* Form Number: ATF REC 5400/2. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. Other: None. These records show daily activities in the manufacture, use, storage, and disposition of explosive materials by manufacturers. The records are used to show where and to whom explosive materials are sent, thereby ensuring that any diversion will be readily apparent and, if lost or stolen, ATF will be immediately notified on discovery of the loss or theft. ATF requires that records be kept 5 years from the date a transaction occurs or until discontinuance of business or operations by the licensee.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that 2,008 respondents will take 15 minutes to maintain each record.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 130,520 annual total burden hours associated with this collection.

If additional information is required contact: Brenda E. Dyer, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: October 5, 2005.

Brenda E. Dyer,

Department Clearance Officer, Department of Justice.

[FR Doc. 05–20454 Filed 10–11–05; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

September 30, 2005.

The Department of Labor (DOL) has submitted the following public information collection request (ICR) 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 this 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 Employment Standards Administration (ESA), 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: Employment Standards Administration.

Type of Review: Extension of currently approved collection.

Title: OFCCP Recordkeeping and Reporting Requirements—Supply and Service.

OMB Number: 1215–0072.

Frequency: Annually.

Type of Response: Reporting; Recordkeeping; and Third party disclosure.

Affected Public: Business or other for-profit; Not-for-profit institutions; and State, Local, or Tribal Government.

Number of Respondents: 83,462.

Annual Responses: 83,462.

Average Response Time: Approximately 110 hours.

Estimated Annual Burden Hours: 9,223,921.

Total Annualized capital/startup costs: $0.

Total Annual Costs (operating/maintaining systems or purchasing. services): $110,607.

Description: Recordkeeping and reporting requirements incurred by Federal contractors under Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and Section 4212 of the Vietnam Era Veterans' Readjustment Act are necessary to substantiate compliance with nondiscrimination and affirmative action requirements enforced by the ESA's Office of Contract Compliance Programs.

Darrin A. King,

Acting Departmental Clearance Officer.

[FR Doc. 05–20386 Filed 10–11–05; 8:45 am]

BILLING CODE 4510–CM–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petitions for Modification

The following parties have filed petitions to modify the application of existing safety standards under section 101(c) of the Federal Mine Safety and Health Act of 1977.

1. Genwal Resources, Inc.

[Docket No. M–2005–064–C]

Genwal Resources, Inc., P.O. Box 1077, Price, Utah 84501 has filed a petition to modify the application of 30 CFR 75.901 (Protection of low- and medium-voltage three-phase circuits used underground) to its South Crandall Canyon Mine (MSHA I.D. No. 42–02356) located in Emery County, Utah. The petitioner requests a modification of the existing standard to permit an alternative method of compliance for the grounding of a diesel generator. The petitioner proposes to use a portable diesel generator for utility power and to move electrically powered mobile and stationary equipment throughout the mine. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

2. Black Stallion Coal Company

[Docket No. M–2005–065–C]

Black Stallion Coal Company, 500 Lee Street, P.O. Box 1189, Charleston, West Virginia 25324 has filed a petition to modify the application of 30 CFR 75.900 (Low- and medium-voltage circuits serving three-phase alternating current equipment; circuit breakers) to its Black Stallion Mine (MSHA I.D. No. 46–09086) located in Boone County, West Virginia. The petitioner proposes to use the circuit breaker required in 30 CFR 75.900 for short circuit protection only. The contactor will be equipped to provide under-voltage, grounded phase protection, and other protective functions normally provided by the contactor. The petitioner has listed specific terms and conditions in this petition for modification that will be followed when the proposed alternative method is implemented. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

3. San Juan Coal Company

[Docket No. M–2005–066–C]

San Juan Coal Company, P.O. Box 561, Waterflow, New Mexico 87421 has filed a petition to modify the application of 30 CFR 75.503 (Permissible electric face equipment; maintenance) and 30 CFR 18.35(a)(5)(i) (Portable (trailing) cables and cords) to its San Juan South Underground Mine (MSHA I.D. No. 29–02170) located in San Juan County, New Mexico. The petitioner requests a modification of the existing standard to permit a higher maximum length on trailing cables for the three-phase, 995-volt continuous mining machine, 995-volt roof bolting machine, 995-volt auxiliary fan and 995-volt breaker. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

Request for Comments

Persons interested in these petitions are encouraged to submit comments via Federal eRulemaking Portal: *http://www.regulations.gov;* E-mail: *zzMSHA-Comments@dol.gov;* Fax: (202) 693–9441; or Regular Mail/Hand Delivery/Courier: Mine Safety and Health Administration, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209. All comments must be postmarked or received in that office on or before November 14, 2005. Copies of these petitions are available for inspection at that address.

Dated: October 5, 2005.

Rebecca J. Smith,

Acting Director, Office of Standards, Regulations, and Variances.

[FR Doc. 05–20448 Filed 10–11–05; 8:45 am]

BILLING CODE 4510–43–P

MORRIS K. UDALL SCHOLARSHIP AND EXCELLENCE IN NATIONAL ENVIRONMENTAL POLICY FOUNDATION

Sunshine Act Meetings

TIME AND DATE: 9 a.m. to 12 p.m., Friday, November 4, 2005.

PLACE: The offices of the Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation, 130 South Scott Avenue, Tucson, AZ 85701.

STATUS: This meeting will be open to the public, unless it is necessary for the Board to consider items in executive session.

MATTERS TO BE CONSIDERED: (1) A report on the U.S. Institute for Environmental Conflict Resolution; (2) A report from the Udall Center for Studies in Public Policy; (3) A report on the Native Nations Institute; (4) Program Reports; and (5) A Report from the Management Committee.

PORTIONS OPEN TO THE PUBLIC: All sessions with the exception of the session listed below.

PORTIONS CLOSED TO THE PUBLIC: Executive session

CONTACT PERSON FOR MORE INFORMATION: Christopher L. Helms, Executive Director, 130 South Scott Avenue, Tucson, AZ 85701, (520) 670–5529.

Dated: October 6, 2005.

Christopher L. Helms,

Executive Director, Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation, and Federal Register Liaison Officer.

[FR Doc. 05–20493 Filed 10–7–05; 10:10am]

BILLING CODE 6820–FN–M

NUCLEAR REGULATORY COMMISSION

Proposed Revision of the NRC Enforcement Policy

AGENCY: Nuclear Regulatory Commission.

ACTION: Policy statement: Notification of proposed revision.

SUMMARY: The Nuclear Regulatory Commission (NRC) is considering a revision to its Enforcement Policy

(Policy), Supplement VII, to change the criteria considered when determining the Severity Level of violations of the NRC's employee protection regulations.

DATES: Comments on this proposed revision to the NRC Enforcement Policy may be submitted on or before December 12, 2005. The staff's disposition of comments will be documented, and made available on the NRC Web site.

ADDRESSES: Submit written comments to: Michael T. Lesar, Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, Mail Stop: T6D59, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland, between 7:30 a.m. and 4:15 p.m., Federal workdays. Copies of comments received may be examined at the NRC Public Document Room, Room O1F21, 11555 Rockville Pike, Rockville, MD. You may also e-mail comments to *nrcrep@nrc.gov.*

The NRC maintains the current Enforcement Policy on its Web site at *http://www.nrc.gov*, select *What We Do*, *Enforcement*, then *Enforcement Policy.*

FOR FURTHER INFORMATION CONTACT: Robert Fretz, Office of Enforcement, Nuclear Regulatory Commission, Washington, DC 20555–0001, (301) 415–1980, e-mail (*RXF@nrc.gov*) or Maria Schwartz, Office of Enforcement, Nuclear Regulatory Commission, Washington, DC 20555–0001, (301) 415–2742, e-mail (*MES@nrc.gov*).

SUPPLEMENTARY INFORMATION: On April 14, 2000, the Executive Director for Operations chartered a Discrimination Task Group (DTG) to evaluate the NRC's handling of employee discrimination cases. The DTG's report, ''Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues,'' was forwarded to the Commission as an attachment to SECY–02–0166, dated September 12, 2002. Among other recommendations, the DTG recommended changing the Severity Level criteria for violations of the Commission's Employee Protection Regulations to include additional factors when applying Severity Levels. On March 26, 2003, the Commission issued a Staff Requirements Memorandum (SRM) on SECY–02–0166 approving the recommendations of the DTG as revised by the Senior Management Review Team. The Commission approved, without comment, the DTG recommendation regarding Severity Level criteria. The staff is now proposing to change the Enforcement Policy in response to the Commission's direction in its SRM on SECY–02–0166.

The primary goals of enforcement in the discrimination area are to deter licensees and individuals from taking adverse actions against employees for engaging in protected activities, and to ensure that there is a work environment that allows employees to feel free to raise concerns. As a result, the Severity Levels assigned to a particular act of discrimination should be graded based on factors that promote these goals. In addition to these goals, the proposed revision to Supplement VII of the Enforcement Policy would improve the effectiveness of the NRC's enforcement program by allowing the staff to more appropriately assess the significance of discrimination violations.

The Enforcement Policy currently categorizes the Severity Level of a discrimination violation solely by the level of the manager in the organization who initiated or approved the adverse action. For example, a violation of an employee protection regulation attributed to a senior corporate manager would normally result in a Severity Level I violation whereas a violation attributed to a mid-level manager or first-line supervisor would normally result in a Severity Level II or III violation, respectively. The DTG recommended that Supplement VII of the Enforcement Policy be revised in the discrimination area to account for other factors in addition to the level of the manager. The proposed changes to the Severity Level factors would allow the NRC staff to further consider: (1) The severity of the adverse action (e.g., monetary effect, downgrade of position, involuntary transfer from a supervisory to non-supervisory position, and negative appraisal comments); (2) potential site or organizational impact of the adverse action; (3) failure by licensee or contractor or subcontractor management to followup on a discrimination complaint; and (4) whether or not the adverse action was taken because an employee came to the NRC or other government agency with a concern. The NRC staff will continue to consider the aspect of willfulness on the part of the individual taking the adverse action in accordance with Section IV.A.4 of the Enforcement Policy when assessing the significance of the violation.

The proposed revision incorporates the use of several terms not currently used in Supplement VII, including tangible adverse action, mid-level manager, and site or organizational impact. These terms, as used in the proposed revision to Supplement VII, are defined below.

A tangible adverse action is that action that had an actual, negative effect on an employee. Tangible adverse actions include, but are not limited to, negative monetary effects (e.g., job termination, and failure to receive a routine annual pay increase or bonus), demotion or arbitrary downgrade of a position, transfer to a position that is recognized to have a lesser status (e.g., from a supervisory to a non-supervisory position), and an overall performance appraisal downgrade. Adverse actions that are not considered ''tangible'' include a negative comment in a performance appraisal, that had no effect on the overall appraisal grade or visible impact on the employee, or a letter of reprimand or counseling which subsequently did not have a negative effect on an employee's position or compensation. These adverse actions would be considered less severe and typically would not be considered for escalated enforcement.

The impact or consequences of the tangible adverse action would be considered when making a Severity Level determination. For example, a substantial monetary action, such as termination or job demotion, would generally be considered a significant tangible adverse action and could result in a Severity Level I or II violation. Whereas, an overall performance appraisal downgrade or action that had a lesser monetary effect (e.g., reduced bonus) would not be considered a significant tangible adverse action and, thus, could result in a Severity Level II or III violation.

A mid-level manager is, in most cases, considered to be a manager below the level of a senior manager (typically a vice-president or above) or owner of a company but above a first line supervisor. For large organizations, such as power reactor licensees with several levels of management, mid-level management may actually encompass several levels of management below the level of senior manager. Similarly, in a large organization, for purposes of Severity Level determination, a second level supervisor, such as a general foreman in a maintenance organization, may be most appropriately grouped with first line supervision. Conversely, smaller companies, such as radiography or well logging licensees, may only have one or two levels of management, all of which would be considered at least mid-level.

For discrimination cases involving non-licensee contractors or subcontractors, the NRC may choose to exercise discretion in determining the severity level of a violation by taking into account the contract manager's position within the contractor's organization and the relation of that

position to licensed activities. In discrimination cases where an adverse action was initiated or approved by mid-level management within the organization but the specific manager cannot be identified, the Severity Level determination will consider the action taken as though a specific individual manager was identified. For example, during the course of an otherwise legitimate reduction in force, an employee is subject to the layoff, at least in part, due to engaging in a protected activity. In this example, a panel of mid-level managers approves the list of employees affected by the layoff, including the employee wrongly laid off, but no single mid-level manager is specifically identified as responsible for the adverse action. Therefore, Severity Level consideration would be based, in part, on mid-level management involvement.

Potential site or organizational impact is the negative impact on the work environment that could occur if the adverse action is conspicuous and widely known to other employees. The NRC recognizes that this would be the most subjective of the proposed severity level factors and that precise criteria would likely be difficult to establish. Therefore, the NRC anticipates that this factor will only be used when the adverse action is clearly widely-known. Widely-known actions which could affect the organization by affecting the work environment for other employees include, for example, those actions that result in an individual being absent from the workplace, as a result of a termination, suspension, or relocation of work space. Adverse actions involving performance appraisals do not typically result in an employee's absence and may not necessarily be known by other employees. Therefore, actions related to such things as performance appraisals would not typically be considered widely-known under this factor, unless evidence suggests otherwise.

Although not specifically included as a severity level factor in the proposed revision, the NRC notes that the threat of an adverse action is also considered to constitute an adverse action because the threat affects the terms and conditions of employment, thereby affecting the work environment. The NRC recognizes, however, that the threat of an adverse action does not have the same consequences to an individual as an actual tangible adverse action. Under the proposed revision, a SL II violation, for example, could be appropriate, if a mid-level manager threatened to terminate an employee and the threat had widespread site or organizational impact, i.e., was widely-known among employees.

Accordingly, the proposed revision to the NRC Enforcement Policy, Supplement VII, reads as follows:

NRC Enforcement Policy

* * * * *

Supplement VII—Miscellaneous Matters

* * * * *

A. Severity Level I—Violations Involving for Example

* * * * *

4. Employee Discrimination in violation of 10 CFR 50.7, or similar regulations, by a senior corporate officer or manager involving a significant tangible adverse action (e.g., substantial monetary action, such as termination or job demotion).

B. Severity Level II—Violations Involving for Example

* * * * *

4. Employee Discrimination in violation of 10 CFR 50.7, or similar regulations where a tangible adverse action (e.g., an actual, negative effect on an employee, such as denial of training, lower performance rating, or denial of a small, routine annual pay increase) was taken or approved by a senior manager; or violations in which at least two of the following factors apply:

(a) The adverse action was approved by at least a mid-level manager (e.g., a manager above a first-line supervisor) or at a level within the organization corresponding to a mid-level manager (in those cases where the specific mid-level manager cannot be identified); or

(b) The adverse action was tangible and significant (e.g., substantial monetary action, such as termination or job demotion); or

(c) The adverse action was widely-known; or

(d) The adverse action was taken because an employee came to the NRC or other government agency with a concern; or

(e) The licensee, contractor or subcontractor's management failed to followup on a discrimination complaint made by one of its own employees or the licensee's management failed to followup on a discrimination complaint made to the licensee by a contractor or subcontractor employee.

A. Severity Level III—Violations Involving for Example

* * * * *

5. Employee Discrimination in violation of 10 CFR 50.7, or similar regulations where at least one of the following factors apply:

(a) The adverse action was approved by at least a mid-level manager (e.g., a manager above a first-line supervisor) or at a level within the organization corresponding to a mid-level manager (in those cases where the specific mid-level manager cannot be identified); or

(b) The adverse action was tangible (e.g., an actual, negative effect on an employee, such as a denial of a small, routine annual pay increase, denial of training, or lower performance rating); or

(c) The adverse action was widely-known; or

(d) The adverse action was taken because an employee came to the NRC or other government agency with a concern; or

(e) The licensee, contractor or subcontractor's management failed to followup on a discrimination complaint made by one of its own employees or the licensee's management failed to followup on a discrimination complaint made to the licensee by a contractor or subcontractor employee.

D. Severity Level IV—Violations Involving for Example

* * * * *

7. Employee Discrimination in violation of 10 CFR 50.7, or similar regulations which, in itself, does not warrant a Severity Level III categorization.

Dated at Rockville, MD, this 27th day of September, 2005.

For the Nuclear Regulatory Commission.

Michael R. Johnson,

Director, Office of Enforcement.

[FR Doc. E5–5578 Filed 10–11–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Federal Register Notice

DATES: Weeks of October 10, 17, 24, 31, November 7, 14, 2005.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of October 10, 2005

There are no meetings scheduled for the Week of October 10, 2005.

Week of October 17, 2005—Tentative

Tuesday, October 18, 2005

9:30 a.m.—Briefing on Decommissioning Activities and Status (Public Meeting) (Contact: Dan Gillen, 301–415–7295).

This meeting will be webcast live at the Web address—www.nrc.gov.

Week of October 24, 2005—Tentative

Wednesday, October 26, 2005

1:30 p.m.—Discussion of Security Issues (Closed–Ex.1).

Thursday, October 27, 2005

10 a.m.—Discussion of Security Issues (Closed–Ex.1).

Week of October 31, 2005—Tentative

Tuesday, November 1, 2005

9:30 a.m.—Briefing on Implementation of Davis-Besse Lessons Learned Task Force (DBLLTF) Recommendations (Public Meeting) (Contact: Brendan Moroney, 301–415–3974).

This meeting will be webcast live at the Web address—www.nrc.gov.

Week of November 7, 2005—Tentative

There are no meetings scheduled for the Week of November 7, 2005.

Week of November 14, 2005—Tentative

There are no meetings scheduled for the Week of November 14, 2005.

The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415–1292. Contact person for more information: Michelle Schroll, (301) 415–1662.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *www.nrc.gov/what-we-do/policy-making/schedule.html*

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify the NRC's Disability Program Coordinator, August Spector, at 301–415–7080, TDD: 301–415–2100, or by e-mail at *aks@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *dkw@nrc.gov.*

Dated: October 6, 2005.

Debra L. McCain,

Office of the Secretary.

[FR Doc. 05–20494 Filed 10–7–05; 10:10 am]

BILLING CODE 7590–01–M

PENSION BENEFIT GUARANTY CORPORATION

Proposed Submission of Information Collection for OMB Review; Comment Request; Survey of Nonparticipating Single Premium Group Annuity Rates

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of intention to request extension of OMB approval.

SUMMARY: The Pension Benefit Guaranty Corporation (''PBGC'') intends to request that the Office of Management and Budget (''OMB'') extend approval, under the Paperwork Reduction Act, of a collection of information that is not contained in a regulation (OMB control number 1212–0030; expires January 31, 2006). This voluntary collection of information is a quarterly survey of insurance company rates for pricing annuity contracts. The survey is conducted by the American Council of Life Insurers for the PBGC. This notice informs the public of the PBGC's intent and solicits public comment on the collection of information.

DATES: Comments should be submitted by December 12, 2005.

ADDRESSES: Comments may be mailed or delivered to the Legislative & Regulatory Department Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026. Comments also may be submitted by e-mail to *paperwork.comments@pbgc.gov* or by fax to 202–326–4112. The PBGC will make all comments available on its Web *site www.pbgc.gov.*

Copies of the collection of information may be obtained without charge by writing to the PBGC's Communications and Public Affairs Department at Suite 240 at the above address or by visiting that office or calling 202–326–4040 during normal business hours. (TTY and TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4040.)

FOR FURTHER INFORMATION CONTACT: Thomas H. Gabriel, Attorney, Legislative & Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026, 202–326–4024. (TTY and TDD users may call the Federal relay service toll-free at 1–800–877–8339 and request connection to 202–326–4024).

SUPPLEMENTARY INFORMATION: The Pension Benefit Guaranty Corporation's regulations prescribe actuarial valuation methods and assumptions (including interest rate assumptions) to be used in determining the actuarial present value of benefits under single-employer plans that terminate (29 CFR Part 4044) and under multiemployer plans that undergo a mass withdrawal of contributing employers (29 CFR Part 4281). Each month the PBGC publishes the interest rates to be used under those regulations for plans terminating or undergoing mass withdrawal during the next month.

The interest rates are intended to reflect current conditions in the annuity markets. To determine these interest rates, the PBGC gathers pricing data from insurance companies that are providing annuity contracts to terminating pension plans through a quarterly ''Survey of Nonparticipating Single Premium Group Annuity Rates.'' The survey is distributed by the American Council of Life Insurers and provides the PBGC with ''blind'' data (*i.e.,* is conducted in such a way that the PBGC is unable to match responses with the companies that submitted them). The information from the survey is also used by the PBGC in determining the interest rates it uses to value benefits payable to participants and beneficiaries in PBGC-trusteed plans for purposes of the PBGC's financial statements.

The survey is directed at insurance companies that have volunteered to participate, most or all of which are members of the American Council of Life Insurers. The survey is conducted quarterly and will be sent to approximately 22 insurance companies. Based on experience under the current approval, the PBGC estimates that 11 insurance companies will complete and return the survey. The PBGC further estimates that the average annual burden of this collection of information is 41 hours and $110.

The collection of information under the regulation has been approved by OMB under control number 1212–0030 through January 31, 2006. The PBGC intends to request that OMB extend its approval for another three years. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The PBGC is soliciting public comments to—

- Evaluate whether the collection of information is necessary for the proper

performance of the functions of the agency, including whether the information will have practical utility;

- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- 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.

Dated in Washington, DC, this 4th day of October, 2005.

Rick Hartt,

Chief Technology Officer, Pension Benefit Guaranty Corporation.

[FR Doc. 05–20437 Filed 10–11–05; 8:45 am]

BILLING CODE 7708–01–P

RAILROAD RETIREMENT BOARD

Computer Matching and Privacy Protection Act of 1988; Notice of RRB and SSA Records Used in Computer Matching

AGENCY: Railroad Retirement Board (RRB).

ACTION: Notice of Records Used in Computer Matching Programs; Notification to individuals who are railroad employees, or applicants and beneficiaries under the Railroad Retirement Act or who are applicants or beneficiaries under the Social Security Act.

SUMMARY: As required by the Computer Matching and Privacy Protection Act of 1988, RRB is issuing public notice of its use and intent to use, in ongoing computer matching programs, information obtained from the Social Security Administration (SSA) of the amount of wages reported to SSA and the amount of benefits paid by that agency. The RRB is also issuing public notice, on behalf of the Social Security Administration, of SSA's use and intent to use, in ongoing computer matching programs, information obtained from the RRB of the amount of railroad earnings reported to the RRB.

The purposes of this notice are (1) to advise individuals applying for or receiving benefits under the Railroad Retirement Act of the use made by RRB of this information obtained from SSA by means of a computer match and (2) to advise individuals applying for or receiving benefits under the Social Security Act of the use made by SSA of this information obtained from RRB by means of a computer match.

ADDRESSES: Interested parties may comment on this publication by writing to Ms. Beatrice Ezerski, Secretary to the Board, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–2092.

FOR FURTHER INFORMATION CONTACT: Ms. Lynn Harvey, Privacy Act Officer, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–2092, telephone number (312) 751–4869.

SUPPLEMENTARY INFORMATION: The Computer Matching and Privacy Protection Act of 1988, Pub. L. 100–503, requires a Federal agency participating in a computer matching program to publish a notice regarding the establishment of a matching program. The last notice for this matching program was published at 68 FR 10057 (March 3, 2003).

Name of Participating Agencies: Social Security Administration and Railroad Retirement Board.

Purpose of the Match: The RRB will, on a daily basis, obtain from SSA a record of the wages reported to SSA for persons who have applied for benefits under the Railroad Retirement Act and a record of the amount of benefits paid by that agency to persons who are receiving or have applied for benefits under the Railroad Retirement Act. The wage information is needed to compute the amount of the tier I annuity component provided by sections 3(a), 4(a) and 4(f) of the Railroad Retirement Act (45 U.S.C. 231b(a), 45 U.S.C. 231c(a) and 45 U.S.C. 231c(f). The benefit information is needed to adjust the tier I annuity component for the receipt of the Social Security benefit. This information is available from no other source.

In addition, the RRB will receive from SSA the amount of certain social security benefits which the RRB pays on behalf of SSA. Section 7(b)(2) of the Railroad Retirement Act (45 U.S.C. 231f(b)(2)) provides that the RRB shall make the payment of certain social security benefits. The RRB also requires this information in order to adjust the amount of any annuity due to the receipt of a social security benefit. Section 10(a) of the Railroad Retirement Act (45 U.S.C. 231i(a)) permits the RRB to recover any overpayment from the accrual of social security benefits. This information is not available from any other source.

Thirdly, the RRB will receive from SSA once a year a copy of SSA's Master Benefit Record for earmarked RRB annuitants. Section 7(b)(7)) of the Railroad Retirement Act (45 U.S.C. 231f(b)(7) requires that SSA provide the requested information. The RRB needs this information to make the necessary cost-of-living computation quickly and accurately for those RRB annuitants who are also SSA beneficiaries.

SSA will receive from RRB weekly RRB earnings information for all railroad employees. SSA will match the identifying information of the records furnished by the RRB against the identifying information contained in its Master Benefit Record and its Master Earnings File. If there is a match, SSA will use the RRB earnings to adjust the amount of Social Security benefits in its Annual Earnings Reappraisal Operation (AERO). This information is available from no other source.

SSA will also receive from RRB on a daily basis RRB earnings information on selected individuals. The transfer of information may be initiated either by RRB or by SSA. SSA needs this information to determine eligibility to Social Security benefits and, if eligibility is met, to determine the benefit amount payable. Section 18 of the Railroad Retirement Act (45 U.S.C. 231q(2)) requires that earnings considered as compensation under the Railroad Retirement Act be considered as wages under the Social Security Act for the purposes of determining entitlement under the Social Security Act if the person has less than 10 years of railroad service or has 10 or more years of service but does not have a current connection with the railroad industry at the time of his/her death.

Authority for Conducting the Match: Section 7(b)(7) of the Railroad Retirement Act (45 U.S.C. 231f(b)(7)) provides that the Social Security Administration shall supply information necessary to administer the Railroad Retirement Act.

Sections 202, 205(o) and 215(f) of the Social Security Act (42 U.S.C. 402, 405(o) and 415(f) relate to benefit provisions, inclusion of railroad compensation together with wages for payment of benefits under certain circumstances, and the re-computation of benefits.

Categories of Records and Individuals Covered: All applicants for benefits under the Railroad Retirement Act and current beneficiaries will have a record of any social security wages and the amount of any social security benefits furnished to the RRB by SSA. In addition, all persons who ever worked in the railroad industry after 1936 will

have a record of their service and compensation furnished to SSA by RRB. The applicable Privacy Act Systems of Records used in the matching program are as follows: RRB–5, Master File of Railroad Employees' Creditable Compensation; RRB–22, Railroad Retirement, Survivor, Pensioner Benefit System; SSA/OSR, 09–60–0090, Master Beneficiary Record (MBR); and SSA/OSR, 09–60–0059, Master Earnings File (MEF).

Inclusive Dates of the Matching Program: The consolidated matching program shall become effective no sooner than 40 days after notice of the matching program is sent to Congress and the Office of Management and Budget (OMB), or 30 days after publication of this notice in the **Federal Register**, whichever date is later. The matching program will continue for 18 months from the effective date and may be extended for an additional 12 months thereafter, if certain conditions are met.

The notice we are giving here is in addition to any individual notice.

A copy of this notice will be or has been furnished to the Office of Management and Budget and the designated committees of both houses of Congress.

Dated: October 4, 2005.

By Authority of the Board.

Beatrice Ezerski,

Secretary to the Board.

[FR Doc. 05–20371 Filed 10–11–05; 8:45 am]

BILLING CODE 7905–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 35–28043]

Filings Under the Public Utility Holding Company Act of 1935, as Amended (''Act'')

October 5, 2005.

Notice is hereby given that the following filing(s) has/have been made with the Commission under provisions of the Act and rules promulgated under the Act. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendment(s) is/are available for public inspection through the Commission's Branch of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by October 27, 2005, to the Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in the case of an attorney at law, by certificate) should be filed with the request. Any request for hearing should identify specifically the issues of facts or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After October 27, 2005, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

Entergy Corporation (70–9049; 70–9123; 70–10202)

Entergy Corporation (''Entergy''), 639 Loyola Avenue, New Orleans, LA 70113, a registered holding company, has filed post-effective amendments to its original declaration/applications (''Amended Declarations'') under sections 6(a), 7, 9(a), 10, 12(b), 12(c),13(b), 32 and 33 of the Act and rules 42, 43, 45, 46, 53, 54, 83, 90 and 91 under the Act.

I. Existing Orders

By order dated June 22, 1999 (Holding Company Act Release No. 27039; File No. 70–9123) (''Original Order'') Entergy was authorized, among other things, to finance its exempt wholesale generator (''EWG'') and foreign utility company (''FUCO'') (collectively, ''Exempt Projects'') investments by providing guarantees and other forms of credit support regarding the securities and other obligations of these entities in an aggregate amount not to exceed $750 million.

By order dated June 13, 2000 (Holding Company Act Release No. 27184; File No. 70–9049) (''2000 Order'') the Original Order was modified to authorize Entergy, among other things, to issue securities for the purpose of investing in Exempt Projects and to provide credit support for the securities and obligations of the Exempt Projects to the extent that its ''aggregate investment'' (as defined in rule 53 of the Act) in the Exempt Projects did not exceed 100% of its consolidated retained earnings.

By order dated June 30, 2004 (Holding Company Act Release No. 27864; File No. 70–10202) (''2004 Order'') Entergy was authorized, among other things, to issue securities and use the proceeds from the issuances to fund investments in Exempt Projects, as long as the ''aggregate investment'' (as defined in rule 53 of the Act) did not exceed 100% of Entergy's consolidated retained earnings as set forth in the 2000 Order.

II. Rule 54

The transactions approved in the Original Order, 2000 Order and 2004 Order were each subject to the provisions of rule 54 under the Act. Rule 54 provides that, in determining whether to approve the issue or sale of any securities for purposes other than the acquisition of any Exempt Projects or other transactions unrelated to Exempt Projects, the Commission shall not consider the effect of the capitalization or earnings of subsidiaries of a registered holding company that are EWGs or FUCOs if the requirements of rule 53(a), (b) and (c) are satisfied.[1]

In the Amended Declarations, Entergy states that it is ineligible for the safe harbor provisions of rule 54 that were relied upon by the Commission in issuing the Original Order, 2000 Order and 2004 Order because it no longer satisfies the condition contained in rule 53(b)(1), as discussed below.[2] Accordingly, Entergy requests authority to issue and sell securities to continue to finance the acquisition of EWGs or to guarantee the security of an EWG when the event described in rule 53(b)(1) of the Act has occurred. Entergy must, in

[1] Under rule 53(a), the Commission shall not make certain specified findings under sections 7 and 12 in connection with a proposal by a holding company to issue securities for the purpose of acquiring the securities of, or other interest in, an EWG, or to guarantee the securities of an EWG, if each of the conditions in paragraphs (a)(1) through (a)(4) are met, provided that none of the conditions specified in paragraphs (b)(1) through (b)(3) of rule 53 exists.

[2] Entergy states that all of the other criteria of rule 53(a) and (b) are satisfied, except with respect to rule 53(a)(1). However, Entergy states that while its ''aggregate investment'' in Exempt Projects exceeds the 50% of consolidated retained earnings limitation of rule 53(a)(1), Entergy is in compliance with the 2000 Order which allows Entergy to invest up to 100% of its consolidated retained earnings in Exempt Projects. As of June 30, 2005, Entergy's aggregate investment in Exempt Projects was approximately $2.9 billion and was equal to approximately 57% of Entergy's consolidated retained earnings of approximately $5 billion.

Entergy states that it has complied with, and will continue to comply with, the record keeping requirements of rule 53(a)(2), the limitation in rule 53(a)(3) on the use of Entergy system domestic public utility subsidiary companies' personnel in rendering services to affiliated Exempt Projects, and the requirements of rule 53(a)(4) concerning the submission of certain filings and reports under the Act to retail regulatory commissions.

Finally, none of the other conditions set forth in rule 53(b) currently exists. Specifically, as required by rule 53(b)(2), Entergy's average consolidated retained earnings for the four most recent quarterly periods have not decreased by 10% from the average for the previous four quarterly periods, and, as required by rule 53 (b)(3), Entergy did not report operating losses in its previous fiscal year attributable to its investments in Exempt Projects in excess of 5% of Entergy's consolidated retained earnings.

accordance with rule 53(c), affirmatively demonstrate that the issue and sale of a security to finance the acquisition of an EWG or the guarantee of a security of an EWG will not have a substantial adverse impact upon the financial integrity of the registered holding company system and will not have an adverse impact on any utility subsidiary, its customers or on the ability of State commissions to protect the subsidiary or customers.

III. Rules 53(b)(1) and 53(c)

A. Rule 53(b)(1)

Rule 53(b)(1) states that the safe harbor provided by the rule generally is not available if: (1) The registered holding company or any subsidiary company having assets with book value exceeding 10% or more of consolidated retained earnings has been the subject of a bankruptcy proceeding; (2) the average consolidated retained earnings for the four most recent quarterly periods have decreased by 10% from the average for the previous four quarterly periods and the aggregate investment in EWGs and FUCOs exceeds two percent of total capital invested in utility operations; or (3) in the previous fiscal year, the registered holding company reported operating losses attributable to its direct or indirect investments in EWGs and FUCOs, and the losses exceed an amount equal to 5% of consolidated retained earnings.

On September 23, 2005, Entergy New Orleans, Inc. (''ENO''), a public utility subsidiary of Entergy, filed a voluntary petition for relief under Chapter 11 of the U.S. Bankruptcy Code (''Bankruptcy Code'') in the United States Bankruptcy Court for the Eastern District of Louisiana. The book value of ENO's assets exceeded 10% of Entergy's ''consolidated retained earnings'' as of June 30, 2005. Consequently, the circumstances described in rule 53(b)(1) have occurred.

The bankruptcy petition was precipitated by the unanticipated and devastating impact of Hurricane Katrina, which destroyed substantial portions of ENO's facilities, disrupted its revenues, and, with the evacuation of the City of New Orleans (''City''), eliminated at least in the short term, the quality of ENO's customer base, which is directly linked to the fortunes of the City. ENO is continuing in possession of its properties and has continued to operate its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.[3]

ENO's most pressing concern, and the immediate cause of its bankruptcy filing, is the liquidity crisis resulting from the hurricane's severe disruption to operations. ENO estimates that over one hundred thousand of its customers are presently unable to accept electric and gas service, and will remain unable to accept such service for a period of time that cannot yet be determined. Other customers in the New Orleans area who have had their utility services restored have been displaced by Hurricane Katrina. The ordinary cycle of customer payment of utility bills has been shattered. As a result, ENO's cash receipts have been significantly below normal levels since the hurricane.

B. Rule 53(c)

In accordance with rule 53(c), Entergy believes that the transactions authorized in the Original Order, 2000 Order and 2004 Order (to the extent they involve the issuance of securities by Entergy to finance the acquisition of EWGs), (i) will not have a substantial adverse impact upon Entergy's financial integrity and (ii) will not have an adverse impact on Entergy's utility subsidiaries (including ENO), their customers or on the ability of Entergy's state and local regulators to protect the subsidiaries or customers. In support of its position, Entergy states that:

1. As of June 30, 2005, Entergy's aggregate investment in Exempt Projects was equal to 17% of Entergy's total consolidated capitalization, 15% of consolidated net utility plant and 18% of the market value of Entergy's common stock. As of March 31, 2000 (the most recent calendar quarter preceding the 2000 Order), Entergy's aggregate investment in Exempt Projects was equal to 7% of Entergy's total capitalization, 7% of Entergy's consolidated net utility plant and 24% of the market value of Entergy's outstanding common stock.

2. Entergy's consolidated retained earnings have grown by an average of 12% annually during the period since the Commission issued the 2000 Order (*i.e.*, from June 30, 2000 through June 30, 2005).

3. Income from Entergy's investments in Exempt Projects has contributed positively to its overall earnings during the period since the Commission issued the 2000 Order.

4. As of March 31, 2000 (the most recent calendar quarter preceding the 2000 Order), Entergy's consolidated capitalization ratio was approximately 50.0% debt and approximately 50.0% equity, consisting of approximately 5.0% preferred stock and approximately 45.0% common stock. As of June 30, 2005, Entergy's consolidated capitalization ratio was approximately 50.6% debt and approximately 49.4% equity, consisting of approximately 2.3% preferred stock and approximately 47.1% common stock. These ratios are within industry ranges set by the independent debt rating agencies for BBB-rated electric utility companies.

5. As of the date of the Amended Declarations, each of the considerations set forth in the 2000 Order, in support of Entergy's assertion that its existing and proposed level of investment in Exempt Projects would not have an adverse impact on any Entergy operating utility subsidiaries or their ratepayers, or on the ability of interested state commissions to protect the utilities and their customers, continues to apply.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–5580 Filed 10–11–05; 8:45 am]

BILLING CODE 8010–01–P

[3] On September 26, 2005, the Commission issued an emergency order (Holding Company Act Release No. 28036) authorizing Entergy and ENO to enter into a secured $200 million credit facility and allowing ENO to borrow up to $150 million under the credit facility. In addition the order modified two outstanding orders so as to eliminate the requirements that ENO maintain common equity of at least 30% of its consolidated capitalization and investment grade credit ratings.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52563; File No. SR–Amex–2004–74]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to the Elimination of Commentary .01(5) to Amex Rule 916

October 4, 2005.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 27, 2004, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Amex. On September 26, 2005, Amex filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing

[1] 15 U.S.C 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In Amendment No. 1, Amex proposed to amend the rule text of Amex Rule 915, in order to substitute the term ''NMS stock'' for the term ''national market system security,'' for consistency

this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to eliminate Commentary .01(5) to Exchange Rule 916, which governs the withdrawal of approval for securities underlying options traded on the Exchange and amend Exchange Rule 915(a), which governs the criteria of underlying securities with respect to which option contracts are approved for listing and trading on the Exchange. The text of the proposed rule change is available on Amex's Web site (*http://www.amex.com*), at the Office of the Secretary of Amex, 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, Amex included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Amex has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to eliminate Commentary .01(5) to Amex Rule 916. Commentary .01 sets forth the guidelines to be considered by the Exchange in determining whether an underlying security previously approved for options trading continues to be appropriate. Specifically, Rule 916 and related Commentary .01 provide that if an underlying security previously approved by the Exchange does not meet the then current requirements for continuance, the Exchange will not open for trading additional series of such options class and may also limit any new opening transactions in those options series that have previously been opened for trading.

Commentary .01(5), in particular, provides that an underlying security will not be deemed to meet the Exchange's requirements for continued approval whenever:

5. The issuer has failed to make timely reports as required by applicable requirements of the Securities Exchange Act of 1934, and such failure has not been corrected within 30 days after the date the report was due to be filed.

The Exchange proposes to eliminate this provision based on its experience in recent years applying this requirement. The Exchange believes that this provision limits the ability of investors to use options to hedge existing equity positions and is not necessary given the entire application of Commentary .01. In addition, the Exchange notes that the underlying security will continue to trade on national securities exchanges, regardless of the late filings or reports required by the Exchange Act.

The Exchange submits that Commentary .01(5) potentially harms investors and the marketplace by preventing the use of new options series to hedge positions in the underlying security of companies that fail to make timely reports required by the Exchange Act. The Exchange states that this restriction is inconsistent with the underlying equity markets, whereby failure to properly file Exchange Act reports does not result in a similar trading restriction. Accordingly, the Exchange maintains that Commentary .01(5) limits the ability of investors who may wish to hedge their underlying stock positions with new options series, at a time when the ability to hedge may be particularly important.

The Exchange believes that Commentary .01(5) has substantially outlived any usefulness and now serves to unnecessarily burden and confuse the investing public. Commentary .01(5) to Rule 916 has been a part of the Exchange's continued listing criteria since late 1976, shortly after the listing and trading of standardized options commenced on the Exchange. In contrast to 1976, the Exchange states that the standardized options market today is a mature market largely consisting of sophisticated investors with significant access to information, such as information on the failure of a company to make timely Exchange Act reports. Therefore, the Exchange contends that there is no reason to limit the opportunity for investors to execute transactions in options classes (including new series within those classes) simply because a company is not timely in filing its Exchange Act reports, when investors are not similarly restricted from purchasing or selling shares in the underlying company.

Moreover, the limitation on new options series imposed pursuant to Commentary .01(5) causes considerable confusion and frustration in the options marketplace because it only restricts the trading of *new* series in a given option class. The Exchange has found that Commentary .01(5) tends to confuse both public customers and market professionals, who find themselves restricted from trading any new options series in a given class at the same time that trading occurs in pre-existing options series or the underlying stock itself. Still further confusion can arise in this process because the Exchange maintains that Amex, as well as the other options exchanges, have no independent means to verify whether any of the listed securities underlying options traded at the Exchange have failed to meet their Exchange Act reporting requirements. Accordingly, the options exchanges, including Amex, must rely on other SROs or third parties for such notification, which is always difficult to monitor, particularly since such third-party reports are sometimes delayed or inaccurate.[4]

The Exchange further submits that Commentary .01(5) is unnecessary for the protection of investors and the marketplace. For example, underlying securities that are delisted or fail to be NMS securities are no longer approved for options trading under existing rules. Specifically, existing Commentary .01(6) to Rule 916 provides that an underlying security will no longer be approved for options transactions when:

''(6) The issue, in the case of an underlying security that is principally traded on a national securities exchange, is delisted from trading on that exchange and neither meets NMS criteria nor traded through the facilities

with Regulation NMS. *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

[4] The Exchange notes that it has a procedure in place to monitor when an underlying security previously approved for option transaction ceases to trade on or is delisted from its primary listed market. The Exchange's Listing Qualification Department (''Department'') monitors: (1) The daily list services issued by the primary listing markets (such as the New York Stock Exchange, Inc., Amex, and The Nasdaq Stock Market); (2) press releases issued by the primary listing markets and the news wires; and (3) information circulars issued by the primary listing markets. If the Department is aware that an underlying security may be halted for trading on or delisted from its primary listed market, the Department would monitor such security closely on a daily basis. In the event of a delisting of the underlying security from its primary listed market, Amex will cease opening new series of options in such security and allow the existing series of options to expire. Additionally, if the underlying security has been halted or suspended in the primary market, the Exchange may halt trading in the option class pursuant to Amex Rule 918(b) and shall halt trading pursuant to Amex Rule 117. Telephone conversation between Jeffrey Burns, Associate General Counsel, Amex, and Steve L. Kuan, Special Counsel, Division of Market Regulation, Commission, September 29, 2005.

of a national securities association, or the issue, in the case of an underlying security that is principally traded through the facilities or a national securities association, is no longer designated as an NMS security.'' [5]

Amex believes a better approach is to limit or suspend options trading when the underlying security itself has been delisted and not subject the process to the inherent uncertainty of a failure of the underlying company to timely file its Exchange Act reports. The Exchange accordingly submits that Commentary .01(5) should be eliminated.

Moreover, the Exchange is amending Amex Rule 915(a) to substitute ''NMS stock'' as defined in Regulation NMS for the previous description of a national market system security. In addition, the Exchange is updating Commentary .01(6) of Rule 916 in light of Regulation NMS.

Both of these provisions include a requirement that the underlying security must be a national market system security (''NMS security''). As part of the recently adopted Regulation NMS, among other things, the Commission revised the definition of an ''NMS security.'' [6] Specifically, Rule 600(b)(46) under Regulation NMS defines an NMS security as ''any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.'' Rule 600(b)(47) also defines an ''NMS stock'' as any NMS security other than an option. As such, Exchange Rule 915(a) and Commentary .01(6) of Exchange Rule 916 will be amended to reflect these new terms.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(5) of the Act,[8] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of change, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Amex–2004–74 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–Amex–2004–74. 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 Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Amex–2004–74 and should be submitted on or before November 2, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–5574 Filed 10–11–05; 8:45 am]

BILLING CODE 8010–01–P

[5] In Amendment No. 1, the Exchange proposed to amend Amex Rule 916, Commentary .01(6) to update the rule text with respect to the definition of ''NMS stock'' in Regulation NMS under the Act. Telephone conversation between Jeffrey Burns, Associate General Counsel, Amex, and Steve L. Kuan, Special Counsel, Division of Market Regulation Commission, September 29, 2005.

[6] *See supra* note 3.

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(5).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52562; File No. SR–CBOE–2004–37]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to the Deletion of Interpretation and Policy .01(e) to CBOE Rule 5.4

October 4, 2005.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 1, 2004, 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 September 21, 2005, the Exchange filed Amendment No. 1 to the proposed rule

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to eliminate an Interpretation and Policy to a CBOE Rule concerning the approval of securities that underlie options traded on the Exchange. The text of the proposed rule change is available on CBOE's Web site (*http://www.cboe.com*), at the CBOE'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 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 eliminate subparagraph (e) of Interpretation .01 (hereafter, ''Interpretation .01(e)'') to CBOE Rule 5.4. Interpretation .01 to Rule 5.4 sets forth various situations under which an underlying security previously approved for Exchange option transactions will no longer meet Exchange requirements for the continuance of such approval (''continued listing criteria''). Rule 5.4 provides that the Exchange will not open for trading any additional series of options in that class and may also limit any new opening transactions in those option series that have already been opened. The Exchange also proposes to amend certain provisions of Exchange rules that govern the criteria for both the (1) initial listing and (2) the continued approval to list options on certain securities, as provided under Rule 5.3(a)(1) and Interpretation and Policy .01(f) to Rule 5.4.

Currently, Interpretation .01(e) provides that an underlying security will no longer be approved for CBOE options transactions when:

> ''(e) The issuer has failed to make timely reports as required by applicable requirements of * * * [the Act], and such failure has not been corrected within 30 days after the date the report was due to be filed.''

The Exchange proposes to eliminate this provision because the Exchange states that (1) it limits investors' ability to use options to hedge existing equity positions, and (2) it is not necessary in the context of the rest of Interpretation .01 to Rule 5.4.

The Exchange contends that Interpretation .01(e) prevents investors from using new option series to hedge positions they may hold in the underlying security of companies that fail to make timely reports required by the Exchange Act.[4] The Exchange states that this restriction is not consistent with the rules and regulations in the markets for the underlying securities where failure to file reports required by the Exchange Act does not result in a similar trading restriction. Accordingly, the Exchange maintains that Interpretation .01(e) limits the abilities of shareholders in such companies who may wish to hedge their positions with new option series, at a time when the ability to hedge may be particularly important.

The Exchange believes that this provision may have been appropriate when first implemented around 1976 when the listing and trading of standardized options on exchanges was still in its infancy, and information pertaining to the operational soundness of public companies was not readily available to the investing public. However, the Exchange states that the listed options market is now a mature market with sophisticated investors with significant access to information to assist them in making informed investment decisions, such as information on a company's timely filing of Exchange Act reports.[5] The Exchange concludes that there is no reason to continue limiting investors' ability to execute transactions in options classes (including new series within those classes) simply because a company is not timely in filing its Exchange Act reports when investors are not similarly restricted from purchasing or selling shares in the underlying company.

Moreover, the Exchange has found that Interpretation .01(e) limits investors' ability to hedge underlying stock positions at a time when they may be in most need to protect their investment. The failure of a public company to comply with its reporting requirements under the Exchange Act could cause a significant movement in the price of the company's stock. Restricting the Exchange from opening new option series may leave investors with no means to hedge their positions with option contracts at strike prices that more accurately reflect the contemporaneous price trends of the underlying stock.

Additionally, the Exchange maintains that there is a more appropriate means to protect investors from trading options on potentially unstable securities. Existing Interpretation and Policy .01(f) to Rule 5.4 (''Interpretation .01(f)'') provides that an underlying security will no longer be approved for the listing of new option series when:

> ''(f) The issue, in the case of an underlying security that is principally traded on a national securities exchange, is delisted from trading on that exchange and neither meets NMS criteria nor is traded through the facilities of a national securities association, or the issue, in the case of an underlying security that is principally traded through the facilities of a national securities association, is no longer designated as an NMS security.''

The Exchange acknowledges that new options series on a security should not be permitted to be opened if the underlying security is no longer trading in its primary listing market. Typically, the Exchange becomes aware of issues that may impact the continued listing of a security on its primary listing exchange (or Nasdaq) well before the primary listing exchange delists that security. Exchange staff routinely monitor the daily press and informational releases disseminated by the primary listing exchanges and Nasdaq and also utilize private news services to monitor the news items pertaining to the issuers of securities that underlie options traded on the Exchange.[6] In many cases, when an issuer is delinquent in its Exchange Act reporting obligations, the issuer is given a substantial amount of time in which to comply before the listing market actually delists the issuer's security. In many situations, the issuer is able to comply with its reporting obligations

[3] *See* Form 19b–4 dated September 21, 2005 (''Amendment No. 1''). In Amendment No. 1, which replaced the original filing in its entirety, the Exchange conformed the definition of ''NMS security'' in CBOE Rules 5.3(a)(1) and Interpretation .01(f) of Rule 5.4 to that found in Regulation NMS. *See* Securities Exchange Act Release No. 51808 (June 9, 2005) 70 FR 37496 (June 29, 2005).

[4] The types of reports typically include both 10–K annual reports and 10–Q quarterly reports.

[5] Despite this vastly improved degree of information education, it is still the responsibility of the CBOE to insure that no new options series is listed on an ineligible class.

[6] This is consistent with Interpretation .03 to Rule 5.4.

without being delisted. During this period, CBOE states that its staff is continually monitoring the status of the issuers' compliance with reporting obligations to determine whether the security may be delisted.[7] Finally, the listing exchange or Nasdaq typically issue a press release well in advance of any delisting to give investors and other market participants ample notice.[8]

Given the availability of information relating to public issuers of securities in today's markets, and in light of additional continued listing standards under Rule 5.4, the Exchange maintains that the appropriate point at which to restrict the issuance of new options series in an options class is when the security is delisted. Therefore, the Exchange proposes to eliminate Interpretation .01(e).

Finally, as a matter of ''housekeeping,'' the Exchange also proposes to clarify Exchange Rule 5.3(a)(1) and Interpretation .01(f), which govern the criteria for the initial and continued listing of options on a particular security. Both of these provisions include a requirement that the underlying security must be a national market system security (''NMS security''). As part of the recently adopted Regulation NMS, among other things, the Commission revised the definition of an ''NMS security.''[9] Specifically, Rule 600(b)(46) under Regulation NMS defines an NMS security as ''any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.'' Rule 600(b)(47) also defines an ''NMS stock'' as any NMS security other than an option. As such, Exchange Rule 5.3(a)(1) and Interpretation .01(f) will be amended to reflect these new terms.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Section 6(b)(5) of the Act[11] in particular, in that the proposed rule change will serve to remove impediments to and perfect the mechanism of a free and open market and a national market system.

B. Self-Regulatory Organization's Statement on Burden on Competition

This proposed rule change does not 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.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, 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–2004–37 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–CBOE–2004–37. 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–2004–37 and should be submitted by November 2, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–5583 Filed 10–11–05; 8:45 am]

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[7] Additionally, if the underlying security has been halted or suspended in the primary market, then the Exchange may halt trading in the option class pursuant to CBOE Rule 6.3(a) and shall halt such trading pursuant to CBOE Rule 6.3B. Telephone conversation between Jim Flynn, Attorney, CBOE, and Florence Harmon, Senior Special Counsel, Division of Market Regulation, Commission, October 3, 2005.

[8] The Commission posts delisting notices (or orders) on its Web site. *See http://www.sec.gov/rules/delist.shtml.*

[9] *See* Securities Exchange Act Release No. 34–51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52556; File No. SR–CHX–2005–20]

Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Order Granting Approval to Proposed Rule Change Relating to Participant Fees and Credits

October 4, 2005.

On July 17, 2005, the Chicago Stock Exchange, Inc. (''CHX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend its Participant Fee Schedule to eliminate, retroactive to January 1, 2005, the assignment fees for listed securities that were assigned to a specialist when

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

other firms were not competing for the assignment. Such assignment fees have already been eliminated for securities assigned on or after May 2, 2005.[3] The proposed rule change would eliminate such fees for assignments made during the period from January 1, 2005 through May 1, 2005, thus eliminating assignment fees for securities assigned without competition for all of 2005.[4]

The proposed rule change was published for comment in the **Federal Register** on August 9, 2005.[5] The Commission received no comments on the proposal.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange[6] and, in particular, the requirements of section 6 of the Act.[7] The Commission finds specifically that the proposed rule change is consistent with section 6(b)(4) of the Act[8] in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members. The Commission notes that assignment fees for securities assigned without competition have already been eliminated for all such assignments effective on or after May 2, 2005. The Commission further notes that the elimination of the assignment fee on a retroactive basis would be for the period January 1, 2005 through May 1, 2005. Thus, the elimination of this fee would be applied evenhandedly during the current year. Therefore, the Commission believes that the proposed rule change is consistent with the Act.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[9] that the proposed rule change (File No. SR–CHX–2005–20) be, and it hereby is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–5582 Filed 10–11–05; 8:45 am]

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[3] *See* Securities Exchange Act Release No. 51763 (May 31, 2005), 70 FR 33230 (June 7, 2005).

[4] CHX has represented that these assignment fees have already been assessed and paid, and thus CHX would rebate such fees upon Commission approval of the proposed rule change. Telephone conversation between Leah Mesfin, Special Counsel, Division of Market Regulation, Commission, and Kathleen M. Boege, Vice President & Associate General Counsel, CHX, on September 26, 2005.

[5] *See* Securities Exchange Act Release No. 52200 (August 3, 2005), 70 FR 46238.

[6] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78s(b)(2).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52561; File No. SR–PCX–2005–107]

Self-Regulatory Organizations; Pacific Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rules Regarding Lead Market Maker's Guaranteed Participation in Trades Executed by Public Outcry

October 4, 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 September 23, 2005, the Pacific Exchange, Inc. (''PCX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The PCX filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii)[3] of the Act and Rule 19b–4(f)(6) thereunder,[4] which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The PCX proposes to amend PCX Rule 6.82(d) to better describe a Lead Market Maker's (''LMM'') guaranteed participation on trades that are executed via public outcry. The text of the proposed rule change, is available on the PCX's Web site (*http://www.pacificex.com*), at the PCX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The PCX 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 submits that the purpose of the proposed rule change is to adopt clarifying language to better describe an LMM's guaranteed participation in trades that occur via public outcry. The Commission recently approved changes to PCX rules pertaining to LMMs.[5] These changes allow an LMM to operate from a location other than the PCX trading floor.

According to the Exchange, its intention at all times was that if an LMM is not present on the trading floor they will not be entitled to a 40% guaranteed participation (as specified in PCX Rule 6.82(d)(2)) on any trade that occurs in the trading crowd via public outcry. While this provision was described in the purpose statement of SR–PCX–2005–31, the PCX at this time feels that a change to the rule text will clarify when an LMM is actually entitled to their guaranteed participation on trades in accordance with Rule 6.82(d)(2). The proposed rule change now clearly states that LLMs will be entitled to their 40% guaranteed participation on public outcry trades only when they are preset in the trading crowd.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations under the Act applicable to a national securities exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] requirements that rules of an exchange be designed to facilitate transactions in securities, to promote just and equitable principles of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 51937 (June 29, 2005), 70 FR 38997 (July 6, 2005) (SR–PCX–2005–31).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

trade, to enhance competition and to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The PCX neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30-days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to section 19(b)(3)(A) of the Act [8] and Rule 19b–4(f)(6) thereunder.[9] A proposed rule change filed under Commission Rule 19b–4(f)(6) [10] normally does not become operative prior to 30 days after the date of filing. The PCX requests that the Commission waive the 30-day operative delay, as specified in Rule 19b–4(f)(6)(iii), and designate the proposed rule change to become operative immediately. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow the PCX to immediately clarify its rule governing LMM's guaranteed participation in trades that occur by public outcry. Accelerating the operative date will allow for a more efficient and effective market operation by offering clarity to existing PCX rules. For these reasons, the Commission designates the proposed rule change as effective and operative immediately.[11]

At any time within 60 days after the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–PCX 2005–107 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–PCX–2005–107. 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 PCX. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–PCX 2005–107 and should be submitted on or before November 2, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–5581 Filed 10–11–05; 8:45 am]

BILLING CODE 8010–01–P

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6).

[10] *Id.*

[11] For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52565; File No. SR–Phlx–2005–53]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Disclaimer of Warranties by SIG Indices, LLLP

October 5, 2005.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1], and Rule 19b–4 [2] thereunder, notice is hereby given that on September 15, 2005, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Phlx. The Phlx filed Amendment No. 1 to the proposed rule change on September 30, 2005.[3] The Exchange has filed the proposal as a ''non-controversial'' rule change pursuant to section 19(b)(3)(A) of the Act [4] and Rule 19b–4(f)(6) 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 persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to amend Phlx Rule 1104A (Susquehanna Indices, LLLP) to add a new index that was licensed by Susquehanna Indices, LLLP (''SI'') to the Exchange.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Form 19b–4 dated September 30, 2005 (''Amendment No. 1''). Amendment No. 1 clarified that the Exchange listed options on the SIG Oil Exploration and Product Index on or about July 13, 2005. In addition, in a telephone call on October 3, 2005, between Juri Trypupenko, Phlx, and Sonia Trocchio, Special Counsel, Division of Market Regulation, Commission, Mr. Trypupenko indicated that the comma after the words ''SIG Restaurant Index™'' was not underlined in its original filing.

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 17 CFR 240.19b–4(f)(6).

The text of the proposed rule change is set forth below. New language is italicized; deletions are in brackets.

Rule 1104A SIG Indices, LLLP

SIG Indices, LLLP makes no warranty, express or implied, as to results to be obtained by any person or any entity from the use of the SIG Investment Managers Index™, the SIG Cable, Media & Entertainment Index™, the SIG Casino Gaming Index™, the SIG Semiconductor Equipment Index™, the SIG Semiconductor Device Index™, the SIG Specialty Retail Index™, the SIG Steel Producers Index™, the SIG Footwear & Athletic Index™, the SIG Education Index™, the SIG Restaurant Index™, [and] the SIG Coal Producers Index™*, and the SIG Oil Exploration and Production Index™* or any data included therein in connection with the trading of option contracts thereon, or for any other use. SIG Indices, LLLP makes no express or implied warranties of merchantability or fitness for a particular purpose for use with respect to the SIG Investment Managers Index™, the SIG Cable, Media & Entertainment Index™, the SIG Casino Gaming Index™, the SIG Semiconductor Equipment Index™, the SIG Semiconductor Device Index™, the SIG Specialty Retail Index™, the SIG Steel Producers Index™, the SIG Footwear & Athletic Index™, the SIG Education Index™, the SIG Restaurant Index™, [and] the SIG Coal Producers Index™*, and the SIG Oil Exploration and Production Index™* or any data included therein.

* * * * *

I. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx 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 Phlx has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend Phlx Rule 1104A, which applies to indexes maintained by SI, to include a new index recently licensed by SI to the Exchange.[6]

Phlx Rule 1104A provides generally that SI makes no warranty, express or implied, as to results to be obtained by any person or entity from the use of the SIG Investment Managers Index™, the SIG Cable, Media & Entertainment Index™, the SIG Casino Gaming Index™, the SIG Semiconductor Equipment Index™, the SIG Semiconductor Device Index™, the SIG Specialty Retail Index™, the SIG Steel Producers Index™, the SIG Footwear & Athletic Index™, the SIG Education Index™, the SIG Restaurant Index™, and the SIG Coal Producers Index™, and that SI makes no express or implied warranties of merchantability or fitness for a particular purpose for use with respect to any of the named indexes or any data included therein.[7] The Exchange is now proposing to amend Rule 1104A to expand the coverage of the rule to include the newly-licensed SIG Oil Exploration and Production Index™.[8]

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act[9] in general, and furthers the objectives of section 6(b)(5) of the Act[10] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule change disclaiming warranties as to results or merchantability or fitness for a particular purpose should encourage SI to continue to maintain the SIG Indices so that options on them may be traded on the Exchange, thereby providing investors with enhanced investment opportunities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change is being designated by the Exchange as a ''non-controversial'' rule pursuant to section 19(b)(3)(A) of the Act[11] and subparagraph (f)(6) of Rule 19b–4 thereunder,[12] because the proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for thirty days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, provided that the Exchange has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the filing of the proposed rule change.[13] At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[14]

The Exchange requests that the Commission waive the operative delay. The Commission has determined that it is consistent with the protection of

[6] The Exchange currently lists options on the SIG Investment Managers Index™, the SIG Cable, Media & Entertainment Index™, the SIG Casino Gaming Index™, the SIG Semiconductor Equipment Index™, the SIG Semiconductor Device Index™, the SIG Specialty Retail Index™, the SIG Steel Producers Index™, the SIG Footwear & Athletic Index™, the SIG Education Index™, the SIG Restaurant Index™, and the SIG Coal Producers Index™, pursuant to a license agreement with SI and Exchange Rule 1009A(b). The indexes are trademarks of SI.

[7] The Exchange noted in its filing to adopt Rule 1104A that the proposed disclaimer was appropriate given that it was similar to disclaimer provisions of American Stock Exchange Rule 902C relating to indexes underlying options listed on that exchange. *See* Securities Exchange Act Release No. 48135 (July 7, 2003), 68 FR 42154 (July 16, 2003)(approving SR–Phlx–2003–21). The Exchange recently amended Rule 1104A to include the SIG Coal Producers Index™, as required by the license agreement between SI and the Exchange. *See* Securities Exchange Act Release No. 51664 (May 6, 2005), 70 FR 25641 (May 13, 2005)(SR–Phlx–2005–24).

[8] Options on the SIG Oil Exploration and Production Index™ were listed pursuant to Section 19b–4(e) of the Act on or about July 13, 2005. *See* Amendment No. 1, *supra* note 3.

[9] 15 U.S.C. 78f(b).

[10] 10 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6).

[13] As required under Rule 19b–4(f)(6)(iii), the Exchange has provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the filing date of this proposal.

[14] For purposes of calculating the 60-day abrogation date, the Commission considers the 60-day period to have commenced on September 30, 2005, the date Phlx filed Amendment No. 1.

investors and the public interest to waive the 30-day operative delay because accelerating the operative date will help to ensure that all options traded on SIG indices are treated uniformly.[15]

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–Phlx–2005–53 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–Phlx–2005–53. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the 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 available publicly. All submissions should refer to File Number SR–Phlx–2005–53 and should be submitted on or before November 2, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–5584 Filed 10–11–05; 8:45 am]

BILLING CODE 8010–01–P

[15] For purposes only of accelerating the 30-day operative period for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[16] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 10205 and # 10206]

Louisiana Disaster Number LA–00004.

AGENCY: Small Business Administration

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Louisiana (FEMA–1607–DR), dated 09/24/2005.

Incident: Hurricane Rita.

Incident Period: 09/23/2005 and continuing.

Effective Date: 09/27/2005.

Physical Loan Application Deadline Date: 11/23/2005.

EIDL Loan Application Deadline Date: 06/26/2006.

ADDRESSES: Submit completed loan applications to : Small Business Administration, Disaster Area Office 3, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, Small Business Administration, 409 3rd Street, Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the Presidential disaster declaration for the State of Louisiana , dated 09/24/2005 is hereby amended to include the following areas as adversely affected by the disaster:

Primary Parishes:

Acadia, Iberia, Lafayette, Saint Mary.

Contiguous Parishes:

Louisiana: Assumption, Iberville, Saint Landry, Saint Martin, Terrebonne.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

S. George Camp,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 05–20376 Filed 10–11–05; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 10205 and # 10206]

Louisiana Disaster Number LA–00004

AGENCY: Small Business Administration

ACTION: Amendment 2.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Louisiana (FEMA–1607–DR), dated 09/24/2005.

Incident: Hurricane Rita.

Incident Period: 09/23/2005 and continuing.

Effective Date: 09/27/2005.

Physical Loan Application Deadline Date: 11/23/2005.

EIDL Loan Application Deadline Date: 06/26/2006.

ADDRESSES: Submit completed loan applications to: Small Business Administration, Disaster Area Office 3, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, Small Business Administration, 409 3rd Street, Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the Presidential disaster declaration for the State of Louisiana, dated 09/24/2005 is hereby amended to include the following areas as adversely affected by the disaster:

Primary Parishes:

Allen, LaFourche, Terrebonne.

Contiguous Parishes:

Louisiana: Jefferson, Rapides, Saint Charles, Saint James, ST John the Baptist.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Cheri L. Cannon,

Associate Administrator for Disaster Assistance.

[FR Doc. 05–20377 Filed 10–11–05; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

The Ticket to Work and Work Incentives Advisory Panel Meeting

AGENCY: Social Security Administration (SSA).

ACTION: Notice of Teleconference.

DATES: October 24, 2005—2 p.m. to 4 p.m. Eastern Daylight Savings Time Ticket to Work and Work Incentives Advisory Panel Conference Call. Call-in number: 1–888–395–6878. Pass code:

6199207. Leader/Host: Berthy De la Rosa-Aponte.

SUPPLEMENTARY INFORMATION:

Type of meeting: On October 24, 2005, the Ticket to Work and Work Incentives Advisory Panel (the ''Panel'') will hold a teleconference. This teleconference meeting is open to the public.

Purpose: In accordance with section 10(a)(2) of the Federal Advisory Committee Act, the Social Security Administration (SSA) announces this teleconference meeting of the Ticket to Work and Work Incentives Advisory Panel. Section 101(f) of Public Law 106–170 establishes the Panel to advise the President, the Congress, and the Commissioner of SSA on issues related to work incentive programs, planning and assistance for individuals with disabilities as provided under section 101(f)(2)(A) of the Act. The Panel is also to advise the Commissioner on matters specified in section 101(f)(2)(B) of that Act, including certain issues related to the Ticket to Work and Self-Sufficiency Program established under section 101(a).

The interested public is invited to listen to the teleconference by calling the phone number listed above. Public testimony will not be taken.

Agenda: The full agenda for the meeting will be posted on the Internet at *http://www.ssa.gov/work/panel* at least one week before the starting date or can be received, in advance, electronically or by fax upon request.

Contact Information: Records are kept of all proceedings and will be available for public inspection by appointment at the Panel office. Anyone requiring information regarding the Panel should contact the staff by:

- Mail addressed to the Social Security Administration, Ticket to Work and Work Incentives Advisory Panel Staff, 400 Virginia Avenue, SW, Suite 700, Washington, DC 20024.
- Telephone contact with Debra Tidwell-Peters at (202) 358–6430.
- Fax at (202) 358–6440 or
- E-mail to *TWWIIAPanel@ssa.gov.*

Dated: October 5, 2005.

Chris Silanskis,

Designated Federal Officer.

[FR Doc. 05–20397 Filed 10–11–05; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 5205]

Announcement of Meetings of the International Telecommunication Advisory Committee

SUMMARY: The International Telecommunication Advisory Committee announces meetings of ITAC Study Group A to debrief the recent meeting of ITU–T Study Group 3 (Charging and accounting) and prepare for ITU–T Study Group 2 (Operational aspects of service provision, networks and performance). Members of the public may participate, and may join in the discussions.

The International Telecommunication Advisory Committee (ITAC) will meet on Wednesday, October 19, 2005, 2–4 p.m. There is one item on the agenda, a debrief of the outcome of the recently-completed meeting of ITU–T Study Group 3. Directions to the venue of the meeting may be obtained from Julian Minard, *minardje@state.gov*.

The International Telecommunication Advisory Committee (ITAC) will meet by conference call on October 20, 2005 at 2 p.m. to discuss a contribution to ITU–T Study Group 2. Information on the call in number and passcode may be obtained from Julian Minard, *minardje@state.gov*.

The International Telecommunication Advisory Committee (ITAC) will meet on Tuesday, November 15, 2005 from 9 a.m. to noon to discuss further contributions to ITU–T Study Group 2. Particulars on this meeting may be obtained from Julian Minard, *minardje@state.gov*.

Dated: October 5, 2005.

Anne D. Jillson,

Director, FACA Support, International Communications & Information Policy, Department of State.

[FR Doc. 05–20548 Filed 10–11–05; 8:45 am]

BILLING CODE 4710–07–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Trade Policy Staff Committee; Public comments on the Caribbean Basin Economic Recovery Act and the Caribbean Basin Trade Partnership Act: Report to Congress

AGENCY: Office of the United States Trade Representative.

ACTION: Notice and request for public comment.

SUMMARY: The Trade Policy Staff Committee (TPSC) is seeking the views of interested parties on the operation of the Caribbean Basin Economic Recovery Act (CBERA), as amended by the Caribbean Basin Trade Partnership Act (CBTPA) (19 U.S.C. 2701 et seq.). Section 212(f) of the CBERA, as amended, requires the President to submit a report to Congress regarding the operation of the CBERA and CBTPA (together commonly referred to as the Caribbean Basin Initiative, or CBI) on or before December 31, 2001, and every two years thereafter. The TPSC invites written comments concerning the operation of the CBI, including comments on the performance of each CBERA and CBTPA beneficiary country, as the case may be, under the criteria described in sections 212(b), 212(c), and 213(b)(5)(B) of the CBERA, as amended. This information will be used in the preparation of a report to the U.S. Congress on the operation of the program.

DATES: Public comments are due at USTR no later than 5 p.m., November 4, 2005.

ADDRESSES: Submissions by electronic mail: *FR0529@USTR.EOP.GOV.* Submissions by facsimile: Gloria Blue, Executive Secretary, Trade Policy Staff Committee, at (202) 395–6143. The public is strongly encouraged to submit documents electronically rather than by facsimile. See requirements for submissions below.

FOR FURTHER INFORMATION CONTACT: Russell Smith, Office of the Americas, Office of the United States Trade Representative, 600 17th Street, NW., Room 523, Washington, DC 20508. The telephone number is (202) 395–9450.

SUPPLEMENTARY INFORMATION: Interested parties are invited to submit comments on any aspect of the program's operation, including the performance of CBERA and CBTPA beneficiary countries, as the case may be, under the criteria described in sections 212(b), 212(c), and 213(b)(5)(B) of the CBERA, as amended, and provided below. Other issues to be examined in this report include: the CBI's effect on the volume and composition of trade and investment between the United States and the Caribbean Basin beneficiary countries; and its effect in advancing U.S. trade policy goals as set forth in the CBTPA. The following countries are both CBERA and CBTPA beneficiary countries: Barbados, Belize, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Nicaragua, Panama, Saint Lucia, and Trinidad and Tobago. Antigua and Barbuda, Aruba, The Bahamas, British Virgin Islands, Dominica, Grenada, Montserrat, Netherlands Antilles, Saint Kitts and

Nevis, Saint Vincent and the Grenadines currently receive benefits only under CBERA. When the Dominican Republic—Central America—United States Free Trade Agreement (CAFTA–DR) enters into force for one or more of the CBI beneficiary countries of Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, or Nicaragua, that country will cease to be designated as a CBERA and CBTPA beneficiary country.

Eligibility Criteria for CBTPA Beneficiary Countries (Section 213(b)(5)(B) of CBERA)

In determining whether to designate a country as a CBTPA beneficiary country, the President must take into account the criteria contained in sections 212(b) and (c) of CBERA, and other appropriate criteria, including the following:

(1) Whether the beneficiary country has demonstrated a commitment to undertake its obligations under the WTO under or ahead of schedule and participate in negotiations toward the completion of the FTAA or another free trade agreement.

(2) The extent to which the country provides protection of intellectual property rights consistent with or greater than the protection afforded under the Agreement on Trade-Related Aspects of Intellectual Property Rights.

(3) The extent to which the country provides internationally recognized worker rights including—

(I) The right of association;

(II) The right to organize and bargain collectively;

(III) A prohibition on the use of any form of forced or compulsory labor;

(IV) A minimum age for the employment of children; and

(V) Acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

(4) Whether the country has implemented its commitments to eliminate the worst forms of child labor.

(5) The extent to which the country has met U.S. counter-narcotics certification criteria under the Foreign Assistance Act of 1961.

(6) The extent to which the country has taken steps to become a party to and implement the Inter-American Convention Against Corruption.

(7) The extent to which the country applies transparent, nondiscriminatory and competitive procedures in government procurement, and contributes to efforts in international fora to develop and implement rules on transparency in government procurement.

Before a country can receive benefits under the CBTPA, the President must also determine that the country has satisfied the requirements of section 213(b)(4)(A)(ii) of CBERA (19 U.S.C. 2703(b)(4)(A)(ii)) relating to the implementation of procedures and requirements similar in all material aspects to the relevant procedures and requirements contained in chapter 5 of the North American Free Trade Agreement.

Requirements for Submissions

Comments must be submitted in English by the deadline indicated above. In order to facilitate prompt processing of submissions, the Office of the United States Trade Representative strongly urges and prefers electronic (e-mail) submissions in response to this notice. In the event that an e-mail submission is impossible, submissions should be made by facsimile. Hand-delivered submissions will not be accepted.

Persons making submissions by e-mail should use the following subject line: ''CBI Report to Congress.'' Documents should be submitted as either WordPerfect, MSWord, or text (.TXT) files. Spreadsheets submitted as supporting documentation are acceptable as Quattro Pro or Excel files. Persons who make submissions by e-mail should not provide separate cover letters; information that might appear in a cover letter should be included in the submission itself. To the extent possible, any attachments to the submission should be included in the same file as the submission itself, and not as separate files.

Written comments, notice of testimony, and testimony will be placed in a file open to public inspection pursuant to 15 CFR 2003.5, except business confidential information exempt from public inspection in accordance with 15 CFR 2003.6. Business confidential information submitted in accordance with 15 CFR 2003.6 must be clearly marked ''BUSINESS CONFIDENTIAL'' at the top of each page, including any cover letter or cover page, and must be accompanied by a non-confidential version indicating where confidential information was redacted by inserting asterisks where material was deleted, as well as a non-confidential summary of the confidential information. If any document submitted electronically contains business confidential information, the file name of the business confidential version should begin with the characters ''BC-,'' and the file name of the public version should begin with the characters ''P-.'' The ''P-'' or ''BC-'' should be followed by the name of the submitter. All public documents and non-confidential summaries shall be available for public inspection in the USTR Reading Room. The USTR Reading Room is open to the public, by appointment only, from 10 a.m. to noon and 1 p.m. to 4 p.m., Monday through Friday. An appointment to review the file must be scheduled at least 48 hours in advance and may be made by calling (202) 395–6186.

Carmen Suro-Bredie,

Chairman, Trade Policy Staff Committee.

[FR Doc. 05–20372 Filed 10–11–05; 8:45 am]

BILLING CODE 3190–W6–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements Filed the Week Ending September 23, 2005

The following Agreements were filed with the Department of Transportation under sections 412 and 414 of the Federal Aviation Act, as amended (49 U.S.C. 1382 and 1384) and procedures governing proceedings to enforce these provisions. Answers may be filed within 21 days after the filing of the application.

Docket Number: OST–2005–22542.

Date Filed: September 21, 2005.

Parties: Members of the International Air Transport Association.

Subject: Mail Vote 456—Resolution 010w. TC3 Within South East Asia Special Passenger Amending Resolution between China (excluding Hong Kong SAR, Macao SAR) and Russia (in Asia).

Intended effective date: October 15, 2005.

Docket Number: OST–2005–22564.

Date Filed: September 23, 2005.

Parties: Members of the International Air Transport Association.

Subject:

TC1 Passenger Tariff Coordinating Conference Teleconference, July 25–27, 2005.

TC1 Longhaul (except between USA and Chile, Panama) Resolutions (Memo PTC1 0330).

TC1 Passenger Tariff Coordinating Conference Teleconference, July 25–27, 2005.

TC1 Areawide Resolutions (PTC1 0333).

Minutes: TC1 Teleconference, July 25–27, 2005 (Memo PTC1 338).

Tables: TC1 Longhaul specified fare table (Memo PTC1 0104).

Technical Correction: TC1 Passenger Tariff Coordinating Conference

Teleconference, July 25–27, 2005.
TC1 Longhaul (except between USA and Chile, Panama) (Memo PTC1 0336).
Intended effective date: January 1, 2005.
Docket Number: OST–2005–22565.
Date Filed: September 23, 2005.
Parties: Members of the International Air Transport Association.
Subject:
TTC1 Passenger Tariff Coordinating Conference.
Teleconference, July 25–27, 2005.
TC1 Caribbean Resolutions (PTC1 0332).
Minutes: TC1 Teleconference, July 25–27, 2005 (Memo PTC1 338).
Tables: TC1 Caribbean specified fare table (Memo PTC1 0103).
Technical Correction: TC1 Caribbean specified fare table (Memo PTC1 0105).
Intended effective date: November 1, 2005.

Renee V. Wright,
Program Manager, Docket Operations, Federal Register Liaison.
[FR Doc. 05–20401 Filed 10–11–05; 8:45 am]
BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (formerly Subpart Q) During the Week Ending September 23, 2005

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (see 14 CFR 301.201 *et. seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: OST–2005–22552.
Date Filed: September 22, 2005.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: October 13, 2005.
Description: Application of ABX Air, Inc. requesting issuance of a certificate of public convenience and necessity to engage in scheduled foreign air transportation of property and mail between any point or points in the United States and any point in the countries listed in Appendix A to the application.

Renee V. Wright,
Program Manager, Docket Operations, Federal Register Liaison.
[FR Doc. 05–20400 Filed 10–11–05; 8:45 am]
BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Privacy Act of 1974: System of Records

AGENCY: Office of the Secretary, Department of Transportation (DOT).

ACTION: Notice to modify a system of records.

SUMMARY: DOT proposes to modify an existing system of records under the Privacy Act of 1974. Proposed modifications include changing the name from DOT/SLS 152 Data Automation Program Records to DOT/SLS 152 Travel Voucher Records; deleting some records now covered under Department of the Interior System of Records DOI–85; and updating administrative information.

DATES: *Effective date:* This notice will be effective, without further notice, on November 21, 2005, unless modified by a subsequent notice to incorporate comments received by the public. Comments must be received by November 14, 2005 to be assured consideration.

ADDRESSES: Send comments to Steven Lott, Departmental Privacy Officer, United States Department of Transportation, Office of the Secretary, 400 7th Street, SW., Room 6106, Washington, DC 20590 or *Steven.Lott@dot.gov.*

FOR FURTHER INFORMATION CONTACT: Edward Margosian, Office of Finance and Administration, Saint Lawrence Seaway Development Corporation, P.O. Box 520, Massena, New York 13662–0520, 315–764–3275 (voice), 315–764–3235 (fax), or *edward.margosian@sls.dot.gov* (e-mail).

SUPPLEMENTARY INFORMATION: The Office of Finance and Administration of the Saint Lawrence Seaway Development Corporation operates a travel voucher records system for employees and other individuals who travel on official business for the Corporation. The system of records, which is used to certify, pay and record travel costs, contains personal information about individuals. The following information may be contained in the system: Name, home and/or business address, home and/or business telephone number(s), social security number, and related travel information.

DOT/SLS 152

SYSTEM NAME:
Travel Voucher Records.

SECURITY CLASSIFICATION:
Sensitive, unclassified.

SYSTEM LOCATION:
This system of record is in the Office of Finance and Administration, P.O. Box 520, 180 Andrews Street, Massena, New York 13662–0520.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM OF RECORDS:
Employees and consultants.

CATEGORIES OF RECORDS IN THE SYSTEM:
Travel vouchers.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:
5 U.S.C. 301, 44 U.S.C. 3101, 33 U.S.C. 984(a)(4).

PURPOSES:
This system integrates travel voucher records.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:
Voucher disbursement: GAO and independent audits.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:
None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:
Paper copies and magnetic media (CDs).

RETRIEVABILITY:
Records are retrieved by name and voucher number.

SAFEGUARDS:
Records are kept in locked file cabinets accessible to appropriate supervisor and his/her immediate assistants.

RETENTION AND DISPOSAL:
Records are retained in accordance with Government Accountability Office and National Archives and Records Administration requirements. Most paper records are destroyed after a four year period. Paper records used for investigation and enforcement proceedings are maintained for a longer

period of time. Electronic records are stored for an indefinite period of time.

SYSTEM MANAGER AND ADDRESS:

Director of Finance and Administration, Saint Lawrence Seaway Development Corporation, P.O. Box 520, 180 Andrews Street, Massena, N.Y. 13662–0520.

NOTIFICATION PROCEDURE:

Individuals may inquire, in writing, to the System manager.

RECORD ACCESS PROCEDURES:

Same as ''Notification procedure.''

CONTESTING RECORD PROCEDURES:

Same as ''Notification procedure.''

RECORD SOURCE CATEGORIES:

Information contained in this system would come from Saint Lawrence Seaway Development Corporation records.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Dated: October 4, 2005.

Steven Lott,

Departmental Privacy Officer.

[FR Doc. 05–20399 Filed 10–11–05; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Draft Supplemental Environmental Impact Statement for US 411 Connector, Bartow County, GA

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of availability.

SUMMARY: In compliance with the National Environmental Policy Act of 1969, the FHWA, in cooperation with the Georgia Department of Transportation (GDOT), have jointly prepared a Draft Supplemental Environmental Impact Statement (DSEIS) for proposed transportation improvements in the US 411 Corridor. The project is within Bartow County. The DSEIS identifies various alternatives and the associated environmental impacts of the proposed alternatives. Interested citizens are invited to review the DSEIS and submit comments. Copies of the DSEIS may be obtained by telephoning or writing the contact person listed below under **ADDRESSES**. Public reading copies of the DSEIS are available at the locations listed under **SUPPLEMENTARY INFORMATION**.

DATES: A 45-day public review period will begin on October 7, 2005 and conclude on November 21, 2005. Written comments on the alternatives and impacts to be considered must be received by GDOT by November 21, 2005. A public hearing to receive comments on the DSEIS will be held in Cartersville, GA on October 24, 2005.

ADDRESSES: Written comments on the DSEIS should be addressed to Mr. Harvey D. Keepler, State Environmental/Location Engineer, Georgia Department of Transportation, 3993 Aviation Circle, Atlanta, GA 30336–1593. Requests for a copy of the DSEIS may be addressed to Mr. Harvey D. Keepler at the address above. Please see **SUPPLEMENTARY INFORMATION** section for a listing of the available documents and formats in which they may be obtained. Copies of the Draft EIS are also available for public inspection and review. See **SUPPLEMENTARY INFORMATION** section for locations.

FOR FURTHER INFORMATION CONTACT: To request copies of the DSEIS or for additional information, contact: Mr. Harvey D. Keepler, State Environmental/Location Engineer, Georgia Department of Transportation, 3993 Aviation Circle, Atlanta, GA 30336–1593.

SUPPLEMENTARY INFORMATION: Hearing Date and Location: Monday, October 24, 2005: Cartersville Civic Center, 435 West main Street, Cartersville, GA (4 p.m.–7 p.m.)

Copies of the DSEIS are available in hard copy format for public inspection at:

Georgia Department of Transportation, Office of Environment/Location, 3993 Aviation Circle, Atlanta, GA 30336–1593.

Georgia Department of Transportation District Six Office, 500 Joe Frank Harris Parkway, Cartersville, GA 30120.

Bartow County Commissioners Office, 135 W Cherokee Ave, Suite 251, Cartersville, GA 30120.

City of Cartersville, City Clerks Office, 10 North Public Square, Cartersville, GA 30120.

City of Rome, City Clerks Office, Rome City Hall, 601 Broad Street, Rome, GA 30162.

Georgia Highlands College, Cartersville Campus, Library, 5441 Highway 20, NE Cartersville, GA 30121.

Bartow County Library, 429 W Main Street, Cartersville, GA 30120.

Background

This DSEIS provides a detailed evaluation of the US 411 Connector project. The project corridor lies within Bartown County, Georgia. This DSEIS includes an examination of the purpose and need, alternatives under consideration, travel demand, affected environment, environmental consequences, and mitigation measures as a result of the improvements under consideration. Five build alternatives, including the No-Action Alternative, are considered for improvements to the US 411 Corridor. FHWA was the lead agency for the preparation of the Draft SEIS.

The FHWA, the GDOT, and other local agencies invite interested individuals, organizations, and Federal, State, and local agencies to comment on the evaluated alternatives and associated social, economic, or environmental impacts related to the alternatives.

Dated on: October 5, 2005.

Robert M. Callan,

Division Administrator, Federal Highway Administration, Atlanta, Georgia.

[FR Doc. 05–20385 Filed 10–11–05; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Agency Information Collection Activities; Request for Comments; Clearance of a New Information Collection: Work Schedules and Sleep Patterns of Railroad Dispatchers

AGENCY: Federal Railroad Administration, DOT.

ACTION: Notice and request for comments.

SUMMARY: The Federal Railroad Administration invites public comments about our intention to request the Office of Management and Budget's (OMB) approval for a new information collection. The proposed collection involves the work schedules and sleep patterns of railroad dispatchers. FRA seeks to develop an understanding of the work schedule-related fatigue issues that affect railroad dispatchers. FRA will use the data obtained from the proposed collection (a survey) to identify whether or not this segment of the railroad workforce has a work and sleep schedule pattern that may compromise their ability to carry out their safety critical role in railroad operations in a suitable manner. FRA is required by the Paperwork Reduction Act of 1995 to publish this notice. The **Federal Register** notice with a 60-day comment period soliciting comments on the following collection of information was published on August 4, 2005.

DATES: Please submit comments on or before November 14, 2005.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Brogan, Office of Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1120 Vermont Ave., NW., Mail Stop 17, Washington, DC 20590 (telephone: (202) 493–6292), or Victor Angelo, Office of Support Systems, RAD–20, Federal Railroad Administration, 1120 Vermont Ave., NW., Mail Stop 35, Washington, DC 20590 (telephone: (202) 493–6470). (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (PRA), Pub. L. No. 104–13, 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR Part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. 44 U.S.C. 3506, 3507; 5 CFR 1320.5, 1320.8(d)(1), 1320.12. On August 4, 2005, FRA published a 60-day notice in the **Federal Register** soliciting comment on ICRs that the agency was seeking OMB approval. 70 FR 44971. FRA received two comments in response to this notice. Both commenters supported the proposed information collection.

The first comment came from Mr. Leo McCann, President of the American Train Dispatchers Association (ATDA). ATDA is a rail labor organization that represents approximately 2,100 railroad workers who are charged with the task of safely and efficiently moving the nation's freight and passenger service on a daily around-the-clock basis. In his remarks, Mr. McCann stated the following:

> ATDA is considered one of several ''non-operating crafts'' whose members are subject to work schedule-related fatigue. Fatigue continues to be a factor for the non-operating crafts within the rail industry, especially in view of the working conditions, expanded territories, frequent changes in workweek and starting times, and erratic call schedules for our extra train dispatchers. Our members, like BRS and BMWE, are subject to a number of work schedule-related factors which can lead to fatigue induced accidents and incidents. As such, we support the study contemplated in the above-referenced notice to assist FRA and the rail industry in understanding the impact of work schedules, territory size, call schedules, working conditions, and other factors which may contribute to ATDA employee fatigue.

The second comment came from Mr. Freddie Simpson, President of the Brotherhood of Maintenance of Way Employees (BMWE). The BMWE is a rail labor organization that represents 40,000 railroad workers who build, maintain, repair, and inspect tracks, bridges, and related railroad infrastructure throughout the United States. In his letter, Mr. Simpson noted the following:

> Railroad Dispatchers play a critical role in the safety of rail operations. Fatigue has been a huge factor in the railroad industry, and recent railroad mergers and manpower reductions have exacerbated the problem. BMWE contends that the Work Schedules and Sleep Patterns of Railroad Dispatchers, OMB Control Number 2130–NEW, study will help FRA and the rail industry to develop an understanding of the work schedule-related fatigue issues that affect Railroad Dispatchers.

Before OMB decides whether to approve these proposed collections of information, it must provide 30 days for public comment. 44 U.S.C. 3507(b); 5 CFR 1320.12(d). Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30 day notice is published. 44 U.S.C. 3507 (b)–(c); 5 CFR 1320.12(d); see also 60 FR 44978, 44983, Aug. 29, 1995. OMB believes that the 30 day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect. 5 CFR 1320.12(c); see also 60 FR 44983, Aug. 29, 1995.

The summaries below describe the nature of the information collection requirements (ICRs) and the expected burden. The proposed requirements are being submitted for clearance by OMB as required by the PRA.

Title: Work Schedules and Sleep Patterns of Railroad Dispatchers.

OMB Control Number: 2130–XXXX.

Type of Request: Approval of a new information collection.

Affected Public: Businesses.

Form(s): FRA F 6180.122; FRA F 6180.123.

Abstract: In a continuing effort to improve rail safety and to reduce the number of injuries and fatalities to rail workers, FRA and the railroad industry have focused on the issue of fatigue, primarily among train and engine crew personnel. Because railroading is an around-the-clock, seven-days-a-week operation and because a wide array of workers are needed both to operate and to maintain the nation's railroads, other crafts—besides train and engine crews—can also be subject to fatigue. The non-operating crafts, including track maintenance, signal system maintenance and telecommunications and railroad dispatchers, fall into this second category. FRA is proposing a study which will focus on railroad dispatchers, one of the non-operating railroad crafts. FRA seeks to develop an understanding of the work schedule-related fatigue issues that affect railroad dispatchers. The proposed study has two primary purposes: (1) It aims to document and characterize the work/rest schedules and sleep patterns of the railroad dispatchers; and (2) It intends to examine the relationship between these schedules and level of alertness/fatigue for the individuals who work these schedules. The intent is to report results in the aggregate, not by individual or railroad. Subjective ratings from participants of their alertness/sleepiness on both work and non-work days will be an integral part of this study. The data will be collected through the use of a daily diary or log completed by participants over a continuous two-week time period, as well as through a brief background questionnaire completed by each participant. Analysis of the diary data will allow FRA to assess whether or not there are any work-related fatigue issues for railroad dispatchers. The proposed study will provide a defensible and definitive estimate of the work/rest cycle parameters and fatigue in dispatchers that will inform possible future FRA regulatory policy and action.

Annual Estimated Burden Hours: 858.

Addressee: Send comments regarding these information collections to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 Seventeenth Street, NW., Washington, DC 20503; Attention: FRA Desk Officer.

Comments are invited on the following: Whether the proposed collections of information are necessary for the proper performance of the functions of FRA, including whether the information will have practical utility; the accuracy of FRA's estimates of the burden of the proposed information collections; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collections of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this notice in the **Federal Register**.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35; and 49 CFR 1.48.

Dated in Washington, DC on October 5, 2005.

D.J. Stadtler,

Director, Office of Budget, Federal Railroad Administration.

[FR Doc. 05–20361 Filed 10–11–05; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–314 (Sub–No. 3X)]

Chicago, Central & Pacific Railroad Company'Abandonment Exemption'in Linn County, IA

Chicago, Central & Pacific Railroad Company (CC&P) has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon a 0.79-mile line of railroad, the North Cedar Rapids Spur, extending from milepost 87.74 at 16th Street, NE., to milepost 88.53 near 20th Street NE., at the end of the track, in Cedar Rapids, Linn County, IA. The line traverses United States Postal Service Zip Code 52402.

CC&P has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) any overhead traffic formerly handled on the line can be rerouted over other lines; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board or with any U.S. District Court or has been decided in favor of complainant within the 2-year period;[1] and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on November 11, 2005, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[2] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[3] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by October 21, 2005. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by November 1, 2005, with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to CC&P's representative: Thomas J. Litwiler, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 920, Chicago, IL 60606–2832.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

CC&P has filed an environmental/historic report which addresses the effects, if any, of the abandonment on the environment and historic resources. SEA will issue an environmental assessment (EA) by October 17, 2005. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, at (202) 565–1539. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.] Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), CC&P shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by CC&P's filing of a notice of consummation by October 12, 2006, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: October 5, 2005.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 05–20442 Filed 10–11–05; 8:45 am]

BILLING CODE 4915–01–P

[1] CC&P states that a portion of the North Cedar Rapids Spur is immediately adjacent to the industrial facilities of Cedarapids, Inc. (Cedarapids). In 2002, Cedarapids initiated litigation in state court, which was later removed to federal court, with CC&P regarding use of and title to the adjacent portion of the North Cedar Rapids Spur right-of-way. *See Cedarapids, Inc.* v. *Chicago, Central & Pac. R. Co.,* 265 F. Supp.2d 1005 (N.D. Iowa 2003). As part of a settlement of that litigation, the parties agreed that CC&P would abandon the North Cedar Rapids Spur and transfer the subject right-of-way to Cedarapids. The settlement is conditioned upon Board approval or exemption of the abandonment.

[2] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines,* 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[3] Each OFA must be accompanied by the filing fee, which currently is set at $1,200. *See* 49 CFR 1002.2(f)(25).

DEPARTMENT OF THE TREASURY

Public Meeting of the President's Advisory Panel on Federal Tax Reform

AGENCY: Department of the Treasury.

ACTION: Notice of meeting.

SUMMARY: This notice advises all interested persons of a public meeting of the President's Advisory Panel on Federal Tax Reform.

DATES: This meeting will be held on Thursday, October 27, 2005. The meeting will be held via teleconference and will begin at 11 a.m. eastern daylight time. Interested parties will be able to listen to the meeting. Call-in information will be posted on the Panel's Web site, *http://www.taxreformpanel.gov,* at a later date.

FOR FURTHER INFORMATION CONTACT: The Panel staff at (202) 927–2TAX (927–2829) (not a toll-free call) or e-mail *info@taxreformpanel.gov* (please do not send comments to this box). Additional information is available at *http://www.taxreformpanel.gov.*

SUPPLEMENTARY INFORMATION:

Purpose: The October 27 meeting is the thirteenth meeting of the Advisory Panel. At this meeting, the Panel will continue to discuss issues associated with reform of the tax code. There is a possibility that this meeting will not take place as scheduled. Please check the Panel's Web site for updated information.

Comments: Interested parties are invited to call into the teleconference to listen to the meeting; however, no public comments will be heard at the meeting. Any written comments with respect to this meeting may be mailed to The President's Advisory Panel on Federal Tax Reform, 1440 New York Avenue, NW., Suite 2100, Washington,

DC 20220. All written comments will be made available to the public.

Records: Records are being kept of Advisory Panel proceedings and will be available at the Internal Revenue Service's FOIA Reading Room at 1111 Constitution Avenue, NW., Room 1621, Washington, DC 20024. The Reading Room is open to the public from 9 a.m. to 4 p.m., Monday through Friday except holidays. The public entrance to the reading room is on Pennsylvania Avenue between 10th and 12th streets. The phone number is (202) 622–5164 (not a toll-free number). Advisory Panel documents, including meeting announcements, agendas, and minutes, will also be available on *http://www.taxreformpanel.gov.*

Dated: October 7, 2005.

Mark S. Kaizen,

Designated Federal Officer.

[FR Doc. 05–20513 Filed 10–11–05; 8:45 am]

BILLING CODE 4811–33–P

DEPARTMENT OF THE TREASURY

Financial Management Service

Privacy Act of 1974, as Amended; System of Records

AGENCY: Financial Management Service, Treasury.

ACTION: Notice of proposed new system of records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended, the Financial Management Service gives notice of a proposed new Privacy Act system of records entitled ''Treasury/FMS .006–Direct Deposit Enrollment Records.''

DATES: Comments must be received no later than November 14, 2005. The proposed new system of records will become effective November 21, 2005 unless comments are received which would result in a contrary determination.

ADDRESSES: You should send your comments to Tom Longnecker, Disclosure Officer, Financial Management Service, 401 14th Street, SW., Washington, DC 20227. Comments received will be available for inspection at the same address between the hours of 9 a.m. and 4 p.m. Monday through Friday. You may send your comments by electronic mail to *tom.longnecker@fms.treas.gov* or *regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Tom Longnecker, Disclosure Officer, (202) 874–6837.

SUPPLEMENTARY INFORMATION: Pursuant to the Privacy Act of 1974, as amended, 5 U.S.C. 552a, the Financial Management Service (FMS) is proposing to establish a new system of records entitled ''Direct Deposit Enrollment Records—Treasury/FMS .006.'' FMS, a bureau within the Department of the Treasury, is responsible for disbursing public money. Making payments by electronic funds transfer (EFT), rather than by paper check, benefits both recipients and the Government. Agency records indicate that recipients are 30 times less likely to have a problem with an electronic payment than with a paper check. Unlike check payments, electronic payments are not susceptible to being lost, stolen, or damaged in transit. Electronic payments are far less susceptible to forgery or alteration than checks. Further, EFT payments are less costly than checks. The Government saves approximately 62 cents for each payment made electronically, rather than by check.

Over the past three decades, Treasury has developed numerous programs to enable agencies to make EFT payments. One of these programs, known as ''Direct Deposit,'' is used by FMS to transmit benefit payments, as well as wage, salary, retirement, allotment, and travel payments, directly to the recipient's account at a bank, credit union, or other financial institution.

In 2003, FMS disbursed about 74% of more than 929 million Federal payments through EFT, rather than by paper check. FMS continues to implement various programs to increase the number of payments made by EFT. Among other things, FMS intends to increase the use of Direct Deposit throughout the United States and to expand the ways in which Federal payees may request Direct Deposit for Government payments.

FMS intends to increase the use of Direct Deposit with the assistance of FMS's fiscal agents (the Federal Reserve Banks), contractors, and various community groups. At various information sessions and meetings around the country, Federal benefit recipients will be offered the opportunity to enroll in Direct Deposit or be provided with assistance in completing the Direct Deposit enrollment application. Currently, a payee who wishes to sign up for Direct Deposit must enroll through his or her financial institution or by contacting the Federal agency that authorizes the benefit or other type of payment to the payee. As part of its efforts to increase the use of Direct Deposit, FMS and/or its fiscal agents and contractors will directly receive Direct Deposit enrollment applications for processing.

The records covered by the proposed system are necessary to process Direct Deposit enrollment applications that may be received directly by FMS, its fiscal agents, and/or contractors. The records are collected and maintained to ensure that Direct Deposit enrollment applications are processed correctly in order to minimize any risk that a recipient's Federal payment will be disbursed to the wrong account. In order to process a Direct Deposit application, a payee needs to submit his or her name, address, social security number, financial institution account information, and information about the type of benefit paid to the payee by the Government. Without such information, FMS, its fiscal agents and contractors, would not be able to process the Direct Deposit enrollment application as requested by the individual authorizing the Direct Deposit enrollment.

In addition to the purposes cited above, the information contained in the covered records will be used for collateral purposes related to the processing of Direct Deposit enrollments, such as collection of statistical information on operations, development of computer systems, investigation of unauthorized or fraudulent activity, and the collection of debts arising out of such activity.

Thus, the information contained in the records covered by FMS's proposed system of records is necessary to accurately process Direct Deposit enrollment applications.

FMS recognizes the sensitive nature of the confidential information it obtains when collecting financial institution account information from the public and has many safeguards in place to protect the information from theft or inadvertent disclosure. When appropriate, FMS's arrangements with its fiscal agents and contractors include requirements that preclude them from retaining, disclosing, and using for other purposes the information received from Direct Deposit enrollment applications. In addition to various procedural and physical safeguards, access to computerized records is limited, through the use of access codes, encryption techniques and/or other internal mechanisms. Access to records is granted only as authorized by a business line manager at FMS or FMS's fiscal agent to those whose official duties require access solely for the purposes outlined in the proposed system. The information in the Direct Deposit Enrollment Records system will allow the public to enjoy the benefits of Direct Deposit while lowering costs to

the Government and minimizing the risks of improper payments, thefts, fraudulent transactions, and the loss of public funds.

The new system of records report, as required by 5 U.S.C. 552a(r) of the Privacy Act, has been submitted to the Committee on Government Reform of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget, pursuant to Appendix I to OMB Circular A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' dated November 30, 2000.

For the reasons set forth in the preamble, FMS proposes a new system of records Treasury/FMS .006–Direct Deposit Enrollment Records, which is published in its entirety below.

Dated: October 3, 2005.

Sandra L. Pack,

Assistant Secretary for Management and Chief Financial Officer.

Treasury/FMS .006

SYSTEM NAME:

Direct Deposit Enrollment Records—Treasury/Financial Management Service.

SYSTEM LOCATION:

Records are located at the Federal Reserve Bank, acting in its capacity as Treasury's fiscal agent, 2200 North Pearl Street, Dallas, Texas 75201.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who enroll with the FMS to receive Federal payments from the Federal Government via an electronic funds transfer program known as ''Direct Deposit.''

CATEGORIES OF RECORDS IN THE SYSTEM:

The records may contain identifying information, such as an individual's name(s), social security number, home address, home and work telephone number, and personal e-mail address (home and work); information about an individual's bank account(s) and other types of accounts to which payments are made, such as the individual's bank account number and the financial institution routing and transit number; information about an individual's payments received from the United States, including the type of payment received and the Federal agency responsible for authorizing the payment.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 31 U.S.C. 321; 31 U.S.C. chapter 33; 31 U.S.C. 3332.

PURPOSE(S):

The purpose of this system is to maintain records about individuals who wish to enroll in the Direct Deposit program in order to receive Federal payments directly to a bank account or other similar type of account via electronic funds transfer, rather than by paper check.

The records are used to process Direct Deposit enrollment applications that may be received directly by FMS, its fiscal agents, and/or contractors. The records are collected and maintained to guarantee that Direct Deposit enrollment applications are processed properly to ensure that a recipient's Federal payment will be disbursed to the correct account. Without the appropriate information, FMS, its fiscal agents and contractors, would not be able to process the Direct Deposit enrollment application as requested by the individual authorizing the Direct Deposit.

The information will also be used for collateral purposes related to the processing of Direct Deposit enrollments, such as collection of statistical information on operations, development of computer systems, investigation of unauthorized or fraudulent activity, and the collection of debts arising out of such activity.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

These records may be used to disclose information to:

(1) Appropriate Federal, State, local or foreign agencies responsible for investigating or prosecuting the violation of, or for enforcing or implementing, a statute, rule, regulation, order, or license, where the disclosing agency becomes aware of a potential violation of civil or criminal law or regulation.

(2) A court, magistrate, or administrative tribunal, in the course of presenting evidence, including disclosures to opposing counsel or witnesses, for the purpose of civil discovery, litigation, or settlement negotiations or in response to a subpoena, where relevant or potentially relevant to a proceeding, or in connection with criminal law proceedings.

(3) A congressional office in response to an inquiry made at the request of the individual to whom the record pertains.

(4) Fiscal agents, financial agents, financial institutions, and contractors for the purpose of processing Direct Deposit enrollment applications, including, but not limited to, processing Direct Deposit enrollment forms and implementing programs related to Direct Deposit; investigating and rectifying possible erroneous information; creating and reviewing statistics to improve the quality of services provided; conducting debt collection services for debts arising from Direct Deposit activities; or developing, testing and enhancing computer systems.

(5) Federal agencies, their agents and contractors for the purposes of facilitating the processing of Direct Deposit enrollment applications and the implementation of programs related to Direct Deposit.

(6) Federal agencies, their agents and contractors, credit bureaus, and employers of individuals who owe delinquent debt for the purpose of garnishing wages, only when the debt arises from the unauthorized or improper use of the Direct Deposit program. The information will be used for the purpose of collecting such debt through offset, administrative wage garnishment, referral to private collection agencies, litigation, reporting the debt to credit bureaus, or for any other authorized debt collection purpose.

(7) Financial institutions, including banks and credit unions, for the purpose of disbursing payments and/or investigating the accuracy of information required to complete transactions using Direct Deposit and for administrative purposes, such as resolving questions about a transaction.

(8) Representatives of the National Archives and Records Administration (NARA) who are conducting records management inspections under authority of 44 U.S.C. 2904 and 2906.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

Debt information concerning a government claim against a debtor when the debt arises from the unauthorized use of Direct Deposit is also furnished, in accordance with 5 U.S.C. 552a(b)(12) and 31 U.S.C. 3711(e), to consumer reporting agencies, as defined by the Fair Credit Reporting Act, 5 U.S.C. 1681(f), to encourage repayment of a delinquent debt.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM: STORAGE:

Records are maintained in paper and electronic media.

RETRIEVABILITY:

Records are retrieved by name, social security number, telephone number, transaction identification number, or other alpha/numeric identifying information.

SAFEGUARDS:

All official access to the system of records is on a need-to-know basis only, as authorized by a business line manager at FMS or FMS's fiscal agent. Procedural and physical safeguards, such as personal accountability, audit logs, and specialized communications security, are utilized. Each user of computer systems containing records has individual passwords (as opposed to group passwords) for which he or she is responsible. Thus, a security manager can identify access to the records by user. Access to computerized records is limited, through use of access codes, encryption techniques, and/or other internal mechanisms, to those whose official duties require access. Storage facilities are secured by various means such as security guards, badge access, and locked doors with key entry.

RETENTION AND DISPOSAL:

Electronic and paper records for enrollments and associated transactions will be retained for six (6) months or as otherwise required by statute or court order. Records in electronic media are electronically erased using industry-accepted techniques, and in accordance with applicable Financial Management Service policies regarding the retention and disposal of fiscal agency records. Paper records are destroyed in accordance with fiscal agency archive and disposal procedures and applicable Financial Management Service policies regarding the retention and disposal of fiscal agency records.

SYSTEM MANAGER(S) AND ADDRESS:

EFT Strategy Division, Federal Finance, Financial Management Service, 401 14th Street, SW., Washington, DC 20227.

NOTIFICATION PROCEDURE:

Inquiries under the Privacy Act of 1974, as amended, shall be addressed to the Disclosure Officer, Financial Management Service, 401 14th Street, SW., Washington, DC 20227. All individuals making inquiries should provide with their request as much descriptive matter as is possible to identify the particular record desired. The system manager will advise as to whether FMS maintains the records requested by the individual.

RECORD ACCESS PROCEDURES:

Individuals requesting information under the Privacy Act of 1974, as amended, concerning procedures for gaining access to or contesting records should write to the Disclosure Officer. All individuals are urged to examine the rules of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, and appendix G, concerning requirements of this Department with respect to the Privacy Act of 1974, as amended.

CONTESTING RECORD PROCEDURES:

See ''Record access procedures'' above.

RECORD SOURCE CATEGORIES:

Information in this system is provided by the individual on whom the record is maintained (or by his or her authorized representative), other persons who electronically authorize payments from the Federal government, Federal agencies responsible for authorizing payments, Federal agencies responsible for disbursing payments, and Treasury fiscal agents that process Direct Deposit enrollment applications, and contractors.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 05–20364 Filed 10–11–05; 8:45 am]

BILLING CODE 4810–35–U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 13704

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 13704, Health Coverage Tax Credit Registration Update Form.

DATES: Written comments should be received on or before December 12, 2005, to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, (202) 622–3634, at Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Health Coverage Tax Credit Registration Update Form.

OMB Number: 1545–1954.

Form Number: 13704.

Abstract: Internal Revenue Code Sections 35 and 7527 enacted by public law 107–210 (see attachment) require the Internal Revenue Service to provide payments of the HCTC to eligible individuals beginning August 1, 2003. The IRS will use the Registration Update Form to ensure, that the processes and communications for delivering these payments help taxpayers determine if they are eligible for the credit and understand what they need to do to continue to receive it.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals and Households, Federal Government, State and Local or Tribal Government.

Estimated Number of Respondents: 2,200.

Estimated Time Per Respondent: 30 minutes.

Estimated Total Annual Burden Hours: 1,100.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of

information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: September 30, 2005.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. 05–20440 Filed 10–11–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8894

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8894, Request to Revoke Partnership Level Tax Treatment Election.

DATES: Written comments should be received on or before December 12, 2005, to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, (202) 622–3634, at Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Request to Revoke Partnership Level Tax Treatment Election.

OMB Number: 1545–1955.

Form Number: 8894.

Abstract: IRC section 6231(a)(1)(B)(ii) allows small partnerships to elect to be treated under the unified audit and litigation procedures. This election can only be revoked with the consent of the IRS. Form 8894 will provide a standardize format for small partnership to request this revocation and for the IRS to process it.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit organizations.

Estimated Number of Respondents: 100.

Estimated Time Per Respondent: 1 hour, 52 minutes.

Estimated Total Annual Burden Hours: 186.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: September 29, 2005.

Allan Hopkins,

Acting, IRS Reports Clearance Officer.

[FR Doc. 05–20441 Filed 10–11–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0132]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed to determine a veteran's eligibility for specially adapted housing or specially home adaptation grant.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before December 12, 2005.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *irmnkess@vba.va.gov*. Please refer to ''OMB Control No. 2900–0132'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501—3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the

quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Veteran's Application in Acquiring Specially Adapted Housing or Special Home Adaptation Grant, VA Form 26–4555.

OMB Control Number: 2900–0132.

Type of Review: Extension of a currently approved collection.

Abstract: Veterans with service-connected disability complete VA form 26–4555 to apply for assistance in acquiring specially adapted housing or the special home adaptation grant. VA uses the data collected to determine the veteran's eligibility.

Affected Public: Individuals or households.

Estimated Annual Burden: 500 hours.

Estimated Average Burden Per Respondent: 10 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 3,000.

Dated: October 4, 2005.

By direction of the Secretary:

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E5–5586 Filed 10–11–05; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Cemeteries and Memorials; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that a meeting of the Advisory Committee on Cemeteries and Memorials will be held November 29–30, 2005, in the Kenneth Eaton Conference Room 819 at the Lafayette Building, 811 Vermont Avenue, NW., Washington, DC. On November 30, 2005, the meeting will begin at 8:30 a.m. and conclude at approximately 4 p.m. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the administration of national cemeteries, soldiers' lots and plots, the selection of new national cemetery sites, the erection of appropriate memorials, and the adequacy of Federal burial benefits. The Committee will make recommendations to the Secretary regarding these activities.

On November 29, 2005, the Committee will receive updates on National Cemetery Administration (NCA) issues. In the afternoon, the Committee will tour the National Archives in Washington, DC. On November 30, 2005, the Committee will tour the White House and then reconvene for a business session, beginning at 1:30 p.m., which will include discussions of committee recommendations, future meeting sites, and potential agenda topics.

Time will not be allocated for receiving oral presentations from the public. Any member of the public wishing to attend the meeting should contact Mr. David Schettler, Designated Federal Officer, at (202) 273–5175. The Committee will accept written comments. Comments may be transmitted electronically to the Committee at *dave.schettler@va.gov* or mailed to the National Cemetery Administration (41C2), 810 Vermont Avenue, NW., Washington, DC 20420. In the public's communications with the Committee, the writers must identify themselves and state the organizations, associations, or persons they represent.

Dated: October 4, 2005.

By Direction of the Secretary.

E. Philip Riggin,

Committee Management Officer.

[FR Doc. 05–20447 Filed 10–11–05; 8:45 am]

BILLING CODE 8320–01–M

Corrections

Federal Register

Vol. 70, No. 196

Wednesday, October 12, 2005

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF TRANSPORTATION

Maritime Administration

46 CFR Part 296

[Docket No. MARAD–2004–18489]

RIN 2133–AB62

Maritime Security Program

Correction

In rule document 05–18678 beginning on page 55581 in the issue of Thursday, September 22, 2005, make the following correction:

§296.11 [Corrected]

On page 55592, in § 296.11, in the second column, in paragraph (c)(3), in the fith and sixth lines, ''*(see 49 CFR Chapter I)*'' should read ''*(see 47 CFR Chapter I)*''.

[FR Doc. C5–18678 Filed 10–11–05; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Wednesday,
October 12, 2005

Part II

Environmental Protection Agency

40 CFR Parts 9, 63, 260 et al.

National Emission Standards for Hazardous Air Pollutants: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors (Phase I Final Replacement Standards and Phase II); Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9, 63, 260, 264, 265, 266, 270 and 271

[FRL–7971–8]

RIN 2050–AE01

National Emission Standards for Hazardous Air Pollutants: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors (Phase I Final Replacement Standards and Phase II)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action finalizes national emission standards (NESHAP) for hazardous air pollutants for hazardous waste combustors (HWCs): hazardous waste burning incinerators, cement kilns, lightweight aggregate kilns, industrial/commercial/institutional boilers and process heaters, and hydrochloric acid production furnaces. EPA has identified HWCs as major sources of hazardous air pollutant (HAP) emissions. These standards implement section 112(d) of the Clean Air Act (CAA) by requiring hazardous waste combustors to meet HAP emission standards reflecting the performance of the maximum achievable control technology (MACT).

The HAP emitted by HWCs include arsenic, beryllium, cadmium, chromium, dioxins and furans, hydrogen chloride and chlorine gas, lead, manganese, and mercury. Exposure to these substances has been demonstrated to cause adverse health effects such as irritation to the lung, skin, and mucus membranes, effects on the central nervous system, kidney damage, and cancer. The adverse health effects associated with exposure to these specific HAP are further described in the preamble. For many HAP, these findings have only been shown with concentrations higher than those typically in the ambient air.

This action also presents our decision regarding the February 28, 2002 petition for rulemaking submitted by the Cement Kiln Recycling Coalition, relating to EPA's implementation of the so-called omnibus permitting authority under section 3005(c) of the Resource Conservation and Recovery Act (RCRA). That section requires that each permit issued under RCRA contain such terms and conditions as permit writers determine to be necessary to protect human health and the environment. In that petition, the Cement Kiln Recycling Coalition requested that we repeal the existing site-specific risk assessment policy and technical guidance for hazardous waste combustors and that we promulgate the policy and guidance as rules in accordance with the Administrative Procedure Act if we continue to believe that site-specific risk assessments may be necessary.

DATES: The final rule is effective December 12, 2005. The incorporation by reference of Method 0023A into § 63.14 is approved by the Director of the Federal Register as of December 12, 2005.

ADDRESSES: The official public docket is the collection of materials that is available for public viewing at the Office of Air and Radiation Docket and Information Center (Air Docket) in the EPA Docket Center, Room B–102, 1301 Constitution Ave., NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: For more information concerning applicability and rule determinations, contact your State or local representative or appropriate EPA Regional Office representative. For information concerning rule development, contact Michael Galbraith, Waste Treatment Branch, Hazardous Waste Minimization and Management Division, (5302W), U.S. EPA, 1200 Pennsylvania Avenue, NW., Washington DC 20460, telephone number (703) 605–0567, fax number (703) 308–8433, electronic mail address *galbraith.michael@epa.gov.*

SUPPLEMENTARY INFORMATION:

Regulated Entities

The promulgation of the final rule would affect the following North American Industrial Classification System (NAICS) and Standard Industrial Classification (SIC) codes:

Category	NAICS code	SIC code	Examples of potentially regulated entities
Any industry that combusts hazardous waste as defined in the final rule.			
	562211	4953	Incinerator, hazardous waste
	327310	3241	Cement manufacturing, clinker production
	327992	3295	Ground or treated mineral and earth manufacturing
	325	28	Chemical Manufacturers
	324	29	Petroleum Refiners
	331	33	Primary Aluminum
	333	38	Photographic equipment and supplies
	488, 561, 562	49	Sanitary Services, N.E.C.
	421	50	Scrap and waste materials
	422	51	Chemical and Allied Products, N.E.C
	512, 541, 561, 812	73	Business Services, N.E.C.
	512, 514, 541, 711	89	Services, N.E.C.
	924	95	Air, Water and Solid Waste Management

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists examples of the types of entities EPA is now aware could potentially be regulated by this action. Other types of entities not listed could also be affected. To determine whether your facility, company, business, organization, etc., is regulated by this action, you should examine the applicability criteria in Part II of this preamble. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Abbreviations and Acronyms Used in This Document

acfm actual cubic feet per minute
Btu British thermal units
CAA Clean Air Act
CFR Code of Federal Regulations
DRE destruction and removal efficiency
dscf dry standard cubic foot
dscm dry standard cubic meter

EPA Environmental Protection Agency
FR Federal Register
gr/dscf grains per dry standard cubic foot
HAP hazardous air pollutant(s)
ICR Information Collection Request
kg/hr kilograms per hour
kW-hour kilo Watt hour
MACT Maximum Achievable Control Technology
mg/dscm milligrams per dry standard cubic meter
MMBtu million British thermal unit
ng/dscm nanograms per dry standard cubic meter
NESHAP national emission standards for HAP
ng nanograms
POHC principal organic hazardous constituent
ppmv parts per million by volume
ppmw parts per million by weight
Pub. L. Public Law
RCRA Resource Conservation and Recovery Act
SRE system removal efficiency
TEQ toxicity equivalence
µg/dscm micrograms per dry standard cubic meter
U.S.C. United States Code

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Part One: Background and Summary

I. What Is the Statutory Authority for This Standard?

Section 112 of the Clean Air Act requires that the EPA promulgate regulations requiring the control of HAP emissions from major and certain area sources. The control of HAP is achieved through promulgation of emission standards under sections 112(d) and (in a second round of standard setting) (f).

EPA's initial list of categories of major and area sources of HAP selected for regulation in accordance with section 112(c) of the Act was published in the **Federal Register** on July 16, 1992 (57 FR 31576). Hazardous waste incinerators, Portland cement plants, clay products manufacturing (including lightweight aggregate kilns), industrial/commercial/institutional boilers and process heaters, and hydrochloric acid production furnaces are among the listed 174 categories of sources. The listing was based on the Administrator's determination that these sources may reasonably be anticipated to emit one or more of the 186 listed HAP in quantities sufficient to designate them as major sources.

II. What Is the Regulatory Development Background of the Source Categories in the Final Rule?

Today's notice finalizes standards for controlling emissions of HAP from hazardous waste combustors: incinerators, cement kilns, lightweight aggregate kilns, boilers, process heaters [1], and hydrochloric acid production furnaces that burn hazardous waste. We call incinerators, cement kilns, and lightweight aggregate kilns Phase I sources because we have already promulgated standards for those source categories. We call boilers and hydrochloric acid production furnaces Phase II sources because we intended to promulgate MACT standards for those source categories after promulgating MACT standards for Phase I sources. The regulatory background of Phase I and Phase II source categories is discussed below.

A. Phase I Source Categories

Phase I combustor sources are regulated under the Resource Conservation and Recovery Act (RCRA), which establishes a ''cradle-to-grave'' regulatory structure overseeing the safe treatment, storage, and disposal of hazardous waste. We issued RCRA rules to control air emissions from hazardous waste burning incinerators in 1981, 40 CFR Parts 264 and 265, Subpart O, and from cement kilns and lightweight aggregate kilns that burn hazardous waste in 1991, 40 CFR Part 266, Subpart H. These rules rely generally on risk-based standards to assure control necessary to protect human health and the environment, the applicable RCRA standard. See RCRA section 3004 (a) and (q).

The Phase I source categories also are subject to standards under the Clean Air Act. We promulgated standards for Phase I sources on September 30, 1999 (64 FR 52828). This final rule is referred to in this preamble as the Phase I rule or 1999 final rule. These emission standards created a technology-based national cap for hazardous air pollutant emissions from the combustion of hazardous waste in these devices. The rule regulates emissions of numerous hazardous air pollutants: dioxin/furans, other toxic organics (through surrogates), mercury, other toxic metals (both directly and through a surrogate), and hydrogen chloride and chlorine gas. Where necessary, Section 3005(c)(3) of RCRA provides the authority to impose additional conditions on a source-by-source basis in a RCRA permit if necessary to protect human health and the environment.

A number of parties, representing interests of both industrial sources and of the environmental community, sought judicial review of the Phase I rule. On July 24, 2001, the United States Court of Appeals for the District of Columbia Circuit granted portions of the Sierra Club's petition for review and vacated the challenged portions of the standards. *Cement Kiln Recycling Coalition* v. *EPA*, 255 F. 3d 855 (D.C. Cir. 2001). The court held that EPA had not demonstrated that its calculation of MACT floors met the statutory requirement of being no less stringent than (1) the average emission limitation achieved by the best performing 12 percent of existing sources and, for new sources, (2) the emission control achieved in practice by the best controlled similar source for new sources. 255 F.3d at 861, 865–66. As a remedy, the court, after declining to rule on most of the issues presented in the industry petitions for review, vacated the ''challenged regulations,'' stating that: ''[W]e have chosen not to reach the bulk of industry petitioners' claims, and leaving the regulations in place during remand would ignore petitioners' potentially meritorious challenges.'' Id.

[1] A process heater meets the RCRA definition of a boiler. Therefore, process heaters that burn hazardous wastes are covered under subpart EEE as boilers, and are discussed as such in subsequent parts of the preamble.

at 872. Examples of the specific challenges the Court indicated might have merit were provisions relating to compliance during start up/shut down and malfunction events, including emergency safety vent openings, the dioxin/furan standard for lightweight aggregate kilns, and the semivolatile metal standard for cement kilns. *Id.* However, the Court stated, ''[b]ecause this decision leaves EPA without standards regulating [hazardous waste combustor] emissions, EPA (or any of the parties to this proceeding) may file a motion to delay issuance of the mandate to request either that the current standards remain in place or that EPA be allowed reasonable time to develop interim standards.'' Id.

Acting on this invitation, all parties moved the Court jointly to stay the issuance of its mandate for four months to allow EPA time to develop interim standards, which would replace the vacated standards temporarily, until final standards consistent with the Court's mandate are promulgated. The interim standards were published on February 13, 2002 (67 FR 6792). EPA did not justify or characterize these standards as conforming to MACT, but rather as an interim measure to prevent adverse consequences that would result from the regulatory gap resulting from no standards being in place. Id. at 6793, 6795–96; see also 69 FR at 21217 (April 20, 2004). EPA also entered into a settlement agreement, enforceable by the Court of Appeals, to issue final standard conforming to the Court's mandate by June 14, 2005. That date has since been extended to September 14, 2005.

B. Phase II Source Categories

Phase II combustors—boilers and hydrochloric acid production furnaces—are also regulated under the Resource Conservation and Recovery Act (RCRA) pursuant to 40 CFR Part 266, Subpart H, and (for reasons discussed below) are also subject to the MACT standard setting process in section 112(d) of the CAA. We delayed promulgating MACT standards for these source categories pending reevaluation of the MACT standard-setting methodology following the Court's decision to vacate the standards for the Phase I source categories. We also have entered into a judicially enforceable consent decree with Sierra Club that requires EPA to promulgate MACT standards for the Phase II sources by June 14, 2005, since extended to September 14, 2005—the same date that (for independent reasons) is required for the replacement standards for Phase I sources.

III. How Was the Final Rule Developed?

We proposed standards for HWCs on April 20, 2004 (69 FR 21197). The public comment period closed on July 6, 2004. In addition, on February 4, 2005, we requested certain key commenters to comment by email on a limited number of issues arising from public comments on the proposed rule. The comment period for those issues closed on March 7, 2005.

We received approximately 100 public comment letters on the proposed rule and the subsequent direct request for comments. Comments were submitted by owner/operators of HWCs, trade associations, state regulatory agencies and their representatives, and environmental groups. Today's final rule reflects our consideration of all of the comments and additional information we received. Major public comments on the proposed rule along with our responses, are summarized in this preamble.

IV. What Is the Relationship Between the Final Rule and Other MACT Combustion Rules?

The amendments to the Subpart EEE, Part 63, standards for hazardous waste combustors apply to the source categories that are currently subject to that subpart—incinerators, cement kilns, and lightweight aggregate kilns that burn hazardous waste. Today's final rule, however, also amends Subpart EEE to establish MACT standards for the Phase II source categories—those boilers and hydrochloric acid production furnaces that burn hazardous waste.

Generally speaking, you are an affected source pursuant to Subpart EEE if you combust, or have previously combusted, hazardous waste in an incinerator, cement kiln, lightweight aggregate kiln, boiler, or hydrochloric acid production furnace. You continue to be an affected source until you cease burning hazardous waste and initiate closure requirements pursuant to RCRA. Affected sources do not include: (1) Sources exempt from regulation under 40 CFR part 266, subpart H, because the only hazardous waste they burn is listed under 40 CFR 266.100(c); (2) research, development, and demonstration sources exempt under § 63.1200(b); and (3) boilers exempt from regulation under 40 CFR part 266, subpart H, because they meet the definition of small quantity burner under 40 CFR 266.108. See § 63.1200(b).

If you never previously combusted hazardous waste, or have ceased burning hazardous waste and initiated RCRA closure requirements, you are not subject to Subpart EEE. Rather, EPA has promulgated separate MACT standards for sources that do not burn hazardous waste within the following source categories: commercial and industrial solid waste incinerators (40 CFR Part 60, Subparts CCCC and DDDD); Portland cement manufacturing facilities (40 CFR Part 63, Subpart LLL); industrial/commercial/institutional boilers and process heaters (40 CFR Part 63, Subpart DDDDD); and hydrochloric acid production facilities (40 CFR Part 63, Subpart NNNNN). In addition, EPA considered whether to establish MACT standards for lightweight aggregate manufacturing facilities that do not burn hazardous waste, and determined that they are not major sources of HAP emissions. Thus, EPA has not established MACT standards for lightweight aggregate manufacturing facilities that do not burn hazardous waste.

Note that non-stack emissions points are not regulated under Subpart EEE.[2] Emissions attributable to storage and handling of hazardous waste prior to combustion (i.e., emissions from tanks, containers, equipment, and process vents) would continue to be regulated pursuant to either RCRA Subpart AA, BB, and CC and/or an applicable MACT that applies to the before-mentioned material handling devices. Emissions unrelated to the hazardous waste operations may be regulated pursuant to other MACT rulemakings. For example, Portland cement manufacturing facilities that combust hazardous waste are subject to both Subpart EEE and Subpart LLL, and hydrochloric acid production facilities that combust hazardous waste may be subject to both Subpart EEE and Subpart NNNNN.[3] In these instances Subpart EEE controls HAP emissions from the cement kiln and hydrochloric acid production furnace stack, while Subparts LLL and NNNNN would control HAP emissions from other operations that are not directly related to the combustion of hazardous waste (e.g., clinker cooler emissions for cement production facilities, and hydrochloric acid product transportation and storage for hydrochloric acid production facilities).

Note that if you temporarily cease burning hazardous waste for any reason, you remain an affected source and are still subject to the applicable Subpart

[2] Note, however, that fugitive emissions attributable to the combustion of hazardous waste from the combustion device are regulated pursuant to Subpart EEE.

[3] Hydrochloric acid production furnaces that combust hazardous waste are also affected sources subject to Subpart NNNNN if they produce a liquid acid product that contains greater than 30% hydrochloric acid.

EEE requirements. However, even as an affected source, the emission standards or operating limits do not apply if: (1) Hazardous waste is not in the combustion chamber and you elect to comply with other MACT (or CAA section 129) standards that otherwise would be applicable if you were not burning hazardous waste, e.g., the nonhazardous waste burning Portland Cement Kiln MACT (Subpart LLL); or (2) you are in a startup, shutdown, or malfunction mode of operation.

V. What Are the Health Effects Associated With Pollutants Emitted by Hazardous Waste Combustors?

Today's final rule protects air quality and promotes the public health by reducing the emissions of some of the HAP listed in Section 112(b)(1) of the CAA. Emissions data collected in the development of this final rule show that metals, hydrogen chloride and chlorine gas, dioxins and furans, and other organic compounds are emitted from hazardous waste combustors. The HAP that would be controlled with this rule are associated with a variety of adverse health affects. These adverse health effects include chronic health disorders (e.g., irritation of the lung, skin, and mucus membranes and effects on the blood, digestive tract, kidneys, and central nervous system), and acute health disorders (e.g., lung irritation and congestion, alimentary effects such as nausea and vomiting, and effects on the central nervous system). Provided below are brief descriptions of risks associated with HAP that are emitted from hazardous waste combustors.

Antimony

Antimony occurs at very low levels in the environment, both in the soils and foods. Higher concentrations, however, are found at antimony processing sites, and in their hazardous wastes. The most common industrial use of antimony is as a fire retardant in the form of antimony trioxide. Chronic occupational exposure to antimony (generally antimony trioxide) is most commonly associated with ''antimony pneumoconiosis,'' a condition involving fibrosis and scarring of the lung tissues. Studies have shown that antimony accumulates in the lung and is retained for long periods of time. Effects are not limited to the lungs, however, and myocardial effects (effects on the heart muscle) and related effects (e.g., increased blood pressure, altered EKG readings) are among the best-characterized human health effects associated with antimony exposure. Reproductive effects (increased incidence of spontaneous abortions and higher rates of premature deliveries) have been observed in female workers exposed in an antimony processing facilities. Similar effects on the heart, lungs, and reproductive system have been observed in laboratory animals.

EPA assessed the carcinogenicity of antimony and found the evidence for carcinogenicity to be weak, with conflicting evidence from inhalation studies with laboratory animals, equivocal data from the occupational studies, negative results from studies of oral exposures in laboratory animals, and little evidence of mutagenicity or genotoxicity.[4] As a consequence, EPA concluded that insufficient data are available to adequately characterize the carcinogenicity of antimony and, accordingly, the carcinogenicity of antimony cannot be determined based on available information. However, the International Agency for Research on Cancer in an earlier evaluation, concluded that antimony trioxide is ''possibly carcinogenic to humans'' (Group 2B).

Arsenic

Chronic (long-term) inhalation exposure to inorganic arsenic in humans is associated with irritation of the skin and mucous membranes. Human data suggest a relationship between inhalation exposure of women working at or living near metal smelters and an increased risk of reproductive effects, such as spontaneous abortions. Inorganic arsenic exposure in humans by the inhalation route has been shown to be strongly associated with lung cancer, while ingestion or inorganic arsenic in humans has been linked to a form of skin cancer and also to bladder, liver, and lung cancer. EPA has classified inorganic arsenic as a Group A, human carcinogen.

Beryllium

Chronic inhalation exposure of humans to high levels of beryllium has been reported to cause chronic beryllium disease (berylliosis), in which granulomatous (noncancerous) lesions develop in the lung. Inhalation exposure to high levels of beryllium has been demonstrated to cause lung cancer in rats and monkeys. Human studies are limited, but suggest a causal relationship between beryllium exposure and an increased risk of lung cancer. We have classified beryllium as a Group B1, probable human carcinogen, when inhaled; data are inadequate to determine whether beryllium is carcinogenic when ingested.

Cadmium

Chronic inhalation or oral exposure to cadmium leads to a build-up of cadmium in the kidneys that can cause kidney disease. Cadmium has been shown to be a developmental toxicant in animals, resulting in fetal malformations and other effects, but no conclusive evidence exists in humans. An association between cadmium exposure and an increased risk of lung cancer has been reported from human studies, but these studies are inconclusive due to confounding factors. Animal studies have demonstrated an increase in lung cancer from long-term inhalation exposure to cadmium. EPA has classified cadmium as a Group B1, probable carcinogen.

Chlorine gas

Chlorine is an irritant to the eyes, the upper respiratory tract, and lungs. Chronic exposure to chlorine gas in workers has resulted in respiratory effects including eye and throat irritation and airflow obstruction. No information is available on the carcinogenic effects of chlorine in humans from inhalation exposure. A National Toxicology Program (NTP) study showed no evidence of carcinogenic activity in male rats or male and female mice, and equivocal evidence in female rats, from ingestion of chlorinated water. The EPA has not classified chlorine for potential carcinogenicity. In the absence of specific scientific evidence to the contrary, it is the Agency's policy to classify noncarcinogenic effects as threshold effects. RfC development is the default approach for threshold (or nonlinear) effects.

Chromium

Chromium may be emitted in two forms, trivalent chromium (chromium III) or hexavalent chromium (chromium VI). The respiratory tract is the major target organ for chromium VI toxicity for inhalation exposures. Bronchitis, decreases pulmonary function, pneumonia, and other respiratory effects have been noted from chronic high does exposure in occupational settings due to chromium VI. Limited human studies suggest that chromium VI inhalation exposure may be associated with complications during pregnancy and childbirth, while animal studies have not reported reproductive effects from inhalation exposure to chromium VI. Human and animal studies have clearly established that inhaled chromium VI is

[4] See ''Evaluating THe Carcinogenicity of Antimony,'' Rish Assessment Issue Paper (98–030/07–26–99), Superfund Technical Support Center, National Center for Environmental Assessment, July 26, 1999.

a carcinogen, resulting in an increased risk of lung cancer. EPA has classified chromium VI as a Group A, human carcinogen.

Chromium III is less toxic than chromium VI. The respiratory tract is also the major target organ for chromium III toxicity, similar to chromium VI. Chromium III is an essential element in humans, with a daily intake of 50 to 200 micrograms per day recommended for an adult. The body can detoxify some amount of chromium VI to chromium III. EPA has not classified chromium III with respect to carcinogenicity.

Cobalt

Cobalt is a relatively rare metal that is produced primarily as a by-product during refining of other metals, especially copper. Cobalt has been widely reported to cause respiratory effects in humans exposed by inhalation, including respiratory irritation, wheezing, asthma, and pneumonia. Cardiomyopathy (damage to the heart muscle) has also been reported, although this effect is better known from oral exposure. Other effects of oral exposure in humans are polycythemia (an abnormally high number of red blood cells) and the blocking of uptake of iodine by the thyroid. In addition, cobalt is a sensitizer in humans by any route of exposure. Sensitized individuals may react to inhalation of cobalt by developing asthma or to ingestion or dermal contact with cobalt by developing dermatitis. Cobalt is as a vital component of vitamin B_{12}, though there is no evidence that intake of cobalt is ever limiting in the human diet.

A number of epidemiological studies have found that exposures to cobalt are associated with an increased incidence of lung cancer in occupational settings. The International Agency for Research on Cancer (part of the World Health Organization) classifies cobalt and cobalt compounds as ''possibly carcinogenic to humans'' (Group 2B). The American Conference of Governmental Industrial Hygienists has classified cobalt as a confirmed animal carcinogen with unknown relevance to humans (category A3). An EPA assessment concludes that under EPA's cancer guidelines, cobalt would be considered likely to be carcinogenic to humans.[5]

Dioxins and Furans

Exposures to 2,3,7,8-tetrachlorodibenzo-p-dioxin (2,3,7,8–TCDD) and related compounds at levels 10 times or less above those modeled to approximate average background exposure have resulted in adverse non-cancer health effects in animals. This statement is based on assumptions about the toxic equivalent for these compounds, for which there is acknowledged uncertainty. These effects include changes in hormone systems, alterations in fetal development, reduced reproductive capacity, and immunosuppression. Effects that may be linked to dioxin and furan exposures at low dose in humans include changes in markers of early development and hormone levels. Dioxin and furan exposures are associated with altered liver function and lipid metabolism changes in activity of various liver enzymes, depression of the immune system, and endocrine and nervous system effects. EPA in its 1985 dioxin assessment classified 2,3,7,8–TCDD as a probable human carcinogen. The International Agency for Research on Cancer (IARC) concluded in 1997 that the overall weight of the evidence was sufficient to characterize 2,3,7,8–TCDD as a known human carcinogen.[6] In 2001 the U.S. Department of Health and Human Services National Toxicology Program in their 9th Report on Carcinogens classified 2,3,7,8–TCDD as a known human carcinogen.[7]

The chemical and environmental stability of dioxins and their tendency to accumulate in fat have resulted in their detection within many ecosystems. In the United States and elsewhere, accidental contamination of the environment by 2,3,7,8–TCDD has resulted in deaths in many species of wildlife and domestic animals.[8] High residues of this compound in fish have resulted in closing rivers to fishing. Laboratory studies with birds, mammals, aquatic organisms, and other species have demonstrated that exposure to 2,3,7,8–TCDD can result in acute and delayed mortality as well as carcinogenic, teratogenic, mutagenic, histopathologic, immunotoxic, and reproductive effects, depending on dose received, which varied widely in the experiments.[9]

Hydrogen chloride/hydrochloric acid

Hydrogen chloride, also called hydrochloric acid, is corrosive to the eyes, skin, and mucous membranes. Chronic (long-term) occupational exposure to hydrochloric acid has been reported to cause gastritis, bronchitis, and dermatitis in workers. Prolonged exposure to low concentrations may also cause dental discoloration and erosion. No information is available on the reproductive or developmental effects of hydrochloric acid in humans. In rats exposed to hydrochloric acid by inhalation, altered estrus cycles have been reported in females and increased fetal mortality and decreased fetal weight have been reported in offspring. EPA has not classified hydrochloric acid for carcinogenicity. In the absence of specific scientific evidence to the contrary, it is the Agency's policy to classify noncarcinogenic effects as threshold effects. RfC development is the default approach for threshold (or nonlinear) effects.

Lead

Lead can cause a variety of effects at low dose levels. Chronic exposure to high levels of lead in humans results in effects on the blood, central nervous system, blood pressure, and kidneys. Children are particularly sensitive to the chronic effects of lead, with slowed cognitive development, reduced growth and other effects reported. Reproductive effects, such as decreased sperm count in men and spontaneous abortions in women, have been associated with lead exposure. The developing fetus is at particular risk from maternal lead exposure, with low birth weight and slowed postnatal neurobehavioral development noted. Human studies are inconclusive regarding lead exposure and cancer, while animal studies have reported an increase in kidney cancer from lead exposure by the oral route. EPA has classified lead as a Group B2, probable human carcinogen.

Manganese

Health effects in humans have been associated with both deficiencies and excess intakes of manganese. Chronic exposure to low levels of manganese in the diet is considered to be nutritionally essential in humans, with a recommended daily allowance of 2 to 5 milligrams per day (mg/d). Chronic

[5] See ''Derivation of a Provisional Carcinogenicity Assessment for Cobalt and Compounds,'' Risk Assessment Issue Paper (00–122/1–15–02), Superfund Technical Support Center, National Center for Environmental Assessment, January 15, 2002. This is a provisional EPA assessment that has been externally peer reviewed but has not yet been incorporated in IRIS.

[6] IARC (International Agency for Research on Cancer). (1997) IARC monographs on the evaluation of carcinogenic risks to humans. Vol. 69. Polychlorinated dibenzo-para-dioxins and polychlorinated dibenzofurans. Lyon, France.

[7] The U.S. Department of Health and Human Services, National Toxicology Program 9th Report on Carcinogens, Revised January 2001.

[8] This does not necessarily apply in regard to laboratory testing, which tend to use 2,3,7,8 TCDD as the test compound.

[9] Eisler, R. 1986. Dioxin hazards to fish, wildlife, and invertebrates: a synoptic review. U.S. Fish and Wildlife Service Biological Report. 85(1.8).

exposure to high levels of manganese by inhalation in humans results primarily in central nervous system effects. Visual reaction time, hand steadiness, and eye-hand coordination were affected in chronically-exposed workers. Impotence and loss of libido have been noted in male workers afflicted with manganism attributed to inhalation exposures. EPA has classified manganese in Group D, not classifiable as to carcinogenicity in humans.

Mercury

Mercury exists in three forms: elemental mercury, inorganic mercury compounds (primarily mercuric chloride), and organic mercury compounds (primarily methyl mercury). Each form exhibits different health effects. Various sources may release elemental or inorganic mercury; environmental methyl mercury is typically formed by biological processes after mercury has precipitated from the air.

Chronic exposure to elemental mercury in humans also affects the central nervous system, with effects such as increased excitability, irritability, excessive shyness, and tremors. The EPA has not classified elemental mercury with respect to cancer.

The major effect from chronic exposure to inorganic mercury is kidney damage. Reproductive and developmental animal studies have reported effects such as alterations in testicular tissue, increased embryo resorption rates, and abnormalities of development. Mercuric chloride (an inorganic mercury compound) exposure has been shown to result in forestomach, thyroid, and renal tumors in experimental animals. EPA has classified mercuric chloride as a Group C, possible human carcinogen.

Nickel

Nickel is an essential element in some animal species, and it has been suggested it may be essential for human nutrition. Nickel dermatitis, consisting of itching of the fingers, hand and forearms, is the most common effect in humans from chronic exposure to nickel. Respiratory effects have also been reported in humans from inhalation exposure to nickel. No information is available regarding the reproductive of developmental effects of nickel in humans, but animal studies have reported such effects, although a consistent dose-response relationship has not been seen. Nickel forms released from industrial boilers include soluble nickel compounds, nickel subsulfide, and nickel carbonyl. Human and animal studies have reported an increased risk of lung and nasal cancers from exposure to nickel refinery dusts and nickel subsulfide. Animal studies of soluble nickel compounds i.e., nickel carbonyl) have reported lung tumors. The EPA has classified nickel refinery subsulfide as a Group A, human carcinogen and nickel carbonyl as a Group B2, probable human carcinogen.

Organic HAP

Organic HAPs include halogenated and nonhalogenated organic classes of compounds such as polycyclic aromatic hydrocarbons (PAHs) and polychlorinated biphenyls (PCBs). Both PAHs and PCBs are classified as potential human carcinogens, and are considered toxic, persistent and bioaccumulative. Organic HAP also include compounds such as benzene, methane, propane, chlorinated alkanes and alkenes, phenols and chlorinated aromatics. Adverse health effects of HAPs include damage to the immune system, as well as neurological, reproductive, developmental, respiratory and other health problems.

Particulate Matter

Atmospheric particulate matter (PM) is composed of sulfate, nitrate, ammonium, and other ions, elemental carbon, particle-bound water, a wide variety of organic compounds, and a large number of elements contained in various compounds, some of which originate from crustal materials and others from combustion sources. Combustion sources are the primary origin of trace metals found in fine particles in the atmosphere. Ambient PM can be of primary or secondary origin.

Exposure to particles can lead to a variety of serious health effects. The largest particles do not get very far into the lungs, so they tend to cause fewer harmful health effects. Fine particles pose the greatest problems because they can get deep into the lungs. Scientific studies show links between these small particles and numerous adverse health effects. Epidemiological studies have shown a significant correlation between elevated PM levels and premature mortality. Other important effects associated with PM exposure include aggravation of respiratory and cardiovascular disease (as indicated by increased hospital admissions, emergency room visits, absences from school or work, and restricted activity days), lung disease, decreased lung function, asthma attacks, and certain cardiovascular problems. Individuals particularly sensitive to PM exposure include older adults and people with heart and lung disease.

This is only a partial summary of adverse health and environmental effects associated with exposure to PM. Further information is found in the 2004 Criteria Document for PM (''Air Quality Criteria for Particulate Matter,'' EPA/600/P–99/002bF) and the 2005 Staff Paper for PM (EPA, ''Review of the National Ambient Air Quality Standards for Particulate Matter, Policy Assessment of Scientific and Technical Information: OAQPS Staff Paper,'' (June 2005)).

Selenium

Selenium is a naturally occurring substance that is toxic at high concentrations but is also a nutritionally essential element. Studies of humans chronically exposed to high levels of selenium in food and water have reported discoloration of the skin, pathological deformation and loss of nails, loss of hair, excessive tooth decay and discoloration, lack of mental alertness, and listlessness. The consumption of high levels of selenium by pigs, sheep, and cattle has been shown to interfere with normal fetal development and to produce birth defects. Results of human and animal studies suggest that supplementation with some forms of selenium may result in a reduced incidence of several tumor types. One selenium compound, selenium sulfide, is carcinogenic in animals exposed orally. We have classified elemental selenium as a Group D, not classifiable as to human carcinogenicity, and selenium sulfide as a Group B2, probable human carcinogen.

Part Two: Summary of the Final Rule

I. What Source Categories and Subcategories Are Affected by the Final Rule?

Today's rule promulgates standards for controlling emissions of HAP from hazardous waste combustors: incinerators, cement kilns, lightweight aggregate kilns, boilers, and hydrochloric acid production furnaces that burn hazardous waste. A description of each source category can be found in the proposed rule (see 69 FR at 21207–08).

Hazardous waste burning incinerators, cement kilns, and lightweight aggregate kilns are currently subject to 40 CFR part 63, subpart EEE, National Emission Standards for Hazardous Air Pollutants (NESHAP). Today's rule revises the emissions limits and certain compliance and monitoring provisions of subpart EEE for these

source categories. The definitions of hazardous waste incinerator, hazardous waste cement kiln, and hazardous waste lightweight aggregate kiln appear at 40 CFR 63.1201(a).

Boilers that burn hazardous waste are also affected sources under today's rule. The rule uses the RCRA definition of a boiler under 40 CFR 260.10 and includes industrial, commercial, and institutional boilers as well as thermal units known as process heaters. Hazardous waste burning boilers will continue to comply with the emission standards found under 40 CFR part 266, subpart H (i.e., the existing RCRA rules) until they demonstrate compliance with the requirements of 40 CFR part 63, subpart EEE, and, for permitted sources, subsequently remove these requirements from their RCRA permit.

Finally, hydrochloric acid production furnaces that burn hazardous waste are affected sources under today's rule. These furnaces are a type of halogen acid furnace included in the definition of ''industrial furnace'' defined at § 260.10. Hydrochloric acid production furnaces that burn hazardous waste will continue to comply with the emission standards found under 40 CFR part 266, subpart H, until they demonstrate compliance with 40 CFR part 63, subpart EEE, and, for permitted sources, subsequently remove these requirements from their RCRA permit.

II. What Are the Affected Sources and Emission Points?

Today's rule apply to each major and area source incinerator, cement kiln, lightweight aggregate kiln, boiler, and hydrochloric acid production furnace that burns hazardous waste.[10] We note that only major source boilers and hydrochloric acid production furnaces are subject to the full suite of subpart EEE emission standards.[11] The emissions limits apply to each emission point (e.g., stack) where gases from the combustion of hazardous waste are discharged or otherwise emitted into the atmosphere. For facilities that have multiple combustion gas discharge points, the emission limits generally apply to each emission point. A cement kiln, for example, could be configured to have dual stacks where the majority of combustion gases are discharged though the main stack and other combustion gases emitted through a separate stack, such as an alkali bypass stack. In that case, the emission standards would apply separately to each of these stacks.[12]

III. What Pollutants Are Emitted and Controlled?

Hazardous waste combustors emit dioxin/furans, sometimes at high levels depending on the design and operation of the emission control equipment, and, for incinerators, depending on whether a waste heat recovery boiler is used. All hazardous waste combustors can also emit high levels of other organic HAP if they are not designed, operated, and maintained to operate under good combustion conditions.

Hazardous waste combustors can also emit high levels of metal HAP, depending on the level of metals in the waste feed and the design and operation of air emissions control equipment. Hazardous waste burning hydrochloric acid production furnaces, however, generally feed and emit low levels of metal HAP.

All of these HAP metals (except for the volatile metal mercury) are emitted as a portion of the particulate matter emitted by these sources. Hazardous waste combustors can also emit high levels of particulate matter, except that hydrochloric acid production furnaces generally feed hazardous wastes with low ash content and consequently emit low levels of particulate matter. A majority of particulate matter emissions from hazardous waste combustors are in the form of fine particulate. Particulate emissions from incinerators and liquid fuel-fired boilers depend on the ash content of the hazardous waste feed and the design and operation of air emission control equipment. Particulate emissions from cement kilns and lightweight aggregate kilns are not significantly affected by the ash content of the hazardous waste fuel because uncontrolled particulate emissions are attributable primarily to fine raw material entrained in the combustion gas. Thus, particulate emissions from kilns depends on operating conditions that effect entrainment of raw material, and the design and operation of the emission control equipment.

IV. Does the Final Rule Apply to Me?

The final rule applies to you if you own or operate a hazardous waste combustor—an incinerator, cement kiln, lightweight aggregate kiln, boiler, or hydrochloric acid production facility that burns hazardous waste. The final rule does not apply to a source that meets the applicability requirements of § 63.1200(b) for reasons explained at 69 FR at 21212–13.

V. What Are the Emission Limitations?

You must meet the emission limits in Tables 1 and 2 of this preamble for your applicable source category and subcategory. Standards are corrected to 7 percent oxygen. As noted at proposal, we previously promulgated requirements for carbon monoxide, total hydrocarbon, and destruction and removal efficiency standards under subpart EEE for incinerators, cement kilns, and lightweight aggregate kilns. We view these standards as unaffected by the Court's vacature of the challenged regulations in its decision of July 24, 2001. We are therefore not re-promulgating and reopening consideration of these standards in today's final rule, but are summarizing these standards in Tables 1 and 2 for reader's convenience.[13] See 69 FR at 21221, 21248, 21261 and 21274.

Liquid fuel boilers equipped with dry air pollution control devices are subject to different dioxin/furan emission standards than liquid fuel boilers that are not equipped with dry air pollution control devices.[14] Liquid fuel boilers processing hazardous waste with a heating value less than 10,000 BTU/lb must comply with the emission concentration-based standards (expressed as mass of total HAP emissions per volume of stack gas emitted) for mercury, semivolatile metals, low volatile metals, and total chlorine. Liquid fuel boilers processing hazardous waste with heating values greater than 10,000 BTU/lb must comply with thermal emissions-based standards (expressed as mass of HAP emissions attributable to the hazardous waste per million BTU input from the hazardous waste) for those same pollutants. Low volatile metal standards for liquid fuel boilers apply only to emissions of chromium, whereas the low volatile metal standard for the other source categories applies to the combined emissions of chromium, arsenic, and beryllium. Semivolatile metal standards apply to the combined emissions of lead and cadmium.

For any of the source categories except hydrochloric acid production

[10] A major source emits or has the potential to emit 10 tons per year of any single hazardous air pollutant or 25 tons per year or greater of hazardous air pollutants in the aggregate. An area source is a source that is not a major source.

[11] See Part Four, Section II.A for a discussion of the standards that are applicable to area source boilers and hydrochloric acid production furnaces.

[12] We note that there is a provision that allows cement kilns with dual stacks to average emissions on a flow-weighted basis to demonstrate compliance with the metal and chlorine emission standards. See §§ 63.1204(e) and 63.1220(3).

[13] We are also republishing these standards, for reader's convenience only, in the new replacement standard section for these source categories. See § 63.1219, § 63.1220 and § 673.1219.

[14] Liquid fuel boilers equipped with a wet air pollution control device followed by a dry air pollution control device do not meet the definition of a dry air pollution device.

furnaces, you may elect to comply with an alternative to the total chlorine standard under which you would establish site-specific, health-based emission limits for hydrogen chloride and chlorine based on national exposure standards. This alternative chlorine standard is discussed in part two, section IX and part four, section VII.

Incinerators and liquid and solid fuel boilers may elect to comply with an alternative to the particulate matter standard that would limit emissions of all the semivolatile metal HAPs and low volatile metal HAPs. Under this alternative, the numerical emission limits for semivolatile metal and low volatile metal emission HAP are identical to the limitations included in Tables 1 and 2. However, for semivolatile metals, the alternative standard applies to the combined emissions of lead, cadmium, and selenium; for low volatile metals, the standard applies to the combined emissions of chromium, arsenic, beryllium, antimony, cobalt, manganese, and nickel. See § 63.1219(e).

TABLE 1.—SUMMARY OF EMISSION LIMITS FOR EXISTING SOURCES

	Incinerators	Cement kilns	Lightweight aggregate kilns	Solid fuel-fired boilers [1]	Liquid fuel-fired boilers [1]	Hydrochloric acid production furnaces [1]
Dioxin/Furans (ng TEQ/dscm).	0.20 or 0.40 and temperature control < 400°F at APCD inlet [6].	0.20 or 0.40 and temperature control < 400°F at APCD inlet.	0.20 or rapid quench below 400°F at kiln exit.	CO or HC and DRE standard as a surrogate.	0.40 for dry APCD sources; CO or HC and DRE standard as surrogate for others.	CO or HC and DRE standard as surrogate.
Mercury	130 μg/dscm	Hazardous waste feed restriction of 3.0 ppmw and 120 μg/dscm MTEC [11]; or 120 μg/dscm total emissions.	120 hazardous waste MTEC [11] feed restriction or 120 μg/dscm total emissions.	11 μg/dscm	4.2E-5lb/MMBtu [2, 5] or 19 μg/dscm [2]; depending on BTU content of hazardous waste [13].	Total chlorine standard as surrogate.
Particulate Matter	0.013 gr/dscf [8]	0.028 gr/dscf and 20% opacity [12].	0.025 gr/dscf	0.030 gr/dscf [8]	0.035 gr/dscf [8]	Total chlorine standard as surrogate.
Semivolatile Metals (lead + cadmium).	230 μg/dscm	7.6 E-4 lbs/MMBtu [5] and 330 μg/dscm [3].	3.0E-4 lb/MMBtu [5] and 250 μg/dscm [3].	180 μg/dscm	8.2 E–5 lb/MMBtu [2, 5] or 150 μg/dscm [2]; depending on BTU content of hazardous waste [13].	Total chlorine standard as surrogate.
Low Volatile Metals (arsenic + beryllium + chromium).	92 μg/dscm	2.1 E-5 lbs/MMBtu [5] and 56 μg/dscm [3].	9.5E-5 lb/MMBtu [5] and 110 μg/dscm [3].	380 μg/dscm	1.26E–4 lbMMBtu [4, 5] or 370 μg/dscm [4]; depending on BTU content of hazardous waste [13].	Total chlorine standard as surrogate.
Total Chlorine (hydrogen chloride + chlorine gas).	32 ppmv [7]	120 ppmv [7]	600 ppmv [7]	440 ppmv [7]	5.08E–2 lb/MMBtu [5, 7] or 31 ppmv [7]; depending on BTU content of hazardous waste [13].	150 ppmv or 99.923% system removal efficiency.
Carbon Monoxide (CO) or Hydrocarbons (HC).	100 ppmv CO [9] or 10 ppmv HC.	See Note # 10 below.	100 ppmv CO [9] or 20 ppmv HC.	(2) 100 ppmv CO [9] or 10 ppmv HC		
Destruction and Removal Efficiency.	99.99% for each principal organic hazardous pollutant. For sources burning hazardous wastes F020, F021, F022, F023, F026, or F027, however, 99.9999% for each principal organic hazardous pollutant.					

Notes:

[1] Particulate matter, semivolatile metal, low volatile metal, and total chlorine standards for solid and liquid fuel boilers apply only to major sources. Particulate matter, semivolatile and low volatile metal standards for hydrochloric acid production furnaces apply only to major sources, although area sources must still comply with the surrogate total chlorine standard to control mercury emissions.

[2] Standard is based on normal emissions data, and is therefore expressed as an annual average emission limitation.

[3] Sources must comply with both the thermal emissions and emission concentration standards.

[4] Low volatile metal standard for liquid fuel-fired boilers is for chromium only.

[5] Standards expressed as mass of pollutant contributed by hazardous waste per million BTU contributed by the hazardous waste.

[6] APCD means ''air pollution control device''.

[7] Sources may elect to comply with site-specific risk-based emission limits for hydrogen chloride and chlorine gas

[8] Sources may elect to comply with an alternative to the particulate matter standard.

[9] Sources that elect to comply with the CO standard must demonstrate compliance with the HC standard during the comprehensive performance test that demonstrates compliance with the destruction and removal efficiency requirement.

[10] Kilns without a bypass: 20 ppmv HC or 100 ppmv CO [9]. Kilns with a bypass/mid-kiln sampling system: 10 ppmv HC or 100 ppmv CO9 in the bypass duct, mid-kiln sampling system or bypass stack.

[11] MTEC means ''maximum theoretical emission concentration'', and is equivalent to the feed rate divided by gas flow rate

[12] The opacity standard does not apply to a source equipped with a bag leak detection system under 63.1206(c)(8) or a particulate matter detection system under 63.1206(c)(9).

[13] Emission concentration-based standards apply to sources processing hazardous waste with energy content less than 10,000 BTU/lb; thermal emission standards apply to sources processing hazardous waste with energy content greater than 10,000 btu/lb.

TABLE 2.—SUMMARY OF EMISSION LIMITS FOR NEW OR RECONSTRUCTED SOURCES

	Incinerators	Cement kilns	Lightweight aggregate kilns	Solid fuel boilers [1]	Liquid fuel boilers [1]	Hydrochloric acid production furnaces [1]
Dioxin/Furans (ng TEQ/dscm).	0.11 for dry APCD and/or WHB [5] sources; 0.20 for other sources.	0.20 or 0.40 and temperature control <400 °F at APCD inlet.	0.20 or rapid quench <400 °F at kiln exit.	CO or HC and DRE standard as a surrogate.	0.40 for sources with dry APCD; CO or HC and DRE standard as a surrogate for other sources.	CO or THC and DRE standard as a surrogate.
Mercury	8.1 μg/dscm	Hazardous waste feed restriction of 1.9 ppmw and 120 μg/dscm MTEC [10]; or 120 μg/dscm total emissions.	120 hazardous waste MTEC [10] feed restriction or 120 μg/dscm total emissions.	11 μg/dscm	1.2E–6 lb/MMBtu [2 4] or 6.8 μg/dscm [2]; depending on BTU content of hazardous waste [12].	TCl as surrogate.
Particulate matter (gr/dscf).	0.0015 [7]	0.0023 and 20% opacity [11].	0.0098	0.015 [7]	0.0087 [7]	TCl as surrogate.
Semivolatile Metals (lead + cadmium).	10 μg/dscm	6.2E–5 lb/MMBtu [4] and 180 μg/dscm.	3.7 E–5 lb/MMBtu [4] and 43 μg/dscm.	180 μg/dscm	6.2 E–6 lb/MMBtu [2 4] or 78 μg/dscm [2]; depending on BTU content of hazardous waste [12].	TCl as surrogate.
Low Volatile Metals (arsenic + beryllium + chromium).	23 μg/dscm	1.5E–5 lb/MMBtu [4] and 54 μg/dscm.	3..3E–5 lb/MMBtu [4] and 110 μg/dscm.	190 μg/dscm	1.41E–5lb/MMBtu [3 4] or 12 μg/dscm [3]; depending on BTU content of hazardous waste [12].	TCl as surrogate.
Total Chlorine (Hydrogen chloride + chlorine gas).	21 ppmv [6]	86 ppmv [6]	600 ppmv [6]	73 ppmv [6]	5.08E–2 lb/MMBtu [4 6] or 31 ppmv [6]; depending on BTU content of hazardous waste [12].	25 ppmv or 99.987% SRE.
Carbon monoxide (CO) or Hydrocarbons (HC).	100 ppmv CO [8] or 10 ppmv HC.	See note #9 below.	100 ppmv CO [8] or 20 ppmv HC.	100 ppmv CO [8] or 10 ppmv HC		
Destruction and Removal Efficiency.	99.99% for each principal organic hazardous pollutant. For sources burning hazardous wastes F020, F021, F022, F023, F026, or F027, however, 99.9999% for each principal organic hazardous pollutant.					

Notes:

[1] Particulate matter, semivolatile metal, low volatile metal, and total chlorine standards for solid and liquid fuel boilers apply only to major sources. Particulate matter, semivolatile and low volatile metal standards for hydrochloric acid production furnaces apply only to major sources, although area sources must still comply with the surrogate total chlorine standard to control mercury emissions.

[2] Standard is based on normal emissions data, and is therefore expressed as an annual average emission limitation.

[3] Low volatile metal standard for liquid fuel-fired boilers is for chromium only. Arsenic and beryllium are not included in the low volatile metal total for liquid fuel-fired boilers.

[4] Standards expressed as mass of pollutant contributed by hazardous waste per million BTU contributed by the hazardous waste.

[5] APCD means ''air pollution control device'', WHB means ''waste heat boiler''.

[6] Sources may elect to comply with risk-based emission limits for hydrogen chloride and chlorine gas.

[7] Sources may elect to comply with an alternative to the particulate matter standard.

[8] Sources that elect to comply with the CO standard must demonstrate compliance with the THC standard during the comprehensive performance test that demonstrates compliance with the destruction and removal efficiency requirement.

[9] Greenfield kilns without a bypass: 20 ppmv HC or 100 ppmv CO [8] and 50 ppmv HC. Greenfield kilns with a bypass/mid kiln sampling system: Main stack standard of 50 ppmv HC and 10 ppmv HC or 100 ppmv CO [8] in the bypass duct, mid-kiln sampling system or bypass stack. Greenfield kilns with a bypass/mid-kiln sampling system: 10 ppmv HC or 100 ppmv CO [8] in the bypass duct, mid-kiln sampling system or bypass stack; Non-greenfield kilns without a bypass: 20 ppmv HC or 100 ppmv CO [8]. A greenfield kiln is a kiln whose construction commenced after April 19, 1996 at a plant site where a cement kiln (whether burning hazardous waste or not) did not previously exist.

[10] MTEC means ''maximum theoretical emission concentration'', and is equivalent to the feed rate divided by gas flow rate.

[11] The opacity standard does not apply to a source equipped with a bag leak detection system under 63.1206(c)(8) or a particulate matter detection system under 63.1206(c)(9).

[12] Emission concentration-based standards apply to sources processing hazardous waste with energy content less than 10,000 BTU/lb; thermal emission standards apply to sources processing hazardous waste with energy content greater than 10,000 btu/lb.

VI. What Are the Testing and Initial Compliance Requirements?

The testing and initial compliance requirements we promulgate today for solid fuel boilers, liquid fuel boilers, and hydrochloric acid production furnaces are identical to those that are applicable to incinerators, cement kilns, and lightweight aggregate kilns at §§ 63.1206, 63.1207, and 63.1208. We note, however, that today's final rule revises some of these requirements as they apply to all or specific HWCs (*e.g.*, one-time dioxin/furan test for sources not subject to a numerical dioxin/furan standard; dioxin/furan stack test method; hydrogen chloride and chlorine stack test methods)

We also discuss compliance and testing dates for incinerators, cement kilns, and lightweight aggregate kilns as well. Even though we are not repromulgating the compliance and testing requirements for those source categories, those sources must demonstrate compliance with the replacement emission standards promulgated today.

A. Compliance Dates

The time-line for testing and initial compliance requirements is as follows:

1. The compliance date is October 14, 2008; [15]

2. You must submit a comprehensive performance test plan to the permitting authority for review and approval 12 months prior to commencing the test.

3.You must submit an eligibility demonstration for the health-based compliance alternative to the total chlorine emission standard 12 months before the compliance date if you elect to comply with § 63.1215;

4. You must place in the operating record a Documentation of Compliance by the compliance date identifying the operating parameter limits that, using available information, you have determined will ensure compliance with the emission standards;

5. For boilers and hydrochloric acid production furnaces, you must commence the initial comprehensive performance test within 6 months after the compliance date;

6. For incinerators, cement kilns, and lightweight aggregate kilns, you must commence the initial comprehensive performance test within 12 months after the compliance date;

7. You must complete the initial comprehensive performance test within 60 days of commencing the test; and

8. You must submit a Notification of Compliance within 90 days of completing the test documenting compliance with emission standards and continuous monitoring system requirements.

B. Testing Requirements

All hazardous waste combustors must commence the initial comprehensive performance test under the time lines discussed above. The purpose of the comprehensive performance test is to document compliance with the emission standards of the final rule and establish operating parameter limits to maintain compliance with those standards. You must also conduct periodic comprehensive performance testing every five years.

If your source is subject to a numerical dioxin/furan emission standard (i.e., incinerators, cement kilns, lightweight aggregate kilns that comply with the 0.2 ng TEQ/dscm standard, and liquid fuel boilers equipped with a dry air pollution control device), you must conduct a dioxin/furan confirmatory performance test no later than 2.5 years after each comprehensive performance test (i.e., midway between comprehensive performance tests). If your source is not subject to a numerical dioxin/furan emission standard (e.g., solid fuel boilers, lightweight aggregate kilns that comply with the 400 °F temperature limit at the kiln exit, liquid fuel boilers equipped with wet or no air pollution control system, and hydrochloric acid production furnaces), you must conduct a one-time dioxin/furan test to enable the Agency to evaluate the effectiveness of the carbon monoxide/hydrocarbon standard and the destruction and removal efficiency standard in controlling dioxin/furan emissions for those sources. Previous dioxin/furan emission tests may be used to meet this requirement if the combustor operated under the conditions required by the rule and if design and operation of the combustor has not changed since the test in a manner that could increase dioxin/furan emissions. The Agency will use those emissions data when reevaluating the MACT standards under CAA section 112(d)(6), when determining whether to develop residual risk standards for these sources pursuant to section 112(f)(2), and when determining whether the source's RCRA Permit is protective of human health and the environment.

You must use the following stack test methods to document compliance with the emission standards: (1) Method 29 for mercury, semivolatile metals, and low volatile metals; and (2) Method 26/26A, Methods 320 or 321, or ASTM D 6735–01 for hydrogen chloride and chlorine; [16] (3) either Method 0023A or Method 23 for dioxin/furans; and (4) either Method 5 or 5i for particulate matter.

C. Initial Compliance Requirements

The initial compliance requirements for solid fuel boilers, liquid fuel boilers, and hydrochloric acid production furnaces include: [17]

1. You must place in the operating record a Documentation of Compliance by the compliance date identifying the operating parameter limits that, using available information, you have determined will ensure compliance with the emission standards;

2. You must develop and comply with a startup, shutdown, and malfunction plan;

3. You must install an automatic waste feed cutoff system that links the operating parameter limits to the waste feed cutoff system;

4. You must control combustion system leaks;

5. You must establish and comply with an operator training and certification program;

6. You must establish and comply with an operation and maintenance plan;

7. If your source is equipped with a baghouse, you must install either a bag leak detection system or a particulate matter detection system; [18] and

8. If your source is equipped with an electrostatic precipitator or ionizing wet scrubber, you must either establish site-specific control device operating parameter limits which limits are linked to the automatic waste feed cutoff system, or install a particulate matter detection system and take corrective measures when the alarm level is exceeded.

VII. What Are the Continuous Compliance Requirements?

The continuous compliance requirements for solid fuel boilers, liquid fuel boilers, and hydrochloric acid production furnaces are identical to those applicable to incinerators, cement kilns, and lightweight aggregate kilns. See § 63.1209. We note, however, that today's final rule revises some of these requirements as they apply to all or specific HWCs (e.g., bag leak detection system requirements; optional particulate matter detection system requirements; compliance assurance for thermal emissions-based standards).

You must use carbon monoxide or hydrocarbon continuous emissions monitors (as well as an oxygen continuous emissions monitor to correct the carbon monoxide or hydrocarbon values to 7% oxygen) to ensure compliance with the carbon monoxide or hydrocarbon emission standards.

You must also establish limits (as applicable) on the feedrate of metals, chlorine, and ash, key combustor operating parameters, and key operating

[15] See 69 FR at 21313 for rationale. We received no adverse comments at proposal.

[16] Note that you may be required to use other test methods to document emissions of hydrogen chloride and chlorine if you elect to comply with the alternative, health-based emission limits for total chlorine under § 63.1215. See § 63.1208(b)(5).

[17] These same requirements currently apply to incinerators, cement kilns, and lightweight aggregate kilns.

[18] A major difference between a bag leak detection system and a particulate matter detection system is the way the alarm level is established. The alarm level for a bag leak detection system is established using concepts in the Agency's bag leak detection system guidance document while the alarm level for a particulate matter detection system is established based on the detector response during the comprehensive performance test. The ash feedrate limit for incinerators and boilers is waived if you use a particulate matter detection system but not if you use a bag leak detection system because the bag leak detection system alarm level may not provide reasonable assurance of continuous compliance with the particulate matter emission standard.

parameters of the air pollution control device based on operations during the comprehensive performance test. You must continuously monitor these parameters with a continuous monitoring system.

VIII. What Are the Notification, Recordkeeping, and Reporting Requirements?

The notification, recordkeeping, and reporting requirements that we promulgate today for solid fuel boilers, liquid fuel boilers, and hydrochloric acid production furnaces are identical to those that are applicable to incinerators, cement kilns, and lightweight aggregate kilns. See §§ 63.1210 and 63.1211. We note, however, that today's final rule revises some of these requirements as they apply to all or specific HWCs.

You must submit notifications including the following to the permitting authority in addition to those required by the NESHAP General Provisions, subpart A of 40 CFR part 63:

1. Notification of changes in design, operation, or maintenance (§ 63.1206(b)(5)(i));

2. Notification of performance test and continuous monitoring system evaluation, including the performance test plan and continuous monitoring system performance evaluation plan (§ 63.1207(e));

3. Notification of compliance, including results of performance tests and continuous monitoring system evaluations (§§ 63.1210(b), 63.1207(j); 63.1207(k), and 63.1207(l)); and

4. Various notifications if you request or elect to comply with alternative requirements at § 63.1210(a)(2).

You must submit the following reports to the permitting authority in addition to those required by the NESHAP General Provisions, subpart A of 40 CFR part 63:

1. Startup, shutdown, and malfunction plan, if you elect to comply with § 63.1206(c)(2)(ii)(B));

2. Excessive exceedances report (§ 63.1206(c)(3)(vi)); and

3. Emergency safety vent opening reports (§ 63.1206(c)(4)(iv)).

Finally, you must keep records documenting compliance with the requirements of Subpart EEE. Recordkeeping requirements are prescribed in § 63.1211(b), and include requirements under the NESHAP General Provisions, subpart A of 40 CFR

IX. What Is the Health-Based Compliance Alternative for Total Chlorine, and How Do I Demonstrate Eligibility?

A. Overview

The rule allows you to establish and comply with health-based compliance alternatives for total chlorine for hazardous waste combustors other than hydrochloric acid production furnaces in lieu of the MACT technology-based emission standards established under §§ 63.1216, 63.1217, 63.1219, 63.1220, and 63.1221. See § 63.1215. To identify and comply with the limits, you must:

(1) Identify a total chlorine emission rate for each on-site hazardous waste combustor. You may select total chlorine emission rates as you choose to demonstrate eligibility for the health-based limits, except the total chlorine emission rate limits for incinerators, cement kilns, and lightweight aggregate kilns cannot result in total chlorine emission concentrations exceeding the Interim Standards provided by §§ 63.1203, 63.1204, and 63.1205;[19]

(2) Calculate the HCl-equivalent emission rate for the total chlorine emission rates you select, considering long-term exposure and using Reference Concentrations (RfCs) as the health threshold metric. This emission rate is called the annual average HCl-equivalent emission rate;

(3) Perform an eligibility demonstration to determine if your annual average HCl-equivalent emission rate meets the national exposure standard (i.e., Hazard Index not exceeding 1.0 considering the maximum annual average ambient concentration of hydrogen chloride and chlorine at an off-site receptor location which concentrations are attributable to all on-site hazardous waste combustors) and thus is below the annual average HCl-equivalent emission rate limit;

(4) Calculate the HCl-equivalent emission rate for the total chlorine emission rates you select, considering short-term exposure and using acute Reference Exposure Levels (aRELs) as the health threshold metric. This emission rate is called the 1-hour average HCl-equivalent emission rate.

(5) Determine whether your 1-hour HCl-equivalent emission rate may exceed the national exposure standard (i.e., Hazard Index not exceeding 1.0 considering the maximum 1-hour average ambient concentration of hydrogen chloride and chlorine at an off-site receptor location which concentrations are attributable to all on-site hazardous waste combustors) and thus may exceed the 1-hour average HCl-equivalent emission rate limit when complying with the annual average HCl-equivalent emission rate limit, absent an hourly rolling average limit on the feedrate of total chlorine and chloride.

(6) Submit your eligibility demonstration, including your determination of whether the 1-hour average HCl-equivalent emission rate limit may be exceeded absent an hourly rolling average limit on the feedrate of total chlorine and chloride, for review and approval;

(7) Document during the comprehensive performance test the total chlorine system removal efficiency for each combustor and use this system removal efficiency to calculate chlorine feedrate limits. Also, document that total chlorine emissions during the test do not exceed the 1-hour average HCl-equivalent emission rate limit during any run of the test. In addition, establish operating limits on the emission control device based on operations during the comprehensive performance test; and

(8) Comply with the requirements for changes in the design, operation, or maintenance of the facility which could affect the HCl-equivalent emission rate limits or system removal efficiency for total chlorine, and changes in the vicinity of your facility over which you do not have control (e.g., new receptors locating proximate to the facility).

B. HCl-Equivalent Emission Rates

You must express total chlorine emission rates (lb/hr) from each on-site hazardous waste combustor, including hydrochloric acid production furnaces[20], as an annual average HCl-equivalent emission rate and a 1-hour average HCl-equivalent emission rate. See § 63.1215(b). The annual average HCl-equivalent emission rate equates chlorine emission rates to hydrogen chloride (HCl) emission rates using Reference Concentrations (RfCs) as the health risk metric for long-term exposure. The 1-hour average HCl-equivalent emission rate equates chlorine emission rates to HCl emission rates using 1-hour Reference Exposure

[19] Note that the final rule sunsets the Interim Standards on the compliance date of today's rule but codifies the Interim Standards for total chlorine under § 63.1215(b)(7).

[20] Although hydrochloric acid production furnaces are not eligible for the health-based total chlorine emission limits (because control of total chlorine is a surrogate for control of metal HAP), you must consider total chlorine emissions from hydrochloric acid production furnaces when demonstrating that total chlorine emissions from all on-site hazardous waste combustors will not exceed the Hazard Index limit of 1.0 at an off-site receptor location.

Levels (aRELs) as the health risk metric for acute exposure.

To calculate HCl-equivalent emission rates, you must apportion total chlorine emissions (ppmv) between chlorine and HCl using the volumetric ratio of chlorine to hydrogen chloride (Cl_2/HCl).

- To calculate the annual average HCl-equivalent emission rate (lb/hr) and the emission rate limit, you must use the historical average Cl_2/HCl volumetric ratio from all regulatory compliance tests and the gas flowrate (and other relevant parameters) from the most recent RCRA compliance test or MACT performance test.
- To calculate the 1-hour average HCl-equivalent emission rate (lb/hr) and emission rate limit, you must use the highest Cl_2/HCl volumetric ratio from all regulatory compliance tests and the gas flowrate from the most recent RCRA compliance test or MACT performance test.
- If you believe that the Cl_2/HCl volumetric ratio for one or more historical compliance tests is not representative of the current ratio, you may request that the permitting authority allow you to screen those ratios from the analysis of historical ratios.
- If the permitting authority believes that too few historical Cl_2/HCl ratios are available to establish a representative average ratio and a representative maximum ratio, the permitting authority may require you to conduct periodic testing to establish representative ratios.
- You must include the Cl_2/HCl volumetric ratio demonstrated during each performance test in your data base of historical Cl_2/HCl ratios to update the ratios for subsequent calculations of the annual average and 1-hour average HCl-equivalent emission rates (and emission rate limits).

C. Eligibility Demonstration

You must perform an eligibility demonstration to determine whether the total chlorine emission rates you select for each on-site hazardous waste combustor meet the national exposure standard (i.e., the Hazard Index of 1.0 cannot be exceeded at an off-site receptor location considering maximum annual average ambient concentrations attributable to all on-site hazardous waste combustors and the RfCs for HCl and chlorine) using either a look-up table analysis or a site-specific compliance demonstration.[21] Eligibility for the health-based total chlorine standard is determined by comparing the annual average HCl-equivalent emission rate for the total chlorine emission rate you select for each combustor to the annual average HCl-equivalent emission rate limit.

The annual average HCl-equivalent emission rate limit is the HCl-equivalent emission rate, determined by equating the toxicity of chlorine to HCl using RfCs as the health risk metric for long-term exposure, which ensures that maximum annual average ambient concentrations of HCl equivalents do not exceed a Hazard Index of 1.0, rounded to the nearest tenths decimal place (0.1) and considering all on-site hazardous waste combustors. See § 63.1215(b)(2).

Your facility is eligible for the health-based compliance alternatives for total chlorine if either: (1) The annual average HCl-equivalent emission rate for each on-site hazardous waste combustor is below the HCl-equivalent emission rate limit determined from the appropriate value for the emission rate limit in the applicable look-up table and the proration procedure for multiple combustors discussed below; or (2) the annual average HCl-equivalent emission rate for each on-site hazardous waste combustor is below the annual average HCl-equivalent emission rate limit you calculate based on a site-specific compliance demonstration.

1. Look-Up Table Analysis

Look-up tables for the eligibility demonstration are provided as Tables 1 and 2 to § 63.1215. Table 1 presents annual average HCl-equivalent emission rate limits for sources located in flat terrain. For purposes of this analysis, flat terrain is terrain that rises to a level not exceeding one half the stack height within a distance of 50 stack heights.

Table 2 presents annual average HCl-equivalent emission rate limits for sources located in simple elevated terrain. For purposes of this analysis, simple elevated terrain is terrain that rises to a level exceeding one half the stack height, but that does not exceed the stack height within a distance of 50 stack heights.

If your facility is not located in either flat or simple elevated terrain, you must conduct a site-specific compliance demonstration.

To determine the annual average HCl-equivalent emission rate limit for a source from the look-up table, you must use the stack height and stack diameter for your hazardous waste combustors and the distance between the stack and the property boundary. If any of these values for stack height, stack diameter, and distance to nearest property boundary do not match the exact values in the look-up table, you must use the next lowest table value. If you have more than one hazardous waste combustor on site, you must adjust the emission rate limits provided by the tables such that the sum of the ratios for all combustors of the adjusted emission rate limit to the emission rate limit provided by the table cannot exceed 1.0. See § 63.1215 (c)(3)(v).

2. Site-Specific Compliance Demonstration

You may use any scientifically-accepted peer-reviewed risk assessment methodology for your site-specific compliance demonstration to calculate an annual average HCl-equivalent emission rate limit for each on-site hazardous waste combustor. An example of one approach for performing the demonstration for air toxics can be found in the EPA's ''Air Toxics Risk Assessment Reference Library, Volume 2, Site-Specific Risk Assessment Technical Resource Document,'' which may be obtained through the EPA's Air Toxics Web site at *http://www.epa.gov/ttn/atw.*

To determine the annual average HCl-equivalent emission rate limit for each on-site hazardous waste combustor, your site-specific compliance demonstration must, at a minimum: (1) estimate long-term inhalation exposures through the estimation of annual or multi-year average ambient concentrations; (2) estimate the inhalation exposure for the actual individual most exposed to the facility's emissions from hazardous waste combustors, considering locations where people reside and where people congregate for work, school, or recreation; (3) use site-specific, quality-assured data wherever possible; (4) use health-protective default assumptions wherever site-specific data are not available, and: (5) contain adequate documentation of the data and methods used for the assessment so that it is transparent and can be reproduced by an experienced risk assessor and emissions measurement expert.

To establish the annual average HCl-equivalent emission rate limit for each combustor, you may apportion as you elect among the combustors the annual average HCl-equivalent emission rate limit for the facility, which limit ensures that the RfC-based Hazard Index of 1.0 is not exceeded.

[21] The total chlorine emission rates (lb/hr) for incinerators, cement kilns, and lightweight aggregate kilns cannot result in total chlorine emission concentrations (ppmv) exceeding the Interim Standards provided by §§ 63.1203, 63.1204, and 63.1205. The final rule sunsets the Interim Standards on the compliance date of today's rule but codifies the Interim Standards for total chlorine under § 63.1215(b)(7).

D. Assurance That the 1-Hour HCl-Equivalent Emission Rate Will Not Be Exceeded

The long-term, RfC-based Hazard Index will always be higher than the short-term, aREL-based Hazard Index for a constant HCl-equivalent emission rate because the health threshold levels for short-term exposure are orders of magnitude higher than the health threshold levels for long-term exposure.[22] Even though maximum 1-hour average ambient concentrations are substantially higher than maximum annual average concentrations, the higher short-term ambient concentrations do not offset the much higher health threshold levels for short-term exposures. Thus, the long-term, RfC-based Hazard Index will always govern regarding whether a source can make an eligibility demonstration. Accordingly, eligibility for the health-based emission limits is based solely on whether a source can comply with the annual average HCl-equivalent emission rate limit.

Nonetheless, some sources may have highly variably chlorine feedrates (and corresponding highly variable HCl-equivalent emission rates) such that they may feed chlorine at very high levels for short periods of time and still remain in compliance with the chlorine feedrate limit established to ensure compliance with the annual average HCl-equivalent emission rate limit.[23] To ensure that the 1-hour HCl-equivalent emission rate limit will not be exceeded during these periods of peak emissions, you must establish a 1-hour average HCl-equivalent emission rate and 1-hour average HCl-equivalent emission rate limit for each combustor and consider site-specific factors including prescribed criteria to determine if the 1-hour average HCl-equivalent emission rate limit may be exceeded absent an hourly rolling average limit on chlorine feedrate. If the 1-hour average HCl-equivalent emission rate limit may be exceeded, you must establish an hourly rolling average feedrate limit on chlorine.

You must calculate the 1-hour average HCl-equivalent emission rate from the total chlorine emission rate you select for each source.

You must establish the 1-hour average HCl-equivalent emission rate limit for each affected source using either a look-up table analysis or site-specific analysis. Look-up tables are provided for 1-hour average HCl-equivalent emission rate limits as Table 3 and Table 4 to this section. Table 3 provides limits for facilities located in flat terrain. Table 4 provides limits for facilities located in simple elevated terrain. You must use the Tables to establish emission rate limits in the same manner as you use Tables 1 and 2 to establish annual average HCl-equivalent emission rate limits.

If you conduct a site-specific analysis to establish a 1-hour average HCl-equivalent emission rate limit, you must follow the risk assessment procedures you used to establish an annual average HCl-equivalent emission rate limit. The 1-hour HCl-equivalent emission rate limit, however, is the emission rate than ensures that the Hazard Index associated with maximum 1-hour average exposures is not greater than 1.0.

You must consider criteria including the following to determine if a source may exceed the 1-hour HCl-equivalent emission rate limit absent an hourly rolling average chlorine feedrate limit: (1) The ratio of the 1-hour average HCl-equivalent emission rate based on the total chlorine emission rate you select for each hazardous waste combustor to the 1-hour average HCl-equivalent emission rate limit for the combustor; and (2) the potential for the source to vary total chlorine and chloride feedrates substantially over the averaging period for the feedrate limit you establish to ensure compliance with the annual average HCl-equivalent emission rate limit.

If you determine that a source may exceed the 1-hour average HCl-equivalent emission rate limit, you must establish an hourly rolling average chlorine feedrate limit as discussed below in Section G.

You must include the following information in your eligibility demonstration to document your determination whether an hourly rolling average feedrate limit is needed to maintain compliance with the 1-hour HCl-equivalent emission rate limit: (1) Determination of the Cl2/HCl volumetric ratio established for 1-hour average HCl-equivalent emission rate determinations as provided by § 63.1215(b)(6)(ii); (2) determination of the 1-hour average HCl-equivalent emission rate calculated from the total chlorine emission rate you select for the combustor; (3) determination of the 1-hour average HCl-equivalent emission rate limit; (4) determination of the ratio of the 1-hour average HCl-equivalent emission rate to the 1-hour HCl-equivalent emission rate limit for the combustor; and (5) determination of the potential for the source to vary chlorine feedrates substantially over the averaging period for the long-term feedrate limit (*i.e.*, 12-hours, or up to annually) established to maintain compliance with the annual average HCl-equivalent emission rate limit.

E. Review and Approval of Eligibility Demonstrations

The permitting authority will review and approve your eligibility demonstration. Your eligibility demonstration must contain, at a minimum, the information listed in § 63.1215(d)(1).

1. Review and Approval for Existing Sources

If you operate an existing source, you must submit the eligibility demonstration to your permitting authority for review and approval not later than 12 months prior to the compliance date. You must also submit a separate copy of the eligibility demonstration to: U.S. EPA, Risk and Exposure Assessment Group, Emission Standards Division (C404–01), Attn: Group Leader, Research Triangle Park, North Carolina 27711, electronic mail address *REAG@epa.gov*.

Your permitting authority should notify you of approval or intent to disapprove your eligibility demonstration within 6 months after receipt of the original demonstration, and within 3 months after receipt of any supplemental information that you submit. A notice of intent to disapprove your eligibility demonstration will identify incomplete or inaccurate information or noncompliance with prescribed procedures and specify how much time you will have to submit additional information or to comply with the MACT total chlorine standards. If your eligibility demonstration is disapproved, the permitting authority may extend the compliance date of the total chlorine standard to allow you to make changes to the design or operation of the combustor or related systems as quickly as practicable to enable you to achieve compliance with the MACT standard for total chlorine.

If your permitting authority has not approved your eligibility demonstration by the compliance date, and has not issued a notice of intent to disapprove your demonstration, you may nonetheless begin complying, on the compliance date, with the annual average HCl-equivalent emission rate limits you present in your eligibility demonstration.

If your permitting authority issues a notice of intent to disapprove your eligibility demonstration after the

[22] USEPA, ''Technical Support Document for HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 24.2.

[23] See discussion below in Section F regarding the requirement to establish chlorine feedrate limits.

compliance date, the authority will identify the basis for that notice and specify how much time you will have to submit additional information or to comply with the MACT total chlorine standards. The permitting authority may extend the compliance date of the total chlorine standard to allow you to make changes to the design or operation of the combustor or related systems as quickly as practicable to enable you to achieve compliance with the MACT standard for total chlorine.

2. Review and Approval for New and Reconstructed Sources

The procedures for review and approval of eligibility demonstrations applicable to existing sources discussed above also apply to new or reconstructed sources, except that the date you must submit the eligibility demonstration is as discussed below.

If you operate a new or reconstructed source that starts up by April 12, 2007, or a solid fuel-fired boiler or liquid fuel-fired boiler that is an area source that increases its emissions or its potential to emit such that it becomes a major source of HAP before April 12, 2007, you must either: (1) Submit an eligibility demonstration for review and approval by April 12, 2006 and comply with the HCl-equivalent emission rate limits and operating requirements you establish in the eligibility demonstration; or (2) comply with the final total chlorine emission standards under §§ 63.1216, 63.1217, 63.1219, 63.1220, and 63.1221, by October 12, 2005, or upon startup, whichever is later, except for a standard that is more stringent than the standard proposed on April 20, 2004 for your source. If a final standard is more stringent than the proposed standard, you may comply with the proposed standard until October 14, 2008, after which you must comply with the final standard.

If you operate a new or reconstructed source that starts up on or after April 12, 2007, or a solid fuel-fired boiler or liquid fuel-fired boiler that is an area source that increases its emissions or its potential to emit such that it becomes a major source of HAP on or after April 12, 2007, you must comply with either of the following. You may submit an eligibility demonstration for review and approval 12 months prior to startup. Alternatively, you may comply with the final total chlorine emission standards under §§ 63.1216, 63.1217, 63.1219, 63.1220, and 63.1221 upon startup. If the final standard is more stringent than the standard proposed for your source on April 20, 2004, however, and if you start operations before October 14, 2008, you may comply with the proposed standard until October 14, 2008, after which you must comply with the final standard.

F. Testing Requirements

You must comply with the requirements for comprehensive performance testing under § 63.1207.

1. Test Methods for Stack Gas Containing Alkaline Particulate

If you operate a cement kiln or a combustor equipped with a dry acid gas scrubber, you must use EPA Method 320/321 or ASTM D 6735–01, or an equivalent method, to measure hydrogen chloride, and the back-half (caustic impingers) of Method 26/26A, or an equivalent method, to measure chlorine.

2. Test Methods for Stack Gas Containing High Levels of Bromine or Sulfur

If you operate an incinerator, boiler, or lightweight aggregate kiln and your feedstreams contain bromine or sulfur during the comprehensive performance test at the levels indicated below, you must use EPA Method 320/321 or ASTM D 6735'01, or an equivalent method, to measure hydrogen chloride, and Method 26/26A, or an equivalent method, to measure chlorine and hydrogen chloride combined. You must determine your chlorine emissions to be the higher of: (1) The value measured by Method 26/26A, or an equivalent method; or (2) the value calculated by the difference between the combined hydrogen chloride and chlorine levels measured by Method 26/26a, or an equivalent method, and the hydrogen chloride measurement from EPA Method 320/321 or ASTM D 6735–01, or an equivalent method.

These procedures apply if you feed during the comprehensive performance test bromine at a bromine/chlorine ratio in feedstreams greater than 5 percent by mass, or sulfur at a sulfur/chlorine ratio in feedstreams greater than 50 percent by mass.[24]

Finally, you should precondition the M26/26A filter for one hour prior to beginning the performance test to minimize the potential for a low bias caused by adsorption/absorption of hydrogen chloride on the filter.

G. Monitoring Requirements

You must establish and comply with limits on the same operating parameters that apply to sources complying with the MACT standard for total chlorine under § 63.1209(o), except that feedrate limits on total chlorine and chloride must be established as described below.

1. Feedrate Limit to Ensure Compliance with the Annual Average HCl-Equivalent Emission Rate Limit

For sources subject to the feedrate limit for total chlorine and chloride under § 63.1209(n)(4) to ensure compliance with the semivolatile metals standard, the feedrate limit (and averaging period) for total chlorine and chloride to ensure compliance with the annual average HCl-equivalent emission rate limit is the same as required by that paragraph. Thus, the chlorine feedrate limit is the average of the run averages during the comprehensive performance test, and is established as a 12-hour rolling average.

That chlorine feedrate limit cannot exceed the numerical value (i.e., not considering the averaging period) of the feedrate limit that ensures compliance with the annual average HCl-equivalent emission rate limit, however. Therefore, the numerical value of the total chlorine and chloride feedrate limit must not exceed the value you calculate as the annual average HCl-equivalent emission rate limit (lb/hr) divided by [1 − system removal efficiency]. You must calculate a total chlorine system removal efficiency for each test run of the comprehensive performance test as [1 − total chlorine emission rate (g/s)/ chlorine feedrate (g/s)], and calculate the average system removal efficiency of the test run averages. If your source does not control total chlorine, you must assume zero system removal efficiency. If emissions during the comprehensive performance test exceed the annual average HCl-equivalent emission rate limit, eligibility for the health-based emission limits is not affected. This is because the emission rate limit is an annual average limit. Compliance is based on a 12-hour rolling average chlorine feedrate limit (rather than an (up to) an annual averaging period) for sources subject to the 12-hour rolling average feedrate limit for total chlorine and chloride under § 63.1209(n)(4) to ensure compliance with the semivolatile metals standard given that the more stringent feedrate limit (i.e., the feedrate limit with the shorter averaging period) would apply.

For sources exempt from the feedrate limit for total chlorine and chloride under § 63.1209(n)(4) because they comply with § 63.1207(m)(2) (which allows compliance with the semivolatile metals emission standard absent emissions testing by assuming all metals fed are emitted), the feedrate limit for total chlorine and chloride to ensure

[24] USEPA, ''Technical Support Document for HWC MACT Standards, Volume IV: Compliance with the HWC MACT Standards,'' September 2005, Chapter 15.1.2.

compliance with the annual average HCl-equivalent emission rate must be established as follows:

- You must establish an average period for the feedrate limit that does not exceed an annual rolling average;
- You must calculate a total chlorine system removal efficiency for each test run of the comprehensive performance test as [1 − total chlorine emission rate (g/s)/chlorine feedrate (g/s)], and calculate the average system removal efficiency of the test run averages. If your source is not equipped with a control system that consistently and reproducibly controls total emissions (e.g., wet or dry scrubber), you must assume zero system removal efficiency. If emissions during the comprehensive performance test exceed the annual average HCl-equivalent emission rate limit, eligibility for emission limits under this section is not affected. The emission rate limit is an annual average limit and compliance is based on an annual average feedrate limit on total chlorine and chloride (or a shorter averaging period if you so elect under paragraph (g)(2)(ii)(A) of this section); and
- You must calculate the feedrate limit for total chlorine and chloride as the annual average HCl-equivalent emission rate limit (lb/hr) divided by [1 − system removal efficiency] and comply with the feedrate limit on the averaging period you establish.

2. Feedrate Limit To Ensure Compliance With the 1-Hour Average HCl-Equivalent Emission Rate Limit

You must establish an hourly rolling average feedrate limit on total chlorine and chloride to ensure compliance with the 1-hour average HCl-equivalent emission rate limit unless you determine that the hourly rolling average feedrate limit is waived as discussed under Section D above. If required, you must calculate the hourly rolling average feedrate limit for total chlorine and chloride as the 1-hour average HCl-equivalent emission rate limit (lb/hr) divided by [1 − system removal efficiency] using the system removal efficiency demonstrated during the comprehensive performance test.

H. Relationship Among Emission Rates, Emission Rate Limits, and Feedrate Limits

We summarize here the relationship among: (1) the total chlorine emission rate you select in your eligibility demonstration; (2) the annual average and 1-hour average HCl-equivalent emission rates you present in your eligibility demonstration; (3) the annual average and 1-hour average emission rate limits you present in your eligibility demonstration; (4) performance test emission rates for total chlorine and HCl-equivalent emissions; and (5) long-term and hourly rolling average chlorine feedrate limits.

1. Total Chlorine Emission Rate, Annual Average HCl-Equivalent Emission Rate, and Annual Average HCl-Equivalent Emission Rate Limit

For the eligibility demonstration, you must select a total chlorine emission concentration (ppmv) for each combustor, determine the Cl_2/HCl volumetric ratio, calculate the annual average HCl-equivalent emission rate (lb/hr), and document that the emission rate does not exceed the annual average HCl-equivalent emission rate limit.

You select a total chlorine (*i.e.*, HCl and chlorine combined) emission concentration (ppmv) for each hazardous waste combustor expressed as chloride ($Cl^{(-)}$) equivalent. For incinerators, cement kilns, and lightweight aggregate kilns, this emission concentration cannot exceed the Interim Standards for total chlorine. You then determine the average Cl_2/HCl volumetric ratio considering all historical regulatory emissions tests and apportion total chlorine emissions between Cl_2 and HCl accordingly. You use these apportioned volumetric emissions to calculate the Cl_2 and HCl emission rates (lb/hr) using the average gas flowrate (and other relevant parameters) for the most recent RCRA compliance test or MACT performance test for total chlorine. Finally, you use these Cl_2 and HCl emission rates to calculate an annual average HCl-equivalent emission rate, which cannot exceed the annual average HCl-equivalent emission rate limit that you establish as discussed below.

To establish the annual average HCl-equivalent emission rate limit, you may either use Tables 1 or 2 in § 63.1215 to look-up the limit, or conduct a site-specific risk analysis. Under the site-specific risk analysis option, the annual average HCl-equivalent emission rate limit would be the highest emission rate that the risk assessment estimates would result in a Hazard Index not exceeding 1.0 for the actual individual most exposed to the facility's emissions considering off-site locations where people reside and where people congregate for work, school, or recreation.

If you have more than one on-site hazardous waste combustor, and if you use the look-up tables to establish the annual average HCl-equivalent emission rate limits, the sum of the ratios for all combustors of the annual average HCl-equivalent emission rate to the annual average HCl-equivalent emission rate limit cannot not exceed 1.0. This will ensure that the RfC-based Hazard Index of 1.0 is not exceeded, a principle criterion of the eligibility demonstration.

If you use site-specific risk analysis to demonstrate that a Hazard Index of 1.0 is not exceeded, you would generally identify for each combustor the maximum annual average HCl-equivalent emission rate that the risk assessment estimates would result in an RfC-based Hazard Index of 1.0 at any off-site receptor location (i.e., considering locations where people reside and where people congregate for work, school, or recreation.[25] This emission rate would be the annual average HCl-equivalent emission rate limit for each combustor.

2. 1-Hour Average HCl-Equivalent Emission Rate and Emission Rate Limit

As discussed in Section D above, you must determine in your eligibility demonstration whether the 1-hour HCl-equivalent emission rate limit may be exceeded absent an hourly rolling average chlorine feedrate limit. To make this determination, you must establish a 1-hour average HCl-equivalent emission rate and a 1-hour average HCl-equivalent emission rate limit.

You calculate the 1-hour average HCl-equivalent emission rate from the total chlorine emission rate, established as discussed above, using the equation in § 63.1215(b)(3).

You establish the 1-hour average HCl-equivalent emission rate limit by either using Tables 3 or 4 in § 63.1215 to look-up the limit, or conducting a site-specific risk analysis. Under the site-specific risk analysis option, the 1-hour average HCl-equivalent emission rate limit would be the highest emission rate that the risk assessment estimates would result in an aREL-based Hazard Index not exceeding 1.0 at any off-site receptor location (i.e., considering locations where people reside and where people congregate for work, school, or recreation).

3. Performance Test Emissions

During the comprehensive performance test, you must demonstrate a system removal efficiency for total chlorine as [1 − TCl emitted (lb/hr)/chlorine fed (lb/hr)]. During the test, however, the total chlorine emission rate you select for each combustor and the annual average HCl-equivalent

[25] Note again, however, that the total chlorine emission concentration (ppmv) is capped by the Interim Standards for incinerators, cement kilns, and lightweight aggregate kilns.

emission rate limit can exceed the levels you present in the eligibility demonstration. This is because those emission rates are annual average rates and need not be complied with over the duration of three runs of the performance test, which may be nominally only 3 hours.

The 1-hour average HCl-equivalent emission rate limit cannot be exceeded during any run of the comprehensive performance test, however. This limit is based on an aREL Hazard Index of 1.0; an exceedance of the limit over a test run with a nominal 1-hour duration would result in a Hazard Index of greater than 1.0.

4. Chlorine Feedrate Limits

To maintain compliance with the annual average HCl-equivalent emission rate limit, you must establish a long-term average chlorine feedrate limit. In addition, if you determine under § 63.1205(d)(3) that the 1-hour average HCl-equivalent emission rate may be exceeded (i.e., because your chlorine feedrate may vary substantially over the averaging period for the long-term chlorine feedrate limit), you must establish an hourly rolling average chlorine feedrate limit.

Long-Term Chlorine Feedrate Limit. The chlorine feedrate limit to maintain compliance with the annual average HCl-equivalent emission rate is either: (1) The chlorine feedrate during the comprehensive performance test if you demonstrate compliance with the semivolatile metals emission standard during the test (see § 63.1209(o)); or (2) if you comply with the semivolatile metals emission standard under § 63.1207(m)(2) by assuming all metals in the feed to the combustor are emitted, the HCl-equivalent emission rate limit divided by [1 − system removal efficiency] where you demonstrate the system removal efficiency during the comprehensive performance test.

If you establish the chlorine feedrate limit based on the feedrate during the performance test to demonstrate compliance with the semivolatile metals emission standard, the averaging period for the feedrate limit is a 12-hour rolling average. If you establish the chlorine feedrate limit based on the system removal efficiency during the performance test, the averaging period is up to an annual rolling average. See discussion in Part Four, Section VII.B of this preamble.

If you comply with the semivolatile metals emission standard under § 63.1207(m)(2), however, the long-term chlorine feedrate limit is based on the system removal efficiency during the comprehensive performance test rather than the feedrate during the performance test. This is because the averaging period for this chlorine feedrate limit (that ensures compliance with the annual average HCl-equivalent emission rate limit) is up to an annual rolling average. See § 63.1215(g)(2). Thus, the chlorine feedrate, and total chlorine emissions, can be higher than the limit during the relatively short duration of the comprehensive performance tests.

Hourly Rolling Average Chlorine Feedrate Limit. If you determine under § 63.1205(d)(3) that the 1-hour average HCl-equivalent emission rate limit may be exceeded, you must establish an hourly rolling average chlorine feedrate limit. That feedrate limit is established as the 1-hour HCl-equivalent emission rate limit divided by [1 − system removal efficiency]. The hourly rolling average chlorine feedrate limit is not established based on feedrates during the performance test because performance test feedrates may be substantially lower than the feedrate needed to ensure compliance with the 1-hour average HCl-equivalent emission rate. Note, however, that the hourly rolling average feedrate limit cannot be exceeded during any run of the comprehensive performance test. This chlorine feedrate limit is based on the 1-hour average HCl-equivalent emission rate limit, which is based on an aREL Hazard Index of 1.0. Thus, an exceedance of the hourly rolling average feedrate limit (and the 1-hour lHCl-equivalent emission rate limit) over a test run with a nominal 1-hour duration would result in a Hazard Index of greater than 1.0.

I. Changes

Your requirements will change in response to changes that affect the HCl-equivalent emission rate or HCl-equivalent emission rate limit for a source.

1. Changes Over Which You Have Control

Changes That Affect HCl-Equivalent Emission Rate Limits. If you plan to change the design, operation, or maintenance of the facility in a manner that would decrease the annual average or 1-hour average HCl-equivalent emission rate limit (*e.g.*, reduce the distance to the property line; reduce stack gas temperature; reduce stack height), prior to the change you must submit to the permitting authority a revised eligibility demonstration documenting the lower emission rate limits and calculations of reduced total chlorine and chloride feedrate limits.

If you plan to change the design, operation, or maintenance of the facility in a manner than would increase the annual average or 1-hour average HCl-equivalent emission rate limit, and you elect to increase your total chlorine and chloride feedrate limits, prior to the change you must submit to the permitting authority a revised eligibility demonstration documenting the increased emission rate limits and calculations of the increased feedrate limits prior to the change.

Changes That Affect System Removal Efficiency. If you plan to change the design, operation, or maintenance of the combustor in a manner than could decrease the system removal efficiency, you are subject to the requirements of § 63.1206(b)(5) for conducting a performance test to reestablish the combustor's system removal efficiency. You also must submit a revised eligibility demonstration documenting the lower system removal efficiency and the reduced feedrate limits on total chlorine and chloride.

If you plan to change the design, operation, or maintenance of the combustor in a manner than could increase the system removal efficiency, and you elect to document the increased system removal efficiency to establish higher feedrate limits on total chlorine and chloride, you are subject to the requirements of § 63.1206(b)(5) for conducting a performance test to reestablish the combustor's system removal efficiency. You must also submit a revised eligibility demonstration documenting the higher system removal efficiency and the increased feedrate limits on total chlorine and chloride.

2. Changes Over Which You Do Not Have Control

If you use site-specific risk assessment in lieu of the look-up tables to establish the HCl-equivalent emission rate limit, you must review the documentation you use in your eligibility demonstration every five years from the date of the comprehensive performance test and submit for review and approval with the comprehensive performance test plan either a certification that the information used in your eligibility demonstration has not changed in a manner that would decrease the annual average HCl-equivalent emission rate limit, or a revised eligibility demonstration. Examples of changes beyond your control that may decrease the annual average HCl-equivalent emission rate limit (or 1-hour average HCl-equivalent emission rate limit) are construction of residences at a location exposed to higher ambient

concentrations than evaluated during your previous risk analysis, or a reduction in the RfCs or aRELs.

If, in the interim between the dates of your comprehensive performance tests, you have reason to know of changes that would decrease the annual average HCl-equivalent emission rate limit, you must submit a revised eligibility demonstration as soon as practicable but not more frequently than annually.

If you determine that you cannot demonstrate compliance with a lower annual average HCl-equivalent emission rate limit (dictated by a change over which you do not have control) during the comprehensive performance test because you need additional time to complete changes to the design or operation of the source or related systems, you may request that the permitting authority grant you additional time to make those changes as quickly as practicable.

X. Overview on Floor Methodologies

The most contentious issue in the rulemaking involved methodologies for determining MACT floors, namely, which sources are best performing, and what is their level of performance. Superficially, these questions have a ready answer: the best performers are the lowest emitters as measured by compliance tests, and those tests fix their level of performance. But compliance tests are snapshots which do not fully capture sources' total operating variability. Since the standards must be met at all times, picking lowest compliance test data to set the standard results in standards best performing sources themselves would be unable to meet at all times.

To avoid this impermissible result, EPA selected approaches that reasonably estimate best performing sources' total variability. Certain types of variability can be quantified statistically, and EPA did so here (using standard statistical approaches) in all of the floor methodologies used in the rule. There are other components of variability, however, which cannot be fully quantified, but nonetheless must be accounted for in reasonably estimating best performing sources' performance over time. EPA selected ranking methodologies which best account for this total variability.

Where control of the feed of HAP is feasible and technically assessable (the case for HAP metals and for total chlorine), EPA used a methodology that ranked sources by their ability to best control both HAP feed and HAP emissions. This methodology thus assesses the efficiency of control of both the HAP inputs to a hazardous waste combustion unit, and the efficiency of control of the unit's outputs. This methodology reasonably selects the best performing (and for new sources, best controlled) sources, and reasonably assesses their level of performance. When HAP feed control is not feasible, notably where HAP is contributed by raw material and fossil fuel inputs, EPA determined best performers and their level of performance using a methodology that selects the lowest emitters using the best air pollution control technology. This methodology reasonably estimates the best performing sources' level of performance, and better accounts for total variability in emissions levels of the best performing sources.

EPA carefully examined approaches selecting lowest emitters as best performers. Examination of other test conditions from the same best performing sources shows, however, that this approach results in standards not achievable even by the best performers. Indeed, in order to meet such standards, even ''best performing'' sources (lowest emitting in individual tests) would have to add additional air pollution control technology. EPA views this result as an end run around the section 112(d)(2) beyond-the-floor process, because floor standards would force industry-wide technological changes without consideration of the factors (cost and energy in particular) which Congress mandated for consideration when establishing beyond-the-floor standards.

Part Three: What Are the Major Changes Since Proposal?

I. Database

A. Hazardous Burning Incinerators

Five incinerators have been removed from the database because they have initiated or completed RCRA closure.[26] Two incinerators have been added to the list of sources used to calculate the floor levels.[27] Emissions data from source 3015 has been excluded for purposes of calculating the particulate matter floor because the source was processing an atypical waste stream from a particulate matter compliance perspective. See part four, section I.F. We have excluded the most recent mercury and dioxin/furan emissions data from source 327, and have instead used data from an older test condition to represent this source's emissions because the source encountered problems with its carbon injection system during the most recent test. See part four, section I.F. Emissions data from source 3006 has been excluded for purposes of calculating the semivolatile metal standard because this source did not measure cadmium emissions during its emissions test. See part four, section I.F. We have added mercury emissions data from source 901 (DSSI) to the incinerator mercury database because this source (which is otherwise subject to standards for liquid fuel boilers) is burning a waste which is unlike that burned by any other liquid fuel boiler with respect to mercury concentration and waste provenance, but typical of waste burned by incinerators with respect to those factors. See part four, section VI.D.1. This change correspondingly affects the liquid fuel boiler standard by removing that data from the liquid fuel boiler database.

B. Hazardous Waste Cement Kilns

1. Use of Emissions Data From Ash Grove Cement Company

The emissions data from Ash Grove Cement Company, which operates a recently constructed preheater/precalciner kiln located in Chanute, Kansas, are considered when calculating MACT floors for new hazardous waste burning cement kilns. In the proposal, we did not consider their emissions data in the floor analyses for existing sources because Ash Grove Cement used the data to demonstrate compliance with the new source interim standards, and did not address the data for purposes of new source standards. See 69 FR at 21217 n. 35. Consistent with our position on use of post-1999 emissions data, we are including Ash Grove Cement's emissions data in the floor analyses for new sources. See also Part Four, Section I.B of the preamble.

2. Removal of Holcim's Emissions Data From EPA's HWC Data Base

Following cessation of hazardous waste operations in 2003, we are removing all emissions data from both wet process cement kilns at Holcim's Holly Hill, South Carolina, plant from our hazardous waste combustor data base. This is consistent with our approach in both this rule and the 1999 rule to base the standards only on performance of sources that actually are operating (i.e., burning hazardous waste). See also Part Four, Section I.A and 64 FR at 52844.

[26] See ''Final Technical Support Document for HWC MACT Standards, Volume II: HWC Database'' for a list of the sources that have initiated or completed RCRA closure.

[27] We noticed the data from these sources but did not include them in the MACT standard calculations at proposal. Note that inclusion of these sources did not affect any of the calculated MACT standards. See ''Final Technical Support Document for HWC MACT Standards, Volume II: HWC Database'' for more discussion.

3. Use of Mercury Data

As discussed below, we are using a commenter-submitted dataset as the basis of the mercury standards for existing and new cement kilns. This comprehensive dataset documents the day-to-day levels of mercury in hazardous waste fired to all cement kilns for a three year period covering 1999 to 2001. We have determined that the commenter-submitted data are more representative than data used at proposal. See Part Four, Section I.D of the preamble for our rationale.

C. Hazardous Waste Lightweight Aggregate Kilns

We are incorporating mercury data submitted by a commenter into the MACT floor analysis for existing and new lightweight aggregate kilns. These data document the day-to-day levels of mercury in hazardous waste fired to lightweight aggregate kilns located at Solite Corporation's Arvonia plant between October 2003 and June 2004. We have determined that the commenter-submitted data are more representative than the data used at proposal. See Part Four, Section I.E of the preamble for our rationale.

D. Liquid Fuel Boilers

In the proposed rule, we classified liquid fuel boilers as one category. The final rule classifies them into two for purposes of the mercury, semivolatile metals, chromium, and total chlorine standards: one for liquid fuel boilers burning lower heating value hazardous waste (hazardous waste with a heating value less than 10,000 Btu/lb), and another for liquid fuel boilers burning higher heating value hazardous waste (hazardous waste with a heating value of 10,000 Btu/lb or greater).

We also made other, minor changes to the data base because some sources have initiated closure, were misclassified as other sources in the proposed rule, or were inadvertently not considered in the floor calculations although the sources' test reports were in the docket at proposal.

E. HCl Production Furnaces

Six of the 17 hydrochloric acid production furnaces have ceased burning hazardous waste since proposal. Consequently, we do not use emissions data from these sources to establish the final standards. All six of these sources were equipped with waste heat recovery boilers and had relatively high dioxin/furan emissions. In addition, we reclassified source #2020 as a boiler based on comments received at proposal.

F. Total Chlorine Emissions Data Below 20 ppmv

We corrected all the total chlorine measurements in the data base that were below 20 ppmv to account for potential systemic negative biases in the Method 0050 data in response to comments on the proposed rule. See the discussion in Part Four, Section I.C.1 below.

To account for the bias, we corrected all total chlorine emissions data that were below 20 ppmv to 20 ppmv. We accounted for within-test condition emissions variability for the corrected data by imputing a standard deviation that is based on a regression analysis of run-to-run standard deviation versus emission concentration for all data above 20 ppmv. This approach of using a regression analysis to impute a standard deviation is similar to the approach we used to account for total variability (i.e., test-to-test and within test variability) of PM emissions for sources that use fabric filters.

II. Emission Limits

A. Incinerators

The changes in the incinerator standards for existing sources since proposal are:

Standard	Proposed limit	Final limit
Dioxin/Furans (ng TEQ/dscm)	Sources with dry air pollution control systems or waste heat boilers: 0.28; For others: 0.2 or 0.4 and temperature control at inlet of air pollution control device < 400 °F.	For all sources, 0.20 or 0.40 and temperature control < 400 °F at the air pollution control device inlet.
Particulate Matter (gr/dscf)	0.015	0.013.
Semivolatile Metals (μg/dscm)	59	230.
Low Volatile Metals (μg/dscm)	84	92.
Total Chlorine (ppmv)	1.5	32.
Alternative to the particulate matter standard: Combined emissions of lead, cadmium and selenium (μg/dscm).	59	230.
Alternative to the particulate matter standard: Combined emissions of arsenic, berrylium, chrome, antimony, cobalt, manganese, and nickel (μg/dscm).	84	92.

The changes in the incinerator standards for new sources since proposal are:

Standard	Proposed limit	Final limit
Particulate Matter (gr/dscf)	0.0007	0.0015
Mercury (μg/dscm)	8.0	8.1
Semivolatile Metals (μg/dscm)	6.5	10
Low Volatile Metals (μg/dscm)	8.9	23
Total Chlorine (ppmv)	0.18	21
Alternative to the particulate matter standard: Combined emissions of lead, cadmium and selenium (μg/dscm)	6.5	10
Alternative to the particulate matter standard: Combined emissions of arsenic, berrylium, chrome, antimony, cobalt, manganese, and nickel (μg/dscm)	8.9	23

Hazardous Waste Burning Cement Kilns

The changes in the standards for existing cement kiln since proposal are:

Standard	Proposed limit	Final limit
Mercury (μg/dscm)	64 [1]	Both 3.0 ppmw [2] and either 120 μg/dscm (stack emissions) or 120 μg/dscm (expressed as a hazardous waste MTEC) [3].
Particulate matter	0.028 gr/dscf	0.028 gr/dscf *and* 20% opacity [4].
Semivolatile metals	4.0E–04 lb/MMBtu [5]	7.6E–04 lb/MMBtu [5] *and* 330 μg/dscm.
Low volatile metals	1.4E–05 lb/MMBtu [5]	2.1E–05 lb/MMBtu [5] *and* 56 μg/dscm.
Total chlorine (ppmv) [6]	110	120.

[1] The proposed mercury standard was an annual limit.
[2] Feed concentration of mercury in hazardous waste as-fired.
[3] HW MTEC means maximum theoretical emissions concentration of the hazardous waste and MTEC is defined at § 63.1201(a).
[4] The opacity standard does not apply to a source equipped with a bag leak detection system under § 63.1206(c)(8) or a particulate matter detection system under § 63.1206(c)(9).
[5] Standard is expressed as mass of pollutant stack emissions attributable to the hazardous waste per million British thermal unit heat input of the hazardous waste.
[6] Combined standard, reported as a chloride ($Cl^{(-)}$) equivalent.

The changes in the standards for new cement kilns since proposal are:

Standard	Proposed limit	Final limit
Mercury (μg/dscm)	35 [1]	Both 1.9 ppmw [2] and either 120 μg/dscm (stack emissions) or 120 μg/dscm (expressed as a hazardous waste MTEC) [3].
Particulate matter	0.0058 gr/dscf	0.0023 gr/dscf and 20% opacity [4].
Semivolatile metals	6.2E–05 lb/MMBtu [5]	6.2E–05 lb/MMBtu [5] *and* 180 μg/dscm.
Low volatile metals	1.4E–05 lb/MMBtu [5]	1.5E–05 lb/MMBtu [5] *and* 54 μg/dscm.
Total chlorine (ppmv) [6]	78	86.

[1] The proposed mercury standard was an annual limit.
[2] Feed concentration of mercury in hazardous waste as-fired.
[3] HW MTEC means maximum theoretical emissions concentration of the hazardous waste and MTEC is defined at § 63.1201(a).
[4] The opacity standard does not apply to a source equipped with a bag leak detection system under § 63.1206(c)(8) or a particulate matter detection system under § 63.1206(c)(9).
[5] Standard is expressed as mass of pollutant stack emissions attributable to the hazardous waste per million British thermal unit heat input of the hazardous waste.
[6] Combined standard, reported as a chloride ($Cl^{(-)}$) equivalent.

C. Hazardous Waste Burning Lightweight Aggregate Kilns

The changes in the standards for existing lightweight aggregate kilns since proposal are:

Standard	Proposed limit	Final limit
Dioxins and furans (ng TEQ/dscm)	0.40	0.20 *or* rapid quench of the flue gas at the exit of the kiln to less than 400 °F.
Mercury (μg/dscm)	67 [1]	120 μg/dscm (stack emissions) or 120 μg/dscm (expressed as a hazardous waste MTEC) [2].
Semivolatile metals	3.1E–04 lb/MMBtu [3] *and* 250 μg/dscm	3.0E–04 lb/MMBtu [3] *and* 250 μg/dscm.

[1] The proposed mercury standard was an annual limit.
[2] HW MTEC means maximum theoretical emissions concentration of the hazardous waste and MTEC is defined at § 63.1201(a).
[3] Standard is expressed as mass of pollutant stack emissions attributable to the hazardous waste per million British thermal unit heat input of the hazardous waste.

The changes in the standards for new lightweight aggregate kilns since proposal are:

Standard	Proposed limit	Final limit
Dioxins and furans (ng TEQ/dscm)	0.40	0.20 *or* rapid quench of the flue gas at the exit of the kiln to less than 400 °F.

Standard	Proposed limit	Final limit
Particulate matter	0.0099 gr/dscf	0.0098 gr/dscf.
Mercury (μg/dscm)	67 [1]	120 μg/dscm (stack emissions) or 120 μg/dscm (expressed as a hazardous waste MTEC) [2].
Semivolatile metals	2.4E–05 lb/MMBtu [3] *and* 43 μg/dscm	3.7E–05 lb/MMBtu [3] *and* 43 μg/dscm.

[1] The proposed mercury standard was an annual limit.
[2] HW MTEC means maximum theoretical emissions concentration of the hazardous waste and MTEC is defined at § 63.1201(a).
[3] Standard is expressed as mass of pollutant stack emissions attributable to the hazardous waste per million British thermal unit heat input of the hazardous waste.

D. Solid Fuel Boilers

The changes in the solid fuel boiler standards for existing sources since proposal are:

Standard	Proposed limit	Final limit
Mercury (μg/dscm)	10	11
Semivolatile Metals (μg/dscm)	170	180
Low Volatile metals (μg/dscm)	210	380
Alternative to the particulate matter standard: Combined emissions of lead, cadmium and selenium (μg/dscm)	170	180
Alternative to the particulate matter standard: Combined emissions of arsenic, beryllium, chromium, antimony, cobalt, manganese, and nickel (μg/dscm)	210	380

The changes in the solid fuel boiler standards for new sources since proposal are:

Standard	Proposed limit	Final limit
Mercury (μg/dscm)	10	11
Semivolatile Metals (μg/dscm)	170	180
Low Volatile metals (μg/dscm)	210	380
Alternative to the particulate matter standard: Combined emissions of lead, cadmium and selenium (μg/dscm)	170	180

E. Liquid Fuel Boilers

We redefined the liquid fuel boiler subcategory into two separate boiler subcategories based on the heating value of the hazardous waste they burn: Those that burn waste below 10,000 Btu/lb, those that burn hazardous waste with a heating value of 10,000 Btu/lb or greater. See Part Four, Section VI.D.2 of today's preamble for a complete discussion.

The additional changes to the liquid fuel boiler standards for existing sources since proposal are:

Standard	Proposed limit	Final limit	
		HW Fuel < 10,000 Btu/lb	HW Fuel ≥ 10,000 Btu/lb
Mercury (lb/MM Btu)	3.7E–6	19 μg/dscm	4.2E–5
Particulate matter (gr/dscf)	0.032	0.035	
Semivolatile metals (lb/MM Btu)	1.1E–5	150 μg/dscm	8.2E–5
Chromium (lb/MM Btu)	1.1E–4	370 μg/dscm	1.3E–4
Total chlorine (Lb/MM Btu)	2.5E–2	31 ppmv	5.1E–2
Alternative to the particulate matter standard: Combined emissions of lead, cadmium and selenium (lb/MM Btu).	1.1E–5	150 μg/dscm	8.2E–5
Alternative to the particulate matter standard: Combined emissions of arsenic, beryllium, chromium, antimony, cobalt, manganese, and nickel (lb/MM Btu).	1.1E–4	370 μg/dscm	1.3E–4

The changes in the liquid fuel boiler standards for new sources since proposal are:

Standard	Proposed limit	Final limit	
		HW fuel < 10,000 Btu/lb	HW fuel > 10,000 Btu/lb
Dioxin and Furan, dry APCD (ng TEQ/dscm)	0.015 or temp control <400F for dry APCD.	0.40	
Mercury (lb/MM Btu)	3.8E–7	6.8 µg/dscm	1.2E–6
Particulate matter (gr/dscf)	0.0076	0.0087	
Semivolatile metals (lb/MM Btu)	4.3E–6	78 µg/dscm	6.2E–6
Chromium (lb/MM Btu)	3.6E–5	12 µg/dscm	1.4E–5
Total chlorine (lb/MM Btu)	7.2E–4	31 µg/dscm	5.1E–2
Alternative to the particulate matter standard: Combined emissions of lead, cadmium and selenium (lb/MM Btu).	4.3E–6	78 µg/dscm [1]	6.2E–6 [1]
Alternative to the particulate matter standard: Combined emissions of arsenic, beryllium, chromium, antimony, cobalt, manganese, and nickel (lb/MM Btu).	3.6E–5	12 µg/dscm [2]	1.4E–5 [2]

[1] New or reconstructed liquid fuel boilers that process residual oil or liquid feedstreams that are neither fossil fuel nor hazardous waste and that operate pursuant to the alternative to the particulate matter standard must comply with the alternative emission concentration standard of 4.7 µg/dscm, which is applicable to lead, cadmium and selenium emissions attributable to all feedstreams (hazardous and nonhazardous).

[2] New or reconstructed liquid fuel boilers that process residual oil or liquid feedstreams that are neither fossil fuel nor hazardous waste that operate pursuant to the alternative to the particulate matter standard must comply with the alternative emission concentration standard of 12 µg/dscm, which is applicable to arsenic, beryllium, chrome, antimony, cobalt, manganese, and nickel emissions attributable to all feedstreams (hazardous and nonhazardous).

F. Hydrochloric Acid Production Furnaces

The changes in the hydrochloric acid production furnace standards for existing sources since proposal are:

Standard	Proposed limit	Final limit
Dioxin and Furans	0.4 ng TEQ/dscm	Carbon Monoxide/Total Hydrocarbons and DRE standards as surrogates.
Total chlorine	14 ppmv or 99.9927% system removal efficiency	150 ppmv or 99.923% system removal efficiency.

The changes in the hydrochloric acid production furnace standards for new sources since proposal are:

Standard	Proposed limit	Final limit
Dioxin and Furans	0.4 ng TEQ/dscm	Carbon Monoxide/Total Hydrocarbons and DRE standards as surrogates
Total chlorine	1.2 ppmv or 99.9994% system removal efficiency	25 ppmv or 99.987% system removal efficiency

G. Dioxin/Furan Testing for Sources Not Subject to a Numerical Standard

Today's final rule requires that all sources not subject to a numerical dioxin and furan standard perform a one time test to determine their dioxin and furan emissions. See the discussion in Part Four, Section VII.L.

In the proposed rule, this requirement was limited to solid fuel boilers and those liquid fuel boilers with a wet or no air pollution control system. The final rule expands this requirement to include hydrochloric acid production furnaces and those lightweight aggregate kilns that elect to comply with the temperature limit at the kiln exit in lieu of the 0.20 ng TEQ/dscm dioxin/furan standard. Those sources are not subject to a numerical dioxin/furan standard under the final rule for reasons explained in Volume III of the Technical Support Document, Sections 12 and 15. We note that sources not subject to a numerical dioxin/furan emission standard are subject to the carbon monoxide or hydrocarbon standards and the DRE standard as surrogates.

We are making no changes to the implementation of this requirement. See the proposed rule at 69 FR at 21307 for more information.

III. Statistics and Variability

A. Using Statistical Imputation To Address Variability of Nondetect Values

In the final rule, we use a statistical approach to impute the value of nondetect emissions and feedrate measurements to avoid dampening of the variability of data sets when nondetect measurements are assumed to be present at the detection limit.

At proposal, we assumed that nondetects (i.e., HAP levels in stack emissions below the level of detection of the applicable analytic method) are invariably present at the detection limit. Commenters on the proposed rule stated, however, that assuming nondetects are present at the detection limit dampens emissions variability—a consideration necessary to reasonably ascertain sources' performance over time. This could have significant practical consequence for those data sets (such as the data base for liquid fuel boilers) dominated by nondetected values. We agree with these commenters, and instead of making the arbitrary assumption that all nondetected values are identical (which

in fact is highly unlikely), we are using a statistical methodology to impute the value of nondetect measurements.

The imputation approach assigns a value for each nondetect measurement in a data set within the possible range of values that results in maximizing the 99th percentile upper prediction limit for the data set. For example, the possible range of values for a measurement that is 100% nondetect is between zero and the detection limit.

On February 4, 2005 we distributed a direct request for comments on the imputation approach to major stakeholders. We respond to the comments we received in Part Four, Section IV.D of today's notice.

B. Degrees of Freedom When Imputing a Standard Deviation Using the Universal Variability Factor for Particulate Matter Controlled by a Fabric Filter

The use of the universal variability factor to impute a standard deviation for particulate emissions from sources controlled with a fabric filter takes advantage of the empirical observation that the standard deviation of particulate emissions from sources is positively correlated to the average particulate emissions of sources. Based on this observation, we use regression analysis to determine the best fitting curve to explain the relationship of average value to standard deviation.

In the final rule, we use the actual sample size, rather than an assumed sample size of nine used at proposal, to determine the degrees of freedom for the t-statistic to calculate the floor using the standard deviation imputed from the universal variability factor for particulate matter controlled by a fabric filter.

At proposal, we used eight degrees of freedom to identify the t-statistic to account for within-test condition variability (i.e., run-to-run variability) for standard deviations imputed from the universal variability factor regression.[28] This is because, on average, about three test conditions with nine individual test runs are associated with each source used to develop the regression curve.

A commenter states, however, that this approach can dramatically understate variability when imputing a standard deviation for a source with only three runs because the t-statistic is substantially higher for 2 degrees of freedom than 8 degrees of freedom.

We agree with the commenter. Moreover, using the actual number of runs to identify the t-statistic rather than assuming nine runs is appropriate given that the true test condition average is less certain for sources with only three runs, and thus there is less certainty in the imputed standard deviation. The higher t-statistic associated with a three-run data set reflects this uncertainty.

In addition, we include emissions data classified as ''normal'' in the regression analysis for the final rule. At proposal, we used only data classified as CT (i.e., highest compliance test condition in a test campaign) or IB (i.e., a compliance test condition that achieved lower emissions than another compliance test condition in the test campaign). We conclude that normal data (i.e., emissions data that were not used to establish operating limits and thus do not reflect variability in controllable operating parameters) should also be considered in the regression analysis because particulate matter emissions are relatively insensitive to baghouse inlet loading and operating conditions.[29] Including normal emissions in the analysis provides additional data to better quantify these devices' performance variability.

IV. Compliance Assurance for Fabric Filters, Electrostatic Precipitators, and Ionizing Wet Scrubbers

The final rule provides additional requirements to clarify how you determine the duration of periods of operation when the alarm set point has been exceeded for a bag leak detection system or a particulate matter detection system:

1. You must keep records of the date, time, and duration of each alarm, the time corrective action was initiated and completed, and a brief description of the cause of the alarm and the corrective action taken.

2. You must record the percent of the operating time during each 6-month period that the alarm sounds.

3. In calculating the operating time percentage, if inspection of the fabric filter, electrostatic precipitator, or ionizing wet scrubber demonstrates that no corrective action is required, no alarm time is counted.

4. If corrective action is required, each alarm shall be counted as a minimum of 1 hour.

The final rule also establishes revised procedures for establishing the alarm set point if you elect to use a particulate matter detector system in lieu of site-specific operating parameter limits for compliance assurance for sources equipped with electrostatic precipitators and ionizing wet scrubbers. The rule explicitly allows you to maximize controllable operating parameters during the comprehensive performance test to account for variability by, for example, detuning the APCD or spiking ash. To establish the alarm set-point, you may either establish the set-point as the average of the test condition run average detector responses during the comprehensive performance test or extrapolate the detector response after approximating the correlation between the detector response and particulate matter emission concentrations. You may extrapolate the detector response up to a response value that corresponds to 50% of the particulate matter emission standard or 125% of the highest particulate matter concentration used to develop the correlation, whichever is greater. To establish an approximate correlation of the detector response to particulate matter emission concentrations you should use as guidance Performance Specification-11 for PM CEMS (40 CFR Part 60, Appendix B), except that you need conduct only 5 runs to establish the initial correlation rather than a minimum of 15 runs required by PS–11.

The final rule also notes that an exceedance of a detector response that corresponds to the particulate matter emission standard is not evidence that the standard has been exceeded because the correlation is an approximate correlation used for the purpose of compliance assurance to determine when corrective measures must be taken. The correlation, however, does not meet the requirements of PS–11 for compliance monitoring.

In addition, if you elect to use a particulate matter detection system in lieu of site-specific control device operating parameter limits on the electronic control device, the ash feedrate limit for incinerators and boilers under § 63.1209(m)(3) is waived. The ash feedrate limit is waived because the particulate matter detection system continuously monitors relative particulate matter emissions and the alarm set point provides reasonable assurance that emissions will not exceed the standard.[30]

[28] USEPA, ''Draft Technical Support Document for HWC MACT Standards, Volume III: Selection of MACT Standards,'' March 2004, p. 5–4.

[29] USEPA, ''Technical Support Document for HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 5.3. See also Part Four, Section III.C of this preamble.

[30] Note that if your incinerator or boiler is equipped with a fabric filter and you elect under § 63.1206(c)(8)(i) to use a particulate matter detection system in lieu of a bag leak detection system for compliance assurance, the ash feedrate limit is waived. The ash feedrate limit is not waived if you use a bag leak detection system, however, because the alarm level may not ensure compliance with the emission standard when you follow the

Finally, you must submit an excessive exceedance notification within 30 days of the date that the alarm set-point is exceeded more than 5 percent of the time during any 6-month block period of time, or within 30 days after the end of the 6-month block period, whichever is earlier. The proposed rule would have required you to submit that notification within 5 days of the end of the 6-month block period.

V. Health-Based Compliance Alternative for Total Chlorine

The final rule includes the following major changes to the proposed health-based compliance alternative for total chlorine:

(1) You must use 1-hour Reference Exposure Levels (aRELs) rather than 1-hour acute exposure guideline levels (AEGL–1) as the acute health risk threshold metric when calculating 1-hour HCl-equivalent emission rates;

(2) You must establish a long-term average chlorine feedrate limit (i.e., 12 hour rolling average or an (up to) annual rolling average) as the annual average HCl-equivalent emission rate limit divided by [1 − system removal efficiency]. You establish the total chlorine system removal efficiency during the comprehensive performance test. The proposed rule would have required you to establish the long-term average chlorine feedrate limit as the average of the test run averages of the comprehensive performance test.[31]

(3) At proposal, we requested comment on whether and how to establish a short-term chlorine feedrate limit to ensure that the acute exposure Hazard Index of 1.0 is not exceeded. See 69 FR at 21304. We conclude for the final rule that a 1-hour rolling average feedrate limit may be needed for some situations (i.e., if chlorine feedrates can vary substantially during the averaging period for the long-term feedrate limit and potentially result in an exceedance of the 1-hour average HCl-equivalent emission rate limit). Accordingly, although your eligibility for the health-based compliance alternatives is based on annual average HCl-equivalent emissions, you must determine considering prescribed criteria whether your 1-hour HCl-equivalent emission rate may exceed the national exposure standard (i.e., Hazard Index not exceeding 1.0 considering the maximum 1-hour average ambient concentration of hydrogen chloride and chlorine at an off-site receptor location[32]) and thus may exceed the 1-hour average HCl-equivalent emission rate limit absent an hourly rolling average limit on the feedrate of chlorine. If the acute exposure standard may be exceeded, you must establish an hourly rolling average chlorine feedrate limit as the 1-hour HCl-equivalent emission rate limit divided by [1 − system removal efficiency]. You establish the system removal efficiency during the comprehensive performance test.

(4) When calculating HCl-equivalent emission rates, rather than partitioning total chlorine emissions between chlorine and HCl (i.e., the Cl_2/HCl volumetric ratio) based on the comprehensive performance test as proposed, you must establish the Cl_2/HCl volumetric ratio used to calculate the annual average HCl-equivalent emission rate based on the historical average ratio from all regulatory compliance tests. You must establish the Cl_2/HCl volumetric used to calculate the 1-hour average HCl-equivalent emission rate as the highest of the historical ratios from all regulatory compliance tests. The rule allows you to exclude ratios from historical compliance tests where the emission data may not be representative of the current Cl_2/HCl ratio for reasons such as changes to the design or operation of the combustor or biases in measurement methods. The rule also explicitly allows the permitting authority to require periodic emissions testing to obtain a representative average and maximum ratio;

(5) The look-up table analysis has been refined by presenting annual average and 1-hour HCl-equivalent emission rate limits as a function of stack height, stack diameter, and distance to property line. In addition, separate look-up tables are presented for flat terrain and simple elevated terrain;

(6) The proposed rule required approval of the eligibility demonstration before you could comply with the alternative health-based emission limits for total chlorine. Under the final rule, if your permitting authority has not approved your eligibility demonstration by the compliance date, and has not issued a notice of intent to disapprove your demonstration, you may nonetheless begin complying, on the compliance date, with the annual average HCl-equivalent emission rate limits you present in your eligibility demonstration. In addition, if your permitting authority issues a notice of intent to disapprove your eligibility demonstration, the authority will identify the basis for that notice and specify how much time you will have to submit additional information or to comply with the MACT total chlorine standards. The permitting authority may extend the compliance date of the total chlorine standards to allow you to make changes to the design or operation of the combustor or related systems as quickly as practicable to enable you to achieve compliance with the MACT total chlorine standards;

(7) We have revised the approach for determining chlorine emissions if you feed bromine or sulfur during the comprehensive performance test at levels higher than those specified in § 63.1215(e)(3)(ii)(B). Under the final rule, you must use EPA Method 320/321 or ASTM D 6735'01, or an equivalent method, to measure hydrogen chloride, and Method 26/26A, or an equivalent method, to measure chlorine and hydrogen chloride. You must determine your chlorine emissions to be the higher of: (1) The value measured by Method 26/26A, or an equivalent method; or (2) the value calculated by difference between the combined hydrogen chloride and chlorine levels measured by Method 26/26a, or an equivalent method, and the hydrogen chloride measurement from EPA Method 320/321 or ASTM D 6735–01, or an equivalent method; and

(8) The proposed rule would have required you to conduct a new comprehensive performance test if you planned to make changes to the facility that would lower the annual average HCl-equivalent emission rate limit. Under the final rule, you would be required to conduct a performance test as a result of a planned change only for a change to the design, operation, or maintenance of the combustor that could affect the system removal efficiency for total chlorine if the change could reduce the system removal efficiency, or if the change would increase the system removal efficiency and you elect to increase the feedrate limits on total chlorine and chloride.

concepts in the Agency's guidance document on bag leak detection systems to establish the alarm level.

[31] Note that, as a practical matter, most sources must establish the chlorine feedrate limit as the average of the test run average feedrate limit during the comprehensive performance test to demonstrate compliance with the semivolatile emission standard. This is because chlorine feedrate is a compliance assurance parameter for the semivolatile metal emission standard. That feedrate limit is based on a 12-hour rolling average. To ensure compliance with the annual average HCl-equivalent emission rate limit, however, that feedrate limit cannot exceed the value calculated as the annual average HCl-equivalent emission rate limit divided by [1 − system removal efficiency], where you demonstrate the total chlorine system removal efficiency during the performance test.

[32] Under the site-specific risk assessment approach to demonstrate eligibility, you must consider locations where people reside and where people congregate for work, school, or recreation.

Part Four: What Are the Responses to Major Comments?

I. Database

A. Revisions to the EPA's Hazardous Waste Combustor Data Base

Comment: Several commenters identify sources which have ceased operations as a hazardous waste combustor and should be removed from EPA's data base.

Response: We agree with commenters that data and information from sources no longer burning hazardous waste should not be included in our hazardous waste combustor data base and should not be used to calculate the MACT standards. We consider any source that has initiated RCRA closure procedures and activities as a source that is no longer burning hazardous waste. This data handling decision is consistent with the approach we used in the 1999 final rule. See 64 FR at 52844. As we stated in that rule, ample emissions data remain to support calculating the MACT standards without using data from sources that no longer burn hazardous waste.

As a result, we removed the following former hazardous waste combustors from the data base: the Safety-Kleen incinerator in Clarence, New York, the Dow Chemical Company incinerators in Midland, Michigan, and LaPorte, Texas, the two Holcim wet process cement kilns in Holly Hill, South Carolina, the Dow Chemical Company liquid fuel-fired boiler in Freeport, Texas, the Union Carbide liquid fuel-fired boilers in Hahnville, Louisiana, and Texas City, Texas, and six Dow Chemical Company hydrochloric production furnaces in Freeport, Texas.

We are retaining, however, Solite Corporation's lightweight aggregate facility in Cascade, Virginia, in the data base. Even though the facility recently initiated RCRA closure procedures, this data handling decision differs from those listed in the preceding paragraph because Solite Corporation provided this new information in February 2005 while information on the other closures was reported or available to us in 2004. Because we cannot continually adjust our data base and still finalize this rulemaking by the court-ordered deadline, we stopped making revisions to the data base in late 2004. Additional facility changes after that date, like Solite Corporation's Cascade facility closure, simply could not be incorporated.

Comment: One commenter identifies a source in EPA's data base that should be classified as a boiler instead of a hydrochloric acid production furnace.

Response: We agree with the commenter. In today's rule, Dow Chemical Company's boiler F–2820, located in Freeport, Texas, is reclassified in our data base as a boiler. This source is identified as unit number 2020 in our data base.

B. Use of Data From Recently Upgraded Sources

Comment: Many commenters recommend that EPA remove from the data base (or not consider for standards-setting purposes) emissions data from sources that upgraded their emissions controls to comply with the promulgated emission standards of either the 1999 rule or the 2002 interim standards. Several commenters also state that any emissions data that were obtained or used to demonstrate compliance with the promulgated standards of 1999 or 2002 should not be used for standard-setting purposes by the Agency. That is, EPA must evaluate the source category as it existed at the beginning of the rule development process and not after emissions controls are later added to comply with the 1999 or 2002 standards. Several commenters also state that EPA is only partly correct in claiming that the interim standards are not MACT standards because the interim standards were established and considered to be MACT until the Court issued its opinion in July 2001. Until that time, sources proceeded to upgrade their facilities to achieve the standards promulgated in 1999. The rationale for these recommendations is threefold: (1) Use of the data unfairly ignores the MACT-driven reductions already achieved by some sources; (2) it is contrary to sound public policy to use data from upgraded facilities to ''ratchet down'' the MACT floors to a level more stringent because these sources would not have increased their level of performance but for the legal obligation to comply with the standards; and (3) EPA's reliance on *National Lime Ass'n* v. *EPA*, 233 F.3d 625, 640 (D.C. Cir. 2000), for the proposition that the motivation for a source's performance is legally irrelevant in developing MACT floor levels is misplaced because that case involved the initial MACT standard setting process, and not a subsequent rule.

One commenter agrees with EPA's proposed position and states that use of data from sources that have upgraded is not only appropriate, but also required by the Clean Air Act. This commenter states that the actual performance of sources that have upgraded their emissions equipment—to meet the 1999 standards or for any reason—is reflected only by the most recently generated emissions data for the source. Thus, the Clean Air Act requires EPA to use the most recently generated data available to it and precludes the Agency from using older, out-of-date performance data.

EPA also received several comments stating that the language of section 112(d)(3)(A) of the Clean Air Act informs how the Agency should consider emissions data from sources that conducted testing after that 1999 rule was promulgated. One commenter states that the only data which should not be used in calculating the MACT floors are from sources that are subject to lowest achievable emission rates (LAER). Thus, the commenter states, Congress considered the possibility of significant and recent upgrades, and concluded that EPA should use up-to-date data to reflect source's performance, but must exclude certain sources from the floor calculation if their upgrades were of a specific degree and were accomplished within a specific period of time. Another commenter states that Congress did not intend to pile technology upon technology as confirmed by section 112(d)(3)(A) that specifically excludes sources that implemented LAER from consideration when establishing section 112(d) standards. Thus, the commenter states, considering data from sources that have upgraded violates both the language and intent of the Clean Air Act. Another commenter states that, while Congress no doubt contemplated that EPA should use all available emissions information in setting initial MACT standards, neither the statute nor the legislative history suggest that follow-up MACT rulemakings require the use of data reflecting compliance efforts with previous MACT standards or interim standards.

Response: As proposed, EPA maintains its position on use of post-1999 emissions data. The statute indicates that EPA is to base MACT floors on performance of sources ''for which the Administrator has emissions information.'' Section 112(d)(3)(A); *CKRC*, 255 F. 3d at 867. There can be no dispute that post-1999 performance data in EPA's possession fits this description. We also reiterate that the motivation for the control reflected in data available to us is irrelevant. See 69 FR at 21217–218. We further agree with those commenters who pointed out that Congress was explicit when it wanted certain emissions information (i.e., sources operating pursuant to a LAER standard) excluded from consideration in establishing floors. There is, of course, no such enumerated exception

for sources that have upgraded their performance for other reasons.

We also do not agree with those commenters arguing (with respect to the standards for the Phase 1 sources (incinerators, cement kilns, and lightweight aggregate kilns)) in effect that the present rulemaking involves revision of an existing MACT standard. If this were indeed a revision of a MACT standard under section 112(d)(6), then EPA would not redetermine floor levels. See 70 FR at 20008 (April 15, 2005). However, EPA has not to date promulgated valid MACT floors or valid MACT standards for these sources. The 1999 standards do not reflect MACT, as held by the *CKRC* court. The interim standards likewise do not reflect MACT, but were designed to prevent a regulatory gap and were described as such from their inception. 67 FR at 7693 (Feb. 13, 2002); see also *Joint Motion of all Parties for Stay of Issuance of Mandate* in case no. 99–1457 (October 19, 2001), pp. 11–12 (''The Parties emphasize that the contemplated interim rule is in the nature of a remedy. It would not respond to the Court's mandate regarding the need to demonstrate that EPA's methodology reasonably predicts the performance of the average of the best performing twelve percent of sources (or best-performing source). EPA intends to address those issues in a subsequent rule, which will necessarily require a longer time to develop, propose, and finalize.'') EPA consequently believes that it is adopting in this rule the initial section 112(d) MACT standards for hazardous waste burning incinerators, cement kilns, and lightweight aggregate kilns, and that the floor levels for existing sources are based, as provided in section 112(d)(3), on performance of those sources for which EPA has ''emissions information.''

However, we disagree with the comment that we must make exclusive use of the most recent information from hazardous waste combustion sources. There is no such restriction in section 112(d)(3). EPA has exhaustively examined all of the data in its possession for all source categories covered by this rule, and determined (and documented) which data are suitable for evaluating sources' performance.

C. Correction of Total Chlorine Data to Address Potential Bias in Stack Measurement Method

Comment: Several commenters state that EPA's proposed total chlorine standards of 1.5 ppm for existing incinerators and 0.18 ppm for new incinerators are based on biased data of indeterminate quality and are unachievable. Commenters assert that Method 26A and its RCRA equivalent, SW 846 Method 0050, have a negative bias at concentrations below 20 ppmv when used on stacks controlled with wet scrubbers. Commenters cite two recurring situations when this bias is likely to occur: (1) hydrogen chloride dissolving in condensed moisture in the sampling train; and (2) hydrogen chloride reacting with alkaline compounds from the scrubber water that are collected on the filter ahead of the impingers.

Commenters are particularly concerned about the negative bias associated with stack gas containing substantial water vapor. Commenters note that EPA found in a controlled laboratory study by Steger [33] that the bias is between 17 and 29 percent at stack gas moisture content of 7 to 9 percent. This stack gas moisture is much less than the nominal 50% moisture contained in some hazardous waste combustor stacks according to the commenters. Commenters believe this is why EPA's Method 0050, which was used to gather most of the data in the HWC MACT data base, states in Section 1.2 that ''this method is not acceptable for demonstrating compliance with HCl emission standards less than 20 ppm.''

Moreover, commenters state that the procedures in Method 0050 to address the negative bias caused by condensed moisture were not followed for many RCRA compliance tests. The method uses an optional cyclone to collect moisture droplets, and requires a 45 minute purge of the cyclone and sampling train to recover hydrogen chloride from water collected by the cyclone and any condensed moisture in the train. The cyclone is not necessary if the stack gas does not contain water droplets. According to commenters, the cyclone and subsequent purge were often not used in the presence of water droplets because a potential low bias below 20 ppmv was irrelevant when demonstrating compliance with emission standards on the order of 100 ppmv. There was no need for the extra complexity and expense of using a cyclone and train purge given the purpose of the test. Although the data were acceptable for their intended purpose, commenters conclude that the data are not useful for establishing standards below 20 ppmv.

For these reasons, commenters suggest that EPA not consider total chlorine measurements below 20 ppmv when establishing the standards.

Response: For the reasons discussed below, we corrected all total chlorine measurements in our data base for all source categories that were below 20 ppmv to 20 ppmv to establish the total chlorine floors. Moreover, to address run-to-run variability given that all runs for several data sets are now corrected to 20 ppmv, we impute a run standard deviation based on a regression analysis of run standard deviation versus total chlorine concentration for sources with total chlorine measurements greater than 20 ppmv. This is the same approach we used to impute variability from sources using fabric filters when determining the particulate matter MACT floors.

Effect of Moisture Vapor. Commenters imply that stack gas with high levels of gas phase water vapor will inherently be problematic, particularly at emissions less than 20 ppmv. There is no basis for claiming that water vapor, per se, causes a bias in SW–846 Method 0050 or its equivalent, Method 26A. Condensed moisture (i.e., water droplets), however, can cause a bias because it can dissolve hydrogen chloride in the sampling train and prevent it from being captured in the impingers if the sampling train is not properly purged. Water droplets can potentially be present due to entrainment from the wet scrubber, condensation in cooler regions of the stack along the stack walls, and entrainment from condensed moisture dripping down the stack wall across the inlet duct opening.

Although Method 0050 addresses the water droplet issue by use of a cyclone and 45 minute purge, the Steger paper (Ibid.) concludes that a 45 minute purge is not adequate to evaporate all water collected by the cyclone in stacks with a total moisture content (vapor and condensed moisture) of 7 to 9%. At those moisture levels, Steger documented the negative bias that commenters reference. Steger's recommendation was to increase the heat input to the sample train by increasing the train and filter temperature from 120C (248F) to 200C (392F). We agree that increasing the probe and filter temperature will provide a better opportunity to evaporate any condensed moisture, but another solution to the problem is to require that the post-test purge be run long enough to evaporate all condensed moisture. That is the approach used by Method 26A, which EPA promulgated after Method 0050, and which sources must use to demonstrate compliance with the final standards. Method 26A uses an extended purge time rather than

[33] Steger, J.L., et al, ''Laboratory Evaluation of Method 0050 for Hydrogen Chloride'', Proc of 13th Annual Incineration Conference, Houston, TX, May 1994.

elevating the train temperature to address condensed moisture because that approach can be implemented by the stack tester at the site without using nonstandard equipment.

We attempted to quantify the level of condensed moisture in the Steger study and to compare it to the levels of condensed moisture that may be present in hazardous waste combustor stack gas. This would provide an indication if the bias that Steger quantified with a 45 minute purge might also be applicable to some hazardous waste combustors. We conclude that this comparison would be problematic, however, because: (1) given the limited information available in the Steger paper, it is difficult to quantify the level of condensed moisture in his gas samples; and (2) we cannot estimate the levels of condensed moisture in hazardous waste combustor stack gas because, even though condensed moisture may have been present during a test, method protocol is to report the saturation moisture level only (i.e., the amount of water vapor present), and not the total moisture content (i.e., both condensed and vapor phase moisture).

We can conclude, however, that, if hazardous waste combustor stack gas were to contain the levels of condensed moisture present in the gas that Steger tested, the 45 minute purge required by Method 0050 would not be sufficient to avoid a negative bias. We also conclude that this is potentially a practical issue and not merely a theoretical concern because, as commenters note, hazardous waste combustors that use wet scrubbers are often saturated with water vapor that will condense if the flue gas cools.

Data from Wet Stacks When a Cyclone Was Not Used. Commenters state that Method 0050 procedures for addressing water droplets (adequate or not, as discussed above) were not followed in many cases because a low bias below 20 ppmv was not relevant to demonstrating compliance with standards on the order of 100 ppmv. We do not know which data sets may be problematic because, as previously stated, the moisture concentration reported was often the saturation (vapor phase only) moisture level and not the total (vapor and liquid) moisture in the flue gas. We also have no documentation that a cyclone was used—even in situations where the moisture content was documented to be above the dew point. We therefore conclude that all data below 20 ppmv from sources controlled with a wet scrubber are suspect and should be corrected.

Potential Bias Due to Filter Affinity for Hydrogen Chloride. Studies by the American Society of Testing and Materials indicate that the filter used in the Method 0050 train (and the M26/26A trains) may adsorb/absorb hydrogen chloride and cause a negative bias at low emission levels. (See ASTM D6735–01, section 11.1.3 and ''note 2'' of section 14.2.3) This inherent affinity for hydrogen chloride can be satisfied by preconditioning the sampling train for one hour. None of the tests in our database were preconditioned in such a manner.

We are normally not concerned about this type of bias because we would expect the bias to apply to all sources equally (e.g., wet or dry gas) and for all subsequent compliance tests. In other words, we are ordinarily less concerned if a standard is based on biased data, as long as the means by which the standard was developed and the means of compliance would experience identical bias.

However, we did correct the wet gas measurements below 20 ppmv to address the potential low bias caused by condensed moisture. This correction would also correct for any potential bias caused by the filter's inherent affinity for hydrogen chloride. This results in a data set that is partially corrected for this issue—sources with wet stacks would be corrected for this potential bias while sources with dry stacks would not be corrected. To address this unacceptable mix of potentially biased and unbiased data (i.e., dry gas data biased due to affinity of filter for hydrogen chloride and wet gas data corrected for condensed moisture and affinity of filter for hydrogen chloride), we also correct total chlorine measurements from dry gas stacks (i.e., sources that do not use wet scrubbers).

Deposition of Alkaline Particulate on the Filter. Commenters are also concerned that hydrogen chloride may react with alkaline compounds from the scrubber water droplets that are collected on the filter ahead of the impingers. Commenters suggest this potential cause for a low bias at total chlorine levels below 20 ppmv is another reason not to use measurements below 20 ppmv to establish the standards.

Although alkaline particulate deposition on the method filter causing a negative bias is a much greater concern for sources that have stack gas containing high levels of alkaline particulate (e.g., cement kilns, sources equipped with dry scrubbers), we agree with commenters that this may be of concern for all sources equipped with wet scrubbers. Our approach to correct all data below 20 ppmv addresses this concern.

Decision Unique to Hazardous Waste Combustors. We note that the rationale for our decision to correct total chlorine data below 20 ppmv to account for the biases discussed above is unique to the hazardous waste combustor MACT rule. Some sources apparently did not follow Method 0050 procedures to minimize the low bias caused by condensed moisture for understandable reasons. Even if sources had followed Method 0050 procedures to minimize the bias (i.e., cyclone and 45 minute purge) there still may have been a substantial bias because of insufficient purge time, as Steger's work may indicate. We note that the total chlorine stack test method used by sources other than hazardous waste combustors—Method 26A—requires that the cyclone and sampling train be purged until all condensed moisture is evaporated. We believe it is necessary to correct our data below 20 ppmv data because of issues associated exclusively with Method 0050 and how it was used to demonstrate compliance with these sources.

Determining Variability for Data at 20 ppmv. Correcting those total chlorine data below 20 ppmv to 20 ppmv brings about a situation identical to the one we confronted with nondetect data. See Part Four, Section V.B. below. The MACT pool of best performing source(s) for some data sets is now comprised of largely the same values. This has the effect of understating the variability associated with these data.

To address this concern, we took an approach similar to the one we used to determine variability of PM emissions for sources equipped with a fabric filter. In that case, we performed a linear regression on the data, charting variability against emissions, and used the variability that resulted from the linear regression analysis as the variability for the sources average emissions. In this case, most or all of the incinerator and liquid fuel boiler sources in the MACT pool have average emissions at or near 20 ppmv. We therefore performed a linear regression on the total chlorine data charting average test condition results above 20 ppmv against the variability associated with that test condition. The variability associated with 20 ppmv was the variability we used for incinerator and liquid fuel boiler data sets affected by the 20 ppmv correction.

We also considered using the statistical imputation approach we used for nondetect values. See discussion in Section IV.B below. The statistical imputation approach for correcting data below 20 ppmv without dampening variability would involve imputing a value between the reported value and 20

ppmv because the ''true'' value of the biased data would lie in this interval. This approach would be problematic, however, given that many of the reported values were much lower than 20 ppmv; our statistical imputation approach would tend to overestimate the run to run variability. Consequently, we conclude that a regression analysis approach is more appropriate. A regression analysis is particularly pertinent in this situation because: (1) We consider data above 20 ppmv used to develop the regression to be unbiased; and (2) all the corrected data averages for which we are imputing a standard deviation from the regression curve are at or near 20 ppmv. Thus, any potential concern about downward extrapolation from the regression would be minimized.

We note that, although a regression analysis is appropriate to estimate run-to-run variability for the corrected total chlorine data, we could not use a linear regression analysis to address variability of nondetect values. To estimate a standard deviation from a regression analysis, we would need to know the test condition average emissions. This would not be feasible, however, because some or all of the run measurements for a test condition are nondetect. In addition, we are concerned that a regression analysis would not accurately estimate the standard deviation at low emission levels because we would have to extrapolate the regression downward to levels where we have few measured data (i.e., data other than nondetect). Moreover, the statistical imputation approach is more suitable for handling nondetects because the approach calculates the run-to-run variability by taking into account the percent nondetect for the emissions for each run.[34] A regression approach would be difficult to apply particularly in the case of test conditions containing partial nondetects or a mix of detect and nondetect values. Given these concerns with using a regression analysis to estimate the standard deviation of test conditions with runs that have one or more nondetect (or partial nondetect) measurements, we conclude that the statistical imputation approach best assures that the calculated floor levels account for run-to-run emissions variability.

Compliance with the Standards. The final standards are based on data that were corrected to address specific issues concerning these data. See the above discussion regarding stack gas moisture, filter affinity for hydrogen chloride, and alkaline compound reactions with hydrogen chloride in the sampling train.

Sources must demonstrate compliance using a stack test method that also addresses these issues. Sources with wet stacks must use Method 26A and follow those procedures regarding the use of a cyclone and the purging of the system whenever condensed moisture may be present in the sampling system.

Finally, all sources—those with either wet or dry gas—should precondition the sampling train for one hour prior to beginning the test to satisfy the filter's affinity for hydrogen chloride. The permitting authority will ensure that sources precondition the sample train (under authority of § 63.1209(g)(2)) when they review and approve the performance test plan.

D. Mercury Data for Cement Kilns

Comment: Several commenters state that EPA's data base of mercury emissions data (and associated feed concentrations of mercury in the hazardous waste) are unrepresentative and unsuitable for use in determining MACT standards for cement kilns. These comments are supported by an extensive amount of data submitted by the cement manufacturing industry including three years of data documenting day-to-day levels of mercury in hazardous waste fuels fired to all 14 hazardous waste burning cement kilns.[35] The commenters recommend that EPA use the commenter-submitted data as the basis for assessing cement kilns' performance for control of mercury because it is the most complete and representative data available to EPA.

Response: We agree that the commenter-submitted mercury data are more representative than those we used at proposal. First, these data represent a significantly larger and more comprehensive dataset compared to the one used to support the proposed mercury standard. The commenter-submitted data document the day-to-day levels of mercury in hazardous waste fired to all cement kilns for a three year period covering 1999 to 2001. In total, approximately 20,000 measurements of the concentration of mercury in hazardous waste are included in the dataset. When considered in whole, these data describe the performance (and variability thereof) of all cement kilns for the three year period because each measurement represents the mercury concentration in the burn tank used to fire the kiln over the course of a day's operation (or longer period).[36] In comparison, the data used to support the proposed floor level consisted of a much smaller dataset of approximately 50 test conditions representing a snapshot of performance somewhere in the range of normal operations, with each test condition representing a relatively short period of time (e.g., several hours).[37] As discussed at proposal, we were concerned regarding the representativeness of this smaller dataset. See 69 FR at 21251. In addition, the commenter-submitted dataset allows us to better evaluate the only mercury control technique used by existing hazardous waste burning cement kilns—controlling the feed concentration of mercury in the hazardous waste. The commenters have demonstrated convincingly that the mercury dataset used at proposal does not properly show the range of performance and variability in performance these cement kilns actually experience, while the significantly more robust dataset submitted by commenters does illustrate this variability. Thus, we conclude the larger commenter-submitted dataset is superior to EPA's smaller testing dataset.

We note that our MACT floor analysis of the commenter-submitted dataset to determine which sources are the best performers and to identify a mercury standard for cement kilns is discussed in the background document.[38] Additional discussion of issues related to the mercury standard for cement kilns is found in Part Four, Section VI.B of the preamble.

[34] For multi-constituent HAP (e.g. SVM) the emissions for a run could be comprised of fully detected values for some HAP and detection limits for other HAP that were nondetect.

[35] See docket item OAR–2004–0022–0049.

[36] Mercury is a volatile compound at the typical operating temperatures of the air pollution control devices used by cement kilns (i.e., baghouses and electrostatic precipitators). Most of the mercury exits the cement kiln system as volatile stack emissions, with a smaller fraction partitioning to the clinker product or cement kiln dust. Thus, in general, there is a proportional relationship between the mercury concentration in the hazardous waste and stack emissions of mercury (i.e., as the mercury concentration in hazardous waste increases (assuming mercury concentrations in other inputs such as raw materials and fossil fuels (coal) and other factors remain constant), emissions of mercury will correspondingly increase).

[37] EPA's dataset for mercury for cement kilns is not like the RCRA compliance test emission data for other HAPs where each source designs the compliance test such that the operating limits it establishes account for the variability it expects to encounter during its normal operations (e.g., semi- and low volatile metals). This is not necessarily true for mercury for cement kilns as shown in our analysis of our mercury dataset at proposal. See 69 FR at 21251.

[38] USEPA, ''Technical Support Document for HWC MACT Standards, Volume III: Selection of MACT Standards,'' Sections 7.5.3 and 11.0, September 2005.

E. Mercury Data for Lightweight Aggregate Kilns

Comment: One commenter, an owner and operator of seven of the nine operating lightweight aggregate kilns, states that the mercury dataset used by EPA at proposal is a limited and unrepresentative snapshot of performance of their seven kilns. To support their position that the snapshot emissions data are unrepresentative, the commenter submitted eight months of data documenting levels of mercury in hazardous waste fuels fired to their lightweight aggregate kilns.[39]

Response: We agree with the commenter that their mercury data submission is more representative than those used at proposal. As discussed in a notice for public comment sent directly to certain commenters,[40] the commenter-submitted dataset documents the day-to-day levels of mercury in hazardous waste fuels fired to Solite Corporation's Arvonia kilns between October 2003 and June 2004. The dataset consists of over 310 measurements of the concentration in mercury in hazardous waste. Each measurement represents the mercury concentration of the burn tank used to fire the kiln over the course of a day's operation (or longer period). In comparison, the data used to support the proposed floor level consisted of a smaller dataset of 15 test conditions.

The nature of the mercury data submitted by the commenter is the same as we received for the cement kiln category discussed in the preceding section. For similar reasons, we accept the more comprehensive commenter-submitted dataset as one that better shows the range of performance and variability in performance for these lightweight aggregate kilns. One notable difference, however, is that the commenter submitted mercury data only for its company (representing seven of nine lightweight aggregate kilns). Thus, we received no data documenting day-to-day levels of the concentration of mercury in hazardous waste fuels for the other two lightweight aggregate kilns owned by a different company. For these two lightweight aggregate kilns, we continue to use available data available in our database.[41]

Comment: One commenter opposes the use of the commenter-submitted mercury data because EPA would be uncritically accepting a limited and select data set from a commenter with a direct interest in the outcome of its use. Instead, the commenter suggests EPA use its section 114 authority to obtain all data that are available, not just the data selected by that commenter.

Response: We disagree that we uncritically accepted the commenter-submitted mercury data. The reason the commenter submitted data collected between October 2003 and June 2004 is that the facility was, prior to October 2003, in the process of upgrading its on-site analysis equipment. One outcome of this laboratory upgrade was its capability to detect mercury in hazardous waste at lower concentrations. Prior to the upgrade, the facility's on-site laboratory was capable of detecting mercury in the hazardous waste at a concentration of approximately 2 ppmw, which is a level such that the vast majority of measurements would neither be detected nor useful for identifying best performers and their level of performance.[42] The June 4, 2004 cutoff date represents a practicable date that measurements could still be incorporated into the commenter's public comments to the proposed rule, which were submitted on July 6, 2004. Finally, the commenter provided all waste fuel measurements during this period and states reliably that no measurements made during this period were selectively excluded.[43]

We also reject the commenter's suggestion that we use our authority under section 114 of the Clean Air Act to obtain additional hazardous waste mercury concentration data from the facility. There is no obligation for us to gather more performance data, given that the statute indicates that we are to base floor levels on performance of sources ''for which the Administrator has emissions information.'' Section 112(d)(3)(A); *CKRC*, 255 F. 3d at 867. In addition, given our concerns about the usefulness of measurements with high detection limits discussed above, the collection of additional data prior to the laboratory upgrade would not be productive. When balanced against the expenditure of significant resources, both in time and level of effort, to collect several more months of data, we conclude that obtaining additional mercury measurements is unnecessary because the available eight months of data—including over 310 individual measurements—represent a significant amount of data that we judge to be adequately reflective of the source's performance and variability in performance.

F. Incinerator Database

Comment: Commenters state that many of the top performers (e.g., 3011, 3015, 3022, 349) dilute emission concentrations in the stack by burning natural gas to initiate reactive waste (e.g., explosives, inorganic hydrides) or to decontaminate inert material. Commenters do not believe these units should be considered ''representative'' of the overall incinerator source category and should not be used to establish standards for incinerators combusting primarily organic wastes.

Response: Source 3022 has closed and has been removed from the database. Emission data from source #3015 (ICI explosives) has been excluded for purposes of calculating the particulate matter floor because the test report indicates this source was primarily feeding scrap metal, which we conclude to be an atypical waste stream from a particulate matter compliance perspective.[44]

The sources identified by the commenter are among the best performing sources in two instances. Source 3011 is the second ranked best performer for the particulate matter standard. This source is among the best performers for particulate matter because it uses a state-of-the art baghouse that is equipped with Teflon coated bags. There is no evidence to suggest that this source was diluting its particulate matter emissions. We acknowledge that we do not have ash feed data for the test conditions that were used in the particulate matter standard analysis. However, this source had the third and fourth highest metal feed control levels among all the sources used in the MACT analysis for the semivolatile and low volatile metal

[39] See docket items OAR–2004–0022–0270 and OAR–2004–0022–0333.

[40] See docket item OAR–2004–0022–0370.

[41] Unlike that is available for the commenter's kilns, we note that we have compliance test emissions data, which is designed to maximize operating parameters (e.g., HAP feedrates) that affect emissions, for the other two kilns. For additional discussion on how these data were analyzed in conjunction with the commenter-submitted data, see the document ''Technical Support Document for HWC MACT Standards, Volume III: Selection of MACT Standards,'' Section 7.5.3 and 12.0, September 2005.

[42] A mercury concentration of 2 ppmw in the hazardous waste corresponds to a stack concentration of approximately 200 μg/dscm, which is well above the interim standard of 120 μg/dscm for mercury.

[43] See also docket items OAR–2004–0022–0233 and OAR–2004–0022–0367.

[44] We did not have ash feed data for source 3015. We acknowledge that ash feed control levels do not significantly affect particulate matter emissions from sources equipped with baghouses. However, in this instance, the particulate matter emissions from this source may not be representative because this source may not have been feeding any appreciable levels of ash given that scrap metal feeds generally would not contribute to the ash loading into the baghouse.

standards.[45] We therefore conclude that it is appropriate to include this source in the MACT analysis that determines the relevant best performers for particulate matter.

Source 349 is the eighth ranked (out of 11) best performer for the particulate matter standard. We acknowledge that the ash feed level for this source is lower than most incinerators equipped with baghouses. However, particulate matter emissions from sources equipped with baghouses are not significantly affected by the ash inlet loading to the baghouse.[46] This is further supported by the fact that this source is ranked eighth among the best performers. We conclude source 349 is a best performer not because of its relatively low ash feed level, but rather because it is equipped with a well designed and operated baghouse. It is therefore appropriate to include this source in the MACT analysis.

Comment: Commenters state that source 341 should not be considered in the MACT analysis because it is a small laboratory waste burner that processes only 900 lbs/hr of waste. Commenters claim that more than 80 percent of the waste profile is non-hazardous waste.

Response: We approached this comment by asking if it would be appropriate to create a separate subcategory for source 341. We conclude it is not necessary to subcategorize hazardous waste incinerators based on the size of combustion units. This is because the ranking factors used to identify the relevant best performing sources are normalized in order to remove the influence that combustion unit size would otherwise have when identifying best performing sources. See part 4 section III.D below. Air pollution control system types (a ranking factor for particulate matter) are generally sized to match the corresponding volumetric gas flow rate in order to achieve a given control efficiency. The size of the combustor therefore does not influence a source's ability to achieve a given control efficiency. System removal efficiency and hazardous waste feed control MTECs (ranking factors used by the SRE/Feed methodology as described in part 4 section III.B below) are also not influenced by the size of the combustor.[47]

Emission limitations are similarly normalized to remove the influence of combustion unit size by expressing the standards as emission concentration limits rather than as mass emission rate limits. See section III.D. This is illustrated in the following example. Assume there are two cement kilns side by side with similar designs, the only difference being one is twice the size of the other, producing twice as much clinker. They both have identical types of air pollution control systems (the larger source is equipped with a larger control device that is appropriately sized to accommodate the larger volumetric gas flow rates and achieves the same control efficiency as the smaller control device). If we were to assess performance based on HAP mass emission rates (e.g., pounds per hour), the smaller source would be the better performer because its mass emission rates would be half of the mass emission rate of the larger source, even though they both are achieving the same back-end control efficiency. Emission concentrations, on the other hand, are calculated by dividing the HAP mass emission rate (e.g., pounds per hour) by the volumetric gas flowrate (e.g., cubic feet per hour). In the above example, both sources would have identical HAP emission concentrations (the larger source has twice the mass emission rate, but twice the volumetric gas flow rate), accurately reflecting their identical control efficiency. Emission concentrations normalize the size of each source by accounting for volumetric gas flowate, which is directly tied to the amount of raw material each source processes (and subsequently the amount of product that is produced). This is a reason we point out that normalization eliminates the need to create subcategories based on unit size. See part four section III.D.

Further, it would be difficult to determine an appropriate minimum size cutoff in which to base such a subcategorization determination. Such a subcategorization scheme could also yield nonsensical floor results, as was the case when we assessed subcategorizing commercial incinerators and on-site incinerators.[48]

We have identified source 341 as the best performing source for particulate matter and low volatile metals. It is the single best performing source for these standards because it is equipped with a state-of-the-art baghouse.[49] This source, which simultaneously feeds hazardous and nonhazardous wastes, conducted several emission tests that reflected different modes of operation. The amount of nonhazardous waste that was processed in the combustion unit varied across test conditions. We could not ascertain the exact amount of hazardous waste processed in the test condition that was used in the MACT analysis for low volatile metals because the test report stated the wastes that were processed were a mixture of hazardous and nonhazardous wastes, although we estimate that at least 26% of the waste processed was nonhazardous.[50] We note that we are aware of several other incinerators that processed nonhazardous waste at levels greater than 26 percent during their emission tests. We therefore do not believe this to be atypical operation that warrants subcategoriztion.

Moreover, the fact that this source was feeding nonhazardous wastes does not result in atypically low hazardous waste low volatile metal feed control levels, as evidenced by the relative feed control ranking for this source of thirteenth among the 26 sources assessed in the MACT analysis. It also has the highest normalized hazardous waste feed control level among the best performing sources, and has the fifth best low volatile metal system removal efficiency among those same 26 sources. We repeat that this source is being identified as the best performing source primarily because it is equipped with a highly efficient baghouse, not because it is feeding low levels of HAP metals attributable to its hazardous waste.

Furthermore, this source is not the lowest emitting source in the database. There are two sources with similar, but slightly lower low volatile metal compliance test emissions (one commercial incinerator and one onsite, non-commercial incinerator). This provides further evidence that the

[45] We note that feed control levels are normalized based on each source's gas flowrate. The feed control levels used to assess performance are therefore appropriate indicators that directly address whether emissions of these pollutants are in fact being diluted by the combustion of natural gas.

[46] See USEPA, ''Technical Support Document for the HWC MACT Standards, Vol I: Description of Source Categories,'' September 2005, Section 3.2.2, for further discussion.

[47] System removal efficiency is a measure of the amount of the pollutant that is removed from the flue combustion gas prior to being emitted and likewise is not influenced by the size of the combustor because back-end control systems are sized to achieve a given performance level. Hazardous waste feed control levels are normalized to remove the influence of combustor size by dividing each source's mass feed rate by its volumetric gas flowrate.

[48] See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards'', September 2005, Section 4.3.2 for further discussion.

[49] See USEPA, ''Final Technical Support Document for the HWC MACT Standards, Volume I: Description of Source Categories'', September 2005, Section 3.2.1, for further discussion.

[50] See USEPA, ''Final Technical Support Document for the HWC MACT Standards, Volume I: Description of Source Categories'', September 2005, Section 2.1 for further discussion.

emissions from this source appropriately represent emissions of a relevant best performing source.

Regarding the particulate matter standard, source 341 does not have atypically low ash feed rates as compared to other sources equipped with baghouses. Out of the nine best performing particulate matter sources for which we have ash feed information, this source ranks fourth (a ranking of one is indicative of the lowest ash feed rate). Nonetheless, as previously discussed, particulate matter emissions from sources equipped with baghouses are not significantly affected by the ash inlet loading to the baghouse. We note that particulate matter emissions from the second and third best performing source are not significantly different from this source, providing further evidence that this source is representative of the range of emissions exhibited by other well designed and operating incinerators equipped with baghouses.[51]

Comment: Commenters state that sources 3018 and 3019 are identified as best performers for mercury emissions for incinerators. After evaluating the trial burn plans for these sources, the commenter believes the data should not be used to calculate the MACT floor because the spiking rate for mercury was extremely low for a compliance test. The ranking for feedrate is therefore unrepresentative. The commenter suggests that these test results should be characterized as ''normal''.

Response: We have verified that the emission tests performed for sources 3018 and 3019 reflect the upper range of mercury emissions that are not to be exceeded by these sources, and that their spiked mercury feed rates were back-calculated from a risk assessment. We therefore conclude that we properly characterized these emissions as compliance test emissions data because they reflect the emissions resulting from the upper bound of hazardous waste mercury feedrates from these sources.[52] Consequently, these data are properly included with the other data used to calculate floor standards for mercury for incinerators.

Comment: Commenters state the trial burn plan for sources 3018 and 3019 describes these units to be of similar design. Thus the difference in results between these two similar sources is indicative of additional variability above and beyond the run-to-run variability and should be assessed if the data are deemed usable at all.

Response: We conclude both of these sources are in fact unique sources that should be assessed as individual sources for purposes of the MACT analysis. Although these sources are of similar design, we do not believe they are identical, in part because: (1) The facility itself conducted separate emission tests for the two units (rather than trying to avail itself of the 'data in lieu' option, which could save it the expense of a second compliance test, the obvious inference being that the source or regulatory official regards the two units as different); and (2) discussions with facility representatives indicated these units are similar, but not identical.[53] As a result, it would be inappropriate to assess emissions variability by combining the emissions of these two sources into one test condition given they are not identical units.

Comment: Commenters state that emissions data from source 327 should not be used to calculate dioxin/furan and mercury floors because they claim the carbon injection system did not appear to function properly during the test.

Response: We agree with the commenters. We have determined that this source encountered problems with its carbon injection system during the emissions test from which the data were obtained and subsequently used in EPA's proposed MACT analysis. We have also verified that this source did not establish operating parameter limits for the carbon injection system as a result of this test.[54] We therefore have excluded this mercury and dioxin data from the MACT analysis, and have instead used emissions data from an older test condition to represent this source's emissions.

Comment: Commenters state that the emissions data from source 3006 were based on a miniburn to determine how close the unit was to achieving the interim MACT standards. The commenter questions whether these data should be used for purposes of calculating MACT standards.

Response: The fact that a source conducts a voluntary emissions test (e.g., a miniburn) to determine how close it is operating to upcoming emission standards does not necessarily lead us to conclude that the emission data are inappropriate for purposes of calculating MACT standards. However, since proposal, we have determined that this source did not measure cadmium emissions during this emissions test. As a result, we conclude the semivolatile metal emissions data from this source should not be used in the MACT standard calculation for semivolatile metals because the data do not represent the source's combined emissions of lead and cadmium.

II. Affected Sources

A. Area Source Boilers and Hydrochloric Acid Production Furnaces

Comment: Five commenters state that the area sources subject to the proposed rule are negligible contributors to 112(c)(6) HAP emissions and should not be subject to major source standards for 112(c)(6) HAP. Commenters note that requiring compliance with MACT for 112(c)(6) HAP and RCRA for other toxic pollutants is more complicated and burdensome for sources than complying only with RCRA. Although an area source can choose to become regulated as a major source in order to reduce some RCRA requirements, they would become subject to more onerous emissions limits under Subpart EEE and the other MACT requirements.

One of these commenters states that subjecting an area source to major source standards under 112(c)(6) sends a negative message to industry that EPA does not value emissions reduction and/or chemical substitution, or other methods used by area sources to achieve that status. EPA is no longer providing any incentive for sources to take such difficult yet environmentally beneficial steps to become an area source. Imposing Title V permitting requirements on an entire facility that operates as an area source of hazardous air pollutants (HAPs) will impose an unfair and undue burden on the facility.

Another of these commenters states that section 112(c)(6) requires in pertinent part that EPA list categories and subcategories of sources assuring that sources accounting for not less than 90% of the aggregate emissions of each pollutant (specified in 112(c)(6)) are subject to standards under Section 112(d)(2) or (d)(4). In 1998, EPA published a notice identifying the list of source categories accounting for the section 112(c)(6) HAP emissions and to be regulated under section 112(d) to meet the 90% requirement. (63 FR 17838) At the time, EPA acknowledged that MACT standards for a number of the source categories had not yet been promulgated, and stated that when the

[51] Source 341 particulate matter emissions, after accounting for variability, equated to 0.0015 gr/dscf. The second and third ranked particulate matter sources emissions, considering variability, equated to 0.0018 and 0.0023 gr/dscf, respectively.

[52] See February 11, 2005 memo to docket titled ''October 20 Conference Call with Squibb Manufacturing regarding Source # 3018 and 3019''.

[53] Also see February 11, 2005 memo to docket titled ''October 20 Conference Call with Squibb Manufacturing regarding Source # 3018 and 3019''.

[54] See July 15, 2005 memo to docket titled ''Telephone Conversation with Utah DEQ Regarding 2001 Clean Harbor Emission Test.''

regulations for each of those categories are developed, EPA will analyze the data specific to those sources and determine, under Section 112(d), in what manner requirements will be established. EPA also stated that:

''Some area categories may be negligible contributors to the 90% goal, and as such pose unwarranted burdens for subjecting to standards. These trivial source categories will be removed from the listing as they are evaluated since they will not contribute significantly to the 90% goal.'' (63 FR 17841)

The commenter believes the ''two or fewer'' area source boilers identified by EPA in the present rulemaking are ''negligible contributors'' to the 90% goal and therefore, should not be required to adopt the same MACT emission limitations and requirements as major sources of the 112(c)(6) pollutants. The commenter believes EPA's decision to subject area source boilers and hydrochloric acid production furnaces is incorrect, unsupported by the administrative record, and therefore arbitrary and capricious.

One commenter states that, if EPA regulates area sources, it should significantly reduce the administrative burden for area sources by: exempting them from Title V provisions for Subpart EEE requirements; exempting them from compliance with the General Provisions of 63 Subpart A; limiting them to a one-time comprehensive performance test; or limiting other applicable requirements.

Response: We continue to believe that boiler and hydrochloric acid furnace area sources warrant regulation under the major source MACT standards for mercury, dioxin/furan, carbon monoxide/hydrocarbons, and destruction and removal efficiency pursuant to section 112(c)(6).

As discussed at proposal (69 FR at 21212), section 112(c)(6) of the CAA requires EPA to list and promulgate section 112(d)(2) or (d)(4) standards (i.e., standards reflecting MACT) for categories and subcategories of sources emitting seven specific pollutants. Five of those listed pollutants are emitted by boilers and hydrochloric acid production furnaces: mercury, 2,3,7,8-tetrachlorodibenzofuran, 2,3,7,8-tetrachlorodibenzo-p-dioxin, polycyclic organic matter, and polychlorinated biphenyls.

As discussed below, EPA must assure that source categories accounting for not less than 90 percent of the aggregated emissions of each enumerated pollutant are subject to MACT standards (and of course is not prohibited from requiring more than 90 percent of aggregated emissions to be controlled by MACT standards). Congress singled out the pollutants in section 112(c)(6) as being of "'specific concern'" not just because of their toxicity but because of their propensity to cause substantial harm to human health and the environment via indirect exposure pathways (i.e., from the air through other media, such as water, soil, food uptake, etc.). Furthermore, these pollutants have exhibited special potential to bioaccumulate, causing pervasive environmental harm in biota and, ultimately, human health risks.

Section 112(c)(6) of the CAA requires EPA to list categories and subcategories of sources of seven specified pollutants to assure that sources accounting for not less than 90 percent of the aggregate emissions of each such pollutant are subject to standards under CAA section 112(d)(2) or 112(d)(4). In 1998, EPA issued the list of source categories pursuant to section 112(c)(6), and that list is published at 63 Fed. Reg. 17838, 17849, Table 2 (April 10, 1998).

In the 1998 listing, EPA identified the following three subcategories of the HWC source category that emit one or more of the seven section 112(c)(6) pollutants: (1) Hazardous waste incinerators—(emit mercury, dioxin, furans, polycyclic organic matter (POM) and polychlorinated biphenyls (PCBs)); (2) Portland cement manufacture: hazardous waste kilns—(emit mercury, dioxin, furans, and POM); and (3) lightweight aggregate kilns: hazardous waste kilns—(emit dioxin, furans, and mercury). These three subcategories are all subject to today's rule, which is issued pursuant to CAA section 112(d)(2). As explained below, the HWC NESHAP effectively controls emissions of the identified section 112(c)(6) pollutants from the identified subcategories. Accordingly, EPA considers the sources in these three subcategories as being ''subject to standards'' for purposes of section 112(c)(6).

Specifically, with regard to hazardous waste-burning incinerators, cement kilns, and lightweight aggregate kilns, EPA is adopting in this final rule MACT standards for mercury and dioxins/furans. EPA has already adopted MACT standards for control of POM and PCBs emitted by these sources in the 1999 rule, which standards were not reopened or reconsidered in this rulemaking. These standards are the CO/HC standards, which in combination with the Destruction Removal Efficiency (DRE) requirement, assure that these sources operate continuously under good combustion conditions which inhibit formation of POM and PCBs as combustion by-products, or destroy these HAP if they are present in the wastes being combusted.[55] See discussion in Part Four, Sections V.A and V.B of this preamble.

The HWC NESHAP also applies to hazardous waste-burning boilers and hydrochloric acid production furnaces. In particular, for these boilers and furnaces, this rule addresses emissions of dioxin/furan, mercury, POM and PCBs either through specific numeric standards for the identified HAP, or through standards for surrogate pollutants which control emissions of the identified HAP.

We estimate that approximately 620 pounds of mercury are emitted annually in aggregate from hazardous waste burning boilers in the United States.[56] Also, we estimate that hazardous waste burning boilers and hydrochloric acid production furnaces emit in aggregate approximately 2.3 and 0.2 grams TEQ per year of dioxin/furan, respectively. Controlling emissions of these HAP from area sources consequently reduces emissions of these HAP through application of MACT standards. We note that only major source boilers and hydrochloric acid furnaces are subject to the full suite of subpart EEE emission standards.[57] Section 112(c)(3) of the CAA requires us to subject area sources to the full suite of standards applicable to major sources if we find ''a threat of adverse effects to human health or the environment'' that warrants such action. We cannot make this finding for area source boilers and halogen acid production furnaces. 69 FR at 21212. Consequently, as proposed, area sources in these categories would be subject only to the MACT standards for mercury, dioxin/furan, and polycyclic

[55] Courts have repeatedly upheld EPA's authority under CAA section 112(d) to use a surrogate to regulate hazardous pollutants if it is reasonable to do so. See, e.g., *National Lime*, 233 F. 3d at 637 (holding that EPA properly used particulate matter as a surrogate for HAP metals).

[56] See USEPA ''Technical Support Document for HWC MACT Standards, Volume V: Emission Estimates and Engineering Costs,'' September, 2005, Section 3.

[57] We note that as a practical matter, however, the same MACT standards apply to both major and area source HCl production furnaces. This is because major sources are subject to the following standards: CO/HC, DRE, and total chlorine. Because the CO/HC and DRE standards are surrogates to control dioxin/furan, and the total chlorine standard is a surrogate to control metal HAP, area sources are subject to the same standards that address dioxin/furan, polycyclic organic matter, polychlorinated biphenyls, and mercury. There is an enforcement difference between the requirements, however. For area sources, an exceedance of the total chlorine standard (or failure to ensure that compliance is maintained) relates to control of mercury only while for a major source, the same failure relates to control of mercury, other metal HAP, and HCl and chlorine.

organic matter and polychlorinated biphenyls (through the surrogate standards for carbon monoxide/hydrocarbons and destruction and removal efficiency) to control the HAP enumerated in section 112(c)(6). RCRA standards under Part 266, Subpart H for particulate matter, metals other than mercury, and hydrogen chloride and chlorine gas would continue to apply to these area sources unless an area source elects to comply with the major source standards in lieu of the RCRA standards. See § 266.100(b)(3) and the revisions to §§ 270.22 and 270.66.

Commenters refer to the ''two or fewer'' potential area source boilers we identified at proposal as ''negligible contributors'' and, therefore, conclude that these area sources should not be subject to major source standards for emission of these HAPs. Commenters did not quantify the amount of emissions from area sources, and did not even identify how many area sources are at issue. We do not know how many boilers and hydrochloric acid furnaces are area sources. We apparently underestimated the number given that four companies commented on the proposed rule saying that area sources should not be subject to major source standards for mercury, dioxin/furan, PCBs, and polycyclic organic matter, and one of those companies indicates it operates multiple area sources. Consequently, we continue to believe that area sources in these categories may have the potential to emit more than negligible levels of these HAP.

We also note that the major source standards are tailored to minimize the compliance burden for sources that emit low levels of HAP. Commenters raise concerns about applying the major source standards for HAP enumerated in section 112(c)(6) to liquid fuel boiler area sources. The emission standard compliance burden for liquid fuel boilers that have the potential to emit only low levels of mercury, dioxin/furan, and polycyclic organic matter is minimal. For example, sources that emit low levels of mercury because their feedstreams have low levels of mercury can elect to comply with the mercury emission standard by documenting that the mercury in feedstreams will not exceed the standard assuming zero removal by emission control equipment. We note that 75% of the liquid fuel boilers in our data base, and the two boilers cited by commenters, do not have emission control devices.

The compliance burden for the major source standards for dioxin/furan and for the surrogates to control other polycyclic organic matter—carbon monoxide/hydrocarbons and destruction and removal efficiency (DRE)—should also be minimal for area source liquid fuel boilers. The dioxin/furan standard applicable to the 90% of liquid fuel boilers with wet or no air pollution control equipment is compliance with the carbon monoxide/hydrocarbon standard and the DRE standard. Liquid fuel boilers already comply with these same standards under RCRA. The surrogate standards to control other polycyclic organic matter are also the carbon monoxide/hydrocarbon and DRE standards. Finally, we note that the DRE requirement under Subpart EEE is less burdensome than the DRE requirement under RCRA. Under Subpart EEE, a source needs to conduct a one-time only DRE test, provided that design and operation does not change in a manner than could adversely affect DRE. Under RCRA, the DRE test must be conducted each time the RCRA permit is renewed.

The incremental compliance burden associated with the other Subpart EEE major source requirements, such as the operations and maintenance plan, the startup, shutdown, and malfunction plan, operator training, and the automatic waste feed cutoff system should also be minimal for liquid fuel boilers without an emission control device. In addition, most of the requirements are either identical to or very similar to requirements under RCRA with which these area sources are already complying.[58]

B. Boilers Eligible for the RCRA Low Risk Waste Exemption

Comment: Several commenters state that EPA should exempt those boilers that qualify as Low Risk Waste Exemption (LRWE) burners under the RCRA Boiler and Industrial Furnace Rule at § 266.109 from the MACT particulate matter and destruction and removal efficiency (DRE) standards because EPA has not: (1) Made a demonstration that the data used to provide the exemption to low risk burners under RCRA is no longer valid; or (2) established in the affirmative that regulating these units will provide any benefit to human, health and the environment. Commenters believe that regulating LRWE units under Subpart EEE is unnecessary and inconsistent with RCRA subtitle C and more importantly, appears to be controlling LRWE units for control's sake.

Commenters also state that EPA has not properly addressed the requirements of CAA section 112(n)(7) regarding the inconsistency between the requirements for Low Risk Waste Exempt (LRWE) units under RCRA and those of Subpart EEE. The purported purpose of section 112(n)(7) is to allow EPA to avoid imposing additional emission limitations on a source category subcategory when such limitations would be unnecessary and duplicative.

In addition, commenters state that the costs associated with this MACT are much more than improved feed control or better back-end control. This proposed rule also requires substantial dollar investment in improved data acquisition, computer controls and recordkeeping systems, performance testing, training, development of plans, and other regulatory requirements.

Response: Boilers and hydrochloric acid production furnaces that currently qualify for the RCRA § 266.109 low risk waste exemption are not exempt from Subpart EEE under the final rule.

The Administrator does not have the authority under CAA section 112(d) to exempt sources that comply with RCRA § 266.109. Indeed, there is no necessary connection between the two provisions, since one is technology-based and the other is risk-based. CAA section 112(d)(2) requires the Administrator to establish technology-based emission standards, standards that require the maximum degree of reduction in emissions that is deemed achievable. Although section 112(d)(4) gives the Administrator the authority to establish health-based emission standards in lieu of the MACT standards for pollutants for which a health threshold has been established, we cannot use that authority to develop health-based standards for sources that comply with RCRA § 266.109 because those sources emit HAP for which a health threshold has not been established.

The final rule complies fully with CAA section 112(n)(7) by coordinating applicability of the RCRA and CAA requirements and precluding dual requirements. For example, RCRA requirements that are duplicative of MACT requirements will be removed from the RCRA operating permit when the permitting authority issues a certification of compliance after the source submits a Notification of Compliance.

We also note that the MACT standards are tailored to impose

[58] RCRA, 40 CFR Part 264 requirements that are similar to MACT requirements include: the general inspection requirements and personnel training requirements of Subpart B; the preparedness and prevention requirements of Subpart C, including design and operation of facility, testing and maintenance of equipment, and access to communications or alarm system; the contingency plan and emergency procedures requirements of Subpart D; and the operating requirements and monitoring and inspection requirements of Subpart O.

minimal burden on sources that have low emissions of HAP. The particulate matter emission standard and associated testing can be waived (similar to the § 266.109 exemption) for boilers that elect to document that emissions of total metal HAP do not exceed the limits provided by § 63.1206(b)(14). Hydrochloric acid production furnaces are not subject to a particulate matter emission standard.

The compliance burden with the destruction and removal efficiency (DRE) standard is also minimal given that it is a one-time test, provided that the source does not change its design or operation in a manner that would adversely affect DRE. In addition, the compliance burden for sources with low levels of metals in their feedstreams is minimal. Sources can document compliance with the metals emission standards by assuming all metals in the feed are emitted (i.e., by assuming zero system removal efficiency). Under this procedure, boilers burning relatively clean wastes are not required to conduct a performance test to document compliance with the metals emission standards.

Further, we note that the MACT standard to control organic HAP emissions other than dioxin/furan is the same as the RCRA standard—demonstrating good combustion conditions by complying with a carbon monoxide standard of 100 ppmv.

Finally, we note that the ancillary requirements under MACT (e.g., personnel training; operating and maintenance plan; startup, shutdown, and malfunction plan) should not pose substantially higher costs than similar requirements under RCRA. See response to comment in Section A above. To the extent that compliance costs increase, we have accounted for those costs in our estimates of the cost of the final rule.[59]

C. Mobile Incinerators

Comment: A mobile incinerator used as a directly-fired thermal desorption unit at a Superfund remediation site should not be an affected source under this rule.

Response: EPA is not determining or changing the applicability of any hazardous waste burning unit under today's rule. A combustion unit that treats hazardous waste and meets the definition of incinerator at 40 CFR 260.10 is an affected source under this rule. 40 CFR part 63 also defines a source as any building, structure, facility, or installation which emits or may emit any air pollutant. A mobile incinerator at a remediation site meets this definition.

Comment: One commenter states that a subcategory with different standards must be created for mobile incinerators, or the standards for incinerators must be calculated using actual emissions data from mobile units.

Response: EPA did not have any emissions data from mobile incinerators in the database for the proposed rule. That data base was developed over many years with ample opportunity for public comment. We developed a data base for incinerators to support the 1996 proposed rule (61 FR 17358) and noticed that data base for public comment on January 7, 1997 (64 FR 52828). We updated that data base in July 2002, and noticed the revised data base for public comment (67 FR 44452). We used that revised data base to support the proposed rule. We did not receive comments providing data for mobile incinerators as a result of either public notice.

One commenter on the proposed rule provided a summary of emissions data from one test at a mobile incinerator. The commenter suggested that the data support its view that its mobile incinerator is unique and that EPA should consider subcategorizing incinerators according to mobile incinerators versus other incinerators. We analyzed these data and conclude that the final standards are readily achievable by this source. Moreover, as explained elsewhere, EPA's approach to assess the need for subcategorization is to apply a statistical test to determine whether the emissions data are statistically different from the remaining group. Given that owners and operators of mobile incinerators have not provided emissions data prior to proposal, and that the commenter provides summarized data for only one mobile incinerator (which also indicate that the source can achieve the emission standards in the final rule); we are not compelled to gather additional information, particularly given our time constraints to promulgate the final rule under a court-ordered deadline.

Comment: In support of subcategorizing mobile incinerators, commenters state that mobile thermal treatment systems are substantially different from hazardous waste incinerators. They are much smaller in size, firing capacity rate, refractory lining, and operating temperatures. Most of them treat contaminated soil, so have very high particulate feedrate loading with high ash content, rapid kiln rotation rate, and counter-current flow design like cement kilns. This results in high particulate matter emissions. They operate only for a short duration at a site (usually less than 6 months), and have no flexibility with regard to their waste feed.

Response: We recognize that there is variability between various sources' with regard to size, capacity, operating temperatures etc., and so we applied a statistical test to assess the need of subcategorization, as has been discussed above. The emissions data provided by the commenter also indicate the source can achieve the final standards. The soil entrained in desorber off-gases of mobile incinerators has a relatively large particle size, and is very easy to capture with conventional particulate control systems (such as a fabric filter) used by the incinerators.

Comment: Since mobile incinerators are relocated from site to site, the new source standard should not apply based on the erection date of the mobile unit.

Response: We are not changing the applicability of a new or reconstructed source designation in this rulemaking. The relocation issue is addressed in the definition of ''construction'' in 40 CFR Section 63.2, which states: ''Construction does not include the removal of all equipment comprising an *affected source* from an existing location and the reinstallation of such equipment at a new location * * *'' (emphasis added). Therefore, the relocation of an existing Subpart EEE affected source, such as a mobile incinerator, would not result in that mobile incinerator becoming a ''new'' source. Keep in mind also that the relocation exemption only applies to affected sources. If a mobile incinerator is relocated from an R&D facility (where the unit is not an affected source per Table 1 to Section 63.1200) to a location where the mobile incinerator would become an affected source, the relocation exemption within the definition of ''construction'' would not apply and the mobile incinerator would be a ''new'' source. Also, with regard to leased sources, the owner/operator of the facility is responsible for all affected sources operating at his/her facility regardless of whether the sources are owned or leased. The owner or operator should obtain from the leasing company all relevant information pertaining to the affected source in order to be able to demonstrate that the affected source is operating in compliance with the appropriate standards.

III. Floor Approaches

In this section we discuss comments addressing methodologies used in this rule for determining MACT floors. We address comments relating both to

[59] USEPA ''Technical Support Document for HWC MACT Standards, Volume V: Emission Estimates and Engineering Costs,'' September, 2005.

general, overarching issues and to the specific methodologies used in the rule. Our most important point is that the methodologies EPA selected reasonably estimate the performance of the best performing sources by best accounting for these sources' total variability.

A. Variability

1. Authority To Consider Emissions Variability

Comment: Many commenters concur with our approach to account for emissions variability while several commenters believe that our approach does not adequately account for emissions variability. See discussions on separate topics below. One commenter, however, states that use of variability factors (however derived) is inherently unlawful and arbitrary and capricious. The commenter notes that, because floors for existing sources must reflect the ''average'' emission level achieved by the relevant best performing sources, they cannot reflect any worse levels of performance from the best performers. Indeed, the argument is that the Clean Air Act already accounts for variability by requiring EPA to base existing source floors on the average emission level achieved by the best performing sources.

The commenter continues by stating that EPA has added variability factors both to each individual source's performance and to the collective performance of the alleged best performers, in each case purporting to find an emission level that the individual or group would meet ninety-nine times out of 100 future emission tests. Thus, EPA ignores sources' measured performance in favor of the theoretical worst performance that might ever be expected from them. By looking to the best performers' worst performance rather than their average performance, EPA would set weaker floors than the Clean Air Act allows.

In addition, the commenter notes that EPA's approach to account for emissions variability is arbitrary and capricious because EPA never explains why it chose the 99th percentile for its variability adjustments rather than some other percentile.

Finally, the commenter notes that EPA appears to indicate that its variability analysis would either be applied to variation between sources or would affect EPA's statistical analysis of the variation between sources. The commenter states that any attempt by EPA to add a variability factor to adjust for intersource variability is unlawful and arbitrary and capricious.

Response: Our response explains our approach to estimating best performing sources' variability and addresses the following issues: (1) Considering the variability in each source's performance is necessary to identify the best performing sources and their level of performance; (2) EPA reasonably considered variability in ranking sources to identify the best performers and in considering the range of best performing sources' performance over time to identify an emission level that the average of those sources can achieve; (3) considering variability at the 99th percentile level is reasonable; (4) considering intersource variability by pooling run-to-run variability is appropriate; and (5) compliance test conditions do not fully reflect all of best performing sources' performance variability.

a. *Variability Must Be Considered.* Variability in each source's performance must be considered at the outset in identifying the best performing sources. This is simply another way of saying that best performers are those that perform best over time (i.e. day-in, day-out), a reasonable approach. This approach not only reasonably reflects the statutory language, but also furthers the ultimate objective of section 112 which is to reduce risk from exposure to HAP. Since most of the risk from exposure to emissions from this source category is associated with chronic exposure to HAP (see Part 1 section VI above), assessing a source's performance over time by accounting for variability is reasonable and appropriate.

For similar reasons, variability must be considered in ascertaining these sources' level of performance. Floors for existing sources must reflect ''the average emission limitation achieved by the best performing 12 percent'' of sources, and for new sources, must reflect ''the emission control that is achieved in practice by the best controlled source.'' Section 112 (d) (3). EPA construes these requirements as meaning achievable over time, since sources are required to achieve the standards at all times. This interpretation has strong support in the case law. See *Sierra Club* v. *EPA*, 167 F. 3d 658, 665 (D.C. Cir. 1999), stating that ''EPA would be justified in setting the floors at a level that is a reasonable estimate of the performance of the 'best controlled similar unit' under the worst reasonably foreseeable circumstances. It is reasonable to suppose that if an emissions standard is as stringent as 'the emissions control that is achieved in practice' by a particular unit, then that particular unit will not violate the standard. This only results if 'achieved in practice' is interpreted to mean 'achieved under the worst foreseeable circumstances'; see also *National Lime Ass'n* v. *EPA*, 627 F. 2d 416, 431 n. 46 (D.C. Cir. 1980) (where a statute requires that a standard be 'achievable,' it must be achievable under ''the most adverse circumstances which can reasonably be expected to recur'');

The court has further indicated that EPA is to account for variability in assessing sources' performance for purposes of establishing floors, and stated that this assessment may require EPA to make reasonable estimates of performance of best performing sources. *CKRC*, 255 F. 3d at 865–66; *Mossville Environmental Action Now* v. *EPA*, 370 F. 3d 1232, 1242 (D.C. Cir. 2004)(maximum daily variability must be accounted for when establishing MACT floors).[60] Indeed, EPA's error in *CKRC* was not in estimating best performing sources' variability, but in using an unreasonable means of doing so. *CKRC*, 255 F. 3d at 866; *Mossville*, 370 F. 3d at 1241.

Since the emission standards in today's rule must be met at all times, the standards need to account for performance variability that could occur on any single day of these sources' operation (assuming proper design and operation). See *Mossville*, 370 F. 3d at 1242 (upholding MACT floor because it was established at a level that took into account sources' long term performance, not just performance on individual days). Moreover, since EPA's database consists of single data points (because there are no continuous emission monitors for HAPs in stack emissions), EPA must of necessity estimate long-term performance, including daily maximum performance, from this limited set of short term data.

b. *EPA Reasonably Considered Variability in Ranking Sources to Identify the Best Performers and in Considering the Range of Best Performing Sources' Performance Over Time to Identify an Emission Level that the Average of Those Sources Can Achieve.* (1) *Selecting Best Performing Sources.* Each of the floor methodologies used in the rule considers various factors in ranking which sources are the best performing. For each methodology, we therefore consider the quantifiable variability of

[60] See also *Chemical Manufacturers Ass'n* v. *EPA*, 870 F. 2d 177, 228 (5th Cir. 1989) (''The same plant using the same treatment method to remove the same toxic does not always achieve the same result. Tests conducted one day may show a different concentration of the same toxic than are shown by the same test the next day. This variability may be due to the inherent inaccuracy of analytical testing, (i.e. 'analytical variability,' or to routine fluctuations in a plant's treatment performance.'')

the ranking factors in determining which are the best performing sources. 69 FR at 21230–31. Specifically, we assess run-to-run variability (normally the only type of variability which we can quantify) of the factors used under each methodology to rank best performers. Where SRE/Feed is the ranking methodology, we thus assess run-to-run variability of hazardous waste HAP feedrate and of system removal efficiency. Where ranking is based on sources' emissions (the straight emissions methodology), we assess the run-to-run variability of emission levels. Where we use the air pollution control device methodology for ranking, we assess the run-to-run variability of emissions of the lowest-emitting sources (as we do for straight emissions) using the best air pollution control devices. For hydrochloric acid production furnaces, we assess the run-to-run variability of total chlorine system removal efficiency. *Id.*[61]

To account for run-to-run variability in these ranking factors, we rank sources by the 99th percentile upper prediction limit (UPL99). The UPL99 is an estimate of the value that the source would achieve in 99 of 100 future tests if it could replicate the operating conditions of the compliance test. *Id.* at 21231.

(2). *Assessing the Best Performers' Level of Performance Over Time*. Once we identify the best performing sources, we need to consider their emissions variability to establish a floor level that the average of the best performing sources can achieve day-in, day-out. There are two components of emissions variability that must be considered: run-to-run variability and test-to-test variability. Run-to-run emissions variability encompasses variability in individual runs comprising the compliance tests, and includes uncertainties in correlation of monitoring parameters and emissions, and imprecision of stack test methods and laboratory analyses. See 69 FR at 21232.[62] Test-to-test emissions variability is the variability that exists between multiple compliance tests conducted at different times and includes the variability in control device collection efficiency caused by testing at different points in the maintenance cycle of the emission control device[63], and the variability caused by other uncontrollable factors such as using a different stack testing crew or different analytical laboratory, and by different weather conditions (e.g., ambient moisture and temperature) that may affect measurements.

We are able to quantify run-to-run variability. We do so by applying a 99th percentile *modified* upper prediction limit to the averaged emissions of the best performing sources. *Id.* at 21233 and Technical Support Document Volume III section 7.2. The modified upper prediction limit accounts for run-to-run variability of the best performers by pooling their run variance (i.e., within-test condition variability).[64] See *Chemical Manufacturer's Ass'n* v *EPA*, 870 F. 2d 177, 228 (5th Cir. 1989) (upholding use of a variability factor derived, as here, by pooling the performance variability of the best performing plants). Using this approach, we ensure that the average of the best performing sources will be able to achieve the floor in 99 of 100 future performance tests, assuming these best performing sources could replicate their performance when attempting to operate under identical conditions to those used for the compliance test establishing the source as best performing. As just noted, we call this value the modified UPL 99.

The only instance in which we are able to quantify test-to-test variability (as noted above, the other significant component of total operating variability) is for fabric filters (baghouses) when used to control emissions of particulate matter. The modified UPL 99 in these instances reflects not only run-to-run variability, but test-to-test variability as well. That total variability is expressed by the Universal Variability Factor which is derived from analyzing long-term variability in particulate matter emissions for best performing sources across all of the source categories sources that are equipped with fabric filters. 69 FR at 21233. See also the discussion below in Section III.A.2.

Test-to-test variability must be accounted for in other instances as well, however. It follows that if the performance of most efficient fabric filters varies over time relative to particulate matter emissions, then so does their performance relative to the non-mercury metal HAP emissions. We also believe that particulate matter emissions variability from sources equipped with back-end controls other than fabric filters also exists, and is furthermore likely to be higher than what was calculated for fabric filters because there are more uncertainties associated with the correlations between operating parameter limits and control efficiency for these devices.[65] Again, it clearly follows that if the performance of these other control devices varies relative to particulate matter emissions (perhaps even more than what has already been quantified for fabric filters), then so does their performance relative to the non-mercury metal HAP emissions.

Although we cannot quantify this test-to-test variability, we can document its existence and its significance. We conducted two parallel analyses examining all situations where we had multiple test conditions for the sources ranked as best performing performing (examining separate pools for best performing sources under both the straight emissions and SRE/feed ranking methodologies). These analyses showed that these sources' emissions do in fact vary over time, sometimes significantly. In many instances sources had poorer system removal efficiencies and higher emission levels than those in the compliance test used to identify the source as best performing. We further projected that in many instances these best performing sources would not achieve their own UPL 99, the statistically determined prediction limit which captures 99 out of 100 future three-run test averages for the source, if they were to operate at the poorer system removal efficiency of its earlier test and used the federate of its later (best-performing) compliance test. This is significant because the UPL 99 reflects all of a source's run-to-run

[61] These ranking methodologies are discussed later in this section of the preamble, and in USEPA, ''Technical Support Document for HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 7.

[62] Analytic variability exists, and normally must be accounted for in establishing technology-based standards based on performance of the best-performing plants. *Chemical Manufacturers Ass'n* v. *EPA*, 870 F. 2d at 230.

[63] There are myriad factors that affect performance of an emissions control device. These factors change over time, including during the maintenance cycle of the device, such that it is virtually impossible to conduct future compliance tests under conditions that replicate the performance of the control device. See USEPA, ''Technical Support Document for HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 5.3.

[64] We note that the Agency used a statistical approach when proposing the NESHAP for Electric Utility Steam Generating Units. See memo from William Maxwell, EPA, to Utility MACT Project Files, entitled, ''Analysis of variability in determining MACT floor for coal-fired electric utility steam generating units,'' dated Nov. 26, 2003, Docket A–92–55.

[65] For example, sources equipped with electrostatic precipitators generally establish multiple operating limits to best assure compliance with the emission standard (feed control limits, power input limits, etc.). There is not an exact correlation between emission levels and operating levels because there are several factors that can affect the control efficiency of these air pollution control systems, such as variations in inlet loads, power inputs, spark rates, humidity, as well as particle resistivity. See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Sections 16 and 17.

variability. Failure to meet the UPL 99 thus shows both that further variability exists, namely test-to-test variability, and that it is a significant component of total variability. We obtained similar results when we projected best performing sources' performance based on each of these sources' overall system removal efficiency obtained by pooling the removal efficiencies of all of its tests. In many instances, moreover, these projected levels exceeded floor levels calculated by using the straight emissions approach, which ranks best performers as those with the lowest emission levels. This point is discussed further in Section III.B below. EPA's analysis is set out in detail in chapters 16 and 17 of Volume III of the Technical Support Document.[66]

EPA's conclusion is that total variability includes both run-to-run and test-to-test variability, and that both must be accounted for in determining which are the best performing sources and what are their levels of performance over time. As explained in the following Sections B and C, EPA has accordingly adopted floor methodologies which account for this total variability either quantitatively or qualitatively. The approach advocated by the commenter simply ignores that variability exists. Since this approach is contrary to both fact and law, EPA is not adopting it.

c. *Quantifying Run-to-Run Variability at the 99th Percentile Level Is Reasonable.* We selected the 99% prediction limit to ensure a reasonable level '' namely the 99th percentile—of achievability for sources designed and operated to achieve emission levels equal to or better than the average of the best performing sources.[67] Because of the randomness of the emission values, there is an associated probability of the average of the best performing sources, and similarly designed and operated sources, not passing the performance test conducted under the same conditions.[68] At a 99% confidence level, the average of the best performing sources could expect to achieve the floor in 99 of 100 future performance tests conducted under the same conditions as its performance test.. The commenter thus sharply mischaracterizes a 99% confidence level as the worst performance of a best performing source.: the level in fact assumes identical operating conditions as those of the performance test.

EPA routinely establishes not-to-exceed standards (daily maximum values which cannot be exceeded in any compliance test) using the 99% confidence level. *National Wildlife Federation* v. *EPA*, 286 F. 3d 554, 572 (D.C. Cir. 2002).[69] At a confidence level of only 97% for example, the average of the best performing sources could expect to achieve the floor in only 97 of 100 future performance tests.

We note that the choice of a confidence level is *not* a choice regarding the stringency of the emission standard. Although the numerical value of the floor increases with the confidence level selected it only appears to become less stringent. If EPA selected a lower confidence interval, we would necessarily adjust the standard downward due to the expectation that a source would not be expected to achieve the standard for uncontrollable reasons a larger per cent of the time. We would then have to account in some manner for this inability to achieve the standard. See *Weyerhaeuser* v. *Costle*, 590 F. 2d 1011, 1056–57 (D.C. Cir. 1978) (also upholding standards established at 99 % confidence level). The governing issue is what level of confidence should the average of the best performing sources, and similarly designed and operated sources, have of passing the performance test demonstrating compliance with the standard. We believe that the 99% confidence level is a confidence level within the range of values we could have reasonably selected.[70]

d. *Considering Intersource Variability by Pooling Run-to-Run Variability is Appropriate.* The commenter believes that any attempt by EPA to add a variability factor to adjust for intersource variability is unlawful and arbitrary and capricious. We see no statutory prohibition in considering intersource run-to-run variability of the best performing sources (which is all our floor calculation does, by considering the pooled run-to-run variability of the best performing sources). Section 112(d)(3) states that MACT floors are to reflect the ''*average* emission limitation achieved'' but does not specify any single method of ascertaining an average. Considering the average run-to-run variability among the group of best performing sources is well within the language of the provision (and was upheld in *CMA*, as noted above; see 870 F. 2d at 228). The commenter's further argument that 'average' can only mean average of emission levels achieved in performance tests is inconsistent with the holding in *Mossville*, 370 F. 3d at 1242, that EPA must account for variability in developing MACT floors and that individual performance tests do not by themselves account for such variability.

We believe that it is reasonable and necessary to account for intersource variability of the best performing sources by taking the pooled average of the best performing sources' run-to-run variability. This is an aspect of identifying the average performance of those sources. Emissions data for each best performing source are random in nature, and this random nature is characterized by a stochastic distribution. The stochastic distribution is defined by its central tendency (average value) and the amount of dispersion from the point of central tendency (variance or standard deviation). Consequently, to define the performance of the average of the best performing sources, we must consider the average of the average emissions for the best performing sources as well as the pooled variance for those sources. Hence, we must consider intersource variability to identify the floor—the average performance of the best performing sources.

The commenter further states that EPA's attempt to adjust for intersource variability is unlawful, arbitrary, and capricious. EPA set floors at the 99th percentile worst emission level that it believed any source within the group of best performers could achieve, according to the commenter. The 99th percentile worst performance that could be expected from a source within the best performers is, simply put, not the average performance of the sources in that group, according to the commenter.

The commenter misunderstands our approach to calculate the floor—the floor is not the 99th percentile highest emission level that any best performing source could achieve. The floor for

[66] We explain in those sections that these projections assume that system removal efficiencies are constant across differing HAP federates and that the sources' historical (poorer) system removal efficiencies were not the primary result of operating at poorer ''controllable'' conditions relative to the most recent test condition. These are reasonable assumptions, as explained in section 17. 3 of Volume III of the Technical Support Document, although these assumptions also create a measure of uncertainty regarding the emissions projections.

[67] Note, again, that the variability we quantify by these analyses is within-test condition variability only. We cannot quantify test-to-test variability and thus cannot quantify sources' total variability.

[68] See Volume III of the Technical Support Document, Section 7.2 .

[69] The opinion notes further that percentiles for standards expressed as long-term average typically use a lower confidence level (usually 95 %c) due to the opportunity to lower the overall distribution with multiple measurements. 286 F. 3d at 573. The standards in this rule are necessarily daily maximum standards because continuous emissions monitors for HAP do not exist or have not been demonstrated on all types of Subpart EEE sources.

[70] See also *Chemical Mfrs. Ass'n* v. *EPA*, 870 F. 2d at 229 (99th percentile daily variability factor is reasonable); 227 (''the choice of statistical methods is committed to the sound discretion of the Administrator'').

existing sources is calculated as the 99th percentile modified upper prediction limit of the average of the best performing sources. It represents the average of the best performing sources' emissions levels plus the pooled within-test condition variance of the best performing sources. The floor for existing sources is not the highest 99th percentile upper prediction limit for any best performing source as the commenter states.

e. *Why isn't Total Variability Already Accounted for by Compliance Test Conditions?*

Comment: One commenter states that EPA's use of variability factors along with worst-case data is unlawful and arbitrary and capricious. EPA has stated that its use of worst case ''compliance'' data accounts for variability. EPA admits that compliance data reflect special worst case conditions created artificially for the purpose of obtaining lenient permit limits, according to the commenter. EPA provides no reason whatsoever to believe that a source would continue to operate under such conditions even one percent of the time. Thus, the commenter concludes, by applying a 99 percent variability factor to compliance test data, EPA ensures that the adjusted data do not accurately reflect the performance of any source. Accordingly, EPA's use of a variability factor is unlawful.

The commenter also states that, to increase compliance data with the reality that sources will not be operating under the worst case conditions except during permit setting tests, the Agency's use of a variability factor with compliance data is arbitrary and capricious.

Response: All but two standards in the final rule are based on compliance test data—when sources maximized operating parameters that affect emissions to reflect variability of those parameters and to achieve emissions at the upper end of the range of normal operations. Use of these data is appropriate both because they are data in EPA's possession for purposes of section 112(d)(3) and because these data help account for best performing sources' operating variability. *CKRC,* 255 F. 3d at 867.

The main thrust of the comment is that total variability is accounted for by the conditions of the performance test, so that making further adjustments to allow for additional variability is improper. The commenter believes that the floor should be calculated simply as the average emissions of the best performing sources and that this floor would encompass the range of operations of the average of the best performing sources. We disagree.

The compliance test is designed to mirror the outer end of the *controllable* variability occurring in normal operations. These controllable factors include the amount of HAP fed to a source in hazardous waste, and controllable operating parameters on pollution control equipment (such as power input to ESPs, or pressure drop across wet scrubbers, factors which are reflected in the parametric operating limits written into the source's permit and which are based on the results of the compliance testing). However, this is plainly not all of the variability a source experiences. Other components of run-to-run variability, including variability relating to measuring (both stack measurements and measurements at analytic laboratories) are not reflected, for example. Nor is test-to-test variability reflected, notably the point in the maintenance cycle that testing is conducted and the variability associated with those inherently differing test conditions even though the source attempts to replicate the test conditions (e.g., measurement variability attributable to use of a different test crew and analytical laboratory and different weather conditions such as ambient temperature and moisture). Other changes that occur over time are due to a wide variety of factors related to process operation, fossil fuels, raw materials, air pollution control equipment operation and design, and weather. Sampling and analysis variations can also occur from test to test (above and beyond those accounted for when assessing within-test variability) due to differences in emissions testing equipment, sampling crews, weather, and analytical laboratories or laboratory technicians.

Thus, there is some need for a standard to account for this additional variability, and not simply expect for a single performance test to account for it. The analyses in Sections 16 and 17 of Volume III of the Technical Support Document confirm these points.

Moreover, the best performing sources (and the average of the best performers) must be able to replicate the compliance test if they are to be able to continue operating under their full range of normal operations. It is thus no answer to say that the best performing sources could operate under a more restricted set of conditions in subsequent performance tests and still demonstrate compliance, so that there is no need to assure that results of initial performance tests can be replicated. To do so would no longer allow the best performing sources (and thus the average of the best performing sources) to operate under their full range of normal operations, and thus impermissibly would fail to account for their total variability.

As discussed throughout this preamble, emissions variability—run-to-run and test-to-test variability—is real and must be accounted for if a best performing source is to be able to replicate the emissions achieved during the initial compliance test. We consequently conclude that we must account for variability in establishing floor levels, and that merely considering the average of compliance test data fails to do so. We have therefore quantified run-to-run variability using standard statistical methodologies, and accounted for test-to-test variability either by quantifying it (in the case of fabric filter particulate matter removal performance) or accounting for it qualitatively (in the case of the SRE/feed ranking methodology).

Comment: The commenter notes that if EPA believes that single performance test results do not accurately capture source's variability, the solution is to gather more data, not to avoid using a straight emissions methodology. EPA cannot use this as an excuse for basing floor levels on a chosen technology rather than the performance of the best performing sources.

Response: There is no obligation for EPA to gather more performance data, since the statute indicates that EPA is to base floor levels on performance of sources ''for which the Administrator has emissions information.'' Section 112(d)(3)(A); *CKRC,* 255 F. 3d at 867 (upholding EPA's decision to use the compliance test data in its possession in establishing MACT standards). Indeed, the already-tight statutory deadlines for issuing MACT standards would be even less feasible if EPA took further time in data gathering. EPA notes further that because particulate matter continuous emission monitors are not widely used, even further data gathering would be limited to snapshot, single performance test results, still leaving the problem of estimating variability from a limited data set.[71] See also *Sierra Club* v. *EPA*, 167 F. 3d at 662 (''EPA typically has wide latitude in determining the extent of data-gathering necessary to solve a problem'').

Thus, EPA has no choice but to assess best performers and their level of performance on the basis of limited amounts of data per source. As explained in the previous response to

[71] Performance tests take an average of 5–8 days to conduct, and cost approximately from $200,000—$500,000 per test. The commenter's off-hand suggestion appears to have ignored these realities.

comments, EPA has selected a methodology that reasonably do so.

EPA notes further that it has carefully examined those instances where there are multiple test conditions (usually compliance tests conducted at different times) for sources ranked as best performing. This analysis confirms EPA's engineering judgment that total variability is not fully encompassed in the single test condition results used to identify these sources as best performing, and that without taking this additional variability into account, best performing sources would be unable to achieve the floor standard reflecting their own performance in those single test conditions.[72]

2. Universal Variability Factor for Particulate Emissions Controlled with a Fabric Filter

Comment: One commenter states that, in calculating the universal variability factor (UVF) to account for total variability—test-to-test variability and within-test variability—for sources controlling particulate matter with a fabric filter, it appears that EPA considered the variability of sources that are not best performing sources. If so, EPA has contravened the law.

The commenter also states that EPA's attempt to use a variability factor derived from an analysis of variability of multiple sources is unlawful. If EPA considers variability at all, it must consider the relevant source's variability.

Response: We developed the particulate matter UVF for sources equipped with a fabric filter using data from best performing sources only.[73]

It is reasonable to aggregate particulate matter emissions data across source categories for all best performing sources equipped with a fabric filter because the relationship between standard deviation and emissions of particulate matter is not expected to be impacted by the source category type.[74] Rather, particulate emissions from fabric filters are a function of seepage (i.e., migration of particles through the filter cake) and leakage (i.e., particles leaking through pores, channels, or pinholes formed as the filter cake builds up). The effect of seepage and leakage on emissions variability should not vary across source categories.[75] Put another way, fabric filter particulate matter reduction is relatively independent of inlet loadings to the fabric filter. 69 FR 21233. This is confirmed by the fact that there are no operating parameters that can be readily changed to increase emissions from fabric filters, *id.,* so control efficiencies reflected in test conditions from different source types will still accurately reflect fabric filter control efficiency.

3. Test-to-Test Variability

Comment: Several commenters state that EPA seems to have ignored test-to-test variability resulting from changes that occur over time such as: normal and natural changes in a wide variety of factors related to process operation, fuels, raw materials, air pollution control equipment operation and design, and differences in emissions testing equipment, sampling crews, weather, analytical laboratories or laboratory technicians. All these sources of variation are expected in that they are typical and are not aberrations. In addition, there are unexpected sources of variability that occur in real-world operations, which also must be accommodated according to commenters.

Commenters state that using compliance test data and assessing within-test condition variability (i.e., run variance) do not fully account for test-to-test variability and thus understates total variability. Consequently, the average of the best performing sources may not be able to achieve the same emission level under a MACT performance test when attempting to operate under the same conditions as it did during the compliance test EPA used to establish the floor. Even though sources generally operated at the extreme high end of the range of normal operations during the compliance tests EPA uses to establish the standards, the average of the best performing sources would need to operate under those same compliance test conditions to establish the same operating envelope—the operating envelope needed to ensure the source can operate under the full range of normal emissions.

Response: We agree with commenters that we have not quantified test-to-test variability when establishing the floors for standards other than particulate matter where a best performing source uses a fabric filter. We are able to quantify only within-test variability (i.e., run-to-run variability) for the other floors, which is only one component of total variability. This is one reason we use the SRE/Feed approach wherever possible rather than a straight emissions approach to rank the best performing sources to calculate the floor—the SRE/Feed ranking approach derives floors that better estimate the levels of best performing sources' performance. See also discussion in Part Four, Section III.A, and the discussion below documenting that test-to-test variability can be substantial.

Comment: One commenter states that EPA should use the universal variability factor (UVF) that accounts for total variability for particulate matter controlled with a fabric filter to derive a correction factor to account for the missing test-to-test variability component of variability for semivolatile metals and low volatile metals. The commenter then suggests that the within-test variability for semivolatile and low volatile metals be adjusted upward by the correction factor to correct for the missing test-to-test variability component.

The commenter focused on cement kilns and compared the total variability imputed from the UVF for the three cement kiln facilities used to establish the UVF to the within-test variability (i.e., run variance) for each facility. The commenter determined that, on average for the three facilities, total variability was a factor of 4.2 higher than within-test variability. Because semivolatile and low volatile metals are also controlled with a fabric filter, the commenter suggested that the total variability of particulate matter could be used as an estimate of the total variability for semivolatile and low volatile metals. Thus, the commenter suggested that the within-test condition variability for semivolatile and low volatile metals be increased by a factor of 4.2 to account for total variability when calculating floors.

Response: As stated throughout this preamble, we believe that there is variability in addition to within-test condition (i.e., run-to-run) variability that we cannot quantify—that we refer to as test-to-test variability. We also do not believe this test-to-test variability is captured by compliance test operating conditions as discussed above, and thus establishing the floor using emissions data representing the extreme high end of the range of normal emissions does not account for test-to-test variability. We disagree, however, with the commenter's attempts to quantify the remaining test-to-test variability for floors other than particulate matter

[72] USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'', September 2005, Sections 16 and 17.

[73] USEPA, ''Draft Technical Support Document for HWC MACT Standards, Volume III: Selection of MACT Standards,'', March 2004, p. 5–4.

[74] In addition, emissions are not generally affected by particulate inlet loading.

[75] See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 5.3.

where all best performing sources are equipped with fabric filters.

We generally agree with the commenter's approach for extracting the test-to-test component of variability using the UVF curve for particulate matter controlled with a fabric filter.[76] The commenter has documented that for cement kilns, test-to-test variability of particulate emissions controlled with a fabric filter is on average a factor of 4.2 higher than within-test variability.

We believe the commenter's suggestion to adopt this correction factor to semivolatile and low volatile metals is technically flawed and for several reasons would present statistical difficulties. First, total variability for semivolatile metals and low volatile metals controlled with a fabric filter can be different from the total variability of particulate matter controlled with a fabric filter because: (1) The test methods are different (i.e., Method 5 for particulate matter and Method 29 for metals) and thus sample extraction and analysis methods differ; (2) the factors that affect partitioning of particulate matter to combustion gas (i.e., entrainment) are different from the factors that affect semivolatile metal partitioning to the combustion gas (i.e., metal volatility); and (3) the volatility of semivolatile metals is affected by chlorine feedrates.

Second, adopting a variability factor applicable to fabric filters for use on electrostatic precipitators[77] is problematic because both test-to-test and within-test variability of these emission control devices can be vastly different. Factors that affect emissions variability for sources equipped with a fabric filter include: (1) Bag wear and tear due to thermal degradation and chemical attack; and (2) variability in flue gas flowrate. Factors that affect emissions variability for sources equipped with an electrostatic precipitator are different (see discussion in Section III.B above) and include: variations in particle loading and particle size distribution, erosion of collection plates, and variation in fly ash resistivity due to changes atmospheric moisture and in sulfur feedrate (e.g. different type of coal).

Finally, the approach raises several difficult statistical questions including: (1) What is the appropriate number of runs to use to identify the degrees of freedom and the t-statistic in the floor calculations (e.g., should we use the number of runs available for metals emissions for the source or the number of runs available for particulate matter emissions from which the correction factor is derived); and (2) should we use a generic correction factor for all source categories or calculate source category-specific or source-specific correction factors.

For these reasons, we believe the approach we use for quantifying baghouse particulate matter collection variability is not readily transferable to other types of control devices and other HAP. We therefore are not applying a quantified correction factor in the final rule but rather are using a MACT ranking methodology that qualitatively accounts for total emission variability, notably test-to-test variability.

B. SRE/Feed Methdology

1. Description of the Methodology

As proposed, we are using the System Removal Efficiency (SRE)/Feed approach to determine the pool of best performing sources for those HAP whose emissions can be controlled in part by controlling the hazardous waste feed of the HAP—that is, controlling the amount of HAP in the hazardous waste fed to the source. These are HAP metals and chlorine. Our basic approach is to determine the sources in our database with the lowest hazardous waste feedrate of the HAP in question (semi-volatile metals, low volatile metals, mercury, or chlorine), and the sources with the best system removal efficiency for the same HAP. The system removal efficiency is a measure of the percentage of HAP that is removed prior to being emitted relative to the amount fed to the unit from all inputs (hazardous waste, fossil fuels, raw materials, and any other input). The pool of best performing sources are those with the best combination of hazardous waste feedrate and system removal efficiency as determined by our ranking procedure, separate best performer pools being determined for each HAP in question (SVM, LVM, mercury, and chlorine), reflecting the variability inherent in each of these ranking factors (see A.2.a.(1) above). We then use the emission levels from these sources to calculate the emission level achieved by the average of the best performing sources, as also explained in the previous section. This is the MACT floor for the HAP from the source type. For new sources, we use the same methodology but select the emission level (adjusted statistically to account for quantifiable variability) of the source with the best combined ranking. A more detailed description of the methodology is found in Volume III of the Technical Support Document, section 7.3.

This methodology provides a reasonable estimate of the best performing sources and their level of performance for HAP susceptible to hazardous waste feed control. As required by section 112(d)(2), EPA has considered measures that reduce the volume of emissions through process changes, or that prevent pollutant release through capture at the stack, and assessed how these control measures are used in combination. Section 112(d)(2)(A), (C) and (E). Hazardous waste feed control is clearly a process change that reduces HAP emissions; air pollution control systems collect pollutants at the stack. These are the best systems and measures for controlling HAP emissions from hazardous waste combustors. 69 FR at 21226. In considering these factors, EPA has necessarily considered such factors as design of different air pollution control devices, waste composition, pollution control operator training and behavior, and use of pollution control devices and methodologies in combination. *CKRC*, 255 F. 3d at 864–65 (noting these as factors, in addition to a particular type of air pollution control device, that can influence pollution control performance); 69 FR at 21223 n. 47 (system removal efficiency measures all internal control mechanisms as well as back-end emission control device performance).

EPA also believes that this methodology reasonably estimates the best performing sources' level of performance by accounting for these sources' total variability, including their performance over time. The methodology quantifies run-to-run variability. See 69 FR at 21232–33. It does not quantify test-to-test variability because we are unable to do so for these pollutants. (See sections A. 2.a.(2) and 3 above.) Although all variability must be accounted for when calculating floors, the only definitive way to accurately quantify this test-to-test emissions variability is through evaluation of long-term continuous emissions monitoring data, which do not presently exist. We believe, however, that SRE/Feed methodology provides some margin for estimating this additional, non-quantifiable variability. This is illustrated in the technical support document (volume III section 17), which clearly shows that the straight emissions approach underestimates (indeed, fails to account

[76] We note, however, that an argument could be made for using a source or condition-specific correction factor rather than averaging the correction factors for all sources within a source category.

[77] We infer that the commenter suggests that we use this correction factor for semivolatile and low volatile metals controlled by both electrostatic precipitators and fabric filters since the majority of cement kilns are equipped with electrostatic precipitators.

for) lower emitting sources' long-term emissions variability. These lower emitting sources that would otherwise not meet the floor levels on individual days under the straight emission approach would be able (or otherwise are more capable) to do so under the SRE/feed approach.

EPA further believes that the SRE/Feed methodology appropriately accounts for design variability that exists across sources for categories, like those here, which consist of a diverse and heterogeneous mixture of sources. This is especially true of incinerators and boilers, for which there are smaller on-site units that are located at widely varying industrial sectors that essentially combust single, or multiple wastestreams that are specific to their industrial process, and off-site commercial units dealing with many different wastes of different origins and HAP metal and chlorine composition. EPA believes that these variations are best encompassed in the SRE/Feed approach, rather than with a subcategorization scheme that could result in anomalous floor levels because there are fewer sources in each source subcategory from which to assess relative performance.[78] See *Mossville*, 370 F. 3d at 1240 (upholding floor methodology involving reasonable estimation, rather than use of emissions data, when sources in the category have heterogeneous emission characteristics due to highly variable HAP concentrations in feedstocks).

Use of the SRE/Feed approach also avoids basing the floor standards on a combination of the lowest emitting low feeding sources and the lowest emitting high feeding sources. For example, the five lowest emitting incinerators for semivolatile metals that would comprise the MACT pool using a straight emissions methodology include three sources that are the first, second, and fourth lowest feeding sources among all the incinerators.[79] The other two best performing incinerators have the first and second best system removal efficiencies (and the highest two metal feedrates). It is noteworthy that the highest feed control level among these best performing sources is over three orders of magnitude higher than the feed control level of the lowest feeding best performing source.[80] Establishing limits dominated by both superior feed control sources and back-end controlled sources would result in floor levels that are not reflective of the range of emissions exhibited by either low feeding sources or high feeding sources and would more resemble new source standards for both of these different types of combustors. Such floors could lead to situations, for example, where commercial sources could find it impracticable to achieve the standards without reducing the overall scope of their operations (since the standard could operate as a direct constraint on the amount of hazardous waste that could be fed to the device, in effect depriving a combustion source of its raw material). Similarly, low feeding sources that cannot achieve this floor level may be required to add expensive back-end control equipment that would result in minimal emission reductions, likely forcing the smaller on-site source to cease hazardous waste treatment operations and to instead send the waste to a commercial treatment unit.

The inappropriateness of a straight emissions-based approach for feed controlled pollutants for commercial hazardous waste combustors is further highlighted by the fact that several commercial hazardous waste combustors that are achieving the design level of the particulate matter standard are not achieving the semivolatile and/or low volatile metals straight emissions based design level, and, in some instances, floor level.[81] This provides further evidence that low feeding sources are in fact biasing some of the straight emissions-based floors to the extent that even the sources with the most efficient back-end control devices would be incapable of achieving the emission standards calculated on a straight emission basis.

These results are inconsistent with the intent of the section 112 (d) (see 2 Legislative History at 3352 (House Report) stating that MACT is not intended to drive sources out of business). Standards that could force commercial sources to reduce the overall scope of their operations are also inconsistent with requirements and objectives of the Resource Conservation and Recovery Act to require treatment of hazardous wastes before the wastes can be land disposed, and to encourage hazardous waste treatment. RCRA sections 3004 (d), (e), (g) and 1003 (a) (6); see also section 112 (n) (7) of the CAA, stating that section 112 (d) MACT standards are to be consistent with RCRA subtitle C emission standards for the same sources to the maximum extent practicable (consistent with the requirements of section 112 (d)); moreover, EPA doubts that a standard which precludes effective treatment mandated by a sister environmental statute must be viewed as a type of best performance under section 112 (d). The SRE/Feed methodology avoids this result by always considering hazardous waste feed control in combination with system removal efficiency and according equal weight to both means of control in the ranking process.

It is also important to emphasize what the SRE/Feed methodology does not evaluate: Feed control of HAP in fossil fuel or raw material inputs to these devices. Emission reduction of these HAP are controllable by back-end pollution control devices which remove a given percentage of pollutants irrespective of their origin and is assured by the system removal efficiency portion of the methodology, as well as through the particulate matter standard (see section IV.A below). Feed control of these inputs is not a feasible means of control, however. HAP content in raw materials and fossil fuel can be highly variable, and so cannot even be replicated by a single source. Raw material and fossil fuel sources are also normally proprietary, so other sources would not have access to raw material and fossil fuel available (in its performance test) to a source with low HAP fossil fuel and raw material inputs. Such sources would thus be unable to duplicate these results. Moreover, there are no commercial-scale pretreatment processes available for removing or reducing HAP content in raw materials or fossil fuels to these units. See technical support document volume III section 17.5 and 25; see also 69 FR at 21224 and n. 48.

2. Why Aren't the Lowest Emitters the Best Performers?

Some commenters nonetheless argue that best performing sources can only mean sources with the lowest HAP

[78] At proposal, we conducted a technical analysis to determine potential subcategorization options. We then conducted an analysis to determine if these different types of sources exhibited statistically different emissions. Although EPA in the end determined that these source categories should not be subcategorized further, this decision was based in part because the SRE/Feed methodology better accounts for the range of emissions from the best performing sources for these diverse combustion types. See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 4, for an explanation of the subcategorization assessment, which includes examples of anomalous floor results for certain subcategorization approaches.

[79] See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Appendix C, Table ''E_INC_SVMCT'' and, to determine relative feed control and SRE rankings for these sources, Appendix E Table ''SF_INC_SVMCT''.

[80] Source 340 had a semivolatile metal feed control MTEC of 892 μg/dscm, whereas source 327 had a semivolatile metal feed control MTEC of 3,080,571 μg/dscm.

[81] See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 17.4

emissions, and that the SRE/Feed methodology is therefore flawed because it does not invariably select lowest emitters as best performers.[82] The statute does not compel this result. There is no language stating that lowest emitting sources are by definition the best performers. The floor for existing sources is to be based on the average emission limitation achieved by the ''best performing'' 12 per cent of sources. Section 112(d)(3)(A). This language does not specify how ''best performing'' is to be determined: by means of emission level, emission control efficiency, measured over what period of time, etc. See *Sierra Club* v. *EPA*, 167 F. 3d at 661 (language of floor requirement for existing sources ''on its own says nothing about how the performance of the best units is to be calculated''). Put another way, this language does not answer the question of which source is the better performing: one that emits 100 units of HAP but also feeds 100 units of that HAP, or one that emits 101 units of the HAP but feeds 10,000 units. See 69 FR at 21223. Moreover, new source floors are to be based on the performance of the ''best controlled'' similar source achieved in practice. Section 112(d)(3). ''Best controlled'' can naturally be read to refer to some means of control such as system removal efficiency as well as to emission level.

Use of a straight emissions approach to identify floor levels can lead to arbitrary results. Most important, as explained above, it leads to standards which cannot be achieved consistently even by the best performing sources because operating variability is not accounted for. This is shown in section 17 of volume III of the technical support document. These analyses show that (a) emissions from these sources do in fact vary from test-to-test, and that no two snapshot emission test results are identical; (b) our statistical approach that quantifies within test, run-to-run variability underestimates the best performing sources' long term, test-to-test variability;[83] (c) best performing sources under the straight emissions approach advocated by the commenter (i.e. the lowest emitting sources) had other test conditions that did not achieve straight emission floor levels; (d) best performing sources under the straight emissions approach are projected, based on two separate analyses using reasonable assumptions, not to achieve the straight emissions floor standard based on these sources' demonstrated variations in system removal efficiencies over time (i.e., from test-to-test); and (e) SRE/feed methodology yields floor levels (i.e. the floor standards in the rule) that better estimate the emission levels reflecting the performance over time of the best performing sources. See *Mossville,* 370 F. 3d at 1242 (floor standard is reasonable because it accommodated best performing source's highest level of performance (i.e. its total variability), even though the level of the standard was higher than any individual measurement from that source).

As noted earlier, the straight emissions methodology can also limit operation of commercial units because the standard reflects a level of hazardous waste feed control which could force commercial units to burn less hazardous waste because such standards more resemble new source standards. The straight emissions methodology also arbitrarily reflects HAP levels in raw materials and fossil fuels, an infeasible means of control for any source.

Another arbitrary, and indeed impermissible, result of the straight emissions methodology is that in some instances (noted in responses below) the methodology results in standards which would force sources identified as best performing to install upgraded air pollution control equipment. This result undermines section 112 (d) (2) of the statute, by imposing what amounts to a beyond the floor standard without consideration of the beyond the floor factors: the cost of achieving those reductions, as well as energy and nonair environmental impacts.

Comment: The commenter states that because MACT floors must reflect the ''actual performance'' of the relevant best performing hazardous waste combusters, this means that the lowest emitters must be the best performers. The commenter cites *CKRC* v. *EPA*, 255 F. 3d at 862 and other cases in support.

Response: As explained in the introduction above, the statute does not specify that lowest emitters are invariably best performers. Nor does the caselaw cited by the commenter support this position. The D.C. Circuit has held repeatedly that EPA may determine which sources are best performing and may ''reasonably estimate'' the performance of the top 12 percent of these sources by means other than use of actual data. *Mossville,* 370 F. 3d at 1240–41 (collecting cases). In *Mossville,* sources had varying levels of vinyl chloride emissions due to varying concentrations of vinyl chloride in their feedstock. Individual measurements consequently did not adequately represent these sources' performance over time. Not-to-exceed permit limits thus reasonably estimated sources' performance, corroboration being that individual sources with the lowest long-term average performance occasionally came close to exceeding those permit limits. *Id.* at 1241–42. The facts are similar here, since our examination of best performing sources with multiple test conditions likewise shows instances where these sources would be unable to meet floors established based solely on lowest emissions (including their own). As here, EPA was not compelled to base the floor levels on the lowest measured emission levels.

Comment: The same commenter maintains that it is clear from the caselaw that MACT floors must reflect the relevant best performing sources' ''actual performance'', and that this must refer to the emissions level it achieves.

Response: As just stated, the D.C. Circuit has repeatedly stated that EPA may make reasonable estimates of sources' performance in assessing both which sources are best performing and the level of their performance. The court has further indicated that EPA is to account for variability in assessing sources' performance for purposes of establishing floors, and this assessment may require that EPA make reasonable estimates of performance of best performing sources. *CKRC,* 255 F. 3d at 865–66; *Mossville,* 370 F. 3d at 1241–42. See discussion in A.1.a above.

Comment: The commenter generally maintains that EPA's floor approaches consider only the performance of back-end pollution control technology and so fail to capture other means of HAP emission control that otherwise would be captured if EPA were to assess performance based on the emission levels each source achieved.

Response: EPA agrees that factors other than end-of-stack pollution control can affect metal HAP and chlorine emissions. This is why EPA assesses performance for these HAP by considering combinations of system removal efficiency (which measures every element in a control system resulting in HAP reduction, not limited to efficiency of a control device), and hazardous waste HAP feed control. Standards for dioxins and other organic HAP (which have no hazardous waste feed control component) likewise assess every element of control.

[82] In fact, many of the sources identified as best performing under the SRE/Feed methodology are also the lowest emitting, although this is not invariably the case.

[83] Best performing sources pursuant to the straight emissions methodology are projected to be unable to achieve the levl of their of their performance test emissions even after they are adjusted upward to account for run-to-run variability.

EPA also accounts for the variability of HAP levels in the (essential) use of raw materials and fossil fuels by assessing performance of back-end control but not evaluating fuel/raw material substitution, which, as discussed later in the response to comments section, are infeasible means of control. *Mossville,* 370 F. 3d at 1241–42, is instructive on this point. The court held that the constant change in raw materials justified EPA's use of a regulatory limit to estimate a floor level. The reasonableness of this level was confirmed by showing that the highest individual data point of a best performing source was nearly at the level of the regulatory limit. Under the commenter's approach, the court would have had no choice but to hold that the level the source achieved in a single test result using 'clean' raw materials—i.e. the 'level achieved' in the commenter's language—dictated the floor level.

See part four, section III.C for EPA's response to this comment as it relates to the methodologies for the particulate matter standard and total chlorine standard for hydrochloric acid production furnaces.

Comment: The commenter notes that the SRE/Feed methodology does not account for all HAP emissions, failing to account for metal and chlorine feedrates in raw materials and fossil fuels.

Response: The methodology does not assess the effect of feed ''control'' of HAP levels in raw materials or fossil fuels which may be inputs to the combustion units. This is because such control may not be replicable by an individual source, or duplicable by any other source. See 69 FR at 21224 and n. 48; *Sierra Club* v. *EPA*, 353 F. 3d 976, 988 (''substitution of cleaner ore stocks was not * * * a feasible basis on which to set emission standards. Metallic impurity levels are variable and unpredictable both from mine to mine and within specific ore deposits, thereby precluding ore-switching as a predictable and consistent control strategy'').[84] EPA's methodology does account for HAP control of all inputs by assessing system removal efficiency, which measures reductions of HAPs in all inputs (including fossil fuel and raw materials) to a hazardous waste combustion unit. Further, nonmercury metal HAP emissions attributable to raw materials and fossil fuels are effectively controlled with the particulate matter standard, a standard that is based on the sources with best back-end control devices. The only element which is not controlled is what cannot be: HAP levels in feeds for which fuel or raw material switching is simply not an available option.

Comment: The commenter further maintains, however, that the means by which sources may be achieving levels of performance are legally irrelevant (citing *National Lime Ass'n* v. *EPA*, 233 F. 3d 625 , 634 and 640 (D.C. Cir. 2000)). The fact that sources with ''cleaner'' raw material and fossil fuel inputs may not intend to have resulting lower HAP emissions is therefore without legal bearing.

Response: The issue here is not one of intent. The Court, in *National Lime,* rejected the argument that sources' lack of intent to control a HAP did not preclude EPA from establishing a section 112(d) standard for that HAP. See 233 F. 3d at 640, rejecting the argument that HAP metal control achieved by use of back-end control devices (baghouses) could not be assessed by EPA because the sources used the back-end control devices to control emissions of particulate matter. The case did not consider the facts present here, where the issue is not a source's intent, but rather a means of control which involves happenstance (composition of HAP in raw materials and fossil fuel used the day the test was conducted) and so is neither replicable nor duplicable.

National Lime also held that EPA must establish a section 112(d) emission standard for every HAP emitted by a major source. 233 F. 3d at 634. EPA is establishing emission standards for all HAP emitted by these sources. In establishing these standards, EPA is not evaluating emission reductions attributable to the type of fossil fuel and raw material used in the performance tests, because this is not a ''feasible basis on which to set emission standards.'' *Sierra Club,* 353 F. 3d at 988.

EPA thus does not agree with this comment because the issue is not a source's intent but rather whether or not to assess emission reductions from individual test results which reflect an infeasible means of control.

Comment: The commenter maintains, however, that even if individual sources (including those in the pool of best performing sources) cannot reduce HAP concentrations in raw materials and fossil fuels, they may achieve the same reductions by adding back-end pollution control. Nothing in section 112(d)(3) says that sources have to use the means of achieving a level of performance that other best performing sources used.

Response: The thrust of this comment is essentially to impermissibly bypass the beyond-the-floor factors set out in section 112(d)(2) under the guise of adopting a floor standard. Suppose that EPA were to adopt a floor standard dominated by emission levels reflecting HAP concentrations present in a few sources' raw materials and fossil fuels during their test conditions. Suppose further that some sources have to upgrade their back-end control equipment to operate at efficiencies better than the average level demonstrated by the best performing sources, because test results based on fossil fuel and raw material levels are neither replicable nor duplicable. In this situation, EPA believes that it would have improperly adopted a beyond-the-floor standard because EPA would have failed to consider the beyond-the-floor factors (cost, energy, and nonair environmental impacts) set out in section 112(d)(2).[85]

Comment: EPA has not substantiated its claim that sources cannot switch fossil fuels or raw materials.

Response: At proposal we evaluated fuel switching and raw material substitution as beyond-the-floor technologies for cement kilns and lightweight aggregate kilns and stated these technologies would not be cost effective.[86] We also discussed why fuel switching is not an appropriate floor control technology for solid fuel-fired boilers. 69 FR at 21273. Upon further evaluation, we again conclude that fuel switching and raw material substitution are not floor control technologies and are not cost effective beyond-the-floor technologies for cement kilns, lightweight aggregate kilns, and solid fuel-fired boilers.[87]

Comment: EPA has failed to document the basis for its SRE ranking.

[84] Although this language arose in the context of a potential beyond-the-floor standard, EPA believes that the principle stated is generally applicable. MACT standards, after all, are technology-based, and if there is no technology (i.e. no availalble means) to achieve a standard—i.e. for a soruce to achieve a standard whenever it is tested (as the rules require)—then the standard is not an achieveable one.

[85] Analysis of the levels of HAP in raw matrial and nonhazardous waste fuels suggests that this is a realistic outcome. Our analysis shows that emissions attributable to raw material and fossil fuel can be significant relative to the level of the straight emissions-based floor design level and floor (the methodology advocated by the commenter), and therefore could inappropriately impact a source's ability to comply with such a floor standard. See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 17.6.

[86] See, for example, 69 FR at 21252, where we discuss the use of fuel-switching or raw material substitution as a possible beyond-the-floor control for mercury at cement kilns.

[87] See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards, September 2005, Sections 11 and 25, for further discussion.

Specifically, EPA has not stated how it measured sources' SREs, or how it knows those rankings are accurate.

Response: System removal efficiency is a parameter that is included in our database that is calculated by the following formula:

$$\mathrm{SRE} = 100 \times \frac{\left[\left(\text{total HAP mass feedrate}\right) - \left(\text{stack gas HAP mass emission rate}\right)\right]}{\text{total HAP mass feedrate}}$$

The HAP feedrate and emission data are components of the database that were extracted from emission test reports for each source. We use system removal efficiency for each relevant pollutant or pollutant group (e.g., semivolatile metals, low volatile metals, mercury, total chlorine) whenever the data allows us to calculate a reliable system removal efficiency. For example, we generally do not use system removal efficiencies that are based on normal emissions data because of the concern that normal feed data are too sensitive to sampling and measurement error. See 69 FR at 21224.[88]

The system removal efficiencies used in our ranking process are reliable and accurate because the feed and emissions data originate from compliance tests that demonstrate compliance with existing emission standards (primarily RCRA requirements). As such, the data are considered to have excellent accuracy and quality. RCRA trial burn and certification of compliance reports are typically reviewed in detail by the permitting authority. The compliance tests and test reports generally contain the use of various quality assurance procedures, including laboratory, method, and field blanks, spikes, and surrogate samples, all of which are designed to minimize sampling and analytical inaccuracies. EPA also noticed the data base for this rule for multiple rounds of comment and has made numerous changes in response to comment to assure accuracy of the underlying data. Thus, EPA concludes the calculated system removal efficiencies used in the ranking process are both reliable and accurate.

Comment: EPA's approach with regard to use of stack data is internally contradictory. EPA uses stack data in establishing floors, but does not use stack data to determine which performers are best. EPA has failed to explain this contradiction.

Response: Emission levels are used to calculate system removal efficiencies in order to assess each source's relative back-end control efficiency. Also, as explained in the introduction to this comment response section, the SRE/Feed methodology uses the stack emission levels of the sources using the best combinations of hazardous waste feed control and system-wide air pollution control (expressed as HAP percent removal over the entire system) to calculate the floors. The data are adjusted statistically to account for quantifiable forms of variability (run-to-run variability). This methodology reasonably selects best performing sources (for HAP amenable to these means of control), and reasonably estimates these sources' performance over time. As further stated in section B.2 above, using a straight emissions approach to identify best performers and their level of performance can lead to standards for these HAP that do not fully account for variability (including variability resulting from varying and/or uncontrollable amounts of HAP in raw materials and fossil fuels) and could force installation of *de facto* beyond-the-floor controls without consideration of the section 112(d)(2) beyond-the-floor factors.

EPA thus does not see the contradiction expressed by the commenter. Use of the straight emissions approach as advocated by the commenter would lead to standards that do not reasonably estimate sources' performance and which could not be achieved even by the best performers with individual test conditions below the average of the 12 percent of best performing sources. These problems would be compounded many-fold if the data were not normalized and adjusted to at least account for quantifiable variability, steps the commenter also opposes. EPA's use of emissions data (suitably adjusted) after identifying best performers through the ranking methodology avoids these problems and reasonably estimates best performers' level of performance.

Comment: The commenter rejects EPA's finding (69 FR at 21226) that individual test results in the data base do not fully express the best performing sources' performance. The commenter gives a number of reasons for its criticisms, which we answer in the following sequence of comments listed a though f.

a. *Comment:* The commenter states that EPA claims emission levels do not fully reflect variability in part because they are sometimes based on tests where the source was feeding low levels of HAP during the test. The commenter claims this is inconsistent with the fact that EPA preferentially uses worst-case emissions obtained from tests where the sources spiked their feedstreams with metals, and that the mere possibility that these emissions do not reflect test data from conditions where variability was not maximized does not mean those data fail to represent a source's actual performance. The commenter also states that ''EPA's apparent suggestion that the best performing sources could not replicate the average performance of the sources with the lowest emissions is unsubstantiated and unexplained. Assuming that EPA accurately assesses a source's actual performance, the source can replicate that performance.''

Response: HAPs in raw materials and fossil fuels contribute to a source's emissions. EPA has concerns that a straight emissions approach to setting floors may not be replicable by the best performing sources nor duplicable by other non-best performing sources because of varying concentration levels of HAP in raw material and nonhazardous waste fuels. The best performing sources operated under compliance test conditions as the commenter suggests. However, raw material and nonhazardous fuel HAP concentrations for the best performing sources will change over time, perhaps due to a different source of fuel or raw material quarry location, which could affect their ability to achieve the floor level that was based on emissions obtained while processing different fossil fuel or raw materials. EPA takes sharp issue with the commenter's statement that a single performance test result is automatically replicable so long as it is measured properly in the first instance. This statement is incorrect even disregarding HAP contributions in raw materials and fossil fuels since, as noted previously in section A.2.e, there are many other sources of variability

[88] See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume II: Database,'' September 2005, Section 2, for further discussion on system removal efficiencies, which includes sample calculations and references to the database that contain the calculated system removal efficiencies for each source and each HAP or HAP group.

which will influence sources' performance over time (i.e., in subsequent performance tests).

A straight emissions approach for establishing semivolatile and low volatile metal floors may result in instances where the best performing sources would not be capable of achieving the standards if their raw material and nonhazardous waste fuel HAP levels change over time. For each cement kiln and lightweight aggregate kiln, we estimated the emissions attributable to these raw materials and fossil fuels assuming each source was operating with hazardous waste HAP feed and back-end control levels equivalent to the average of the best performing sources (the difference in emissions across sources only being the result of the differing HAP levels in the nonhazardous waste feeds). The analysis shows that emissions attributable to these nonhazarous waste feedstreams (raw materials and fossil fuels) varies across sources, and can be significant relative to the level of the straight emissions-based floor design level and floor, and therefore could inappropriately impact a source's ability to comply with the floor standard.[89]

b. *Comment:* The commenter states that EPA must consider contributions to emissions from raw materials and fossil fuels, that it is irrelevant if sources from outside the pool of best performing sources can duplicate emission levels reflecting ''cleaner'' raw materials and fossil fuels used by the best performing sources, and that sources unable to obtain such ''cleaner'' inputs may always upgrade other parts of their systems to achieve that level of performance.

Response: As previously discussed, EPA's methodology does account for HAP control of all inputs by assessing system removal efficiency, which measures reductions of HAPs from all inputs. Further, nonmercury metal HAP emissions attributable to raw materials and fossil fuels are effectively controlled with the particulate matter standard, a standard that is based on the sources with lowest emissions from best back-end control devices. We are not basing any standards on performance of sources not ranked as among the best performing.

c. *Comment:* The commenter disputes EPA's conclusions that failure of sources to meet all of the standards based on a straight emissions methodology at once shows that the methodology is flawed. The standards are not mutually dependent, so the fact that they are not achieved simultaneously is irrelevant. There is no reason a best performer for one HAP should be a best performer for other HAP.

Response: EPA agrees with this comment. On reflection, EPA believes that because all our standards are not technically interdependent (i.e., implementation of one emission control technology does not prevent the source from implementing another control technology), the fact that sources are not achieving all the standards simultaneously does not indicate a flaw in a straight emissions approach. See *Chemical Manufacturers Ass'n*, 870 F. 2d at 239 (best performing sources can be determined on a pollutant-by-pollutant basis so that different plants can be best performers for different pollutants).

d. *Comment:* Several commenters took the opposite position that EPA must assure that all existing source standards must be achievable by at least 6 percent of the sources, and that all new source standards must be achievable by at least one existing source.

Response: As discussed above, we are not obligated to establish a suite of floors that are simultaneously achievable by at least six percent of the sources because the standards are not technically interdependent. Nonetheless, the SRE/Feed methodology does result in existing floor levels (when combined with the other floor levels for sources in the source category) that are simultaneously achievable by at least six percent of the sources (or, for source categories that have fewer than 30 sources, by at least two or three sources).[90] However, for the new source standards, three of the source categories do not include any sources that are simultaneously achieving all the standards (incinerators, cement kilns, and lightweight aggregate kilns). Again, similar to existing sources, EPA is not obligated to establish a suite of new source floors that are simultaneously achievable by at least one existing source because these standards are not technically interdependent. We conclude that a new source can be designed (from a back-end control perspective) to achieve all the new source standards.[91]

e. *Comment:* The commenter criticizes EPA's discussion at 69 FR 21227–228 indicating that both hazardous waste feed control and back-end pollution control are superior means of HAP emission control and treatment standards should be structured to allow either method to be the dominant control mechanism.

Response: EPA is not relying on this part of the proposed preamble discussion as justification for the final rule, with the one exception noted in the response to the following comment.

f. *Comment:* Considerations of proper waste disposal policy are not relevant to MACT floor determinations. In any case, the possibility that some commercial waste combustors may upgrade their back-end pollution control systems to meet standards reflecting low hazardous waste HAP feedrates, or divert wastes to better-controlled units, is positive, not negative.

Response: As discussed in section B.1 above, there are instances where standards derived by using a straight emissions approach are based on a combination of lowest emitting low feeding sources and lowest emitting higher feeding sources. Resulting floor standards would thus reflect these low hazardous waste feedrates and could put some well-controlled commercial incinerators in the untenable situation of having to reduce the amount of hazardous waste that is treated at their source. Our database verifies that such an outcome is in fact realistic.[92]

This type of standard would operate as a direct constraint on the amount of hazardous waste that could be fed to the device, in effect depriving a combustion source of its raw material. In this instance, hazardous wastes could not be readily diverted to other units because the low feeding hazardous waste sources tend not to be commercial units. In these circumstances, there would be a significant adverse nonair environmental impact. Hazardous waste is required to be treated by Best Demonstrated Available Technology (BDAT) before it can be land disposed. RCRA sections 3004 (d), (e), (g), and (m); *Hazardous Waste Treatment Council* v. *EPA*, 866 F. 2d 355, 361 (D.C.Cir. 1990) (upholding Best Demonstrated Available Technology treatment requirement). Most treatment standards for organic pollutants in hazardous waste can only be achieved by combustion. Leaving some hazardous wastes without a

[89] See USEPA, ''Final Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 17.6. .

[90] These achievability analyses did not account for the additional test-to-test variability that we cannot quantify.

[91] See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume V: Emission Estimates and Engineering Costs,'' September 2005, Section 4.2.3 for a discussion that explains how such a new source could be designed to achieve the new source standards.

[92] See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards'', September 2005, Section 17.4.

treatment option is in derogation of these statutory requirements and goals, and calls into question whether a treatment standard that has significant adverse nonair environmental impacts must be viewed as best performing. See *Portland Cement Ass'n* v. *Ruckelshaus, 486 F. 2d 375 , 386 (D.C. Cir. 1973); Essex Chemical Co.* v. *EPAEPA*, 486 F. 2d 427, 439 (D.C. Cir. 1973). The commenter's statement that waste disposal policy is not relevant to the MACT standard-setting process is not completely correct, since section 112 (n)(7) of the Clean Air Act directs some accommodation between MACT and RCRA standards for sources combusting hazardous waste. Part of this accommodation is using a methodology to evaluate best performing sources that evaluates as best performers those using the best combination of hazardous waste feed control (among other things, an existing control measure under RCRA rules) and system-wide removal.

We assessed whether we could address this issue by subcategorizing commercial incinerators and on-site incinerators. Applying the straight emission approach to such a subcategorization scheme, however, yields anomalous results due to the scarcity of available and complete compliance test data from commercial incinerators. Calculated floor levels for semivolatile metals and low volatile metals for the commercial incinerator subcategory equate to 2,023 and 111 μg/dscm, respectively (both higher than the current interim standards).[93] We conclude that the SRE/Feed methodology better addresses this issue because it yields floor levels that better represent the performance of the best performing commercial incinerators and onsite incinerators alike by applying equal weights to hazardous waste feed control and back-end control in the ranking process.

EPA notes, however, that its choice of the SRE/Feed methodology is justified independent of considerations of adverse impact on hazardous waste treatment and disposal.

Comment: The commenter reiterates its comments with respect to floor levels for new sources.

Response: EPA's previous responses to comments apply to both new and existing source standards.

Comment: Two commenters recommend that EPA define the single best performing source as that source with the lowest aggregated SRE/Feed aggregated score (as proposed), as opposed to the source with the lowest emissions among the best performing existing sources (an approach on which we requested comment).

Response: We agree with the commenters because this is consistent with our methodology for defining best performers for existing sources and assessing their level of performance. We note, however, that with respect to the new source standards, we encountered two instances where the SRE/Feed methodology identified multiple sources with identical single best aggregated scores, resulting in a tie for the best performing source. This occurred for the mercury and low volatile metal new source standards for incinerators. In these instances, EPA applied a tie breaking procedure that resulted in selecting as the single best performing source as that source (of the tied sources) with the lowest emissions. We believe this is a reasonable interpretation of section112(d)(3), which states the new source standard shall not be less stringent than the emission control that is achieved in practice by the best controlled similar *source* (''source'' being singular, not plural). Moreover, we believe use of the emission level as the tie-breaking criteria is reasonable, not only because it is a measure of control, but because we have already fully accounted for hazardous waste feedrate control and system removal efficiency in the ranking methodology. To choose either of these factors to break the tie would give that factor disproportionate weight.

C. Air Pollution Control Technology Methodologies for the Particulate Matter Standard and for the Total Chlorine Standard for Hydrochloric Acid Production Furnaces

At proposal, EPA used what we termed ''air pollution control technology'' methodologies to estimate floor levels for particulate matter from all source categories as a surrogate for non-mercury HAP metals, and for total chlorine from hydrochloric acid furnace production furnaces. 69 FR at 21225–226. Under this approach, we do not estimate emission reductions attributable to feed control, but instead assess the performance of back-end control technologies.[94] We are adopting the same methodologies for these HAP in the final rule. Because the details of the approaches differ for particulate matter and for total chlorine, we discuss the approaches separately below.

1. Air Pollution Control Device Methodology for Particulate Matter

Our approach to establishing floor standards for particulate matter raises three major issues.

The first issue is whether particulate matter is an appropriate surrogate for non-enumerated HAP metals from all inputs, and for all non-mercury HAP metals in raw material and fossil fuel inputs. This issue is discussed at section IV.A of this part, where we conclude that particulate matter is indeed a reasonable surrogate for these metal HAP.

The second issue is why EPA is not evaluating some type of feed control for the particulate matter floor. There are two potential types of feed control at issue: hazardous waste feed control of nonenumerated metals, and feed control of non-mercury HAP metals in raw material and fossil fuel inputs. With respect to feed control of non-enumerated metals in hazardous waste, as discussed in more detail in section IV.A of this part, we lack sufficient reliable data on non-enumerated metals to assess their feedrates in hazardous waste. In addition, there are significant questions about whether feedrates of the non-enumerated metals can be optimized along with SVM and LVM feedrates. We also have explained elsewhere why control of hazardous waste ash feedrate would be technically inappropriate, since it would not properly assess feed control of nonenumerated metals in hazardous waste. See also 69 FR at 21225.

We have also explained why we are not evaluating control of feedrates of HAP metals in raw materials and fossil fuels to hazardous waste combusters: it is an infeasible means of control. See section B of this part. We consequently are not evaluating raw material and fossil fuel ash feed control in determining the level of the various floors for particulate matter.

a. *The methodology.* The final issue is the means by which EPA is evaluating back-end control. Essentially, after determining (as just explained) that back-end control is the means of controlling non-mercury metal HAP and that particulate matter is a proper surrogate for these metals, EPA is using its engineering judgment to determine what the best type of air pollution control device (i.e., back-end control) is to control particulate matter (and, of course, the contained HAP metals). We then ascertain the level of performance by taking the average of the requisite number of sources (either 12 % or five,

[93] See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards'', September 2005, Section 4. and Appendix C, Table ''E–INC–SVM–CT–COM'' and Table ''E–INC–LVM–CT-COM''

[94] See generally USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards'', September 2005, Section 7.4 and 7.5.

depending on the size of the source category) equipped with the best back-end control with the lowest emissions.[95] These floor standards are therefore essentially established using a straight emissions methodology. We have determined that baghouses (also termed fabric filters) are generally the best air pollution control technology for control of particulate matter, and that electrostatic precipitators are the next best.

b. *Why not select the lowest emitters?* Although sources with baghouses tended to have the lowest emission levels for particulate matter, this was not invariably the case. There are certain instances when sources controlled with electrostatic precipitators (or, in one instance, a venturi scrubber) had lower emissions in individual test conditions than sources we identified as best performing which were equipped with baghouses.[96] Under the commenter's approach, we must always use these lowest emitting sources as the best performers.

We again disagree. We do not know if these sources equipped with control devices other than baghouses with lower emissions in single test conditions would actually have lower emissions over time than sources equipped with baghouses because we cannot assess their uncontrollable emissions variability over time. Our data suggests that they likely are not better performing sources. We further conclude that our statistical procedures that account for these sources' within test, run-to-run emissions variability underestimates these sources long-term emissions variability. This is not the case for sources equipped with baghouses, where we have completely assessed, quantified, and accounted for long-term, test-to-test emissions variability through application of the universal variability factor.[97] The sources equipped with control devices other than baghouses with lower snapshot emissions data could therefore have low emissions in part because they were operating at the low end of the ''uncontrollable'' emissions variability profile for that particular snapshot in time. The basis for these conclusions, all of which are supported by our data, are found in section 16 of volume III of the technical support document.

We therefore conclude sources equipped with baghouses are the best performers for particulate matter control not only based on engineering judgment, but because we are able to reliably quantify their likely performance over time. The straight emissions methodology ignores the presence of long-term emissions variability from sources not equipped with baghouses, and assumes without basis that these sources are always better performing sources in instances where they achieved lower snapshot emissions relative to the emissions from baghouses, emissions that have notably already been adjusted to account for long-term emissions variability.

A straight emissions approach also results in inappropriate floor levels for particulate matter because it improperly reflects/includes low ash feed when identifying best performing sources for particulate matter. 69 FR at 21228. For example, the MACT pool of best performing liquid fuel boilers for particulate matter under the straight emissions approach includes eight sources, only one of which is equipped with a back-end control device. These sources have low particulate matter emissions solely because they feed low levels of ash. The average ash inlet loadings for these sources are well over two orders of magnitude lower than the average ash inlet loading for the best performing sources that we identify with the Air Pollution Control Technology approach. (Of course, since ash loadings are not a proper surrogate for HAP metals, these sources' emissions are lowest for particulate matter but not necessarily for HAP metals.) The straight emissions approach would yield a particulate matter floor level of 0.0025 gr/dscf (with a corresponding design level of 0.0015 gr/dscf). There is not one liquid fuel boiler that is equipped with a back-end control that achieved this floor level, much less the design level. The best performing source under the air pollution control technology approach, which is equipped with both a fabric filter and HEPA filter, did not even make the pool of best performing sources for the straight emissions approach. Yet this unit has an excellent ash removal efficiency of 99.8% and the lower emitting devices' removal efficiencies are, for the most part, 0% because they do not have any back-end controls. EPA believes that it is arbitrary to say that these essentially uncontrolled devices must be regarded as ''best performing'' for purposes of section 112(d)(3). We therefore conclude that a straight emissions floor would not be achievable for any source feeding appreciable levels of ash, even if they all were to upgrade with baghouses, or baghouses in combination with HEPA filters, and that a rote selection of lowest emitters as best performers can lead to the nonsensical result of uncontrolled units being classified as best performers.

Comment: Commenter claims end-of-stack control technology is not the only factor affecting emissions of particulate matter, stating that EPA admits that particulate matter emission levels are affected by the feedrate of ash. Accordingly, the performance of a source's end-of-stack control technology is not a reasonable estimate of that source's total performance.

Response: The particulate matter standard serves as a surrogate control for the non-enumerated metals in the hazardous waste streams (for all source categories), and all nonmercury metal HAP in the nonhazardous waste process streams (essentially, raw materials and fossil fuels) for cement kilns, lightweight aggregate kilns, and liquid fuel boilers. The commenter suggests that the APCD approach inappropriately ignores HAP feed control in the assessment of best performing sources. We conclude that it would not be appropriate to use a methodology that directly assesses feed control, such as the SRE/Feed methodology, to determine particulate matter floors. First, direct assessment of total ash feed control would inappropriately assess and seek to control (even though variability of raw material and fossil fuel inputs are uncontrollable) raw material and fossil fuel HAP input, as well as raw material and fossil fuel input. Controlling raw material and fossil fuel HAP input is infeasible, as previously discussed. It also inappropriately limits theses sources' feedstocks that are necessary for their associated production process.

Second, we do not believe that developing a floor standard based on hazardous waste feed control of nonenumerated metals (as opposed to feed control of these metals in raw material and fossil fuels) is appropriate or feasible. In part four, section IV.A, we explain that we lack the data to reliably assess direct feedrate of these metals in hazardous waste. In addition, we also discuss that it is unclear (the lack of certainty resulting from the sparse available data) that hazardous waste feed control of the nonenumerated metals is feasible. The majority of these metals are not directly regulated under existing RCRA requirements, so sources have optimized control of the other HAP

[95] As explained in the responses below, the approach varies slightly if the requisite number of sources do not all use the best back-end pollution control technology. In that case, EPA includes in its pool of best performers the lowest emission levels from sources using the next best pollution control technology.

[96] See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 22.

[97] See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 5.3.

metals, raising issues of whether simultaneous optimization of feed control of the remaining metals is feasible. Moreover, even if one were to conclude that hazardous waste feed control is feasible for the nonenumerated metal HAPs, hazardous waste ash feedrates are not reliable indicators of nonmercury metal HAP feed control levels and are therefore inappropriate parameters to assess in the MACT evaluation process. For example, a source could reduce its ash feed input by reducing the amount of silica in its feedstreams. This would not result in feed control or emission reductions of metal HAP.[98]

Finally, hazardous waste ash feed control levels do not significantly affect particulate matter emissions from cement kilns, lightweight aggregate kilns, and solid fuel-fired boilers because the majority of particulate matter that is emitted originates from the raw material and nonhazardous fuel. Hazardous waste ash feed control levels also do not significantly affect particulate matter emissions from sources equipped with baghouses because these control devices are not sensitive to particulate matter inlet loadings.[99]

Thus, even if one were to conclude that the nonenumerated metal HAPs are amenable to hazardous waste feed control, explicit use of ash feed control in a MACT methodology would not assure that each source's ability to control either nonmercury metal HAP or surrogate particulate matter emissions is assessed. The Air Pollution Control Device methodology identifies and assesses (with the surrogate particulate matter standard) the known technology that always assures metal HAP emissions are being controlled to MACT levels—that technology being back-end control.

Comment: Commenter claims the Air Pollution Control Device approach to calculate particulate matter floors is flawed because the performance of back-end control technology alone does not reflect the performance of the relevant best sources that otherwise would be reflected if EPA were to assess performance based on the emission levels each source achieved because, as EPA admits, it fails to account for the effect of ash feed rate.

Response: We explain above why the Air Pollution Control Technology approach properly identifies the relevant best performing sources for purposes of controlling non-mercury metal HAP (measured as particulate matter), irrespective of ash feed rates. Typically, this results in selecting the sources with the lowest particulate matter emission rates, the result the commenter advocates. This is because we evaluate sources with the best-performing (*e.g.* lowest emitting) baghouses, and particulate matter emissions from baghouses are not significantly affected by inlet particulate matter loadings. Where the pool of best performing sources includes sources operating some other type of back-end control device (because insufficient numbers of sources are equipped with baghouses to comprise 12% of sources, or five sources (depending on the size of the source category)), we again use the lowest particulate matter emission level from the sources equipped with second best technology. Although these data do not reflect test-to-test variability, they are the best remaining data in EPA's possession to estimate performance and EPA is therefore, as required by section 112 (d) (3) (A) and (B), using the data to fill out the requisite percentage of sources for calculating floors.

Comment: Commenter states that EPA has failed to demonstrate how it reasonably estimated the actual performance of each source's end-of-stack control technology because: (1) It failed to acknowledge that there can be substantial differences between the performance of different models of the same type of technology; and (2) it did not explain or support its rankings of pollution control devices.

Response: As discussed in sections 7.4 and 16.2 of volume III of the technical support document and C.1 of this comment response section, we rank associated back-end air pollution control device classes (e.g., baghouses, electrostatic precipitators, etc.), after assessing particulate matter control efficiencies from hazardous waste combustors that are equipped with the associated back-end control class. The data used to make this assessment are included in our database. We also evaluated particulate matter control efficiencies from other similar source categories that also use these types of control systems, such as municipal waste combustors, medical waste incinerators, sewage sludge combustors, coal-fired boilers, oil fired boilers, non-hazardous industrial waste combustors, and non-hazardous waste Portland cement kilns.[100]

After we assign a ranking score to each back-end control class, we determine the number of sources that are using each of these control technology classes. We then identify the MACT control technology or technologies to be those best ranked back-end controls that are being used by 12 percent of the sources (or used by five sources in instances where there are fewer than 30 sources). We then look only at those sources using MACT back-end control and rank order all these sources first by back-end control type, and second by emissions. For example, in instances where there is more than one MACT back-end control, we array the emissions from the sources equipped with the top ranked back-end controls from best to worst (i.e., lowest to highest), followed by the emissions from sources equipped with the second ranked back-end controls from best to worst, and so on. We then determine the appropriate number of sources to represent 12 percent of the source category (5 in instances where there are fewer than 30 sources). If 10 sources represented 12% of the sources in the source category, we would then select the emissions from best ranked 10 sources in accordance with this ranking procedure to calculate the MACT floor. This methodology results in selection of lowest emitters using best back-end air pollution control as pool of the best performing sources.

The commenter is correct that there can be differences between the performance of different models of the same type of technology. We are not capable of thoroughly assessing differences in designs of each air pollution control device in a manner that could be used in the MACT evaluation process, so that we would only select, for example, baghouses of a certain type. Each baghouse, for example, will be designed differently and thus will have different combinations of design aspects that may or may not make that baghouse better than other baghouses (e.g., bag types, air to cloth ratios, control mechanisms to collect accumulated filter cake and maintain optimum pressure drops). We also do not have detailed design information for each source's air pollution control system; such an assessment would therefore not be

[98] For the same reason, even if feed control of total inputs (i.e. raw material and fossil fuel as well as hazardous waste fuel) were feasible, it would be technically inappropriate to use ash feedrates as a surrogate: ash feed control allows sources to selectively reduce the ash feeds without reducing the metal HAP portion of that feed. Back-end control, in contrast, unselectively removes a percentage of everything that is fed to the combustor.

[99] See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of Mact Standards,'' September 2005, Section 3.1.

[100] See USEPA, ''Technical Support Document for th HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 5.3 and 16.2, for further discussion.

possible even if the information could be used to assess relative performance.

We instead account for this difference by selecting sources with the lowest emissions that are using the defined MACT back-end controls to differentiate the performance among those sources that are using that technology (the best performer being the source with the lowest emissions, as just explained). For example, in situations where more than 12% of the sources are using the single best control technology (e.g., more than 12% of incinerators use baghouses to control particulate matter), we use the emissions from the lowest emitting sources equipped with baghouses to calculate the MACT floor. In instances where there are two defined MACT technologies (i.e., 12% of sources do not use the single best control technology), we use all the emissions data from sources equipped with the best ranked control class, and then subsequently use only the lowest emissions from the sources equipped with the second ranked back-end controls.

Comment: EPA did not say how it picked the best performers if more than twelve percent used the chosen technologies. If EPA used emissions data to differentiate performance, the Agency is necessarily acknowledging that emissions data are a valid measure of sources' performance—in which case the Agency's claims to the contrary are arbitrary and capricious.

Response: We did use emissions data to select the pool of best performers where over 12% use the best type of emissions control technology, as explained in the previous response. Emissions data is obviously one means of measuring performance. EPA's position is that it need not be the exclusive means, in part because doing so leads to arbitrary results in certain situations. Our use of emission levels to rank sources that use the best particulate matter control (i.e., baghouses) does not lead to arbitrary results, however. First, we are assessing emission levels here as a means of differentiating sources using a known type of pollution control technology. More importantly, the adjusted emission levels from sources equipped with baghouses are the most accurate measures of performance because these emissions have been statistically adjusted to accurately account for long-term variability through application of the universal variability factor.

Comment: Commenter states that EPA, in its support for its Air Pollution Control Technology Approach used to calculate particulate matter floors, claims that an emissions-based approach would result in floor levels that ''could not necessarily be achieved by sources using the chosen end-of-stack technology,'' citing 69 FR at 21228. Commenter claims that it is settled law that standards do not have to be achievable through the use of any given control technology, and that it is also erroneous to establish floors at levels thought to be achievable rather than levels sources actually achieve.

Response: EPA is not establishing floor levels based on assuring the standards are achievable by a particular type of end-of-stack technology (or, for that matter, any end-of-stack technology). The floor levels in today's final rule reasonably estimate average performance of the requisite percent of best performing sources without regard for whether the levels themselves can be achieved by a particular means. Floor standards for particulate matter are based on the performance of those sources with the lowest emissions using the best back-end control technology (most often baghouses, and sometimes electrostatic precipitators). EPA uses this approach not to assure that the floors are achievable by sources using these control devices, but to best estimate performance of the best performing sources, including these sources' variability.

2. Total Chlorine Standard for Hydrochloric Acid Production Furnaces

We are adopting the methodology we proposed to estimate floor levels for total chlorine from hydrochloric acid production furnaces. 69 FR at 21225–226. As stated there, we are defining best performers as those sources with the best total chlorine system removal efficiency. We are not assessing a level of control attributable to control of chlorine in feedstocks because this would simply prevent these furnaces from producing their ultimate product. Further details are presented in responses below.

Comment: Basing the standard for hydrochloric acid production furnaces on the basis of system removal efficiency rather than chlorine emission reduction is impermissible. Even though these devices' purpose is to produce chlorinated product, the furnaces can use less chlorinated inputs. EPA's proposed approach is surreptitious, an impermissible attempt to assure that the standards are achievable by all sources using EPA's chosen technology, the approach already rejected in *CKRC*.

Response: EPA disagrees. There is nothing in the text of the statute that compels an approach that forces sources to produce less product to achieve a MACT floor standard. Yet this is the consequence of the comment. If standards were based on levels of chlorine in feedstock to these units, less product would be produced since there would be less chlorine to recover. EPA has instead reasonably chosen to evaluate best performing/best controlled sources for this source category by measuring the efficiency of the entire chlorine emission reduction system. Indeed, the situation here is similar to that in *Mossville*, where polyvinyl chloride production units fed raw materials containing varying amounts of vinyl chloride depending on the product being produced. This led to variable levels of vinyl chloride in plant emissions. Rather than holding that EPA must base a floor standard reflecting the lowest amount of vinyl chloride being fed to these units, the court upheld a standard estimating the amount of pollution control achievable with back-end control. 370 F. 3d at 1240, 1243. In the present case, as in *Mossville*, the standard is based on actual performance of back-end pollution control (although here EPA is assessing actual performance of the control technology rather than estimating performance by use of a regulatory limit, making the situation here *a fortiorari* from that in *Mossville*), and does not reflect ''emission variations not related to technological performance''. 370 F. 3d at 1240.

It also should be evident that EPA is not establishing a standard to assure its achievability by a type of pollution control technology, as the commenter mistakenly asserts. The standard for total chlorine is based on the average of the best five sources '' best meaning those sources with greatest (most efficient) system removal efficiencies. EPA did not, as in *CKRC*, establish the standard using the highest emission limit achieved by a source operating a particular type of control.

Comment: The commenter generally maintains that EPA's methodology to determine total chlorine floors for hydrochloric acid production furnaces fails to capture other means of HAP emission control that otherwise would be captured if EPA were assess performance based on the emission levels each source achieved.

Response: As discussed above, the standard for total chlorine is based on the sources with the best system removal efficiencies. System removal efficiency encompasses all means of MACT floor control when assessing relative performance because: (1) Chlorine feed control is not a MACT floor technology for these sources; and (2) the measure of system removal efficiency accounts for every other controllable factor that can affect

emissions (e.g., operating practices, worker training, proper maintenance, pollution control device type, etc).

D. Format of Standards

1. Thermal Emissions

EPA proposed, and is finalizing standards for HAP metals and chlorine (the HAPs amenable to hazardous waste feed control) emitted by energy recovery units (cement kilns, lightweight aggregate kilns, and liquid fuel boilers) expressed in terms of pounds of HAP attributable to the hazardous waste fuel per million british thermal units (BTUs) of hazardous waste fired. 69 FR at 21219–20. EPA received many comments on this issue to which we respond below and in the Response to Comment Document. Some initial discussion of the issue is appropriate, however.

a. *Expressing Standards in Terms of a Normalizing Parameter is Reasonable.* First, using a thermal emissions form of a standard is an example of expressing standards in terms of a normalizing parameter. EPA routinely normalizes emission standards either by expressing them as stack HAP concentrations or by expressing the standards in units of allowable mass emissions per amount of production or raw material processed. Emission concentration-based standards normalize the size of each source by accounting for volumetric gas flowrate, which is directly tied to the amount of raw material each source processes (and subsequently the amount of product that is produced). Metal and particulate matter emission standards for commercial and industrial solid waste incinerators are expressed in emission concentration format. See § 60.2105. The particulate matter standard for Portland cement kilns is expressed as mass of allowable emissions per mass of raw material processed. See § 63.1342. The particulate matter, mercury, and hydrogen chloride standards for nonhazardous waste industrial boilers are expressed as pounds of allowable emissions per million British thermal units (BTUs). See § 63.7500.

Technology-based standards typically normalize emissions because such a format assures equal levels of control across sources per amount of raw material that is processed, and allows EPA to equally assess source categories that comprise units that differ in size. By normalizing the emissions standard we better ensure the same percentage of emission reduction per unit of raw material processed by each source.[101] See *Weyerhaeuser* v. *Costle,* 590 F. 2d 1011, 1059 (D.C. Cir. 1978) (technology-based standards are typically expressed in terms of volume of pollutants emitted per volume of some type of unit of production).

There is no legal bar to this approach since the statute does not directly address the question of whether a source emitting 100 units of HAP per unit of production but 100 units of HAP overall is a better performer (or, for new sources, better controlled) than a source emitting 10 units of HAP per unit of production but emitting 101 units overall.[102] One commenter appeared to suggest that we should assess performance on mass feedrates and mass emission rates, without normalizing. Such an approach would yield nonsensical results because the best performing sources would more likely be the smallest sources in the source category (smaller sources generally have lower mass emission rates because they process less hazardous waste). This would likely yield emission standards that would not be achievable by the larger sources that more likely are better controlled sources based on a HAP removal efficiency basis.[103] Normalization by unit of production is another way of expressing unit size, so that normalizing on this basis is a reasonable alternative to subcategorization on a plant size-by-plant size basis. See section 112(d)(1) (size is an enumerated basis for subcategorizing).

b. Using Hazardous Waste Thermal Input as the Normalizing Parameter is Permissible and Reasonable. Normalization of standards based on thermal input is analogous. For energy recovery units (in this rule, kilns and most liquid fuel boilers), normalizing on the basis of thermal input uses a key feed input as the normalizing parameter, allowing comparison of units with different inputs rather than separately evaluating these units by size and type (see section 112(d)(1)). Again, this approach is legally permissible. The statute does not answer the question of which source is better performing, the source emitting 100 pounds of HAP per million BTUs hazardous waste but 100 pounds of HAP overall or the source emitting 10 pounds of HAP per million BTUs hazardous waste but emitting 101 pounds overall.

The approach also is reasonable. First, as with other standards expressed in normalized terms, by normalizing the emissions standard we ensure the same percentage of emission reduction per unit of raw material processed by each source, thus allowing meaningful comparison among sources. For example, emission concentration-based standards normalize the size of each source by accounting for volumetric gas flowrate, which is directly tied to the amount of raw material each source processes (and subsequently to the amount of product that is produced), and assures equal levels of control per amount of product. Normalization on the basis of HAP amount in hazardous waste per BTU level in the hazardous waste similarly assures equal levels of control across sources per amount of raw material that is processed. Here, the raw material is the hazardous waste fuel, expressed as units of energy. It is reasonable to regard a hazardous waste fuel as a raw material to an energy recovery device. Indeed, fuels are the only input to boilers, so fuels are necessarily such units' sole raw material.[104] [105] Hazardous waste burning cement kilns and lightweight aggregate kilns produce a product in addition to recovered energy and so process other raw materials. However, the reason these units use hazardous waste as inputs is typically to recover usable energy from the wastes. Hence, the hazardous waste fuel is reasonably viewed as a raw material to these devices.

In this regard, we note that our choice of normalizing parameter essentially says that best performers with respect to hazardous waste fuel burned in energy recovery units are those using the lowest HAP feedrate (for metals and chlorine) per amount of energy

[101] A more familiar example of normalization is the Earned Run Average (ERA), which normalizes a baseball pitchers' earned runs on the basis of nine innings pitched in order to make comparisons among pitchers possible.

[102] Or, put another way, the statute does not directly address the question of whether a small source that emits 10 units of HAP is better than a much larger source with better back-end control (but feeding the same raw material at a higher mass feedrates) that emits 100 units of HAP.

[103] See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 6.0.

[104] EPA thus has expressed the MACT standards for particulate matter, mercury, and hydrogen chloride standards for nonhazardous waste industrial boilers as pounds of allowable emissions per million BTUs. § See 63.7500. This normalization considers the total heat input into the combustion device. Normalizing by total heat input would not be appropriate for hazardous waste combustors for metals and chlorine because this would implicitly account for, and in turn require the use of, feed control of HAP in non hazardous waste fuels. This is inappropriate for the reasons discussed in Section III.B of this Part.

[105] We distinguish (i.e., subcategorize) liquid fuel boilers that process hazardous waste with heating values less than 10,000 BTU/lb from those processing hazardous wastes with heating content greater than 10,000 BTU/lb. Although boilers that process hazardous waste with heating values less than 10,000 BTU/lb are still considered to be energy recovery units, we conclude a thermal emissions normalization approach for these sources is not appropriate. See Part Four, Section VI.D.

recovered.[106] This approach accords well with the requirement in section 112(d)(2) that EPA take energy considerations into account in developing MACT, and also that the Agency consider front-end means of control such as input substitution (section 112(d)(2)(A)). In addition, our choice furthers the RCRA goal of encouraging properly conducted recycling and reuse (RCRA section 1003(b)(6)), which is of relevance here in that Congress directed EPA to consider the RCRA emission controls for hazardous waste combustion units in developing MACT standards for these units, and to ensure ''to the maximum extent possible, and consistent with [section 112]'' that section 112 standards are ''consistent'' with the RCRA scheme. CAA section 112(n)(7).[107] Conversely, emission concentration-based standards, the methodology that otherwise would be used to calculate emission concentration-based standards, may result in standards that are biased against sources that recover more energy from hazardous waste. This may discourage sources from recovering energy from hazardous waste because such standards do not normalize each source's allowable emissions based on the amount of hazardous waste it processes for energy recovery purposes. See 69 FR at 21219 and responses below.

Second, use of this normalizing parameter makes it much more likely that hazardous waste feed controls will be utilized by these devices as an aspect of emissions control. See section 112(d)(2)(A) (use of measures reducing the volume of pollutants emitted through ''substitution of materials''); *CKRC,* 255 F. 3d at 865 (EPA to consider means of control in addition to back-end pollution control technology when establishing MACT floors). As explained in our discussion of the SRE/Feed methodology, the MACT floor level for metals and chlorine reflects the best combination of hazardous waste feedrate, and total HAP removal efficiency. See section III.B. However, if standards for energy recovery units are expressed in terms of mass of HAP per volume of stack gas, then it would be relatively easy for these energy recovery devices to achieve a standard, without decreasing concentrations of HAP in their hazardous waste fuels, by diluting the HAP contribution of hazardous waste with emissions from fossil fuel. A thermal emissions format prevents this type of dilution from happening because it ignores additions of stack gases attributable to burning fossil fuels. *Weyerhaeuser,* 590 F. 2d at 1059 (use of production of a unit as a normalizing parameter serves ''the commendable purpose'' of preventing plants from achieving emission limitations via dilution).

For example, assume there are two identical energy recovery units with identical back-end control devices (that reflect the performance of the average of the best performing sources). Source A fulfills 25% of its energy demand from the combustion of hazardous waste; source B fulfills 50% of its energy demand from the combustion of hazardous waste. Also assume that the hazardous waste for these two sources have equivalent energy contents. If these sources were required to comply with an emission concentration based-standard (e.g., μg/dscm), source A would be allowed to feed hazardous waste containing twice the metal content (on a mass concentration basis, e.g., ppm), and would be allowed to emit metal HAP at the same mass emission rate relative to source B. This is because this source is effectively diluting its emissions with the emissions that are being generated by the fossil fuels.[108] A thermal emissions standard format does not allow sources to dilute their emissions with the emissions from fossil fuel inputs because it directly regulates the emissions and feeds associated with the hazardous waste fuel. Under a thermal emissions format both sources would be required to feed hazardous waste with the same thermal feed concentrations (on a lb HAP per million BTU hazardous waste basis), and source A would be required to process hazardous waste with an equivalent concentration of metal HAP (on a mass basis) and also be required to emit half as much metal HAP (on a mass emission rate basis) relative to source B, because source A is processing half as much hazardous waste fuel, thus vindicating the hazardous waste feed control aspect of the standard (see also note below regarding the likelihood of sources using hazardous waste feed control). Further, the thermal feed concentration with which these sources must comply reflects the feed control of the average performance of the best performing sources (on a mass of HAP per million BTU basis). Such a requirement assures that these sources are processing the cleanest hazardous waste fuels to recover energy and are reducing HAP emissions to MACT levels.

We note that it would not be appropriate to express the emission standards for incinerators, hydrochloric acid production furnaces, and solid fuel boilers in terms of thermal emissions. As just explained, the choice of a normalizing parameter is fitted to the nature of the device to which it is applied in order to allow the most meaningful comparisons between devices of like type. We therefore conclude that a thermal emissions format (i.e., normalizing parameter) for incinerators is not appropriate because the primary function of incinerators is to thermally treat hazardous waste (as opposed to recovering energy from the hazardous waste). See 67 FR at 17362 (April 19, 1996). Our database indicates that most incinerators processed hazardous waste during their emissions tests that had, on average, heating values below 10,000 BTU/lb.[109] We have emission test hazardous waste heating value information for 62 incinerators in our database. Of these 62 sources, 40 sources processed hazardous waste with an average heating value of less than 10,000 BTU/lb. The other 22 sources processed hazardous waste with heating values greater than 10,000 BTU/lb in at least one test condition, although we note that 14 of these 22 sources also processed hazardous waste in different test conditions with heating values lower than 10,000 BTU/lb.[110]

We assessed whether we should subcategorize incinerators, similar to how we subcategorize liquid fuel boilers, based on the BTU content of the hazardous waste. Incinerators do recover energy from processing high BTU wastes. Some incinerators are equipped with waste heat boilers, and high BTU hazardous waste can displace fossil fuels that otherwise would have to be burned to thermally treat low BTU wastestreams. However, such energy recovery is considered to be a secondary product because their primary function is to thermally treat hazardous waste. A

[106] As explained earlier, the ultimate ranking of best performers then further evaluates system removal efficiency, best performers then being defined in terms of the combination of hazardous waste thermal feed and system removal efficiency. See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards'', September 2005, Section 7.3.

[107] EPA would adopt the thermal format for the standards, however, whether or not the approach furthered RCRA objectives.

[108] This example assumes there are no HAP emissions attributable to the fossil fuels.

[109] As discussed later, the heating values of hazardous wastes processed at cement kiln and lightweight aggregate kilns are primarily 10,000 BTU/lb or greater.

[110] These data are based on a compilation of heating contents for every incinerator test condition in the database where the source reported such heating content, and include both the most recent test conditions as well as older test conditions. Incinerator test condition heating values range from a low of 790 to a high of 19,800 BTU/lb, with a median value of 7800 BTU/lb.

thermal emissions normalization approach for incinerators that combust hazardous wastes with heating values greater than 10,000 BTU/lb would therefore not be appropriate because the normalized parameter would not be tied to the primary production output that results from the processing of hazardous waste (i.e., treated hazardous waste). In confirmation, no commenters suggested that we apply a thermal emissions format to incinerators.

We also conclude that a thermal emission format is inappropriate for hydrochloric acid production furnaces. These devices recover chlorine, an essential raw material in the process, from hazardous waste. The classic normalizing parameter of amount of product (HCl) produced is therefore the obvious normalizing parameter for these sources. It is true that some hydrochloric acid production furnaces recover energy from high BTU hazardous wastes. See 56 FR at 7141/1 and 7141–42 (Feb. 21, 1991). Some sources are equipped with waste heat boilers, and high BTU wastes help sustain the combustion process, which is necessary to liberate the chlorine from the wastestreams prior to recovering the chlorine in the scrubbing systems. Again, energy recovery is not the primary function of these types of sources.[111] Hydrochloric acid production furnace hazardous waste heating values range from 1,100 to 11,000 BTU/lb (the median energy content for these sources is slightly above 6,000 BTU/lb). The range of hazardous waste heating contents from these sources is much lower than the ranges for cement kilns, lightweight aggregate kilns, and liquid fuel boilers, supporting the premise that energy recovery is of secondary importance. In addition, and critically, the hazardous waste that is processed in these units contains high concentrations of chlorine, confirming that the wastes serve as feedstock for hydrochloric acid production, even if the wastes also have energy value.[112] No commenters suggested that we apply a thermal emissions format to hydrochloric acid production furnaces.

We consider the processing of hazardous waste in solid fuel boilers to be more reflective of energy recovery (relative to incinerators and hydrochloric acid production furnaces) because these sources directly recover the heat that is released from the combustion of the waste streams. However, as stated at proposal, not all these sources are processing hazardous wastes for energy recovery. 69 FR at 21220. These boilers are generally not commercial units, and so tend to burn whatever hazardous wastes are generated at the facility where they are located. Heating values for this source category range from 1,300 to 10,500 BTU/lb, with a median value of 8,000 BTU/lb. We therefore conclude that thermal emission standards for these sources are not appropriate because most of these sources are processing hazardous waste with energy content lower than 10,000 BTU/lb. As discussed in section VI.D, we conclude that 10,000 BTU/lb is an appropriate level that distinguishes whether thermal emission standards or mass emission concentration-based standards are appropriate. We also note that no commenters suggested that we apply a thermal emissions format to solid fuel boilers.

Comment: Commenters state that thermal emission standards are inappropriate because sources burning hazardous waste with a higher energy content or higher percent hazardous waste firing rate (i.e., one that fulfills a greater percentage of its total energy demand from the hazardous waste) would be allowed to emit more HAP.

Response: Part of this comment would apply regardless of what normalizing parameter is used. Technology-based standards (including MACT standards) are almost always expressed in terms of some type of normalizing parameter, i.e., ''X'' amount of HAP may be emitted per unit of normalizing parameter. This allows a meaningful comparison between units of different size and production capacity. A consequence is that the overall mass of HAP emissions varies, but the rate of control remains constant per the normalizing unit. As explained in the introduction to this section, this approach is both routine and permissible.

Cement kilns, lightweight aggregate kilns, and liquid fuel boilers combust hazardous waste to recover valuable energy. Recovering energy is an integral part of their production process. As discussed at proposal, emission concentration-based standards (and the methodology that otherwise would be used to calculate emission concentration-based standards) may result in standards that are biased against sources that recover more energy from hazardous waste. 69 FR at 21219. This may discourage sources from recovering energy from hazardous waste because such standards do not normalize each source's allowable emissions based on the amount of hazardous waste it processes for energy recovery purposes. A source that fulfills 100 percent of its energy demand from hazardous waste would be required to limit its mass HAP emissions to the same levels as an identical source that satisfies, for example, only 10 percent of its energy demand from hazardous waste and 90% from coal. This would inappropriately discourage the safe recovery of energy from hazardous waste, and could in turn result in greater consumption of valuable fossil fuels that otherwise would be consumed.

Sources which fulfill a greater percentage of their energy demand from hazardous waste (either by processing hazardous wastes that are higher in energy content, or by simply processing more hazardous waste) will be allowed to emit more HAP (on a mass emission rate basis) than an identical source that satisfies less of its total energy demand from hazardous waste. This is appropriate because: (1) The source fulfilling a greater percentage of its energy demand from hazardous waste is processing more raw material than the other source (the raw material being the energy content of the waste); and (2) The source fulfilling a lower percentage of its energy demand requirements from hazardous waste would not be allowed to dilute its emissions with nonhazardous waste fuels, and we would thus assure that all sources implement hazardous waste feed control to levels consistent with MACT.[113] This

[111] EPA notes that when first adopting RCRA air emission standards for hydrochloric acid recovery furnaces (then called 'halogen acid furnaces'), EPA indicated that those furnaces designed as boilers would be subject to the emission standards for boilers. 56 FR at 7040. This determination did not have regulatory consequence, since all hydrochloric acid production furnaces were subject to the same emission standards whether they were classified as boilers or as industrial furnaces. Thus, EPA was not concluding that some hydrochloric acid furnaces existed for the primary purpose of recovering energy in the 1991 rulemaking. 56 FR at 7139 (''[Hydrochloric acid recovery furnaces] are typically modified firetube boilers that process secondary waste streams containing 20 to 70 per cent chlorine or bromine to produce a halogen acid product by scrubbing acid from the combustion gases'').

[112] Hazardous waste chlorine feedrates that are included in our database (expressed as MTECs) range from a low of 46,000,000 μg/dscm to a high of 294,000,000 μg/dscm. On a mass chlorine percentage basis, these wastes range from 17% to 82%, noting that these percentages did not include the chlorine that was also spiked during the emissions tests). See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards'', September 2005, Section 15.

[113] Although the rule does not require use of feed control (or any particular means of control to achieve a standard), the rule assures that all sources' emissions will reflect the emissions of the sources with the best hazardous waste federates expressed in terms of amount of HAP per BTU of hazardous waste. Because this format eliminates

Continued

was illustrated in the example provided in the introduction to this comment response section.

Similarly, two sources that combust hazardous waste with the same energy content and the same metal concentrations (on both a thermal concentration and mass-based concentration basis), but at different hazardous waste firing rates, would be required to achieve identical back-end control device operating efficiencies to comply with a thermal emissions-based standard. Holding these factors constant, thermal emission standards require sources to achieve identical percent reductions of the HAP that is processed within the combustor via removal with an air pollution control device. A thermal emission standard format is thus equally stringent for these sources on a percent HAP removal basis, irrespective of the amount of hazardous waste it processes for energy recovery, and better assures that sources burning smaller amounts of hazardous waste (from an energy recovery perspective) are also controlling emissions as well as the average of the best performing sources.

Sources processing higher energy content hazardous wastes would be allowed to feed hazardous wastes with higher metal and chlorine mass-based concentrations relative to other sources combusting lower energy content wastes. To illustrate this, assume there are two sources (named C and D) with identical back-end control systems and identical mass feedrates of hazardous waste. Also assume the hazardous waste of source C has twice the energy content as compared to the hazardous waste processed by source D. A thermal emission standard will allow Source C to feed a hazardous waste that has twice the metals concentration (as measured on a mass basis) as compared to source D, even though both sources would be required to comply with equivalent thermal feed rates limitations. Notably, however: (1) Source C is displacing (*i.e.*, not using) twice as much valuable fossil fuel as the source with the lower energy content hazardous waste, and is feeding twice as much raw material—the raw material being energy content contained in the hazardous waste; (2) source C cannot exceed the feed control levels (expressed on a lbs of HAP per million BTU basis) that was achieved by the average of the best performing sources (assuming its back-end control efficiency is equivalent to the average performance demonstrated by the best performing sources); and (3) source D is required to have lower mass concentrations of metals in its hazardous waste because it is firing poorer quality hazardous waste fuel (from an energy recovery perspective) and because it is feeding less of the same raw material (measured by energy content). Thus, the thermal emissions format appropriately encourages and promotes the processing of clean, high energy content hazardous waste fuels (consistent with evaluating hazardous waste feed control as an aspect of MACT, and not just relying on control solely through use of back end technology), and does so equally for all sources because it normalizes the allowable emissions based on the amount of energy each source recovers from the hazardous waste. Put another way, source C in the above example is controlling HAP emissions to the same extent as the average of the best performing sources per every BTU of hazardous waste fuel it processes (as is source D).

We note that this is a hypothetical example. In practice the average energy content of hazardous waste processed at cement kilns does not vary significantly across sources. Cement kilns burn hazardous wastes with relatively consistent energy contents because that is what their production process necessitates. This is supported by our database and by comments received from the Cement Kiln Recycling Coalition.[114] Heating values of hazardous wastes processed at cement kilns during compliance tests (information which is included in our database) range from 10,300 to 17,600 BTU/lb, with a median value of 12,400 BTU/lb. We note that these are snapshot representations of hazardous waste heating content from these sources that originate from compliance tests. We also have long term average hazardous waste heating measurements from cement kilns indicating that the heating content of the hazardous wastes on average range from 9,900 to 12,200 BTU/lb, with a median value of 11, 500 BTU/lb. We thus conclude that the commenter's concern regarding sources being allowed to emit more HAP if they process hazardous waste with higher energy content is overstated for these sources.

Energy content of hazardous wastes processed in liquid fuel boilers and lightweight aggregate kilns varies more than energy content of hazardous wastes processed by cement kilns, and sources with higher energy content wastes would be allowed to emit more metals than identical sources burning identical volumes of lower energy content wastes (although the degree of control is identical per BTU of hazardous waste fuel processed).[115] Again, these are hypothetical examples. Each energy recovery unit will have an upper bound on the amount of energy it can process from the hazardous waste. Sources that process higher energy content hazardous wastes would not necessarily feed the same volume of hazardous waste as compared to sources processing lower energy content hazardous wastes because they cannot exceed the thermal capacity of their combustion unit. Under a thermal emission standard format, the mass emission rates that would be allowed for identical sources that fulfill 100 percent of their energy demand from hazardous waste and that have differing hazardous waste energy contents would be identical. Although the source with the higher energy content hazardous waste would have a higher allowable mass-based hazardous waste feed concentration, this source would have to process less hazardous waste (on a mass basis) to remain within its thermal capacity. This helps to ensure that its mass HAP emission rate is similar to other sources that process lower energy content hazardous waste.

One commenter's apparent concern with thermal emissions seems to center on an assertion that sources will intentionally blend nonhazardous, high heating value wastes or fuels with low energy, high metal bearing hazardous wastes in order to increase the energy content of these metal bearing wastes so that they will be subject to higher allowable emissions via thermal emission standards. We specifically address that comment later as it relates to commercial energy recovery units (lightweight aggregate kilns and cement kilns). We note here, however, that we do not consider that comment to be of practical concern for liquid fuel boilers

consideration of stack gas attributable to fossil fuel emissions, and thus eliminates the dilutive effect of these emissions, the likelihood that sources will in fact use hazardous waste feed control as part of their control strategy is great.

[114] See comment submitted by the Cement Kiln Recycling Coalition, USEPA, ''Comment Response Document to the Proposed HWC MACT Standards, Volume 1: MACT Standards,'' September 2005, Section 3.3. Also see USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 23.

[115] The hazardous waste heating values of liquid fuel boilers range from 2,200 to 21,000 BTU/lb, with a median value of 14,800. Heating values of lightweight aggregate kilns range from 4,900 to 16,900 BTU/lb, with a median value of 14,800. We note that the low end heating value for lightweight aggregate kilns reflects one source and is not typical of heating values used by the other commercial lightweight aggregate kiln facilities, and are similar to the heating values of cement kilns.

because they do not engage in commercial fuel blending practices.

Comment: A commenter states that EPA's assessment of thermal emissions to identify the relevant best sources is inappropriate because thermal emissions are not emission levels, but rather a ratio of emissions to the heat content in a source's hazardous waste.

Response: This comment challenges the basic idea of normalization, since the comment would be the same regardless of the normalizing parameter being used. Thermal emissions are emission levels that are normalized to account for the amount of energy (*i.e.*, raw material) these sources recover by processing hazardous waste. Similarly, a mass emission concentration (*i.e.*, μg/dscm) is a ratio of the emissions to the volume of combustion gas that is generated, which normalize emissions to account for differences in the size of the combustion units (as well as differences in production capacity). This rulemaking assesses performance and expresses emission standards in both of these formats; both formats normalize the emissions so that we may better assess emission control efficiencies equally across sources based on the percent of HAP in the feed (whether thermal feed or feed normalized based on combustor size) [116] that is controlled or removed from the stack gas prior to being emitted into the atmosphere. As discussed above, technology-based standards have historically assessed performance after normalizing emissions based on the amount of raw material processed by the given industry sector. Thermal emissions normalize each source's emissions based on the amount of raw material (hazardous waste fuel) it processes, and are therefore appropriate to assess and identify the relevant best performers. Finally, as previously explained, this approach is consistent with both the language of section 112 (d) (2) and (3), and the purpose of these provisions.

Comment: A commenter states that EPA's assessment of thermal emissions to identify the relevant best sources is inappropriate because it ignores HAP emissions attributable to the nonhazardous fuel and raw material.

Response: Thermal emission standards do not directly control HAP emissions attributable to the fossil fuels and raw material, in the sense that we did not assess feed control of fossil fuels or raw materials. However, this issue is not related to our choice to use thermal content of hazardous waste as a normalizing parameter. Rather, the issue is whether feed control of fossil fuels and raw materials is a feasible means of control at all. We have determined that it is not, and that only back-end control (expressed as system removal efficiency) is feasible. Moreover, today's rule controls emissions from HAP in raw material and fossil fuels. All non-mercury metal HAP emissions attributable to fossil fuels or raw material are effectively and efficiently controlled to the level of the average of the best performing sources with the surrogate particulate matter standard, as well as the system removal efficiency component of the SRE/Feed methodology.

Comment: EPA has failed to document sources' actual feedrates. Feedrates are presented either as MTECs (where hazardous waste HAP feedrates are divided by gas flow rates) or as thermal feedrates, (where feedrate is expressed as the mass of HAP per million BTUs of hazardous waste fired). This is impermissible, since it does not measure actual feed levels.

Response: This comment essentially takes the position that it is legally impermissible to normalize standards, *i.e.*, express standards on a common basis. EPA rejects this comment for the reasons stated in the introduction to this section.

Comment: A commenter states that an increasing number of fuel blenders are producing fuels with a minimum heating content and maximum metals content in order to maximize revenues because high metal bearing wastes command a higher revenue on the commercial waste market. The commenter states that thermal emission standards are not appropriate because they are based on the implicit assumption that energy recovery entails metals feed.

Response: Contrary to what the commenter suggests, the thermal emissions format will more likely discourage the alleged practice of fuel blenders producing fuels with a minimum heat content and maximum metals content because the standard limits the allowable metal emissions based on the amount of energy contained in the hazardous waste. Thus, a source with a lower energy waste would have to ensure that the mass concentration of metals is also lower to comply with the thermal emission formatted standard. The source would consequently emit less metals (on a mass basis) because of the lower metal mass concentration in the waste fuel. Thermal emission standards reflect the reality that the hazardous waste fuels that are currently processed safely and efficiently in energy recovery units to displace valuable fossil fuel do in fact contain metal HAP. From a feed control perspective, the thermal emissions format appropriately requires sources to process high energy content hazardous waste fuels that reflect the thermal feed control levels achieved by the average of the best performing sources, and does so equally for all sources because it normalizes the allowable emissions based on the amount of energy each source recovers from the hazardous waste.

Comment: A commenter states that EPA should be concerned that fuel blenders and kilns will use the thermal emission standard format to increase the allowable metals feedrates for their units. The commenter claims that sources could inappropriately convert non-hazardous waste fuel to hazardous waste fuel by simply putting coal in a bunker in which hazardous waste was once stored, or mixing nonhazardous waste fuel oil with hazardous waste. The commenter states that a facility with a low hazardous waste firing rate, and relatively low allowable emissions can become a facility with a high hazardous waste percent firing rate, with higher allowable emissions, simply by 'creative' use of the hazardous waste mixture rule. The commenter suggests that EPA clearly state that the hazardous waste thermal emission standards apply only to the hazardous waste portion of the fuel blend mixture. The commenter further suggests that EPA require fuel blenders to report the amount of nonhazardous waste fuel that is contained in the fuel blend, and that cement kilns use this to determine allowable metal feed rates based on the original hazardous waste energy content.

Response: We do not believe hazardous waste combustors will engage in the practice of redesignating their fossil fuels, *i.e.*, coal, as hazardous wastes with creative use of the mixture rule in order to increase their allowable metal HAP emission rate. That would require large quantities of coal to be newly classified as hazardous waste. The coal, and the unit where the coal is stored, would subsequently become subject to all applicable subtitle C requirements, which include storage and closure/post closure requirements. We believe this disincentive will discourage this hypothetical practice.

Moreover, as previously discussed, today's rule does not allow cement kiln or lightweight aggregate kiln emissions to exceed the interim standards. The fact that we are issuing emission

[116] For emission concentration-based standards we normalize hazardous waste feed control levels by calculating what we call maximum theoretical emission concentrations, which are equivalent to the HAP mass feed rate divided by gas flow rate.

standards for some pollutants in the thermal emissions standard format will not encourage fuel blenders to send more metals to these commercial energy recovery sources because their allowable emission concentrations are, by definition, either equivalent to or more stringent than the current limitations with which they are complying. Thus, even if the fuel blenders and energy recovery units engaged in this practice, they could not emit more metals than they are currently allowed to emit. We therefore conclude that it is not necessary to promulgate complicated regulatory provisions that would increase the reporting and recordkeeping requirements of fuel blenders and energy recovery units in order to address a hypothetical scenario that likely would never occur.

Finally, we note that combustion of certain high HAP metal content wastes is already prohibited under RCRA rules. See 40 CFR 268.3. Such wastes remain prohibited from combustion even if they are mixed with fossil fuel so that the mixture has a higher energy content. *U.S.* v. *Marine Shale Processors*, 81 F. 3d 1361, 1366 (5th Cir. 1996) (an unrecyclable hazardous waste is not recycled when it is mixed with a usable non-waste and the mixture is processed). Thus, the dilution prohibition in § 268.3 serves as a further guard against the commenter's concern.

Comment: A commenter states that the thermal emissions format may be problematic because it is based on a flawed assumption that metal HAP from the cement kiln raw material and hazardous waste partition in equal proportions to the total stack gas emissions. The commenter believes that metal retention in the raw materials is higher than the hazardous waste, suggesting that thermal emission standards allow an arbitrary increase in allowable hazardous waste metals emissions. The commenter suggests that EPA require that compliance demonstrations be conducted only under conditions where the metals content in the hazardous waste is significantly higher than the metal content in the raw material to minimize this bias.

Response: The commenter has not provided any emissions data to support this claim, nor does the EPA know of data available that reaches this conclusion. We do not believe there is a significant difference in the partitioning rates of these metals in a cement kiln.[117] Even if there is a difference, this would not result in an arbitrary increase of allowable hazardous waste metals emissions. The thermal emission standards were calculated using thermal emissions data that are based on each source's compliance test. These tests were conducted at hazardous waste feed control levels that represented the upper bound of feed control levels these sources see on a day-to-day basis. To accomplish this, sources spiked metals into the hazardous waste prior to combusting the wastes. The amount of metals that were contained in the hazardous waste streams, after accounting for these spiked metals, far exceeded the metal levels that were contained in the raw material. Thus the differences in partitioning, if any, would likely be overshadowed by the fact that the majority of the metals were contained in the hazardous waste.

Notably, any partitioning bias that that may be present would also have been present during these compliance tests. As a result, this potential bias would be built into the emission standard and thus would not result in an arbitrary increase in allowable hazardous waste metals emissions because these sources will again demonstrate compliance under testing conditions similar to those used to generate the data used to calculate the MACT floors. We conclude that it is not necessary to provide additional prescriptive regulatory language that would require sources to demonstrate system removal efficiencies under testing conditions that exhibit a high ratio of hazardous waste metal content to raw material metal content because the regulations implicitly require sources to demonstrate hazardous waste metal feed control levels that represent the upper range of their allowable feed control levels.[118]

Comment: A commenter states that compliance with standards expressed in a thermal emissions format is problematic because the measurement of energy content of hazardous waste fuel blends is subject to significant variability due to the nature of the test. The commenter also claims that heating value measurements of waste streams that are mixtures of solids and liquids tend be biased high, which would inappropriately give these sources higher allowable metal emission limitation.

Response: There are standard ASTM procedures that reliably measure the energy content of the hazardous waste. Any parameter that is measured for compliance purposes is subject to method imprecision and variability. We do not believe that hazardous waste energy content measurements result in imprecision and variability above and beyond the measurement methods that are currently used to assure compliance with emission concentration-based standards.

The commenter did not provide evidence that supports the claim that energy content measurement and/or sampling methods consistently result in a positive bias. If a bias were consistently present for these types of wastes, then one would expect it to be also reflected in the measured data for which we based the emission standards, which would fully address the commenter's concern. Nonetheless, we note that all hazardous waste sampling and analysis procedures must be prescribed in each source's feedstream analysis plan, which can be reviewed by the permitting authority upon request. These feedstream analysis plans must ensure that sampling and analysis procedures are unbiased, precise, and that the results are representative of the feedstream. See § 63.1208(b)(8). More information on obtaining a representative samples can be found in EPA's SW–846 publication.[119] These procedures involve acquiring several sub-samples that provide integration over the breadth, depth and surface area of the waste container and obtaining replicate samples (see Ch. 13.3.1 of SW–846).

Comment: A commenter states that BTU measurements can be reported as either a higher heating value or a lower heating value, and suggests that EPA require sources to use the lower heating value calculation when determining allowable hazardous waste feed control levels. The commenter seems to imply that use of higher heating values will inappropriately result in higher allowable metal feed rates for fuel blends that contain aqueous waste.

Response: The BTU data in our database that we use to calculate the emission standards reflect higher heating values. It is standard practice in the incineration/combustion industry to report the gross heat of combustion (or

[117] We reference comments submitted by the cement kiln recycling coalition that address this very point. See USEPA, ''Comment Response Document to the Proposed HWC MACT Standards, Volume 1: MACT Standards,'' September 2005, Section 3.3. We have evaluated these comments and find them persuasive on this issue.

[118] Although today's final rule allows sources to extrapolate their allowable hazardous waste feed control levels to levels that are higher than the level demonstrated in the comprehensive performance test, sources must still spike metals into the hazardous waste during the test in order to assure that the system removal efficiency used for the extrapolation procedure is reliable and accurate.

[119] SW–846, ''Test Methods for Evaluating Solid Waste, Physical/Chemical Methods.''

higher heating value). We conclude that sources should use the higher heating value rather than the lower heating value for all compliance determinations because these are method-based emission standards. Fuel blends that contain aqueous wastes will not be inappropriately rewarded with higher allowable feed rates because any fuel mixture that contain aqueous mixtures will have lower reported heating values, irrespective of whether they are reported as higher heating values or lower heating values.[120]

E. Standards Can Be No Less Stringent Than the Interim Standards

Comment: Several commenters oppose EPA's position in the proposed rule that the replacement standards can be promulgated at a level no less stringent than the interim standards for incinerators, cement kilns, and lightweight aggregate kilns. In instances where the calculated replacement standard is less stringent than the interim standard, the commenters oppose EPA's position of ''capping'' the replacement standard at the level of the interim standard to prevent backsliding from those levels. Instead, commenters recommend that EPA calculate and finalize the existing and new source floor levels without regard to the interim standards. One commenter also notes that the interim standards are simply a placeholder without the necessary statutory basis to qualify as emission limitations for purposes of establishing MACT floors. Another commenter, however, supports EPA's position to prevent backsliding to levels less stringent than the interim standards.

Response: We maintain that the replacement standards can be no less stringent than existing standards, including the interim standards under §§ 63.1203–1205, for incinerators, cement kilns, and lightweight aggregate kilns. These standards were promulgated on February 13, 2002, and sources were required to comply with them no later than September 30, 2003, unless granted a one-year extension (see § 63.1206(a)). Thus, all hazardous waste combustors are currently complying with the interim standards. The comment that the standards lack some type of requisite statutory pedigree misses the central point of our interpretation of the statute: motivation for achieving a standard (be it regulatory compulsion, statutory requirement, or some other reason) is irrelevant in determining levels of MACT floors. *National Lime* v. *EPA,* 233 F. 3d at 640. What matters is the level of performance, not what motivated that level.

As a result, the replacement standards promulgated today ensure that sources will emit HAP at levels no higher than levels achieved under current regulations. We do this in this rule, when necessary, by either capping a calculated floor level by the interim standard (when both the calculated floor level and interim standard are expressed in the same format of the standard) or by adopting dual standards in cases where formats of the standard vary (so that comparison of stringency cannot be uniformly determined (as for cement kilns and lightweight aggregate kilns, as explained in the preceding section above and in the following response). In this case, the sources are subject to both the replacement and interim standards.

Comment: One commenter states that some proposed standards expressed in a thermal emissions format would allow some sources to emit semivolatile metals at levels higher than the interim standard. The commenter states that EPA reached incorrect conclusions when making relative stringency comparisons between standards expressed in a thermal emissions and mass concentrations format because, in part, EPA assumed an average F-factor (e.g., semivolatile metals for cement kilns).[121] In addition, the commenter notes that the actual relationship between standards expressed in terms of thermal emissions and mass concentrations is complex and depends on a number of factors. As a result, the commenter urges EPA to adopt dual standards (*i.e.*, promulgate the MACT standard as both the standard expressed in a thermal emissions format and also the interim standard expressed in a mass concentration format) to prevent backsliding.

Response: Even though a source may operate in compliance with a standard expressed in a thermal emission format, a source may or may not also be in compliance with the corresponding mass concentration interim standard (e.g., the semi- and low volatile metal emission standards for cement and lightweight aggregate kilns of §§ 63.1204 and 63.1205, respectively). As reflected in the comment, making a judgment as to whether a replacement standard is more stringent than the interim standard for the HAP is not always a straight-forward calculation. As we discussed in the proposed rule[122] and echoed by the commenter, comparing standards in the thermal emissions format to those in a mass concentration format involves assumptions that vary on a site-specific basis and can vary over time, including the hazardous waste fuel replacement rate, contributions to emissions from nonhazardous waste inputs such as raw materials and nonhazardous waste fuels such as coal, how close to the standard a source elects to comply, the system removal efficiency demonstrated during testing, and the type and composition, including heating value, of fuels burned.

To ensure that sources operating under standards expressed in a thermal emissions format will not emit HAP metals at levels higher than currently achieved under the interim standards, we adopt a dual standard to prevent emissions increasing to levels higher than the interim standards. The dual standard structure includes both the standard expressed in a thermal emissions format and the interim standard, which is expressed in a mass concentration format. We apply this concept to several standards including semivolatile metals, low volatile metals, and mercury[123] for cement kilns and semivolatile metals and low volatile metals for lightweight aggregate kilns. This approach ensures that sources are not emitting HAP metals above the levels of the interim standards because we cannot reliably determine that emissions under a standard expressed in a thermal emissions format would not exceed the interim standard for all sources in the category. See §§ 63.1220(a)(2)–(a)(4), and (b)(2)–(b)(4) and 63.1221(a)(3)–(a)(4) and (b)(3)–(b)(4).

We evaluated the relative stringency of the standards expressed in the thermal emissions format compared to the interim standards for the entire source category in order to determine if the dual standard scheme could be avoided. We determined that we could not. For some HAP groups we found that many sources in the category would have the potential to exceed the interim

[120] The difference between the higher heating value and lower heating value of an aqueous waste is insignificant relative to the difference in heating value between an aqueous waste and an organic liquid waste fuel.

[121] An F-factor is an estimate of the amount of combustion gas volume that is generated per fuel heat input for a given type of fuel, expressed in units, for example, cubic feet of combustion gas per million British thermal units (BTU) of fuel burned. In the proposal, EPA used F-factors to convert the emission standards expressed on a thermal basis to mass concentrations in order to make a judgment as to the relative stringency of the proposed MACT standards relative to the interim standards.

[122] For example, see 69 FR at 21255–258, 267–271.

[123] Although the mercury standard promulgated for cement kilns is not expressed using a thermal emission format basis, the same concept applies because the mercury standard is a hazardous waste feed concentration standard, which is a different format than the interim standard.

standards for that HAP.[124] In this case, we considered simply ''capping'' the standard expressed in the thermal emission format by the interim standard (*i.e.*, the promulgated standard would only be expressed in a mass concentration format). However, we conclude that this approach would not be appropriate because the standard expressed in a thermal emission format would likely be more stringent than the mass concentration for some sources, and the statute requires that MACT floors reflect this superior level of performance.

In other cases we found that the standards expressed in the thermal emissions format would not likely exceed the interim standards by the majority of sources operating under typical conditions.[125] While our analysis (based on information in our data base) shows in these cases that the emission standard expressed in a thermal emission format would not likely result in an exceedance of the interim standard, this conclusion may not be true because the assumptions may not be valid for a particular source or site-specific factors may change in future operations. For example, HAP metal emissions could increase over time due to increases in HAP contributions from raw materials or alternative raw materials. Given this potential, we adopt dual standards for the HAP metal standards in order to ensure that standards expressed in a thermal emissions format will not exceed emission levels achieved under the interim standards.[126]

Comment: Several commenters state that the interim standards do not reflect the average performance of the best sources, and so cannot be the basis for floor levels.

Response: In those few situations where we have established floor levels at the level of the interim standards, we have done so as the best means of estimating performance of the best performing sources. Based on the available data to us, the average of the best performing sources exceeds the level of the interim standards in a few instances. Under these circumstances, the binding regulatory limit becomes the best means available to us to estimate performance. See *Mossville,* 370 F. 3d at 1241–42 (accepting regulatory level as a floor standard where sources' measured performance is not a valid means of determining floor levels, and where such data contains results as high as those regulatory levels).

F. How Can EPA's Approach to Assessing Variability and its Ranking Methodologies Be Reasonable When They Result in Standards Higher Than the Interim Standards?

A commenter argued that EPA's floor methodologies, in particular its consideration of variability beyond that demonstrated in single test conditions, the SRE/feed and Air Pollution Control Device methodologies, must be arbitrary because in a few instances projected standards using these approaches were higher than the current interim standards, a level every source (not just the best performers) are achieving. Commenters also noted that one of the new source standards calculated under these approaches was higher than an existing source standard, another arbitrary result.

EPA believes that these seeming anomalies (which are infrequent) result from the database used to calculate performance and standards, rather than from the approaches to assessing variability or the two questioned floor methodologies. The data base is from test results which preceded EPA's adoption of the interim standards. Thus, the level of performance required by the later rule is not necessarily reflected in pre-rule test data. In confirmation, some of the standards computed using straight emission approaches also are higher than the interim standards. Other anomalies arise simply due to scarcity of data (floor levels for certain HAP emitted by lightweight aggregate kilns especially, where there are only nine sources total). In these situations there is a greater likelihood that one or more of the best performing sources will have relatively high emissions because we are required to use data from five sources to comprise the MACT pool whenever we have data from fewer than 30 sources, and a small amount of data can skew the result. See § 112(d)(3)(B).[127]

For example, many of the calculated new source chlorine floors were slightly higher than the calculated existing source standards because we assumed all sources with measured emissions below 20 ppmv were in fact emitting at 20 ppmv (see part four, section I.C). We generally are unable to differentiate a single best performing source among these best performers because many/all of the best performing sources emissions are adjusted to the same emission level. The calculated new source floor can be slightly higher than the existing source floor because the variability factor that is applied to the single best performing source is based on only one test condition (with three emission test runs). This results in a higher level of uncertainty relative to the existing source standard, which is based on a compilation of emissions data from several sources that have essentially the same projected emissions as a result of the method bias correction factor. The variability factor that is applied to the emissions of the single best performing source is therefore higher than the variability factor for the existing source floor because there are fewer degrees of freedom in the statistical analysis.[128] Likewise, many of the calculated solid fuel boiler new source standards were slightly higher than the calculated existing source standards because, as discussed above, there are fewer degrees of freedom when assessing the variability from a single best performing source. The solid fuel boiler ''anomalies'' also occur using a straight emissions methodology. See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' September, 2005, Section 19, for further discussion that summarizes and explains these so-called anomalies.

[124] An example for each category is semivolatile metals thermal emissions standard for existing cement and lightweight aggregate kilns. See USEPA, ''Final Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' Section 23.1, September 2005.

[125] An example is the emission standards for low volatile metals for existing and new cement kilns and new lightweight aggregate kilns. See USEPA, ''Final Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' Section 23.1, September 2005.

[126] In response to a comment regarding the implementation of dual standards, we note the promulgation of a new provision allowing sources to petition the Administrator to waive the HAP metal feedrate operating parameter limits for either the emissions standards expressed in a thermal emissions format (or the mercury feed concentration standard for cement kilns) or the interim standards based on documentation that the feedrate operating parameter limit is not needed to ensure compliance with the relevant standard on a continuous basis. See new § 63.1209(g)(1)(iv) and Comment Response Document, Volume I, Section 3.5.

[127] See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 19, for further discussion.

[128] For a single test condition the t factor used in variability factor calculation has n–1 degrees of freedom where n is the number of runs for that condition. For the MACT floor calculation the t factor has X–N degrees of freedom where X is the total number of runs from all sources in the MACT pool and N is the number of sources in the pool. See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' September, 2005, Section 7.1 for more information on the floor calculation procedure.

IV. Use of Surrogates

A. Particulate Matter as Surrogate for Metal HAP

Comment: A commenter states that EPA's use of particulate matter as a surrogate for nonenumerated metals is unlawful and arbitrary and capricious because although particulate matter emissions may provide some indication of how good a source's end-of stack control of such metals is, it does not indicate what its actual metal emission levels are.[129] The commenter states that emissions of these metals can vary based on metal feed rate without having any appreciable effect on particulate matter emission levels. Thus a particulate matter standard does not necessarily ensure that metal emissions are reduced to the metal emission levels achieved by the relevant best performing sources. To support this assertion, the commenter states that EPA is on record saying ''low particulate matter emissions do not necessarily guarantee low metal HAP emissions, especially in instances where the hazardous waste feeds are highly concentrated with metal HAP.'' 69 FR at 21221.

Response: The final rule uses a particulate matter standard as a surrogate to control: (1) Emissions of nonenumerated metals that are attributable to all feedstreams (both hazardous waste and remaining inputs); and (2) all nonmercury metal HAP emissions (both enumerated and nonenumerated metal HAP) from the nonhazardous waste process feeds at cement kilns, lightweight aggregate kilns, and liquid fuel boilers (e.g., emissions attributable to coal and raw material at a cement kiln, and emissions attributable to fuel oil for liquid fuel boilers). Incinerators, liquid and solid fuel boilers may elect to comply with an alternative to the particulate matter standard that would limit emissions of all the semivolatile metal HAPs and low volatile metal HAPs. See § 63.1219(e).

The particulate matter standard is a necessary, effective, and appropriate surrogate to control nonmercury metal HAPs. The record demonstrates overwhelmingly that when a hazardous waste combustor emits particulate matter, it also emits nonmercury HAP metals as part of that particulate matter, and that when particulate matter is removed from emissions the nonmercury HAP metals are removed with it.[130] Nonmercury metal HAP emissions are therefore reduced whenever particulate matter emissions are reduced. The particulate matter standard thus is an effective and appropriate surrogate that assures sources are controlling these metal HAP with an appropriate back-end control technology. *National Lime* v. *EPA*, 233 F. 3d at 639. The nonenumerated metal HAP are no different than other semivolatile or low volatile metals in that they also will be effectively controlled with a back-end particulate matter air pollution control device.

We also considered the possibility of developing a standard for nonenumerated HAP metals instead of a PM standard (*i.e.*, regulating these metals directly, rather than through use of a surrogate). We conclude for several reasons, however, that issuing emission standards for these nonenumerated metals in lieu of a particulate matter standard would not adequately control nonmercury metal HAPs to levels achieved by the relevant best performing sources.

We generally lack sufficient compliance test emissions data for the noneneumerated metals to assess the relevant best performing sources, because, as discussed below, most of these metals were not directly regulated pursuant to RCRA air emission standards.[131] Although we have more emissions data for these metals that are based on (so called) normal operations, we still lack sufficient emissions data to establish nonenumerated metal standards for all the source categories. Use of normal data may also be problematic because of the concern raised by the cement kiln and lightweight aggregate kiln stakeholders that our normal metals emissions data obtained from compliance tests are not representative of the range of actual emissions at their sources. Cement kiln and lightweight aggregate kiln stakeholders submitted long-term hazardous waste mercury feed control data that support their assertion. Although these stakeholders did not submit long-term normal hazardous waste feed control data for the nonenumerated metals, we can still see that use of the normal nonenumerated metal snapshot emissions in our database to determine MACT floors could raise similar concerns with respect to whether the normal data in fact represents average emissions at these sources, and their level of performance.

Use of particulate matter emissions data to assess the relevant best performers for nonenumerated metal HAP is therefore more appropriate for two reasons. Compliance test data better account for emissions variability and avoid the normal emissions bias discussed above. We also have much more particulate matter emissions data from more sources, which better allows us to evaluate the true range of emissions from all the sources within the source category and to assess and identify the relevant top performing 12 percent of the sources.

It would be inappropriate to assess total stack gas emissions of nonenumerated metals for cement kiln and lightweight aggregate kilns when determining the relevant best performers because these emissions would, in part, reflect the metal feed levels in these sources' nonhazardous waste process feedstreams. This is not appropriate because nonhazardous process feedstream control is not a feasible means of control. See part four, section III.B.1. A potential solution to this problem would be to identify the relevant best performers by assessing each source's hazardous waste thermal emissions for these nonenumerated metals (given that hazardous waste thermal emissions exclude by definition emissions attributable to inputs other than hazardous waste, *i.e.* raw materials and fossil fuels). This, however, would be problematic because, aside from the data limitation issues, the majority of the nonenumerated metals data reflect normal emissions which often do not contain the highest feed rates used by the source. As a result, we cannot assess performance on a thermal emissions basis because of the uncertainty associated with system removal efficiencies at such low metal feedrates. Furthermore, even if we could issue hazardous waste thermal emissions standards for these metals, a particulate matter emission standard would still be necessary to control nonmercury metal HAP emissions from the nonhazardous waste process feedstreams.

[129] ''Enumerated'' metals are those HAP metals directly controlled with an emission limit, *i.e.*, lead, cadmium, chromium, arsenic and beryllium. The remaining nonmercury metal HAP (*i.e.*, antimony, cobalt, manganese, nickel, and selenium) are called ''nonenumerated'' metal HAP (note that arsenic and berrylium are nonenumerated metals for liquid fuel boilers because the low volatile metal emission standard applies only to chrome).

[130] This statement is equally true for any emitting source, not just hazardous waste combustors. It is well established that semivolatile and low volatile metals exist in solid particulate form at typical air pollution control device operating temperatures. This is supported by (1) known operating temperature ranges of air pollution control devices used by hazardous waste combustors; (2) known metal volatility equilibrium relationships; and (3) extensive technical literature. See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 3.1.

[131] At best, we may have enough compliance test data for antimony and selenium to adequately assess relevant best performers for only incinerators and lightweight aggregate kilns.

Emission standards for these nonenumerated metals could require sources to implement hazardous waste feed control (for these metals) to comply with the standard.[132] We are less assured that these sources were implementing hazardous waste feed control for these nonenumerated metals at the time they conducted the emissions tests (which serve as the basis for floor calculations) because most of these metals were never directly regulated pursuant to the RCRA emission standards.[133] This means that sources tended to optimize (or at least concentrate their efforts on) control of the metals that are regulated. Although these metals were being controlled with each source's back-end control device, sources may not have been controlling these metal feedrates because they probably were not subject to specific feedrate limitations (feed control of the enumerated metal HAP does not ensure feed control of these nonenumerated metal HAP). Furthermore, simultaneous feed control of all these metals, when combined with enumerated semivolatile and low volatile metals, may not be possible because the best performing sources for all these metals may collectively represent a hazardous waste feedstream that does not exist in practice (from a combined metal concentration perspective) because there likely would be different best performers for each of the metal HAP or metal HAP groups.[134] We thus conclude that back-end control as measured and assessed by each source's particulate matter emissions is the appropriate floor technology to assess when identifying the relevant best performers for nonenumerated HAP metals and estimating these sources' level of performance.

Comment: A commenter states that EPA's rationale for use of particulate matter as a surrogate for nonenumerated metals is flawed because EPA has provided no data in the proposal to justify its hypothesis that particulate matter is an appropriate surrogate for non-enumerated metal HAP. The commenter also states that the proposed emission standards for particulate matter for existing sources discriminate against boilers and process heaters that burn clean (*i.e.*, little or very low concentrations of HAP metals) hazardous waste fuels. The commenter suggests that if there are sufficient data, EPA should consider developing an alternative emission standard for total HAP metals for new and existing liquid fuel boilers, as was done for the Subpart DDDDD National Emission Standards for Hazardous Air Pollutants for Industrial/Commercial/Institutional Boilers and Process Heaters.

Response: As previously discussed in this section, particulate matter reflects emissions of nonmercury metal HAPs because these compounds comprise a percentage of the particulate matter (provided these metals are fed into the combustion unit). The technologies that have been developed and implemented to control particulate matter also control nonmercury metal HAP. Since non-mercury metal HAP is a component of particulate matter, we can use particulate matter as a surrogate for these metals. Further justification for the use of particulate matter as a surrogate to control metal HAP is included in the technical support document.[135]

We conclude that we do not have enough nonenumerated metal emissions data to calculate alternative total metal emission floors for liquid fuel boilers. The most problematic of these metals are manganese and cobalt, where we have emission data from only three sources. We have much more compliance test particulate matter emissions data from liquid fuel boilers, and thus conclude that the particulate matter standard best reflects the emission levels achieved by the relevant best performers.

Similar to the above discussion, calculating an alternative total metal emissions floor raises questions regarding the method used to calculate such floors. Hazardous waste combustor metal emissions have traditionally been regulated in volatility groupings because the volatility of the metal affects the efficiency of back-end control (*i.e.*, semivolatile metals are more difficult to control than low volatile metals because they volatilize in the combustor and then condense as small particulates prior to or in the emission control device). When identifying the best performing sources, we previously have, in general, only evaluated sources that have metal emissions information for every metal in the volatility grouping. This approach could prove to be problematic since it is not likely many sources will have emissions data for all the metals.

Although we could not calculate alternative total metal emission floor standards based on the available emissions data we have, we agree with the commenters' view that sources that burn hazardous waste fuels with low levels of nonenumerated metals should be allowed to comply with a metals standard rather than the particulate matter standard. We proposed an alternative to the particulate matter standard (see 69 FR at 21331) for incinerators, liquid, and solid fuel boilers that was a simplified version of the alternative particulate matter standard that is currently in effect for incinerators pursuant to the interim standards (see § 63.1206(b)(14)). We received no adverse comment and are promulgating this alternative as proposed. The alternative metal standards apply to both enumerated and nonenumerated metal HAP, excluding mercury. For purposes of these alternative requirements, each nonenumerated metal is classified as either a semivolatile or a low volatile metal and subsequently grouped with the associated semivolatile and low volatile enumerated metals. The semivolatile and low volatile metals standards under this alternative are the same as those that apply to other liquid fuel boilers, but the standard would apply to all metal HAP, not just those enumerated in the generic low volatile metal and semivolatile metal standards. See §§ § 63.1216(e), 63.1217(e) and 63.1219(e).

B. Carbon Monoxide/Hydrocarbons and DRE as Surrogates for Dioxin/Furan

Comment: One commenter states that the dioxin/furan floors for new and existing solid fuel boilers is unlawful and arbitrary and capricious. EPA established the floor for dioxin/furan for these sources as compliance with the carbon monoxide or hydrocarbon standard and the destruction and removal efficiency (DRE) standard. The

[132] Sources that otherwise would be equipped with what is considered to be a MACT back-end control devices (*i.e.*, a control device achieving the final rule particulate matter standard) may not be able to achieve these metal emissions standards due to varying metal feed levels (both within sources and across sources). Such an outcome may require a source to limit the amount of metal that is fed into the combustion unit to achieve the standard.

[133] Antimony is the only nonenumerated metal that is directly regulated pursuant to the boilers and industrial furnace regulations. See § 266.106.

[134] We generally cannot combine these nonenumerated metals into the associated semivoltile or low volatile metal volatility groupings promulgated in this final rule for purposes of establishing ''grouped'' emission standards because we cannot mix compliance test data with normal emissions data when calculating floors (the majority of the standards included in this final rule are based on compliance test data, and the majority of the data we have for nonenumerated metals being normal). Furthermore, if we were to separately group the normal nonenumerated metal emission data into their associated semivolatile or low volatile metal group, we may encounter data limitation issues because each source would need to have measured each of the nonenumerated metals in that associated metal volatility group in order for us to conclude that the emission data adequately represents the sources combined emissions of semivolatile or low volatile metals.

[135] See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 3.1.

commenter states that EPA has not shown that carbon monoxide or hydrocarbon emissions correlate to dioxin/furan emissions, and, accordingly, has not shown that the carbon monoxide or hydrocarbon standard, together with the DRE standard, are valid surrogates.

This commenter also states that it is inappropriate for EPA to use carbon monoxide or hydrocarbons and DRE as surrogates to establish dioxin/furan floors for liquid fuel boilers with wet or no air pollution control devices and for hydrochloric acid production furnaces. The commenter believes EPA inappropriately justifies these surrogates by claiming that a numerical dioxin/furan floor would not be replicable by the best sources or duplicable by the others. The commenter states that EPA has no discretion to avoid setting floors for a HAP just because it believes that HAP is not controlled with a technology. Rather, EPA must set floors reflecting the relevant best sources' actual performance. Such floors necessarily will be duplicable by the relevant best sources themselves. That they cannot be replicated by other sources is irrelevant according to the commenter.

In addition, the commenter states that EPA does not claim or demonstrate that the carbon monoxide and hydrocarbon floors for solid fuel boilers reflect the average emission levels achieved by the relevant best sources.

Finally, the commenter also notes that EPA appears to argue that its carbon monoxide or hydrocarbon standard and DRE standard could be viewed as work practice standards under section 112(h) which allows EPA to establish work practice standards in lieu of emission standards only if it is not be feasible to set the former. Because EPA has made no such demonstration, setting work practice standards to control dioxin/furan emissions from boilers would be unlawful according to the commenter.

Response: The commenter raises four issues: (1) Are the carbon monoxide/hydrocarbon standard and the DRE standard adequate surrogate floors to control dioxin/furan; (2) floors for existing sources must be established as the average emission limitation achieved by the best performing sources irrespective of whether the limitation is duplicable by the best performing sources or replicable by other sources; (3) EPA has not explained how the carbon monoxide and hydrocarbon floors reflect the average emission limitation achieved by the relevant best sources; and (4) EPA cannot establish work practice standards for dioxin/furan under section 112(h) because it has not demonstrated that setting an emission standard is infeasible under section 112(h)(1).

Carbon Monoxide and Hydrocarbons Are Adequate Surrogates to Control Dioxin/Furan when Other Controls Are Not Effective or Achievable. Carbon monoxide and hydrocarbons (coupled with the DRE standard) are the best available surrogates to control dioxin/furan emissions when a numerical floor would not be achievable and when other indirect controls, such as control of the gas temperature at the inlet of a dry particulate matter control device to 400F, are not applicable or effective.[136]

As we explained at proposal, operating under good combustion conditions to minimize emissions of organic compounds such as polychlorinated biphenyls, benzene, and phenol that can be precursors to dioxin/furan formation is an important requisite to control dioxin/furan emissions.[137] See 69 FR at 21274. Minimizing dioxin/furan precursors by operating under good combustion practices plays a part in controlling dioxin/furan emissions, and that role is substantially enhanced when there are no other dominant factors that relate to dioxin/furan formation and emission (e.g., operating a dry particulate matter control device at temperatures above 400F).

Carbon monoxide and hydrocarbons are widely accepted indicators of combustion conditions. The current RCRA regulations for boilers and hydrochloric acid production furnaces use emissions limits on carbon monoxide and hydrocarbons to control emissions of toxic organic compounds. See 56 FR 7150 (February 21, 1991) documenting the relationship between carbon monoxide, combustion efficiency, and emissions of organic compounds. In addition, carbon monoxide and hydrocarbons are used by many CAA standards for combustion sources to control emissions of organic HAP, including: MACT standards for hazardous waste burning incinerators, hazardous waste burning cement kilns, hazardous waste burning lightweight aggregate kilns, Portland cement plants, and industrial boilers; and section 129 standards for commercial and industrial waste incinerators, municipal waste combustors, and medical waste incinerators. Finally, hydrocarbon emissions are an indicator of organic hazardous air pollutants because hydrocarbons are a direct measure of organic compounds.

Commenters on our proposed MACT standards for hazardous waste incinerators, cement kilns, and lightweight aggregate kilns stated that EPA's own surrogate evaluation[138] did not demonstrate a relationship between carbon monoxide or hydrocarbons and organic HAP at the carbon monoxide and hydrocarbon levels evaluated. See 64 FR at 52847 (September 30, 1999). Several commenters on that proposed rule noted that this should not have been a surprise given that the carbon monoxide and hydrocarbon emissions data evaluated were generally from hazardous waste combustors operating under good combustion conditions (and thus, relatively low carbon monoxide and hydrocarbon levels). Under these conditions, emissions of HAP were generally low, which made the demonstration of a relationship more difficult. These commenters noted that there may be a correlation between carbon monoxide and hydrocarbons and organic HAP, but it would be evident primarily when actual carbon monoxide and hydrocarbon levels are higher than the regulatory levels. We agreed with those commenters, and concluded that carbon monoxide and hydrocarbon levels higher than those we established as emission standards for hazardous waste burning incinerators, cement kilns, and lightweight aggregate kilns are indicative of poor combustion conditions and the potential for increased emissions organic HAP. We continue to believe that carbon monoxide and hydrocarbons are adequate surrogates for organic HAP which may be precursors for dioxin/furan formation and note that the commenter did not explain why our technical analysis is problematic.

Emissions that Are Not Replicable or Duplicable Are Not Being ''Achieved''. The commenter believes that floors must be established as the average emission limitation of the best performing sources irrespective of whether they are replicable by the best performing sources or duplicable by other sources. To the contrary, emission

[136] As discussed in Part Two, Section V, we view the carbon monoxide, hydrocarbon, and destruction removal efficiency standards as unaffected by the Court's vacature of the September 1999 challenged regulations for incinerators, cement kilns, and lightweight aggregate kilns. We are therefore not re-promulgating and reopening consideration of these standards in today's final rule for these source categories.

[137] Operating under good combustion conditions also helps minimize soot formation on boiler tubes. Research has shown that operating under conditions that can form soot followed by operating under good combustion conditions can lead to dioxin/furan formation. See Section 2.4 of Volume III of the Technical Support Document.

[138] See Energy and Environmental Research Corporation, '''Surrogate Evaluation of Thermal Treatment Systems,''' Draft Report, October 17, 1994.

levels that are not replicable by the best performing sources are not being ''achieved'' by those sources and cannot be used to establish the floor.

For solid fuel boilers, we explained at proposal why dioxin/furan emissions are not replicable by the best performing sources (or duplicable by other sources): there is no dominant, controllable means that sources are using that can control dioxin/furan emissions to a particular level. See 69 FR at 21274–75. We explained that data and information lead us to conclude that rapid quench of post-combustion gas temperatures to below 400 °F—the control technique that is the basis for the MACT standards for dioxin/furan for hazardous waste burning incinerators, and cement and lightweight aggregate kilns—is not the dominant dioxin/furan control mechanism for coal-fired boilers. We believe that sulfur contributed by the coal fuel is a dominant control mechanism by inhibiting formation of dioxin/furan. Nonetheless, we do not know what minimum level of sulfur provides significant control. Moreover, sulfur in coal causes emissions of sulfur oxides, a criteria pollutant, and particulate sulfates. For this reason, as well as reasons stated at 69 FR 21275, we are not specifying a level of sulfur in coal for these sources as a means of dioxin/furan control.

The same rationale applies to liquid fuel boilers with no air pollution controls or wet air pollution control systems and to hydrochloric acid production furnaces—there is no dominant, controllable means that sources are using that can control dioxin/furan emissions to a particular emission level.[139] Thus, best performer dioxin/furan emissions are not replicable by the best performing sources (or duplicable by other sources). For these sources, the predominant dioxin/furan formation mechanism for other source categories—operating a fabric filter or electrostatic precipitator above 400F—is not a factor.

Given that these sources are not using controllable means to control dioxin/furan to a particular emission level, there is no assurance that the best performers can achieve in the future the emission level reported in the compliance test in our data base. Put another way, the test data do not reflect these sources' variability, and the variability is largely unquantifiable given the uncertainties regarding control mechanisms plus the environmental counter-productiveness of encouraging use of higher sulfur coal. Hence, that reported emission level is not being ''achieved'' for the purpose of establishing a floor.

Finally, we note that beyond-the-floor controls such as activated carbon can control dioxin/furan to a particular emission level. If a source were to install activated carbon, it could achieve the level demonstrated in a compliance test, after adjusting the level to account for emissions variability to ensure the measurement was replicable. The commenter argues that such a result is mandatory under the straight emissions approach (the only way the commenter believes best performers can be determined). Doing so, however, would amount to a surreptitious beyond-the-floor standard (forcing adoption of a control technology not used by any existing source), without considering the beyond-the-floor factors set out in section 112(d)(2). In fact, we considered beyond-the-floor standards based on use of activated carbon for these sources—solid fuel boilers, liquid fuel boilers with wet or no emission control device, and hydrochloric acid production furnaces—but rejected them for reasons of cost. The cost-effectiveness ranged from $2.5 million to $4.9 million per gram TEQ of dioxin/furan removed. In contrast, the cost-effectiveness of the beyond-the-floor standard we promulgate for liquid fuel boilers equipped with dry emission control devices is $0.63 million per gram TEQ of dioxin/furan removed.[140]

Consequently, we are not promulgating a beyond-the-floor standard for dioxin/furan for these sources, and do not believe we should adopt such a standard under the guise of determining floor levels.

The Carbon Monoxide and Hydrocarbon Floors Are Appropriate MACT Floors. We explained at proposal why the carbon monoxide standard of 100 ppmv and the hydrocarbon standard of 10 ppmv are appropriate floors. See 69 FR at 21282. The floor level for carbon monoxide of 100 ppmv is a currently enforceable Federal standard. Although some sources are achieving carbon monoxide levels below 100 ppmv, it is not appropriate to establish a lower floor level because carbon monoxide is a conservative surrogate for organic HAP. Organic HAP emissions may or may not be substantial at carbon monoxide levels greater than 100 ppmv, and are extremely low when sources operate under the good combustion conditions required to achieve carbon monoxide levels in the range of zero to 100 ppmv.[141] (See also the discussion below regarding the progression of hydrocarbon oxidation to carbon dioxide and water). As such, lowering the carbon monoxide floor below 100 ppmv may not provide significant reductions in organic HAP emissions. Moreover, it would be inappropriate to establish the floor blindly using a mathematical approach—the average emissions for the best performing sources—because the best performing sources may not be able to replicate their emission levels (and other sources may not be able to duplicate those emission levels) using the exact types of good combustion practices they used during the compliance test documented in our data base. This is because there are myriad factors that affect combustion efficiency and, subsequently, carbon monoxide emissions. Extremely low carbon monoxide emissions cannot be assured by controlling only one or two operating parameters.

We proposed a floor level for hydrocarbons of 10 ppmv even though the currently enforceable standard for boilers and hydrochloric acid production furnaces is 20 ppmv because: (1) Although very few sources elect to comply with the RCRA standard for hydrocarbons rather than the standard for carbon monoxide, those that comply with the hydrocarbon standard have hydrocarbon levels well below 10 ppmv; and (2) reducing hydrocarbon emissions within the range of 20 ppmv to 10 ppmv may reduce emissions of organic HAP.

Although all sources are likely to be achieving hydrocarbon levels below 10 ppmv, it is not appropriate to establish a lower floor level because hydrocarbons are a surrogate for organic HAP. Although total hydrocarbons would be reduced at a floor level below 10 ppmv, we do not know whether

[139] We note that the same rationale also applies to incinerators with wet or no air pollution control equipment and that are not equipped with a waste heat boiler.

[140] See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Sections 12, 13, and 15.

[141] We note, however, that this general principle may not always apply. There are data that indicate that even though carbon monoxide levels are below 100 ppmv, hydrocarbon levels may not always be below 10 ppmv. See 64 FR at 52851 and Part Four, Section IV B. and C. of this preamble. An example of how this might occur, although not a likely practical scenario, is if combustion is quenched before substantial carbon monoxide can be generated, leaving unburned hydrocarbons in the stack gas. Because of this potential (although unlikely) concern, the rule requires sources that elect to monitor carbon monoxide rather than hydrocarbons to conduct a one-time test to document that hydrocarbons are below 10 ppmv and to establish operating limits on parameters that affect combustion conditions (i.e., the same operating parameters that we use for compliance assurance with the DRE standard). See § 63.1206(b)(6).

organic HAP would be reduced substantially. As combustion conditions improve and hydrocarbon levels decrease, the larger and easier to combust compounds are oxidized to form smaller compounds that are, in turn, oxidized to form carbon monoxide and water. As combustion continues, carbon monoxide is then oxidized to form carbon dioxide and water. Because carbon monoxide is a difficult-to-destroy refractory compound (*i.e.*, oxidation of carbon monoxide to carbon dioxide is the slowest and last step in the oxidation of hydrocarbons), it is a conservative surrogate for destruction of hydrocarbons, including organic HAP, as discussed above. As oxidation progresses and hydrocarbon levels decrease, the larger, heavier compounds are destroyed to form smaller, lighter compounds until ideally all hydrocarbons are oxidized to carbon monoxide (and then carbon dioxide) and water. Consequently, the relationship between total hydrocarbons and organic HAP becomes weaker as total hydrocarbon levels decrease to form compounds that are not organic HAP, such as methane and acetylene.[142]

Moreover, as discussed above for carbon monoxide, it would be inappropriate to establish the floor blindly using a mathematical approach—the average emissions for the best performing sources—because the best performing sources may not be able to replicate their emission levels (and other sources may not be able to duplicate those emission levels) using the exact types of good combustion practices they used during the compliance test documented in our data base. This is because there are myriad factors that affect combustion efficiency and, subsequently, hydrocarbon (and carbon monoxide) emissions. Extremely low hydrocarbon emissions cannot be assured by controlling only one or two operating parameters.

The Standards for CO and HC Are Not Work Practice Standards. The floor standards for CO or HC for boilers and hydrochloric acid production furnaces are quantified emission limits. The standards consequently are not work practice standards (even though they represent levels showing good combustion control). CAA section 302(k). EPA's reference to section 112(h)(1) at proposal (69 FR at 21275) was consequently erroneous.

[142] USEPA, Technical Support Document for HWC MACT Standards, Volume III: Selection of MACT Standards and Technologies, July 1999, Section 12.1.2.

C. Use of Carbon Monoxide and Total Hydrocarbons as Surrogate for Non-Dioxin Organic HAP [143]

Comment: A commenter states that neither the total hydrocarbon nor carbon monoxide standard alone provides adequate surrogate control for organic HAP. Accordingly, EPA must include standards for both. Hazardous waste combustors could have total hydrocarbon levels below the standard during the carbon monoxide compliance tests, but higher total hydrocarbon levels at other times during normal operation because there are many variables that can affect total hydrocarbon emissions, and these will not all be represented during the carbon monoxide compliance test. The commenter states that EPA is on record stating that carbon monoxide limits alone may not by itself minimize organic emissions because products of incomplete combustion can result from small pockets within the combustion zone where adequate time, temperature, turbulence and oxygen have not been provided to completely oxidize these organics. The commenter also states that EPA is on record stating that total hydrocarbon levels can exceed good combustion condition levels when carbon monoxide levels are below 100 ppmv.

Response: The final rule requires compliance with destruction and removal efficiency and carbon monoxide or hydrocarbon standards as surrogates to control non-dioxin organic HAP emissions [144] from liquid fuel boilers, solid fuel boilers, and hydrochloric acid production furnaces. These are effective and reliable surrogates to control organic HAP. We conclude that simultaneous measurement of both total hydrocarbons and carbon monoxide with continuous emission monitors is not necessary because each serves as a reliable surrogate to control organic HAP emissions. The commenter has cited EPA preamble language that was included in the April 19, 1996 proposed rule for hazardous waste incinerators, cement kilns, and lightweight aggregate kilns. In that rule we proposed to require compliance with both the total hydrocarbon standard and the carbon monoxide standard. We requested comment on whether these requirements were redundant, and we later requested comment on whether we should allow sources to comply with either the carbon monoxide standard or the total hydrocarbon standard. We clarified, however, that allowing sources to comply with the carbon monoxide standard would be contingent on the source demonstrating compliance with the hydrocarbon standard during the compliance test. We believed this was necessary because we had limited data that showed a source could have total hydrocarbon levels exceeding 10 ppmv even though their carbon monoxide emission levels were below 100 ppmv. EPA subsequently promulgated this approach in the September 1999 Final Rule. 62 FR 52829.

Today's rule adopts the same approach for liquid and solid fuel boilers and hydrochloric acid production furnaces. We again conclude that it is not necessary to require sources to verify compliance with both of these standards on a continuous basis with two separate continuous emission monitors, given the redundancy of these measurement techniques. Total hydrocarbon emission measurements are a more direct indicator of organic HAP emissions than carbon monoxide. Hence, continuous compliance with this standard always assures that organic HAP are well controlled. Carbon monoxide is a conservative indicator of combustion efficiency because it is a product of incomplete combustion and because it is a refractory compound that is more thermally stable than hydrocarbons. The hydrocarbon products of incomplete combustion that are simultaneously formed during incomplete, or inefficient, combustion conditions can be subsequently oxidized later in the combustion process. In such instances carbon monoxide will likely still be prevalent in the exhaust gas even though the products of incomplete combustion were later oxidized. The conservative nature of carbon monoxide as an indicator of good combustion practices is supported by our data. At carbon monoxide levels less than 100 ppmv, our data indicates that there is no apparent relationship between carbon monoxide and hydrocarbons (other than that hydrocarbon levels are generally below 10 ppm when carbon monoxide levels are below 100 ppm). For example, a source with a carbon monoxide level of 1 ppm is no more likely to have lower

[143] As discussed in part two, section V, we view carbon monoxide, hydrocarbon, and destruction removal efficiency standards as unaffected by the Court's vacature of the September 1999 challenged regulations for incinerators, cement kilns, and lightweight aggregate kilns. We are therefore not re-promulgating and did not reconsider these standards in today's final rule for these source categories.

[144] As discussed in the previous section, these standards are also used as surrogates to control dioxin/furans for hydrochloric acid production furnaces, solid fuel-fired boilers, and liquid fuel-fired boilers that are not equipped with dry air pollution control devices.

measured hydrocarbons than a source achieving a carbon monoxide emission level of 100 ppm. [145]

We consider the few instances where the data showed total hydrocarbon levels above 10 ppmv while carbon monoxide levels are below 100 ppmv to be anomalies. Even so, we have accounted for this by requiring compliance with the hydrocarbon standard during the compliance test if a source elects to comply with the carbon monoxide standard. See §§ § 63.1216(a)(5)(i), 1217(a)(5)(i), and 1218(a)(5)(i).

We disagree with the commenter's assertion that the total hydrocarbon compliance demonstration during the compliance test is insufficient. Sources are required to establish numerous operating requirements based on operating levels that were demonstrated during the test, including minimum operating temperature, maximum feed rates, minimum combustion zone residence time, and operating requirements on the hazardous waste firing system that control liquid waste atomization efficiency. Sources must comply with these operating requirements on a continuous basis. Compliance with these requirements, in addition to the requirements to comply with the carbon monoxide and destruction and removal standards, adequately assure sources are controlling organic HAP emissions to MACT levels.

Comment: A commenter states that EPA's proposed use of surrogates for organic HAP do not ensure that each of the organic HAP (e.g., polychlorinated biphenyls and polyaromatic hydrocarbons) are reduced to the level of the HAP emitted by the relevant best performing sources. EPA has not shown the necessary correlation between either the total hydrocarbon or carbon monoxide standards and organic HAP, and neither is a reasonable surrogate according to the commenter.

Response: Carbon monoxide and total hydrocarbon monitoring are widely used and accepted indicators of combustion efficiency, and hence control organic HAP, which are destroyed by combustion.[146] Sources that are achieving carbon monoxide of emission levels of 100 ppm or a hydrocarbon emission levels of 10 ppm are known to be operating pursuant to good combustion practices. This is supported by an extensive data analysis we used to support identical standards for incinerators, cement kilns, and lightweight kilns which were promulgated in the September 1999 Final Rule. We are applying the same rationale to support these standards for boilers and hydrochloric acid production furnaces.

Today's rule requires continuous compliance with either a carbon monoxide and hydrocarbon standard, in combination with a destruction and removal efficiency standard, as surrogates to control organic HAP. We conclude that sources which comply with these standards are operating under efficient combustion conditions, assuring non-dioxin organic HAP are being oxidized, thus limiting emissions to levels reflecting MACT. Efficient combustion of hazardous waste minimizes emissions of organic HAP that are fed to the combustion chamber as well as emissions attributable to products of incomplete combustion that may form within the combustion chamber or post combustion. We are not capable of issuing emission standards for each organic HAP because of data limitations and because such emission standards may not be replicable by individual sources or duplicable by the other best performing sources because of the complex nature of combustion and post combustion formation of products of incomplete combustion.

V. Additional Issues Relating to Variability and Statistics

Many commenters raised issues relating to emissions variability and statistics other than those discussed above in Section III.A: (1) Variability dampening for data sets containing nondetects; (2) imputation of variability to address variability dampening for data sets containing nondetects; and (3) our analysis of variance procedures to identify subcategories. We present comments and responses on the remaining topics below.

A. Data Sets Containing Nondetects

Comment: One commenter states that EPA's approach of assuming measurements that are below detection limits are present at the detection limit dampens the variability of the data set. Thus, the variability of ranking parameters is understated when ranking sources to identify the best performers and emissions variability is understated when calculating the floor.

Response: We agree with the commenter. For the final rule, we use an approach to address nondetects whereby a value is assigned to each nondetect within its possible range such that the 99th percentile upper prediction limit for the data set (i.e., test condition runs for each source) is maximized. Although this approach maximizes the deviation among runs containing nondetect measurements, the test condition average is lower because we no longer assume the nondetect analyte is present at the level of detection. See response to comments discussion below for more information on this statistical approach to address variability of nondetects.

We use this measurement imputation approach to address variability of feedrate data sets containing nondetects for source ranking purposes and to address variability of emissions data sets containing nondetects when calculating floors. We do not apply the measurement implementation approach to system removal efficiency (SRE) data sets where feedrates or emissions contain nondetects, however. Statistical imputation of nondetect SREs is complicated given that SRE is derived from feedrate and emissions data, both of which could contain nondetect measurements.[147] Our inability to apply the imputation approach to SREs is not a major concern, however, because system removal efficiency is used as a source ranking criterion only (i.e., it is not used as the standard, except for hydrochloric acid production furnaces where there are no nondetect feedrate or emissions measurements), and there are few instances where system removal efficiencies are derived from nondetect feedrate or emissions data.

B. Using Statistical Imputation To Address Variability of Nondetect Values

On February 4, 2005, EPA distributed by email to major commenters on the proposed rule a direct request for comments on a limited number of issues that were raised by the public comments on the proposed rule. The nondetect measurement imputation approach discussed above was one of the issues for which we requested comment. We discuss below the major comments on the approach.

Comment: Most commenters state that they agree with either the concept or the approach in principle but cannot

[145] See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 3.2 and USEPA, ''Final Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards and Technologies,'' July 1999, Section 5.1.

[146] This is why almost all of the RCRA Land Disposal Restiction treatment standards for organic waste, which standards are for the most part established at an analytic detection level for the organic HAP in question plus a variability factor, are based on the performance of combustion technology. See 40 CFR Part 268.40–43.

[147] See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005 Section 7.3.

provide substantive comments. These commenters indicate they cannot provide substantive comments because they cannot determine the implications of using the approach given that we did not provide the resulting floor calculations. One commenter suggests that, before blindly applying this arbitrary estimate of a nondetect value, a reality check should be done to validate that this is reasonable by consulting what is published on the method variability, as well as by checking variability factors derived for other data in the database that are above the detection limit.

Another commenter voiced significant concerns with the approach. The commenter states that EPA contradicts its assumption at proposal that all data that are reported as nondetect are present at the detection limits by now admitting that the true value is between zero and the level of detection. The commenter concludes that EPA now proposes to retreat from its assumption that undetected pollutants are always present at the detection limits not because that assumption is false but because it does not generate sufficiently lenient floors. The commenter believes that this underscores that EPA's statistical analysis approach cannot possibly give an accurate picture of *any* source's actual emission levels. Accordingly, it cannot possibly satisfy EPA's obligation to ensure that its floors reflect the average emission levels achieved by the relevant best performing sources.

The commenter also states that EPA's imputation approach is independently flawed because it assumes—again inaccurately—that the value for a nondetect is always either the highest value or lowest value in the allowable range. In reality the undetected values will necessarily fall in a range between the highest and lowest, and thus yield less variability than EPA would assume.

Response: We agree in theory with the commenter who suggests that the results of the imputation approach should be checked to see if it overstates variability for nondetect data by comparing the results of the imputation approach with the actual variability for detected measurements in the data set. We considered comparing the relative standard deviation derived from the imputation approach for data sets with nondetects, to the relative standard deviation for the data set using a regression analysis. Under the regression analysis approach, we considered relating the relative standard deviation of detected data sets to the average measurement. We would determine this relationship for each standard for which we have nondetect data, and use the relationship to impute the standard deviation for a data set containing nondetects.[148]

We could not perform this analysis, however, because: (1) We have very few detected measurements for the data sets for several standards and could not establish the relationship between relative standard deviation and emission concentration for those data sets; and (2) moreover, for many data sets where detected measurements would have been adequate to establish the relationship, it would have been problematic statistically to extrapolate the relationship to the very low values assigned to the nondetect measurements (e.g., 100% of the detection limit; the value assigned by our statistical imputation approach).[149]

This commenter also suggests that we check the resultant standard deviation after imputation by consulting what is published on the method variability. The commenter did not explain, however, how method variability relates to the variability of nondetect data.

Moreover, we believe that the imputation approach is one approach we could have reasonably used to estimate variability of nondetect data. We first attempted to apply standard statistical techniques to address the nondetect issue. We investigated standard interval censoring techniques to calculate maximum likelihood estimates (MLE) of the average and standard deviation that provide the best fit for a normal distribution for the data containing nondetect values, taking into account that each nondetect data point can be anywhere within its allowable interval. These techniques are not applicable, however, to data sets where all data are nondetects, as is the case for many of our data sets. In that situation, we approximated the mean as the average of the midpoints of the nondetect intervals, and the standard deviation as one half of the possible range of the data.

After working with this MLE/Approximation approach for some time and iteratively developing complicated algorithms to address problems as they arose, we concluded that we needed a simpler approach that could be applied to all data sets. Accordingly, we developed the statistical imputation approach discussed in Section IV.A above.

For 22 separate floors, we compared the results of the approaches we considered for nondetects: (1) Nondetects present at the detection limit (i.e., full detection limit approach); (2) MLE; (3) MLE combined with an approximation approach (i.e., MLE/Approximation approach; and (4) statistical imputation.[150] The MLE approach was only applicable to 2 of the 22 floor data sets, and the numerical algorithm failed to converge on an answer for one of those. The MLE/Approximation approach sometimes results in floors that are unrealistically high (i.e., it calculated 5 of 22 floors that were higher than the statistical imputation approach, which always produces floors that are equal to or higher than assuming nondetects are present at the full detection limit), and sometimes fails to converge on an answer. Because of these limitations, we do not use either the MLE or MLE/Approximation approach.

We believe the statistical imputation approach is preferable to the full detection limit approach because it: (1) Accounts for variability of data sets containing nondetects; (2) can be applied to all data sets containing nondetects; and (3) results in reasonable floor levels. In most cases, floors calculated using statistical imputation are close to those calculated by the full detection limit approach. The statistical imputation approach can produce substantially higher floors than the full detection limit approach, however, when a relatively high nondetect is reported because of a high detection limit. Nonetheless, the statistical imputation approach calculated floors that were 30% higher than the full detection limit approach for only 2 of the 22 floors.

We reject the comment that our approach to handling nondetect data is a mere manipulation to raise the floor. The commenter observes that EPA appears to determine that its initial approach of assuming the worst-case for nondetect data—that the data are present at the detection limit—did not produce floors that were high enough, and consequently applies another manipulation—statistical imputation of nondetect measurements—that assumes the nondetect data are present at lower levels but nonetheless generates floors that are even higher than before. Although the commenter is correct

[148] Note that, under this approach, we would continue to assume that the nondetect analyte is present at the detection limit.

[149] Note that this was not the case where we use a regression analysis of relative standard deviation versus total chlorine measurements to impute a standard deviation for values below 20 ppmv that we corrected to 20 ppmv to address the low bias of Method 0050. In that situation, we have several total chlorine measurements very close to 20 ppmv.

[150] See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 5.4.

about the outcome of our handling of nondetect data'the floors are generally higher after statistically imputing nondetect measurements than if nondetects are simply assumed to be present at the detection limit—our rationale for handling nondetects is sound. At proposal, we assumed that nondetects are present at the detection limit. We do not know (nor does anyone else) whether a nondetect value is actually present at 1% or 99% of the detection limit. We thought that assuming that all values were at the limit of detection would reasonably estimate the range of performance a source could experience for these nondetect measurements. This approach inherently maximizes the average emissions but minimizes emissions variability.

Commenters on the proposed rule state that assuming nondetects are present at the detection limit dampens emissions variability—a consideration necessary to ensure that a source's performance over time is estimated reasonably. *Mossville*, 370 F. 3d at 1242 (daily maximum variability must be accounted for in MACT standards [including floors] which must be achieved continuously). See also *CMA*, 870 F. 2d at 232 (EPA not even obligated to use data from plants that consistently reported nondetected values in calculating variability factors for best performing plants). We agree with these commenters, and are using the statistical imputation approach to address the concern. Relative to our proposed approach of assuming nondetect measurements are present at the detection limit, the statistical imputation approach reduces the average of the data set for a source while maximizing the deviation of the data set. These are competing and somewhat offsetting factors when calculating the floor for existing sources given that we use a modified 99th percentile upper prediction limit to calculate the floor—the floor is the average of the test condition averages for the best performers plus the pooled variance of their runs. See *CMA*, 870 F. 2d at 232 (upholding approach to variability for datasets with nondetect values where various conservative assumptions in methodology offset less conservative assumptions).

We further disagree with this commenter's view that the statistical imputation approach is independently flawed because it assumes that the value for a nondetect is always either the highest value or lowest value in the allowable range. The commenter states that, in reality, the undetected values will necessarily fall in a range between the highest and lowest, and thus yield less variability than EPA would assume. Although the commenter is correct that the true value of a nondetect measurement is likely to be in the range between the highest or lowest value possible rather than at either extreme, we do not know where the true value is within that range. To ensure that variability is adequately considered in establishing a floor, the statistical imputation approach, by design, maximizes the deviation by assuming the nondetect value is at one end of the range or the other, whichever results in a higher average for the data set.

C. Analysis of Variance Procedures To Assess Subcategorization

We use analysis of variance (ANOVA) to determine whether subcategories of sources have significantly different emissions. For two subsets of emissions, the variance of the data between the two subsets is compared to the variance within the subsets. The ratio of these two variances is called the F-statistic. The larger the F-statistic the more likely the underlying data distributions are different. To make a decision regarding the difference between the two subsets, we compare this calculated F-statistic to an F-value associated with a particular confidence level.

One commenter has raised several concerns with our use of the ANOVA procedure in the selection of incinerator subcategories.

Comment: The ANOVA procedure is based upon the assumption that the underlying distribution of both data sets has a normal shape. For incinerator emissions data this assumption is not valid. A log-probability plot shows that particulate emission data is better described by a lognormal distribution. Prior to conducting the ANOVA procedure, the data should be log-transformed.

Response: We use probability plots, Skewness Coefficients, and Correlation Coefficient/Shapiro-Wilks testing to evaluate whether it is more appropriate to analyze emissions data for ANOVA and floor calculations assuming the data represent a normal or lognormal distribution. We believe it is reasonable to assume the data represent a normal distribution for several reasons.

The purpose of the ANOVA subcategorization analysis is to determine if there is a significant difference in emission levels between potential subcategories to warrant establishing separate floors for the subcategories. Although in some cases it may appear that a data set in its entirety may be better represented by a lognormal distribution, the high emissions data causing the right-hand skew will be truncated when we identify the best performing sources—those with the lowest emissions—to calculate floors. This moves the appearance of a skewed distribution toward one that is more symmetric and thus, more representative of a normal distribution.

In addition, our analyses showed: (1) The probability plots do not suggest that either assumed distribution is significantly or consistently better; (2) the data set arithmetic averages tend to be in the neighborhood of the medians, indicating the data sets are not significantly skewed and more closely normal than lognormal; and (3) in some cases, neither assumed distribution could be statistically rejected.[151]

Comment: Some of the data sets used for comparison have very few members. This means that the within-group variance for a small data set would have to be very low for the two groups to be judged as separate.

Response: We agree, but note that as the sample sizes change, the critical values are also changing depending on the degrees of freedom.

Comment: Only emissions data were considered in the ANOVA tests. Feed rate and removal efficiency should have been considered as well.

Response: Differences between subcategories in feedrates or system removal efficiency are irrelevant if there is no significant difference in emissions between the subcategories. The purpose of considering subcategorization is to determine if there are design, operation, or maintenance differences between subcategories that could affect the type or concentration of HAP emissions and thus sources' ability to achieve the floor absent subcategorization. Consequently, it is appropriate to consider emissions only when evaluating subcategorization.

Comment: The confidence level used by EPA for the F-statistic in all cases was 95 percent. If the calculated F-statistic were equal to this 95 percent confidence value, it would mean that there is only a 5 percent chance that data for the two subsets were drawn from the same parent distribution. A less stringent (lower) confidence level would be more appropriate for this analysis.

The commenter evaluated particulate emissions for specialty incinerators (i.e., munitions, chemical weapons and mixed waste incinerators) and non-specialty incinerators (all others). The commenter log-transformed the data and

[151] USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 8.2.

determined that there was only a 30 percent chance that the two data sets could come from the same parent distribution. This result, together with the vastly different operating characteristics for the two types of incinerators, argues for their being treated as separate categories, according to the commenter.

Response: A confidence level of 95% assigns a probability of 0.95 of accepting the hypothesis when there is no difference between subcategories and hence a probability of 0.05 of rejecting a true hypothesis. This reduces the probability to 5% of rejecting a true hypothesis. A less stringent confidence level would increase the chances of rejecting a true hypothesis. The farther apart the averages of the two potential subcategories are, the more likely they are to be statistically different and the more likely you are to be wrong if you hypothesize that they are not different.

A 95% confidence level is most often used for ANOVA because it is generally believed that being wrong one time out of 20 is an acceptable risk for purposes of ANOVA. In addition, statisticians are comfortable with a 95% confidence level because, in a normal distribution, 95% of the data fall within 2 (actually 1.96) standard deviations of the mean.

Other confidence levels could be used for ANOVA—99% or 90%—if there is a good reason to deviate from the general default of 95%. A 99% confidence level is the second most commonly used confidence level and is generally used when it is very important that you be sure that you are right (i.e., where you can only accept the risk of being wrong 1 time out of 100) before you classify the populations (in this case subcategories) as different. Occasionally, but much less frequently, confidence levels of 90% or less are used. But, we note that these situations are so infrequent that some statistics books provide tables for the ANOVA F-statistic only at the 95% and 99% confidence levels.

For these reasons, we believe that the 95% confidence level is an appropriate level among those we could have reasonably selected.

VI. Emission Standards

A. Incinerators

Comment: A commenter states that EPA's subcategorization (and assignment of differing dioxin/furan standards as a result) between incinerators with wet or no air pollution control device and incinerators equipped with dry air pollution control devices or waste heat boilers is unlawful because incinerators equipped with a given type of pollution control equipment are not different ''classes,'' ''types,'' or ''sizes'' of source. The commenter implies that EPA justifies this subcategorization by stating that these sources have different emission characteristics, which is no less unlawful and arbitrary than subcategorizing based on the pollution control devices they use.

Response: We agree that it would not be appropriate to subcategorize source categories based on a given air pollution control technique. See 69 FR at 403 (Jan. 4, 2004). As stated at proposal, we do not subcategorize incinerators with respect to dioxin/furans based on the type of air pollution control device used. 69 FR at 21214. For example, with respect to dioxin/furans, it would not be appropriate subcategorize based on whether a source is using: (1) Good combustion practices; (2) a carbon bed; (3) an activated carbon injection system; or (4) temperature control at the inlet to its dry air pollution control device. These devices and practices are what control dioxin/furan emissions. Today's final rule does not subcategorize based on these control devices and practices. Instead, our subcategorization approach recognizes the potential of some emission control equipment to create pollutant emissions that subsequently must be addressed.[152]

Dioxin/furans are unique in that these pollutants are not typically present in the process inputs, but rather are formed in the combustor or in post combustion equipment. The primary cause of dioxin/furan emissions from incinerators not equipped with waste heat boilers is post combustion formation by surface-catalyzed reactions that occur within the dry air pollution system.[153] This is evidenced by the statistically significant higher dioxin furan emissions for incinerators with dry air pollution control systems compared to those without dry systems.

Incinerators with dry air pollution systems are designed to effectively control metal and particulate matter emissions through use of baghouses, electrostatic precipitators, etc. Incinerators that are designed in this manner have the potential for elevated dioxin/furan emissions because dry air pollution control systems provide locations where surface-catalyzed reactions can occur (e.g., on particles on fabric filter bags or electrostatic precipitator plates). Thus, for purposes of dioxin/furan formation and control, incinerators equipped with dry air pollution systems are in fact different ''types'' of incinerators because of their unique pollutant generation characteristics.

On the other hand, incinerators with wet air pollution control systems are generally designed to effectively reduce total chlorine emissions (with the use of wet scrubbers) and metals and particulate matter emissions. There generally is a tradeoff, however, in that these types of incinerators may not be as efficient in reducing particulate matter and metal emissions compared to incinerators that are equipped with baghouses and dry electrostatic precipitators. These types of incinerators generally do not have the potential to have elevated dioxin/furan emissions because they do not provide locations where surface catalyzed reactions can occur. For purposes of dioxin/furan emission formation and control, sources with wet air pollution control systems are thus likewise different types of incinerators.[154]

Subcategorizing dry air pollution systems and wet air pollution control systems for purposes of establishing a dioxin/furan standard is no different than subcategorizing incinerators equipped with waste heat boilers. The waste heat boiler is the origin of the dioxin/furan that is generated. These incinerators are designed to efficiently recover heat from the flue gas to produce useful energy. A result of this type of incinerator design, however, is that it also provides a location where surface catalyzed reactions can occur (i.e., the boiler tubes), potentially resulting in elevated dioxin/furan formation (and emissions if not properly controlled).

An alternative approach that does not subcategorize these sources, but rather identifies best performing sources as those sources with the lowest emissions irrespective of whether they have a wet

[152] Although we subcategorize between incinerators with wet or no air pollution control device and incinerators equipped with dry air pollution control devices or waste heat boilers for the floor analysis, the calculated dioxin furan floors for both subcategories for existing sources were determined to be less stringent than the current interim standard. Subsequently, the final rule emission limitations for both subcategories are, for the most part, identical, and equivalent to the interim standard. See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 10.1, for further discussion.

[153] See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume IV: Selection of MACT Standards,'' September 2005, Section 3, for further discussion.

[154] A similar analogy applies to incinerators that are not equipped with air pollution systems. These incinerators are not designed to control emissions of metals, chlorine, and particulate matter (perhaps because emission levels are low due to low HAP feed levels). Similar to incinerator types with wet systems, this design does not provide the locations for surface catalyzed reactions to occur, which leads us to conclude that these are different types of incinerator with respect to dioxin/furan control.

or dry air pollution control device, would yield floors that would not be achievable unless all the sources, including the best performers, adopted beyond-the-floor technology. The calculated dioxin/furan floor for existing incinerators and liquid fuel boilers using such an approach would be 0.008 and 0.009 ng TEQ/dscm, respectively.[155] All of the best performing sources for these calculated floors had either wet air pollution systems or no air pollution control systems. The floor technology used by these sources is good combustion practices. As a result, these floor levels would not be replicable by these best performing sources nor duplicable by other sources through use of the same good combustion practices because of the uncertainties associated with dioxin/furan generation mechanisms and rates that can vary both within sources and across sources, potentially leading to significant variability in emission levels.[156] Sources equipped with wet or no air pollution systems would thus likely be required to install carbon systems to comply with these standards, a technology used by only four incinerators (none of which were best performers in the above discussed floor analysis). Such an outcome should be viewed as a beyond-the-floor technology and therefore assessed pursuant to the factors enumerated in section 112(d)(2). Furthermore, it is unclear, and perhaps doubtful, that these floors would be achievable by these sources even if they were to install beyond-the-floor controls such as activated carbon systems because no sources using activated carbon are currently achieving those floor levels. We therefore conclude that it is appropriate, and necessary, to subcategorize these types of incinerators for purposes of calculating dioxin/furan floor standards.

B. Cement Kilns

1. Hg Standard

Comment: Several commenters recommend that EPA use a commenter-submitted dataset, which includes three years of data documenting day-to-day levels of mercury in hazardous waste fuels fired to all hazardous waste burning cement kilns, to identify a MACT floor for existing and new cement kilns. Several commenters state that *existing* cement kilns should have the option to comply with either of the following mercury standards: (1) A hazardous waste feed concentration limit, expressed in ppmw, based on an evaluation of the five best performing sources within the commenter-submitted dataset (documenting day-to-day levels of mercury in the hazardous waste over a three year period); or (2) a hazardous waste maximum theoretical emissions concentration (MTEC), expressed in units of µg/dscm, developed by projecting emissions of the best performing sources assuming mercury concentrations in the hazardous waste were at the source's 99th percentile level in the commenter-submitted dataset. To identify the best performing sources, the commenter suggests selecting the five sources with the lowest median mercury concentrations in the dataset. For existing sources, the commenters' evaluation yields a hazardous waste feed concentration limit of 3.3 ppmw and a stack concentration emission limit of 150 µg/dscm (rounded to two significant figures and considering mercury contributions only from the hazardous waste). For *new* cement kilns, the commenters recommend a mercury standard in the format of a hazardous waste feed concentration limit only, expressed in ppmw, based on the single source with the lowest 99th percentile level of mercury in hazardous waste. The commenters recommend a mercury standard of 1.9 ppmw for new sources.

Response: We agree with commenters that the commenter-submitted dataset documenting the day-to-day levels of mercury in hazardous waste fuels fired to all hazardous waste burning cement kilns is the best available data to identify floor levels for existing and new cement kilns. See discussion in Part Four, Section I.D. However, we disagree with the commenters' suggested format of the mercury standard for existing sources. Establishing the mercury standard as the commenters' suggest (i.e., 3.3 ppmw in the hazardous waste feed *or* 150 µg/dscm as a hazardous waste MTEC) fails to consider the interim mercury standards. As discussed in Part Four, Section III.E, there can be no backsliding from the levels of performance established in the interim standards. While not every source feeding hazardous waste with a maximum mercury concentration of 3.3 ppmw would exceed the interim standard, most sources using more than 50 percent hazardous waste as fuel (i.e., replacing at least half its fossil fuel with hazardous waste) would exceed the interim standard, emitting mercury higher than the levels allowed under §§ 63.1204(a)(2) and 63.1206(b)(15) of the interim standards.[157] The hazardous waste MTEC of 150 µg/dscm calculated by the commenters is also higher than the level currently allowed under § 63.1206(b)(15) of the interim standards. Since sources cannot backslide from the levels of the interim standards, if we were to accept the commenters' floor analysis results as presented (which we are not), then we would ''cap'' each calculated standard (i.e., 3.3 ppmw hazardous waste feed concentration and 150 µg/dscm in stack emissions) at the interim standard level. This would result in a mercury standard for existing sources of 3.3 ppmw hazardous waste feed *and* a hazardous waste feed MTEC of 120 µg/dscm *or* 120 µg/dscm as a stack gas concentration limit. We note this is similar to the mercury standard adopted today: a hazardous waste feed concentration limit of 3.0 ppmw *and* a hazardous waste feed MTEC of 120 µg/dscm or 120 µg/dscm as a stack gas concentration limit. For an explanation of why we derived a level of 3.0 ppmw from the data, see Section 7.5.3 of Volume III of the Technical Support Document.

The commenters' suggested new source mercury standard of 1.9 ppmw in the hazardous waste has the same deficiency. New sources with a hazardous waste fuel replacement rate of approximately 75% could emit mercury at levels higher than currently allowed under the interim standards. After capping the calculated standard at the interim standard level, we would identify the mercury standard for new sources as a hazardous waste concentration limit of 1.9 ppmw in the hazardous waste and a hazardous waste feed MTEC of 120 µg/dscm *or* 120 µg/dscm as a stack gas concentration limit. For reasons discussed in Section 7.5.3 of Volume III of the Technical Support Document, this is indeed the mercury standard we are promulgating for new cement kilns.

The commenters also suggest that the best performing sources should be identified as those with the lowest three-year median concentration of mercury in hazardous waste. Although this approach would be permissible, we conclude that it is more appropriate to identify the best performers (or single best performer for new sources) by

[155] See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 20 and Appendix C, tables labeled ''E-INC-all-DF'' and ''E-LFB-all-DF''.

[156] Dioxin/furan formation mechanisms are complex. Sources equipped with wet or no air pollution control systems cannot rely on good combustion practices alone to achieve these floor levels because they cannot ''dial in'' to a specific emission level, as is the case with typical back-end control systems that control particulate matter and metals, for example. See Part Four, Section IV.B.

[157] USEPA, ''Technical Support Document for HWC MACT Standards, Volume III: Selection of MACT Standards,'' Section 23.4, September 2005.

selecting those with the lowest 99th percentile upper level mercury concentrations. (This is not a statistically determined upper prediction limit; there is sufficient data for an arithmetically calculated 99th percentile to reliably reflect sources' performance.) We believe that this approach best accounts for the variability experienced by best performing sources over time.

A detailed discussion of the MACT floor analysis for existing and new cement kilns is presented in Section 7.5.3 of Volume III of the Technical Support Document. In summary, the mercury standard for existing cement kilns is 3.0 ppmw in the hazardous waste feed *and* 120 µg/dscm as a hazardous waste maximum theoretical emission concentration feed limit or 120 µg/dscm as a stack gas concentration limit. For new sources the mercury standard is 1.9 ppmw in the hazardous waste feed and 120 µg/dscm as a hazardous waste maximum theoretical emission concentration feed limit or 120 µg/dscm as a stack gas concentration limit.[158]

Comment: Two commenters oppose EPA's proposed approach to base compliance with the mercury standard on averaged annual emissions. The commenters state an annual average would allow mercury emissions to exceed the interim standard because a source could burn high concentrations of mercury waste over a short period and still comply with an annual limit by burning low concentration wastes at other times. These commenters support the concept of a 12-hour rolling average feedrate limit (i.e., the current requirement under the interim standards) in conjunction with an emission standard no less stringent than the interim standard.

Response: We agree with these comments. Cement kilns must establish a 12-hour rolling average feedrate limit of mercury to comply with these standards. The mercury standards for cement kilns are ''capped'' at the interim standard level to prevent backsliding from the current level of performance. This is accomplished by expressing the standard as a limit on the mercury concentration in the hazardous waste (with the rolling average) and either an emission concentration limit or hazardous waste maximum theoretical emission concentration feed limit. See § 63.1209(l)(1)(iii).

2. Total Chlorine

Comment: One commenter states that the proposed MACT floor approach is inconsistent with the statutory definition of MACT because EPA's selection of a routinely achievable system removal efficiency (SRE) was arbitrary and not representative of the best performing sources. Instead, the commenter suggests EPA identify a MACT SRE based on the five sources with the best SREs and apply that SRE to the MACT chlorine feed level. Later, in supplemental comments, the same commenter suggests two alternative approaches to identify a floor level. One approach applies a ranking methodology based on emissions and chlorine feed, and the second suggested approach applies a triple ranking method based on emissions, feed, and chlorine SRE. Other commenters, however, supported EPA's proposed approach.

Response: We are adopting the same approach we proposed at 69 FR at 21259. As we explained, this is a variant of the SRE/Feed approach, the variant involving the degree of system removal efficiency achieved by the best performing sources. In summary, to determine the floor level we first identify the best performing sources according to their hazardous waste chlorine feedrate. The best performing sources are those that have the lowest maximum theoretical emissions concentration (MTEC), considering variability. We then apply an SRE of 90 percent (the specific point in contention) to the best performing sources' total MTEC (i.e., thus evaluating removal of total chlorine across the entire system, including chlorine contributions to emissions from all feedstreams such as raw materials and fossil fuels) to identify the MACT floor, which is expressed as a stack gas emissions concentration in parts per million by volume. This approach defines the MACT floor as an emission level that the best performing sources could achieve if the source limits the feedrate of chlorine in the hazardous waste to the MACT level (i.e., the level achieved by the average of the best performing five sources) while also achieving an SRE that accounts for the inherent variability in raw material alkalinity and (to a lesser degree) cement kiln dust recycle rates, and production requirements. 69 FR at 21259.

Under this approach, we are evaluating hazardous waste feed control as we do for other sources. One commenter objects to our determination that an SRE of 90 percent is representative of the best performing sources because we have not established a MACT SRE—the average SRE achieved by the best performing sources.

There is no doubt that the cement manufacturing process is capable of capturing significant quantities of chlorine when favorable conditions exist within the kiln system. Our usual approach of establishing an SRE by ranking the most efficient SREs taken from individual compliance tests, however, would result in a standard that would not be achievable because it may not be duplicable by the best performers or certainly would not be replicable by others, given that it is a function of various highly variable parameters, especially levels of alkali metals (e.g., sodium and potassium) and volatile compounds (e.g., chlorine and sulfur) in the raw materials. Alkalis and volatiles vary at a given best performer facility (in fact, at all facilities) as different strata are mined in the quarry, and across facilities due to different sources of raw materials. Raw material substitution is infeasible and counter to the objective of producing quality product (i.e., a product with low alkali content).

Cement kilns thus are not able to design or operate to achieve a specific SRE at the high (most efficient) end of the range of test conditions. This is demonstrated by our calculations of system removal efficiency data, which is essentially a collection of performance ''snapshots.'' See SRE data summarized in Table 1 at the end of this response; see also *Mossville*, 370 F. 3d at 1242 (maximum emission variability associated with raw material variability needs to be accounted for in MACT floor determination since the standard must be met at all times under all operating conditions). The performance data of the ''apparent'' best performers—upwards of 99 percent—identified by the commenter are simply a snapshot in the possible range of performance and are not replicable in the future due to factors which are uncontrollable by the source, as just explained. In confirmation, cement kilns achieving this level of removal in one test proved incapable of replicating their own result in other tests even though individual sources each have their own proprietary source of raw materials. See results in table for Giant (SC), Essroc (IN), Holcim (MO), Giant (PA), and LaFarge (KS) all

[158] Please note that we do not regard this standard as a work practice standard under section 112(h)(1) of the Act, because part of the standard includes an emission limit which is measured at the stack. EPA believes the special requirements of section 112(h)(1) apply when a work practice is the exclusive standard.

of whom would violate a 99 + percent standard based on their own operating results.

TABLE 1.—SUMMARY OF SYSTEM REMOVAL EFFICIENCY DATA FOR WET PROCESS CEMENT KILNS [159]

Facility	Number Runs in Data Base	Low SRE Run (%)	High SRE Run (%)	Average SRE of All Runs (%)
LaFarge (OH)	3	99.1	99.4	99.3
Giant (SC)	24	95.5	99.8	99.0
Essroc (IN)	13	97.3	99.9	98.7
Holcim (MO)	6	96.4	99.9	98.4
LaFarge (KS)	12	95.7	99.3	98.1
Giant (PA)	17	87.7	99.4	97.1
Continental (MO)	3	95.7	97.0	96.5
Ash Grove (AR)	37	85.1	98.8	95.1
Texas Industries (TX)	6	88.8	97.0	93.6
Holcim (MS)	9	76.5	99.2	90.0

[159] See Section 3.6 of Volume II (Specific MACT Standards) of Comment Response Document, September 2005.

However, the data indicate that SRE is reasonably quantifiable to a point. Based on our data base of system removal efficiency information from 130 test conditions where total chlorine was evaluated, we conclude that a system removal efficiency of 90 percent is a reasonable estimate of MACT SRE.[160]

We also reject the commenter's three suggested alternative approaches to identify a MACT SRE to apply to the MACT feed level. The commenter's methods all suffer a common flaw: They fail to recognize and take into account the limitations of the total chlorine SRE data. For example, as just demonstrated, available data show that considering the SRE data associated with the most recent compliance test as a ranking factor will result in unachievable standards due to the varying effectiveness of chlorine capture (which impacts emissions) depending on the raw material mix characteristics. Considering only the most recent compliance test data as suggested yields results that are unachievable because the best performer's SRE data are likely biased high (e.g., sources that happen to test under favorable conditions are likely to be identified as best performers), which would not be replicable by even that source on a day-to-day basis.

3. Semivolatile and Low Volatile Metals

Comment: Commenters oppose EPA's proposed approach to treat each kiln as a separate and unique source in the SRE/Feed MACT floor analysis for cement kilns.[161] Commenters state that the approach is an improper way to perform a statistical analysis and reduces the variability in emissions that otherwise would be observed in a MACT pool of five unique sources. Variability is reduced because co-located kilns at the same plant share many of the factors that comprise front-end and back-end controls. As a result, the calculated MACT floors for SVMs and LVMs for cement kilns are too stringent. The commenters' recommended solution (in instances where co-located kilns are among the top five performers) is to use only the data from the best performing co-located kiln, exclude any lesser performing kilns at the plant site, and then include the next-best performing non-co-located kiln in the MACT pool. Implementing their recommendation, the commenters state that the MACT floor for SVMs increases from 4.0×10^{-4} to 7.4×10^{-4} lbs/MMBtu and the floor for LVMs increases from 1.4×10^{-5} to 1.8×10^{-5} lbs/MMBtu. Another commenter generally supports EPA's approach noting that the variability factor applied to the emissions data already accounts for variability.

Response: We consider sources that are not identical as unique sources and emissions data and information from unique sources are considered separate sources in the floor analyses. An example of an ''identical'' source in our data base is compliance test data from a similar on-site combustion unit used in place of a compliance test for another unit (*i.e.*, emissions testing of an identical unit was not conducted). These sources and their associated data are called ''data in lieu of'' sources in our data based on the RCRA provisions under § 266.103(c)(3)(i). We acknowledge that co-located sources may in fact share certain similar operation features (e.g., use of raw material from the same quarry, use of the same coal and hazardous waste burn tank to fire the kilns); however, given that the co-located sources (except those designated as data in lieu of) are not designed identically, and given their hazardous waste feed control levels were not identical during testing, we conclude we must consider each source as a unique source in the floor analyses.[162]

Comment: Commenter states that EPA's proposed standards for new cement kilns are unachievable due to problems with its accounting for variability, in part because EPA did not consider geographic differences when assessing feed control levels. The concentrations of hazardous constituents in the waste in a particular region are likely to be different than in the waste from another geographical region due to types of industrial sectors located within each region. Sources cannot reasonably arrange for transportation of lower HAP wastes generated across the country and cannot treat the hazardous waste to remove or reduce HAP concentrations. The commenter cites several court decisions that support their assertions. Commenter believes that while this represents a problem for developing both the new and existing source floors, it is a greater predicament for the new

[160] As discussed a number of times earlier, we are not basing any standards on feed control of HAP in raw material and fossil fuel input. We instead are controlling HAP attributable to those inputs by means of end-of-stack emission standards which reflect removal of HAP by some type of control device. This approach is consistent with the discussion above, since we are not basing the cement kiln chlorine standard on control of any raw material input, but rather on some type of back-end removal efficiency.

[161] It is common for cement manufacturing plants to operate multiple cement kilns at the same plant.

[162] Nonetheless, we analyzed the SVM and LVM floors for cement kilns as suggested by the commenter. Results of the analysis are presented in ''Technical Support Document for HWC MACT Standards, Volume III: Selection of MACT Standards,'' Section 8.8, September 2005.

source floor because this floor level is based on test data for only one source.

Response: We are not obligated to account for varying hazardous waste feed control levels occurring because of differing HAP generation rates in different locations (for commercial sources), or because different production process types generate higher or lower levels HAP concentration wastes. Hazardous waste feed control is a legitimate control technology. The commenter seems to suggest that we should subcategorize low feeding sources and high feeding sources based on their hazardous waste feed control level. This would inappropriately subcategorize sources based on differing levels of controls, which we do not do. See 69 FR at 403 (January 5, 2004). Nonetheless, as previously discussed, the SRE/Feed methodology lessens the impact of feed control variations across commercial units because it results in fewer situations where best performing back-end controlled sources (from a particulate matter emissions perspective) cannot achieve the semivolatile and low volatile metal design levels and floors.

For new source standards, the single best performing cement kiln sources for semivolatile metals and low volatile metals were not the lowest hazardous waste feed controlled source (both floors were based on sources with the fourth best, (i.e., lowest, hazardous waste feed control level). We therefore do not believe these sources are atypically low hazardous waste feeders relative to the other best performing sources in the existing source MACT pools.

C. Lightweight Aggregate Kilns

1. Mercury Standard

Comment: One commenter, an operator of lightweight aggregate kilns subject to this rule, recommends that EPA establish the mercury standard for lightweight aggregate kilns at a hazardous waste feed concentration limit of 3.3 ppmw for existing sources and 1.9 ppmw for new sources, which is the same standard suggested in public comments by a trade organization representing hazardous waste burning cement kilns. The commenter notes that these mercury limits are appropriate for lightweight aggregate kilns because the commenter's two lightweight aggregate manufacturing facilities participate in the same hazardous waste fuel market as the majority of cement kilns. Moreover, the commenter maintains that its parent company also owns and operates two cement kilns and that its lightweight aggregate kilns receive hazardous waste from many of the same generators that provide hazardous waste fuel to the cement kilns. Consequently, the commenter states that the cement industry's data set of actual mercury feed concentrations in the hazardous waste best represents the full range of hazardous waste fuel concentrations that exist in the waste fuel market (see also Part Four, Sections I.D and E).

Response: We disagree with the commenter. Although the cement industry's set of mercury feed concentration data in the hazardous waste may represent the full range of concentrations for the cement kiln source category, we cannot conclude the same for lightweight aggregate kilns because the commenter states that the mercury dataset are only applicable to its kilns.[163] Further, the commenter provides no specific information or data to support the conclusion that its suggested approach is justified for the other lightweight aggregate kiln facility.

We also disagree with the commenter as to the appropriateness of establishing the mercury standard in the format of a hazardous waste feed concentration (i.e., 3.3 ppmw for existing sources and 1.9 ppmw for new sources) for lightweight aggregate kilns. A hazardous waste feed concentration standard is improper for this source category because one lightweight aggregate kiln facility's sources (although not the commenter's) controls mercury emissions using wet scrubbing. Thus, a hazardous waste feed concentration standard would inappropriately limit the mercury concentration in hazardous waste for sources that use control equipment capable of capturing mercury. A source with control equipment should not be restricted to a hazardous waste feed concentration standard that is based on sources that can only control mercury emissions through limiting the amount of mercury in the hazardous waste.

In any case, as explained earlier in our discussion of cement kiln mercury standard, we believe that it is preferable to establish an emission standard to assure that the actual amount of mercury emitted by these sources is controlled by means of a numerical standard for stack emissions.

Comment: One commenter agrees that a source may not be able to achieve the mercury standard due to raw material contributions that might cause an exceedance of the emission standard in spite of a source using properly designed and operated MACT floor control technologies, including controlling the levels of metals in the hazardous waste. The commenter opposes the proposed alternative standard of 42 μg/dscm, which is expressed as a hazardous waste maximum theoretical emissions concentration. Instead, the commenter suggests that EPA maintain the alternative standard options of §§ 63.1206(b)(15) or 63.1206(b)(9).

Response: We agree with the commenter that the mercury standard should address the concern of raw material contributions causing an exceedance of the emission standard. We also agree that the proposed alternative standard of a hazardous waste maximum theoretical emissions concentration of 42 μg/dscm is an improper standard because the underlying data are unrepresentative. See discussion in Part Four, Section I.E. We note that the mercury standard promulgated today is 120 μg/dscm as a stack gas concentration limit or 120 μg/dscm as a hazardous waste maximum theoretical emission concentration feed limit. The alternative mercury standard sought by the commenter under § 63.1206(b)(15) is a limit of 120 μg/dscm as a hazardous waste maximum theoretical emission concentration, which is included in the mercury standard promulgated today. This should address the commenter's concern.

Comment: One commenter supports a mercury standard with short-term compliance limits (e.g., 12-hour rolling average feedrate limits) as opposed to the annual limit proposed.

Response: For reasons discussed in Part Four, Section I.E, we are using a different mercury dataset than at proposal. We solicited comment on a floor approach using these data in a notice [164] sent directly to certain commenters. We are adopting that approach today. The monitoring requirements of the mercury standard for lightweight aggregate kilns includes short-term averaging periods (*i.e.*, not to exceed a 12-hour rolling average), as recommended by the commenter.

2. Total Chlorine Standard

Comment: One commenter supports excluding from the floor analysis all lightweight aggregate kiln sources that lack air pollution control devices for chlorine, such as scrubbing technology. The floor analysis should simply exclude sources without back-end controls according to the commenter.

[163] We note that the commenter-submitted dataset is not amenable for use in establishing standards expressed in a thermal emission format because sufficient information on the characteristics of the hazardous waste (*e.g.*, heating value of hazardous waste) were not provided.

[164] See docket item OAR–2004–0022–0370.

Response: We disagree. For the final rule, we are using the SRE/Feed MACT floor approach which defines best performers as those sources with the best combined front-end hazardous waste feed control and back-end air pollution control efficiency. The commenter's suggestion would exclude emissions data from two of the three facilities in this source category even though valid emissions data from these sources are available (and therefore ordinarily to be used, see *CKRC,* 255 F. 3d at 867), and these sources achieved the best front-end hazardous waste feed control in the category. We note that the best feedrate controlled sources have hazardous waste thermal feed levels that are approximately one-fifth the level of the source's with back-end controls. These data describe the level of performance of sources in the category and must be evaluated in the MACT floor analysis. We also note that even if we were to implement the commenter's suggestion, the MACT floor results would not change for existing and new lightweight aggregate kilns because the total chlorine emissions data of the source with back-end air pollution controls (after considering variability) are higher than the standards promulgated today. Thus, the commenter's suggestion also would result in a standard that would be capped by the interim standard.

3. Beyond-the-Floor Standards

Comment: One commenter opposes EPA's proposed decision to promulgate a beyond-the-floor standard for dioxin/furans for existing and new lightweight aggregate kilns based on performance of activated carbon injection.

Response: For the final rule, we conclude that a beyond-the-floor standard for lightweight aggregate kilns is not warranted. The Clean Air Act requires us to consider costs and non-air quality impacts and energy requirements when considering more stringent requirements than the MACT floor. In the proposed rule, we estimated that the incremental annualized compliance costs for lightweight aggregate kilns to achieve the beyond-the-floor standard would be approximately $1.8 million and would provide an incremental reduction in dioxin/furan emissions of 1.9 grams TEQ per year (see 69 FR at 21262). At proposal we judged costs of approximately $950,000 per additional gram of dioxin/furan TEQ removed as justified, and, therefore, we proposed a beyond-the-floor standard. Since proposal, we made several changes to the dioxin/furan data base as the result of public comments. One implication of these changes is a lower national emissions estimate for dioxin/furans for lightweight aggregate kilns. We now estimate an incremental reduction in dioxin/furan emissions of 1.06 grams TEQ per year with costs ranging between $1.6 and $2.2 million per additional gram of dioxin/furan TEQ removed. Based on these costs and consideration of the non-air quality impacts and energy requirements (including more waste generated in the form of spent activated carbon, and more energy consumed), we conclude that a beyond-the-floor standard for existing and new lightweight aggregate kilns is no longer justified. For an explanation of the beyond-the-floor analysis, see Section 12.1.2 of Volume III of the Technical Support Document. We note that EPA also retains its authority under RCRA section 3005(c) (the so-called omnibus permitting authority) by which permit writers can adopt more stringent emission standards in RCRA permits if they determine that today's standards are not protective of human health and the environment.

D. Liquid Fuel Boilers

1. Mercury Standard Not Achievable When Burning Legacy Mixed Waste

Comment: One commenter states that the proposed liquid fuel boiler mercury standard is not achievable by a commercial boiler, DSSI (Diversified Scientific Services, Inc.) that burns mercury-bearing low level radioactive waste that is also a hazardous waste (so-called 'mixed waste') that was generated years ago (so-called, legacy waste). The waste is an organic liquid containing high concentrations of mercury. The boiler is equipped with a wet scrubber which provides good mercury control—93%, system removal efficiency according to the commenter.

The commenter states that the proposed liquid fuel boiler mercury standard is not achievable using feedrate control and/or additional back-end control. Waste minimization is not an option because the waste has already been generated. Further, available national treatment capacity for mercury-bearing, low-level radioactive organic hazardous waste is very limited. The only other hazardous waste combustion facility authorized to treat such waste is the Department of Energy incinerator at Oak Ridge, Tennessee. Waste treatment volumes at that facility are restricted by the mercury feed rate limitation for the incinerator. In addition, the feedrate of the waste cannot be practicably reduced because of the large back-log of waste that must be treated.

The commenter suggests that their boiler be subject to the incinerator mercury standard because the mixed waste has far higher concentrations of mercury than wastes burned by other boilers and, as a consequence, the boiler is more incinerator-like with respect to the feedrate of mercury.

Response. We agree with the commenter's suggestion. The final rule subjects this commercial liquid fuel boiler to the mercury standard for incinerators. We are classifying this source as a separate type of source for purposes of the mercury standard, because the type of mercury-containing waste it processes is dramatically different from that processed by other liquid fuel boilers, effectively making this a different type of source for purposes of a mercury standard [165]. The source thus feeds mercury at concentrations exceeding that of any boiler but at concentrations within the range processed by hazardous waste incinerators. The maximum test condition average MTEC [166] for mercury for the remaining liquid fuel boilers is 20 μg/dscm. All the liquid fuel boiler mercury data represent ''normal'' data, i.e., data that were not spiked. (The lack of spiked data in the liquid fuel boiler data base, in and of itself, indicates that these sources do not process mercury-bearing waste and do not need the operational flexibility gained by spiking to account for occasional higher concentration mercury wastes.) DSSI's 2002 mercury test condition average MTEC was spiked to 3500 μg/dscm. In other words, DSSI needs the operational flexibility to feed 175 times more mercury than any other liquid fuel boiler. Incinerators, on the other hand, had mercury MTECs that ranged to 110,000 μg/dscm in 2002. In fact, DSSI's mercury feed rate is the eighth highest of the 40 incinerators, including DSSI, for which we have 2002 mercury feed rate data. DSSI's process feed is thus within the upper range of mercury feed found at incinerators.

We believe it is well within the broad discretion accorded us in section 112(d)(1) to subcategorize among ''types'' and ''classes'' of sources within a category. See also *Weyerhaeuser* v. *Costle,* 590 F. 2d at 254, n. 70 (D.C. Cir. 1978) (similar raw waste characteristics justify common classification) and *Chemical Manufacturers Ass'n* v. *EPA,* 870 F. 2d 177, 253–54 and n. 340 (5th

[165] See CAA section 112 (d) (1)), authorizing EPA to distinguish among different ''types * * * of sources within a category or subcategory'' in developing MACT standards.

[166] Maximum theoretical emission concentration is the feedrate normalized by gas flowrate assuming zero system removal efficiency.

Cir. 1989) (same). We note that this boiler will be subject to the liquid fuel boiler standards for all HAP other than mercury (the only HAP where the issue of appropriate classification arises).

Not surprisingly, given the disparity in waste concentration levels, the DSSI boiler, even though equipped with back end control comparable to best performing commercial incinerators, achieves mercury emission levels less than an order of magnitude higher than the other hazardous waste-burning liquid fuel boilers, few of which use back end control that is effective for mercury.[167] This emission disparity likewise indicates that DSSI is treating a different type of waste than other liquid fuel boilers.

The nature of the mercury-bearing waste further confirms that it is of a different type than that processed by other hazardous waste burning liquid fuel boilers. The waste is a remediation waste, a type of waste burned routinely by commercial hazardous waste incinerators but almost never by a liquid fuel boiler.

Moreover, the waste is a legacy, mixed waste generated decades ago in support of the United States' strategic nuclear arsenal. It is not amenable to the types of control all other liquid fuel boilers use to reduce mercury emissions—some type of feed control or other minimization technique. We investigated whether any waste minimization options are feasible for this waste, and find that they are not. Normally, waste minimization is accomplished by one of three means: eliminating the use of mercury in the process to prevent it from being in the waste; pretreating the waste before burning to remove the mercury; or sending it to another facility better suited to handle the waste. Changing the production process to eliminate or reduce the mercury content of the waste is not an option because this waste has already been generated. Pretreatment is already practiced to the maximum extent feasible by settling out and separating the heavier mercury from the liquid components after thermal desorbtion. The remaining organic liquid that is burned by the mixed waste boiler contains concentrations of mercury (in organo-mercury and other organic soluble forms) that are orders of magnitude higher than burned by other liquid fuel boilers. Much of the waste cannot be feasibly pretreated to remove mercury because this legacy, mixed waste comes from many highly diverse sources. It is not practical or feasible to investigate how to remove the mercury from wastes of such varied and unique origins.

Only one other facility could potentially treat this mixed waste, DOE's incinerator at Oak Ridge, Tennessee, whose permit allows the incinerator to manage mixed waste. However, waste treatment volumes for mercury-bearing wastes at that facility are restricted by the mercury feed rate limitation in the incinerator's permit. The DOE incinerator alone cannot assure national capacity for mercury-bearing, low-level radioactive organic hazardous waste. In addition, the back-end emission controls of the mixed waste boiler are superior to those used by most incinerators, including the Oak Ridge incinerator. This boiler uses a highly effective wet scrubbing system—the principal MACT floor back-end control for mercury used by incinerators—that achieves over 93% system removal efficiency. This is superior control compared to most incinerators, including the one at Oak Ridge which achieves 75 to 85% removal.[168]

Thus, this mixed waste boiler is reasonably classified a different type of source with respect to mercury waste than other hazardous waste-burning liquid fuel boilers, based on the nature of the waste burned and confirmed by the source's mercury emissions. We note that, although the final rule subjects only the DSSI mixed waste boiler to the incinerator mercury standard, we would conclude that any other liquid fuel boiler with the same fact pattern (i.e., that met the same criteria as the DSSI boiler as discussed above) should also be subject to the incinerator mercury standard rather than the liquid fuel boiler mercury standard.

Comment. One commenter states that EPA's standards for all sources must reflect the actual emission levels achieved by the relevant best sources. If EPA wishes to subject the boiler source and incinerators to the same emission standards, however, it is entirely within the Agency's power to do so.

Response. We agree. There is no functional difference between this boiler and incinerators with respect to mercury feed rate and the type of waste processed (incinerators often treat remediation wastes). Therefore, the most relevant sources for the purposes of clarification in this case are incinerators, not liquid fuel boilers.

Accordingly, we have classified DSSI as an incinerator for purposes of a mercury standard (*i.e.*, made it subject to the mercury standard for incinerators), and have included the DSSI mercury data with the incinerator data when assessing mercury standards for incinerators.

Comment. In something of a contradiction, the same commenter argues that the mixed waste boiler source (DSSI) does not claim that it cannot meet the relevant mercury standard for liquid fuel boilers, but only that it cannot do so ''using either feedrate control or MACT floor back end emission control.'' Floors must reflect the emission levels that the relevant best sources actually achieve, not what is achievable through the use of a chosen emission control technology. It is flatly unlawful—and essentially contemptuous of court—for EPA even to entertain the source's argument that the source should be subject to a less stringent emission standard based on the levels they believe would be achievable through the use of one chosen control technology.

The commenter also states that the source acknowledges that it could achieve a better emission level, and apparently meet the relevant standards, by using activated carbon. Their argument that doing so would generate large quantities of spent radioactive carbon does not support its attempt to avoid Clean Air Act requirements; the alternative to the source accumulating large quantities of radioactive carbon is releasing large quantities of radioactive and toxic pollution into the environment.

Response. DSSI cannot meet the liquid boiler mercury standard because it burns a unique waste that resembles wastes processed by hazardous waste incinerators (in terms of mercury concentration and provenance) and is unlike any mercury-containing waste burned by the remaining liquid fuel boilers. See the earlier discussion showing that DSSI needs the operational flexibility to feed 175 times more mercury than any other liquid fuel boiler, but that DSSI's process feed is within the upper range of mercury feed found at incinerators.

We agree that DSSI is processing different types of mercury-bearing wastes than those combusted by all other liquid fuel boilers. We believe that establishing a different mercury standard for DSSI is warranted, as it would for any source with demonstrably unique, unalterable feedstock which is

[167] USEPA, ''Technical Support Document for HWC MACT Standards, Volume I: Description of Source Categories,'' September 2004, Section 2.4.4.

[168] For more explanation concerning mixed waste sources, limitations on the concentrations of mercury fed to these sources, and the system removal efficiency achieved, see USEPA, ''Technical Support Document for HWC MACT Standards, Volume III: Selection of Standards,'' September 2005, Section 8.7.

more difficult to treat than that processed by other sources otherwise in the same category.

How DSSI chooses to comply with the incinerator mercury standard (for example, whether it must use some other type of emissions control technology) is not germane to this decision. We note that today's mercury standard for incinerators will force this source to lower its mercury emissions, since it is unlikely that it can meet today's 120 μg/dscm standard at all times without some changes in operations.

Comment. The source argues that waste minimization is not feasible for legacy mixed waste that has already been generated. It is not possible to travel back in time and unmake mixed legacy waste that already has been created. That obvious fact, however, lends no support to their argument that it should be allowed to burn mixed legacy waste with less stringent emission standards, according to one commenter.

Response. As discussed above, the mercury standard for liquid fuel boilers is not achievable for this source because it is a different type and class of boiler, based on the type of mercury-containing hazardous waste it processes. Because this boiler has mercury feed rates that resemble those of incinerators—not liquid fuel boilers—and waste minimization is not possible, subjecting the boiler to the mercury incinerator standard is a reasonable means of sub-categorization pursuant to the discretionary authority provided us by section 112(d)(1) of the Clean Air Act.

Comment. The commenter states that it is entirely possible to dispose of mixed legacy waste without burning it. Specifically, currently available technologies such as chemical oxidation and precipitation can be used to treat mixed legacy waste without burning it—and without releasing mercury into the air. Therefore, mixed legacy waste should not be burned at all; it should be disposed of safely through the application of one of these more advanced technologies.

Response. First, these wastes must be treated before they can be land disposed. RCRA sections 3004(d), (g)(5), and (m). They also must meet a standard of 0.025 mg/l measured by the Toxicity Characteristic Leaching Procedure before land disposal is permissible. 40 CFR 268.40 (standard for ''all other nonwastewaters that exhibit the characteristic of toxicity for mercury'').[169] EPA's technical judgment is that it would be very difficult to meet this standard by any means other than combustion. Moreover, as an organic liquid, the waste is readily amenable to treatment by combustion. In addition, combustion is a legal form of treatment for the waste. EPA did not propose to change or otherwise reconsider these treatment standards in this rulemaking, and is not doing so here. We note, however, that 40 CFR 268.42 and 268.44 provide means by which generators and treatment facilities can petition the Agency to seek different treatment standards from those specified by rule, and set out requirements for evaluating such petitions.

We note further that, because this waste is radioactive, exceptional precautions need to be taken in its handling. The nonthermal treatment alternatives mentioned by the commenter ignore the potential for radiation exposure if nonthermal treatment is used. Concerns (some of which are mentioned in DSSI's comment) include: Nonthermal treatment would (or could) increase worker exposure; desire to reduce handling of radioactive materials in general; need to avoid contaminating equipment that subsequently requires decontamination or handling as radioactive material; minimizing the generation of additional radioactive waste residues; reducing the amount of analysis of radioactive materials, which causes potential exposure, generation of radioactive wastes and equipment; wastes are varied and often of small volumes, which makes it difficult to develop routine procedures. Nonthermal treatment alternatives are also not currently available to DOE to manage the diversity and volume of DOE mixed waste. It is thus our belief that the commenter has not fully explored the implications of its position, especially with regard to radiation exposure.

If the commenter wishes to pursue this issue, EPA believes the appropriate context is through the Land Disposal Restriction mechanisms described above.

Comment. The commenter states that the source argues that feedrate control is not ''practical.'' There appears to be no record evidence indicating what would make feedrate control impractical and why any such obstacle could not be overcome.

Response. Feedrate control to the extent necessary to achieve the liquid fuel boiler standards is not practical for reasons just discussed. This source is one of two available sources that is authorized to treat mixed waste, and the other source is not likely to have the ability to burn mercury-bearing organic waste in the future due to permit limitations and size constraints.

Comment. The commenter states that mixed legacy waste should not be burned at all. If there are truly no other facilities that are currently permitted to dispose of mixed legacy waste, such waste should be stored until a facility that can treat such waste safely—e.g., through chemical oxidation—can be permitted.

Response. The commenter's suggestion is beyond the scope of today's rulemaking. The suggestion is also illegal, since RCRA prohibits the storage of hazardous waste for extended periods. See RCRA section 3004(j); and *Edison Electric Inst.* v. *EPA*, 996 F. 2d 326, 335–37 (DC Cir. 1993) (illegal under RCRA section 3004(j) to store hazardous waste pending development of a treatment technology). EPA also notes that it retains authority under RCRA section 3005(c) (the so-called omnibus permitting authority) by which permit writers can adopt more stringent emission standards in RCRA permits if they determine that today's standards are not protective of human health and the environment.

2. Different Mercury, Semivolatile Metals, Chromium, and Total Chlorine Standards for Liquid Fuel Boilers Depending on the Heating Value of the Hazardous Waste Burned

Comment. Several commenters state that liquid fuel boilers should have an alternative concentration-based standard in addition to the thermal emission-based standard. Liquid fuel boilers are typically ''captive'' units that burn waste fuels generated from on-site or nearby manufacturing operations, rather than accepting wastes from a wide variety of other sources. Because they have captive fuel sources, operators generally do not have fuel blending capabilities. Liquid fuel boilers ''burn what they have,'' and as such have very limited operational flexibility. EPA should not penalize boilers that have the same mass concentrations of metals or chlorine in their waste compared to other boilers, but which wastes have a lower heating value than wastes burned by other boilers. (The ''penalty'' is that emissions limits that are normalized by the heating value of the hazardous waste require that less volume of lower heating value waste can be burned compared to higher heating value fuel.) This problem is made worse by the limited data base for liquid fuel boilers,

[169] Although the legacy waste that DSSI is burning is nominally classified as a nonwastewater due to its high organic content, it is in fact a liquid matrix, meaning that the treatment standard of 0.025 μg/l is effectively a total standard.

the lack of historical data to verify that these standards are achievable over time, and having most or all of the measured emissions below detection limits. In addition, most of the mercury and semivolatile metal data EPA has in the data base were obtained during normal operations and while the source demonstrated compliance with RCRA's chromium standard—the other metals data were available only because stack method Method 29 reports data for all RCRA metals, even ones that are not at issue for the compliance test. (Sources generally elected to comply with the BIF Tier I metals emissions levels, but Tier III for chromium. Thus, the Method 29 test for chromium will give emissions results for all the metals—even those not subjected to stack testing—not just chromium.)

Response. As explained earlier in Part Four, Section V.A., EPA has selected normalizing parameters that best fit the input to the combustion device. A thermal normalizing parameter (i.e., expressing the standards in terms of amount of HAP contributed by hazardous waste per thermal content of hazardous waste) is appropriate where hazardous waste is being used in energy-recovery devices as a fuel, since the waste serves as a type of fuel. Using a thermal normalizing parameter in such instances avoids the necessity of subcategorizing based on unit size.

The commenters raise the other side of the same issue. As the commenters point out, some liquid fuel boilers burn lower Btu hazardous waste because that is the waste available to them, and those with waste that has a low heating value are, in their words, ''penalized,'' compared to those with a high(-er) heating value. Also, since these are not commercial combustion units, they normally lack the opportunity to blend wastes of different heating values to result in as-fired high heating value fuels. If boiler standards are normalized by hazardous waste heating value, sources with lower heating value waste must either reduce the mass concentration of HAP or increase the waste fuel heating value (or increase the system removal efficiency) compared to sources with wastes having the same mass concentration of HAP but higher heating value.

Moreover, the thermal normalizing parameter is not well suited for a hazardous waste that is not burned entirely for its fuel value. In cases where the lower heating value waste is burned, the boiler is serving—at least in part—as a treatment device for the lower heating value hazardous waste. When this occurs, the better normalizing parameter is the unit's gas flow (a different means of accounting for sources of different size), where the standard is expressed as amount of HAP per volume of gas flow (the same normalizing parameter used for most of the other standards promulgated in today's final rule.)

The commenters requested that liquid fuel boilers be able to select the applicable standard (i.e., to choose between normalizing parameters) and further requested that we assess the performance of these units (for the purpose of establishing concentration-based MACT floor levels) by using the same MACT pool of best performing sources expressed on a thermal emissions basis.

Neither of these suggestions is appropriate. Choice of normalizing parameter is not a matter of election, but rather reflects an objective determination of what parameter is reasonably related to the activity conducted by the source. Moreover, the commenter's suggestion to use thermal emissions to measure best performance for a concentration-based standard does not make sense. It arbitrarily assumes that the best performers with respect to low and high heating value wastes are identical.

Instead, we have established two subcategories among the liquid fuel boilers: those burning high and those burning low heating value hazardous waste. The normalizing parameter for sources burning lower energy hazardous waste is that used for the other hazardous waste treatment devices, gas flow rate, so that the standard is expressed as concentration of HAP per volume of gas flow (a concentration-based form of the standard.) The normalizing parameter for sources burning higher energy content hazardous waste is the thermal parameter used for energy recovery devices, such as cement kilns and lightweight aggregate kilns. For the purposes of calculating MACT floors, the best performers are then drawn from those liquid fuel boilers burning lower energy hazardous waste for the lower heating value subcategory, and from those liquid fuel boilers burning higher energy hazardous waste for the higher heating value subcategory [170]. (See Section 23.2 of Volume III of the Technical Support Document for more information.)

Moreover, liquid fuel boilers are not irrevocably placed in one or the other of these subcategories. Rather, the source is subject to the standard for one or the other of these subcategories based on the as-fired heating value of the hazardous waste it burns at a given time. Thus, when the source is burning for energy recovery, then the thermal emissions-based standard would apply. When the source is burning at least in part for thermal destruction, then the concentration based standard would apply. This approach is similar to how we have addressed the issue of normalization in other rules where single sources switch back and forth among inputs which are sufficiently different to warrant separate classification. [171]

We next considered what an appropriate as-fired heating value would be for each liquid fuel boiler subcategory. Although we have used 5000 Btu/lb (the heating value of lowest grade fuels such as scrap wood) in past RCRA actions as a presumptive measure of when hazardous waste is burned for destruction (see, e.g. 48 FR 11159 (March 16, 1983)), we do not think that measure is appropriate here. We used the 5,000 Btu/lb level to delineate burning for destruction from burning for energy recovery at a time when that determination meant the difference between regulation and nonregulation. See 50 FR 49166–167 (Nov. 29, 1985). This is a different issue from choosing the most reasonable normalizing parameter for regulated units (*i.e.*, units which will be subject to a standard in either case).

Instead, we are adopting a value of 10,000 Btu/lb as the threshold for subcategorization. This is approximately the heating value of commercial liquid fossil fuels. 63 FR 33782, 33788 (June 19, 1998) It is also typical of current hazardous waste burned for energy recovery. *Id.* Moreover, EPA has used this value in its comparable fuel specification as a means of differentiating fuels from waste. See *id.* and Table 1 to 40 CFR section 261.38, showing that EPA normalizes all

[170] We also agree that liquid fuel boilers present several unique circumstances, namely: they are often unable to blend fuel and have limited operational flexibility as a result; our data base on these sources' performance is relatively small; much of our mercury and semivolatile metals data is at or near detection limits; and much of the mercury and semivolatile metals data was obtained for other purposes, namely from risk burns or as a result of Method 29 testing to demonstrate compliance with a RCRA chromium standard. While not immediately important to the topic at hand—namely that not all liquid fuel boilers burn for energy recovery—they are secondary issues that we need to closely consider to make sure we do not estimate what the best performing 12% of sources are achieving in an unreasonable manner.

[171] See NESHAP for Stationary Combustion Turbines, 40 CFR section 63.6175 (definitions of ''diffusion flame gas-fired stationary combustion turbine'', ''diffusion flame oil-fired stationary combustion turbine'', ''lean pre-mix gas-fired stationary combustion turbine'' and ''lean premix oil-fired stationary combustion turbine'').

constituent concentrations to a 10,000 Btu/lb level in its specification for differentiating fuels from wastes.

We next examined the waste fuel being burned at cement kilns and lightweight aggregate kilns, which burn hazardous waste fuels to drive the process chemistry to produce products[172], to cross-check whether 10,000 Btu/lb is a reasonable demarcation value for subcategorizing. 10,000 Btu/lb is the minimum heating value found in burn tank and test report data we have for cement kilns and lightweight aggregate kilns [173]. We believe the cement kiln and light weight aggregate kiln data confirm that this is an appropriate cutpoint, since these sources are energy recovery devices that blend hazardous wastes into a consistent, high heating value fuel for energy recovery in their manufacturing process.

We then separated the liquid fuel boiler emissions data we had into two groups, sources burning hazardous waste fuel with less than 10,000 Btu/lb and all other liquid fuel boilers, and performed separate MACT floor analyses. (See Sections 13.4, 13.6, 13.7, 13.8, and 22 of Volume III of the Technical Support Document.) We calculated concentration-based MACT standards for these sources from their respective mercury, semivolatile metals, chromium, and total chlorine data.

Liquid fuel boilers will need to determine which of the two subcategories the source belongs in at any point in time. Thus, you must determine the as-fired heating value of each batch of hazardous waste fired so that you know the heating value of the hazardous waste fired at all times.[174] If the as-fired heating value of hazardous wastes varies above and below the cutpoint (i.e., 10,000 Btu/lb) at times, you are subject to the thermal emissions standards when the heating value is not less than 10,000 Btu/lb and the mass concentration standards when the heating value is less than 10,000 Btu/lb. To avoid the administrative burden of frequently switching applicable operating requirements between the subcategories, you may elect to comply with the more stringent operating requirements that ensure compliance with the standards for both subcategories.

Comment: EPA's attempt to give actual performance two different meanings within a single floor approach is unlawful, unexplained, internally inconsistent, and arbitrary. If EPA believes that mass-based emissions constitute sources' actual performance, the best performing sources must be those with the best mass based emissions—not thermal emissions.

Response: As just explained, we agree with this comment, and have developed MACT floors independently for the two subcategories of liquid fuel boilers. Thus, we have defined two separate MACT pools based on the thermal input of the waste fuel and derived two separate and consistent MACT standards for sources when they burn solely for energy recovery, and when they do not.

We also note that a source cannot ''pick and choose'' the less stringent of the two standards and comply with those. The source must be in compliance with the set of standards that apply.

3. Alternative Particulate Matter Standard for Liquid Fuel Boilers

Comment: A commenter requested that EPA establish standards that allow boilers the option to comply with either a concentration-based particulate matter standard or thermal emissions-based particulate matter standard.

Response: We determined that it is appropriate to express the particulate matter emission standard as a concentration-based standard consistently across source categories and not to give boilers the option to comply with a thermal emissions-based particulate matter standard. As discussed in Part Four, Section III.D as well as the preceding section, metal and chlorine concentration-based emission standards can be biased against sources that process more hazardous waste (from an energy demand perspective), in part because the SRE/Feed methodology assesses feed control of each source when identifying the best performing sources; the ranking procedure thus favors sources with lower percentage hazardous waste firing rates (keeping all other assessment factors equal). The thermal emission standard format eliminates this firing rate bias, which amounts to a limitation on the amount of raw material (hazardous waste fuel to an energy recovery device) that may be processed, when identifying best performing sources.

The methodology we use to identify best performing sources for particulate matter emissions is not affected by the firing rate bias in the manner that metal and chlorine emissions are. This is primarily because we define best performing sources as those with the best back-end air pollution control technology; feed control is not assessed (specifically ash feed control) for raw materials, fossil fuel, or unenumerated HAP metal in the hazardous waste. The hazardous waste firing rate bias is therefore not present when we identify the best performing particulate matter sources because a source's hazardous waste firing rate is not a direct factor in the ranking procedure.

We also note that four of the nine best performing liquid fuel boilers for particulate matter are equipped with fabric filters. Particulate matter emissions from sources equipped with fabric filters are not significantly affected by ash inlet loading. This is not true for metals and chlorine, given metal and chlorine emissions from fabric filters tend to increase at increased feed rates. See Volume III of the Technical Support Document, Sections 5.3 and 7.4. We conclude that the hazardous waste firing rate issue is not a concern for these sources given their particulate matter emissions would not be significantly affected by increased hazardous waste firing rates.

4. Long-term, Annual Averaging Is Impermissible

Comment: Standards expressed as long-term limits are legally impermissible because those levels, by definition, would sometimes be greater than the average emission levels achieved by the best performing sources. Compliance also must be measured on a continuous basis, under section 302(k) of the Act. Thus, floor levels (and standards) for mercury expressed as long-term limits are illegal.

Response: The commenter maintains that the statutory command in section 112(d)(3)(A) to base floor standards for existing sources on ''the average emission limitation achieved by the best performing 12 percent of * * * existing sources'' precludes establishing standards expressed as long term averages because certain daily values could be higher. We do not accept this position. The statute does not state what type of ''average'' performance EPA must assess. Long term, i.e., annual, averaging of performance is quite evidently a type of average, and so is permissible under the statutory text. Moreover, it is reasonable to establish

[172] The Norlite light-weight aggregate kiln was not included in this analysis because they claim they are *not* burning for energy recovery. The waste Norlite burns is 4,860 Btu/lb or lower. This is indicative of a source burning solely for thermal treatment of the waste and not, at least in part, for energy recovery. See 40 CFR 266.100(d)(2)(ii).

[173] The cement kiln burn tank data and test report data shows the minimum heating values of 9,900 and 10,000 Btu/lb, respectively, for the hazardous waste. The minimum lightweight aggregate kiln heating values for hazardous waste was 10,000 Btu/lb, excluding the Norlite source.

[174] If you burn hazardous waste in more than one firing nozzle, you must determine the mass-weighted average heating value of the as-fired hazardous waste across all firing nozzles.

standards on this basis (the standards being the average of the best performing sources, expressed as a long-term average), where sufficient data exist. Indeed, since the principal health concern posed by the emitted HAP is from chronic exposure (i.e. cumulative exposure over time), long-term standards (which reduce the long-term distribution of emitted HAP) arguably would be preferable in addressing the chief risks posed by these sources' emissions.

We establish standards with long-term averaging limits whenever we use normal data to estimate long-term performance. We do this in the few instances where there are insufficient data (whether normal data or compliance test data) to estimate each source's short term emission levels (e.g., mercury and semivolatile metal standards for liquid fuel boilers).[175] One or two snapshot data based on normal operations are not likely to reflect a source's short-term operating levels in part because feed control levels can vary over time.[176] See *Mossville*, 370 F. 3d at 1242 (varying feed rates lead to different emission levels, and this variability must be encompassed within the floor standard because the standard must be met at all times). As a result, snapshot normal emissions, when averaged together, better reflect a source's long term average emissions. An emission standard based on normal data that is averaged together, but expressed as a short-term limit, would not be achievable by the best performing sources because it would not adequately account for their emissions variability. See *National Wildlife Federation* v. *EPA*, 286 F. 3d at 572–73 (''[c]ontinuous operation at or near the daily maximum would in fact result in discharges that exceed the long-term average. Likewise, setting monthly limitations at the 99th percentile would not insure that the long-term average is met''). Long-term limits better account for this variability because such limits allow sources to average their varying feed control levels over time while still assuring average emissions over this period are below the levels demonstrated by the best performing sources.

Indeed, under the commenter's approach where no averaging of intra-source data would be allowed, sources would not be in compliance with the standards during the performance tests themselves. The tests consist of the average of three data runs, so half of the emissions-weighted data points would be impermissibly higher than the average during the test used to derive today's emission standards.

EPA also does not see that section 302(f) of the Act, cited by the commenter, supports its position. That provision indicates that the emission standards EPA establishes must limit the quantity, rate, or concentration of air pollutants on a continuous basis. A standard expressed as a long-term average does so by constraining the overall distribution of emissions to meet a long-term average. Also, long term limits result in emission standards that are lower than those that otherwise would be implemented on a short-term basis. The short-term limit would have to reflect the best performing sources' short term emissions variability (i.e., the maximum amount of variability a source could experience during a single test period). *National Wildlife Federation*, 286 F. 3d at 571–73.

Comment: Other commenters argued the opposite point, that ERA has no data to show that an annual average is achievable, and EPA should establish a longer averaging period.

Response: We believe that all sources can achieve the mercury and semivolatile metals standards for liquid fuel boilers on an annual basis using some combination of MACT controls, i.e., feed control, back end control, or some combination of both. We agree that we have a small data set for these standards, but also believe that it is intuitive that a liquid fuel boiler can meet these standards on an annual basis, because one year is sufficiently more than any seasonal (i.e., several month long) production of certain items that may not be represented by the tests we have.

This informs us that an average of less than a year may not be achievable. It does not inform us that averaging of more than a year is required, since variations that occur with a year are averaged together. An annual average is sufficient for a source to determine whether an individual waste stream impacts negatively on the compliance of the liquid fuel boiler and take measures to address the issue.

5. Gas Fuel Boilers

Comment: How can a boiler burning only gaseous waste also be burning hazardous waste? Uncontained gases are not considered hazardous waste under RCRA. Why are boilers that burn only gasses part of the liquid fuel boiler subcategory?

Response: We agree with the commenter that boilers that burn gasses are unlikely to burn hazardous wastes. However, gas fuel hazardous waste boilers have existed in the past,[177] and we believe we need to define a MACT standard for them. Therefore, we included gas fuel boilers in the liquid fuel boiler subcategory for reasons cited in the proposed rule. See 69 FR at 21216.

E. General

1. Alternative to the Particulate Matter Standards

Comment: Commenters state that some incinerators are currently complying with the alternative to the particulate matter standard provision pursuant to the interim standards. See § 63.1206(b)(14). The eligibility and operating requirements for the alternative to the particulate matter standard in the Interim Standards are different than the proposed alternative to the particulate matter standard in the replacement rule. Specifically, the proposed alternative to the particulate matter standard would no longer require sources to demonstrate a 90% system removal efficiency or a minimum hazardous waste metal feed control level to be eligible for the alternative. Commenters request that EPA clarify in the final rule that the proposed alternative to the particulate matter standard supersedes the requirements in the Interim Standards.

Response: We are finalizing the alternative to the particulate matter standard for incinerators as proposed, with the exception that the alternative metal emission limitations have been revised as a result of database changes since proposal. See § 1219(e) and part three, section II.A. We considered superseding the interim standard alternative to the particulate matter standard requirements (63.1206(b)(14)) immediately (upon promulgation) by replacing it with the revised alternative

[175] Two emission standards in this rulemaking are based on normal data but are expressed as short term limits (the mercury standards for lightweight aggregate and cement kilns). However, in these instances we had enough normal data to reasonably estimate each source's maximum emissions, thus allowing us to express the standard as a short term limit. See USEPA, ''Technical Support Document for HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Sections 11.2 and 12.2.

[176] This is not the case for floors that are based on compliance tests because sources spiked their hazardous wastes to account for variability in hazardous waste feedrate. See Part Four, Section III.C above. Normal data, however, are a snapshot of what occurred on that day and are not likely to be representative over the long term, especially for mercury and semivolatile metals for liquid fuel boilers, where these limited data were almost entirely below the analytic detection limit.

[177] For example, sources 2014 and 2015 owned by Environmental Purification Industries in Toledo, Ohio, were considered hazardous waste boilers at the time the Phase II data base was noticed in the June 27, 2000, despite the fact that these boilers burned only gasses. These boilers have since stopped burning hazardous waste.

standard provisions finalized in today's rule. Although the eligibility requirements for the alternative to the particulate matter standard finalized today are less stringent than the interim standard requirements, the metal emission limitations that are also required by the alternative finalized today are by definition equivalent to or more stringent than the metal limitations in the interim standard alternative. We therefore cannot completely supersede the interim standard provisions immediately (upon promulgation) because sources have three years to comply with more stringent standards. We are instead revising the interim standard provisions of § 63.1206(b)(14) to only reflect the revised alternative standard eligibility criteria (specifically, we have removed the requirements to achieve a given system removal efficiency and hazardous waste metal HAP feed control level).[178] These eligibility criteria revisions become effective immediately with respect to the interim standards because they are less stringent than the current requirements. Sources should modify existing Notifications of Compliance and permit requirements as necessary prior to implementing these revised procedures.

Comment: One commenter is opposed to the alternative to the particulate matter standard because it ignores the health effects/benefits that are attributable to particulate matter.

Response: Particulate matter is not defined as a hazardous air pollutant pursuant the NESHAP program. See CAA 112(b)(1). We control particulate matter as a surrogate for metal HAP. See part four, section IV.A. As a result, a particulate matter standard is not necessary in instances where metal HAP emission standards can alternatively and effectively control the nonmercury metal HAP that is intended be controlled with the surrogate particulate matter standard. The alternative to the particulate matter standard in the final rule accomplishes this. We acknowledge that particulate matter emission reductions result in health benefits. That in itself does not give EPA the authority under § 112(d)(2) to directly regulate particulate matter, however.

2. Assessing Risk as Part of Consideration of Nonair Environmental Impacts

Comment: Commenter states that EPA has inappropriately failed to consider emissions of persistent bioaccumulative pollutants in its beyond-the-floor analysis despite EPA's acknowledgment that these HAPs have non-air quality health and environmental impacts.

Response: EPA has taken the consistent position that considerations of risk from air emissions have no place when setting MACT standards, but rather are to be considered as part of the residual risk determination and standard-setting process made under section 112 (f) of the statute. EPA thus interprets the requirement in section 112 (d) (2) that we consider ''non-air quality health and environmental impacts'' as applying to the by-product outputs from utilization of the pollution control technology, such as additional amount of waste generated, and water discharged.[179] EPA's interpretation was upheld as reasonable in *Sierra Club* v. *EPA*, 353 F. 3d 976, 990 (D.C. Cir. 2004) (Roberts, J.).

VII. Health-Based Compliance Alternative for Total Chlorine

A. Authority for Health-Based Compliance Alternatives

Comment: One commenter states there is no established health threshold for either HCl or chlorine.

Response: Although EPA has not developed a formal evaluation of the potential for HCl or chlorine carcinogenicity (e.g., for IRIS), the evaluation by the International Agency for Research on Cancer stated that there was inadequate evidence for carcinogenicity in humans or experimental animals and thus concluded that HCl and chlorine are not classifiable as to their carcinogenicity to humans (Group 3 in their categorization method). Therefore, for the purposes of this rule, we have evaluated HCl and chlorine only with regard to non-cancer effects. In the absence of specific scientific evidence to the contrary, it has been our policy to classify non-carcinogenic effects as threshold effects. RfC development is the default approach for threshold (or nonlinear) effects.

Comment: One commenter states that the proposal is an inappropriate forum for bringing forward such a significant change in the way that MACT standards are established under Section 112(d) of the Clean Air Act. A precedent-setting change of the magnitude that EPA has raised should be discussed openly and carefully with all affected parties, rather than being buried in several individual proposed standards.

Response: Including health-based compliance alternatives for hazardous waste combustors does not mean that EPA will automatically provide such alternatives for other source categories. Rather, as has been the case throughout the MACT rule development process, EPA will undertake in each individual rule to determine whether it is appropriate to exercise its discretion to use its authority under CAA section 112(d)(4) in developing applicable emission standards. Stakeholders for those affected rules will have ample opportunity to comment on the Agency's proposals.

Comment: One commenter states that the proposed approach is contrary to the intent of the CAA which explicitly calls for a general reduction in HAP emissions from all major sources nationwide through the establishment of MACT standards based on technology, rather than risk, as a first step.

Response: For pollutants for which a health threshold has been established, CAA section 112(d)(4) allows the Administrator to consider such threshold level, with an ample margin of safety, to establish emission standards.

Comment: One commenter states that the proposed approach would take the national air toxics program back to the time-consuming NESHAP process that existed prior to the Clean Air Act Amendments of 1990.

Response: We disagree that allowing a health-based compliance alternative in the final rule will alter the MACT program or affect the schedule for promulgation of the remaining MACT standards. Today's rule is the last MACT rule to be promulgated, and the health-based compliance alternative did not delay promulgation of the rule.

Comment: A commenter is concerned that the proposal would remove the benefit of the ''level-playing field'' that would result from the proper implementation of technology-based MACT standards.

Response: Providing health-based compliance alternatives in the final rule for sources that can meet them will assure the application of a uniform set of requirements across the nation. The final rule and its criteria for demonstrating eligibility for the health-based compliance alternatives apply uniformly to all hazardous waste combustors except hydrochloric acid

[178] Sources can only use § 63.1206(b)(14) for purposes of complying with the interim standards. After the compliance date for today's rule, incinerators electing to comply with the alternative to the particulate matter standard must comply with the provisions found in § 63.1219(e).

[179] See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume V: Emission Estimates and Engineering Costs,'' September 2005, Section 6, for a discussion of the non-air impact that were assessed for this final rule.

production furnaces. The final rule establishes two baseline levels of emission reduction for total chlorine, one based on a traditional MACT analysis and the other based on EPA's evaluation of the health threat posed by emissions of HCl and chlorine. All hazardous waste combustor facilities must meet one of these baseline levels, and all facilities have the same opportunity to demonstrate that they can meet the alternative health-based emission standards. We also note that additional uniformity is provided by limiting the health-based compliance alternatives for incinerators, cement kilns, and lightweight aggregate kilns to the emission levels allowed by the Interim Standards.

Comment: Several commenters state that site-specific emission limits are inappropriate under section 112(d)(4) because they are not emission standards. One commenter asserts that the Agency's position that the limits are based on uniform procedures is flawed because the process allows ''any scientifically-accepted, peer-reviewed risk assessment methodology for your site-specific compliance demonstration.'' This is not a ''uniform'' procedure, according to the commenter. There are a host of variables that influence the results of an accepted methodology. The commenter reasons that, without some standardization of those variables, there is no uniform or standard analysis. Each permitting authority could establish its view of appropriate variables; there would be no national consistency.

Several other commenters assert that EPA has the authority to establish an exposure-based emission limit for total chlorine. One commenter notes that one issue that often arises when considering risk-based standards is whether EPA has authority under section 112 to establish an exposure-based emission limit. The commenter states that the concern seems to be that some stakeholders construe the Act's statutory provisions as requiring uniform emission limitations at all facilities, rather than emissions that are measured at places away from the source and that vary from facility to facility. The commenter does not see any legal impediment to establishing exposure-based limits.

The commenter notes that, first, under section 112, EPA has authority to establish ''emission standards.'' Emission standards are defined to be a requirement established by the State or the Administrator which limits the quantity, rate or concentration of emissions of air pollutants on a continuous basis * * * to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter. EPA's alternate risk-based emission standard will limit the quantity, rate or concentration of the emissions. The commenter states that there is no requirement in the definition that specifies where the emission standard is to be measured, nor is there such a requirement anywhere in the statute.

Second, the commenter notes that EPA's proposed exposure-based limit will result in facilities establishing operating parameter limitations, or OPLs. These OPLs qualify as emission limitations because they are ''operational standards'' being promulgated under section 112, according to the commenter. They will be measured at the facility, not at the point of exposure. Finally, the commenter reasons that the limitations EPA is establishing are uniform. They uniformly protect the individual most exposed to emission levels no higher than a hazard index of 1.0. Consequently, the commenter believes that there is nothing in the statute that prevents the Agency from promulgating exposure-based emission standards.

Response: We agree with the commenters who believe the Agency has the authority to establish health-based compliance alternatives under a national exposure standard. In particular, we agree with the commenter that the health-based compliance alternatives are national standards since they provide a uniform and national measure of risk control, and also that the health-based compliance alternatives are ''emission standards'' because they limit the quantity, rate or concentration of total chlorine emissions.

Section 112(d)(4) authorizes EPA to bypass the mandate in section 112(d)(3) in appropriate circumstances. Those circumstances are present for hazardous waste combustors other than hydrochloric acid production furnaces. Section 112(d)(4) provides EPA with authority, at its discretion, to develop health-based compliance alternatives for HAP ''for which a health threshold has been established,'' provided that the standard reflects the health threshold ''with an ample margin of safety.''

Both the plain language of section 112(d)(4) and the legislative history indicate that EPA has the discretion under section 112(d)(4) to develop health-based compliance alternatives for some source categories emitting threshold pollutants, and that those standards may be less stringent than the corresponding MACT standard (including floor standards) would be.[180] EPA's use of such standards is not limited to situations where every source in the category or subcategory can comply with them. As with technology-based standards, a particular source's ability to comply with a health-based standard will depend on its individual circumstances, as will what it must do to achieve compliance.

In developing health-based compliance alternatives under section 112(d)(4), EPA seeks to ensure that the concentration of the particular HAP to which an individual exposed at the upper end of the exposure distribution is exposed does not exceed the health threshold. The upper end of the exposure distribution is calculated using the ''high end exposure estimate,'' defined as ''a plausible estimate of individual exposure for those persons at the upper end of the exposure distribution, conceptually above the 90th percentile, but not higher than the individual in the population who has the highest exposure'' (EPA Exposure Assessment Guidelines, 57 FR 22888, May 29, 1992). Assuring protection to persons at the upper end of the exposure distribution is consistent with the ''ample margin of safety'' requirement in section 112(d)(4).

We agree with the view of several commenters that section 112(d)(4) is appropriate for establishing health-based compliance alternatives for total chlorine for hazardous waste combustors other than hydrochloric acid production furnaces. Therefore, we have established such compliance alternatives for affected sources in those categories. Affected sources which believe that they can demonstrate compliance with the health-based compliance alternatives may choose to comply with those compliance alternatives in lieu of the otherwise applicable MACT-based standard.

Comment: One commenter states that the risk assessments would not provide an ample margin of safety because background exposures are not taken into account. There is no accounting for other chlorine compounds from other sources at the facility, or from other neighboring facilities. The commenter believes that there is no evidence in the section 112(f) residual risk assessments produced thus far that emissions from collocated sources will actually be pursued by EPA. The commenter also notes that the Urban Air Toxics program cannot be relied upon to address ambient background. This program,

[180] See also Legislative History at 876 (section 112(d)(4) standard may be less stringent than MACT).

required under section 112(k), was to be completed by 1999. However, the strategy has not been finalized and the small amount of activity in this area is focused on *voluntary* emission reductions rather than federal requirements. Finally, the commenter notes that control of criteria pollutants via State Implementation Plans to achieve compliance with the NAAQS is problematic. For particulate matter (PM) and ozone, new NAAQS were set in 1997 and seven years later the nonattainment designations are still being determined. The designation process will be followed by a 3 year period to prepare State Implementation Plans and several more years to carry out those plans. In the meantime, there will be high levels of PM and ozone in the air near many hazardous waste combustors in New Jersey which will exacerbate exposures to chlorine and hydrogen chloride.

Response: Total chlorine missions from collocated hazardous waste combustors must be considered in establishing health-based compliance alternatives under § 63.1215. Ambient levels of HCl or chlorine attributable to other on-site sources, as well as off-site sources, are not considered, however. As we indicated in the Residual Risk Report to Congress and in the recent residual risk rule for Coke Ovens, the Agency intends to consider facility-wide HAP emissions as part of the ample margin of safety determination for CAA section 112(f) residual risk actions. 70 FR at 19996–998 (April 15, 2005); see also, 54 FR at 38059 (Sept. 14, 1989) (benzene NESHAP).

Comment: Several commenters state that acute exposure guideline levels (AEGLs) are *once-in-a-lifetime* exposure levels. They assert that, because short term exposures at a Hazard Index greater than 1.0 may occur more than once in a lifetime, using AEGLs for the purpose of setting risk-based short-term limits for HCl and chlorine does not provide an ''ample margin of safety.''

Response: To assess acute exposure, we proposed to use acute exposure guideline levels for 1-hour exposures (AEGL–1) as health thresholds. We have investigated commenters' concerns, however, and conclude that AEGLs are not likely to be protective of human health because individuals may be subject to multiple acute exposures at a Hazard Index greater than 1.0 from hazardous waste combustors. Consequently, we use acute Reference Exposure Levels (aRELs) rather than acute exposure guideline levels (AEGLs) as acute exposure thresholds for the final rule. See also Part Two, Section IX.D above. Acute RELs are health thresholds below which there would be no adverse health effects while AEGL–1 values are health thresholds below which there may be mild adverse effects.

Acute exposures are relevant (in addition to chronic exposures) and the acute exposure hazard index of 1.0 could be exceeded multiple times over an individual's lifetime. Although we concluded at proposal that the chronic exposure Hazard Index would always be higher than the acute exposure Hazard Index, and thus would be the basis for the total chlorine emission rate limit, this conclusion relates to acute versus chronic exposure to a constant, maximum average emission rate of total chlorine from a hazardous waste combustor. See 69 FR at 21300. We explained that acute exposure must nonetheless be considered when establishing operating requirements to ensure that short-term emissions do not result in an acute exposure Hazard Index of greater than 1.0. This is because total chlorine and chloride feedrates to a hazardous waste combustor (e.g., commercial incinerator) can vary substantially over time. Although a source may remain in compliance with a feedrate limit with a long-term averaging period (e.g., 12-hour, monthly, or annual) based on the chronic Hazard Index, the source could feed chlorine during short periods of time that substantially exceed the long-term feedrate limit. This could result potentially in emissions that exceed the one-hour (i.e., acute exposure) Hazard Index. Consequently, we discussed at proposal the need to establish both short-term and long-term total chlorine and chloride feedrate limits to ensure that neither the chronic exposure nor the acute exposure Hazard Index exceeds 1.0.[181]

We conclude that 1-hour Reference Exposure Levels (aRELs) are a more appropriate health threshold metric than AEGL–1 values for hazardous waste combustors given that the acute Hazard Index limit of 1.0 may be exceeded multiple times over an individual's lifetime, albeit resulting from uncontrollable factors. The California Office of Health Hazard Assessment has developed acute health threshold levels that are intended to be protective for greater than once in a lifetime exposures. The acute exposure levels are called acute Reference Exposure Levels and are available at *http://www.oehha.ca.gov/air/acute_rels/acuterel.html.*

The 1-hour REL values for hydrogen chloride and chlorine are 2.1 mg/m^3 and 0.21 mg/m^3, respectively. The AEGL–1 values for hydrogen chloride and chlorine are 2.7 mg/m^3 and 1.4 mg/m^3, respectively. Although there is little difference between the 1-hour REL and AEGL–1 values for hydrogen chloride, the 1-hour REL for chlorine is substantially lower than the AEGL–1 value.

In summary, we believe that aRELs are a more appropriate health threshold metric than AEGL–1 values for establishing health-based compliance alternatives for hazardous waste combustors because aRELs are ''no adverse effect'' threshold levels that are intended to be protective for multiple exposures.

Comment: One commenter states that the health-based compliance alternative is unlawful because the proposal does not address ecological risks that may result from uncontrolled HAP emissions, including risks posed to those areas where few people currently live, but sensitive habitats exist.

Response: An ecological assessment is normally required under CAA section 112(d)(4) to assess the presence or absence of ''adverse environmental effects'' as that term is defined in CAA section 112(a)(7). To identify potential multimedia and/or environmental concerns, EPA has identified HAP with significant potential to persist in the environment and to bioaccumulate. This list does not include hydrogen chloride or chlorine.

We also note that health-based total chlorine emission limits for incinerators, cement kilns, and lightweight aggregate kilns cannot be higher than the current Interim Standards. See § 63.1215(b)(7). Thus, the ecological risk from total chlorine emissions from these sources will not be increased under the health-based limits.

In addition, we note that only 2 of 12 solid fuel boilers have total chlorine emissions higher than 180 ppmv, and only 1 liquid fuel boiler has emissions higher than 170 ppmv. Thus, boilers generally have low total chlorine emissions which would minimize ecological risk.

Consequently, we do not believe that emissions of hydrogen chloride or chlorine from hazardous waste boilers will pose a significant risk to the environment, and facilities attempting to comply with the health-based

[181] Note that we conclude for the final rule that most sources are not likely to exceed the acute Hazard Index because they will establish a 12-hour rolling average chlorine feedrate limit and their chlorine feedrates are not likely to vary substantially over that averaging period. Thus, we believe that most sources will not be required to establish an hourly rolling average chlorine feedrate limit. The owner/operator must determine whether the hourly rolling average chloride feedrate limit can be waived under § 63.1215(d).

alternatives for these HAP are not required to perform an ecological assessment.

B. Implementation of the Health-Based Standards

Comment: Several commenters are concerned that the health-based compliance alternative will place an intensive resource demand on state and local agencies to review and approve facilities' eligibility demonstrations, and State and local agencies may not have adequate expertise to review and approve the demonstrations. One commenter states that permitting authorities do not have the expertise to review eligibility demonstrations that are based on procedures other than those included in EPA's Reference Library, as would be allowed. The commenter also states that, if the health-based compliance alternative is promulgated, EPA should establish one standard method for the analyses so there is consistency nationwide. If EPA offers more than one method, EPA should do all of the risk assessment reviews, instead of passing the responsibility, without clear direction, to the permitting authorities, according to the commenter.

Response: The health-based compliance alternatives for total chlorine that EPA has adopted in the final rule should not impose significant resource burdens on states. The required compliance demonstration methodology is structured in such a way as to avoid the need for states to have significant expertise in risk assessment methodology. We have considered the commenters' concerns in developing the criteria defining eligibility for these compliance alternatives, and the approach that is included in the final rule provides clear, flexible requirements and enforceable compliance parameters. The final rule provides two ways that a facility may demonstrate eligibility for complying with the health-based compliance alternatives. First, look-up tables allow facilities to determine, using a limited number of site-specific input parameters, whether emissions from their sources might cause the Hazard Index limit to be exceeded. Second, if a facility cannot demonstrate eligibility using a look-up table, a modeling approach can be followed. The final rule presents the criteria for performing this modeling.

Only a portion of hazardous waste combustors will submit eligibility demonstrations for the health-based compliance alternatives. Of these sources, several should be able to demonstrate eligibility based on simple analyses—using the look-up tables. However, some facilities will require more detailed modeling. The criteria for demonstrating eligibility for the compliance alternatives are clearly defined in the final rule. Moreover, under authority of RCRA section 3005(c)(3), multi-pathway risk assessments will typically have already been completed for many hazardous waste combustors to document that emissions of toxic compounds, including total chlorine, do not pose a hazard to human health and the environment. Thus, state permitting officials have already reviewed and approved detailed modeling studies for many hazardous waste combustors. The results of these studies could be applied to the eligibility demonstration required by this final rule.

Because these requirements are clearly defined, and because any standards or requirements created under CAA section 112 are considered applicable requirements under 40 CFR part 70, the compliance alternatives would be incorporated into title V programs, and states would not have to overhaul existing permitting programs.

Finally, with respect to the burden associated with ongoing assurance that facilities that opt to do so continue to comply with the health-based compliance alternatives, the burden to states will be minimal. In accordance with the provisions of title V of the CAA and part 70 of 40 CFR (collectively ''title V''), the owner or operator of any affected source opting to comply with the health-based compliance alternatives is required to certify compliance with those standards every five years on the anniversary of the comprehensive performance test. In addition, if the facility has reason to know of changes over which the facility does not have control, and these changes could decrease the allowable HCl-equivalent emission rate limit, the facility must submit a revised eligibility demonstration. Further, before changing key parameters that may impact an affected source's ability to continue to meet the health-based emission standards, the source is required to evaluate its ability to continue to comply with the health-based compliance alternatives and submit documentation to the permitting authority supporting continued eligibility for the compliance alternative. Thus, compliance requirements are largely self-implementing and the burden on states will be minimal.

Comment: One commenter suggests that the look-up tables would have more utility if EPA developed tables for each source category to ensure the HCl-equivalent emission rate limits reflected stack parameters representative of each source category. Similarly, another commenter notes that a look-up table designed to be applicable to all hazardous waste combustors is very conservative and will have limited utility. This commenter does not suggest that EPA develop look-up tables for each class of hazardous waste combustors, however. Rather, the commenter suggests that since look-up tables have already been developed for industrial boilers that do not burn hazardous waste [182] hazardous waste combustors should be allowed to use those look-up tables instead of the look-up tables proposed for hazardous waste combustors.

Response: We noted at proposal that the emission rates provided in the look-up table for hazardous waste combustors are more stringent than those promulgated for solid fuel industrial boilers that do not burn hazardous waste. This is because the key parameters used by the SCREEN3 atmospheric dispersion model (i.e., stack diameter, stack exit gas velocity, and stack exit gas temperature) to predict the normalized air concentrations that EPA used to establish HCl-equivalent emission rates for solid fuel industrial boilers that do not burn hazardous waste are substantially different for hazardous waste combustors. Thus, the maximum HCl-equivalent emission rates for hazardous waste combustors would generally be lower than those EPA established for solid fuel industrial boilers that do not burn hazardous waste.

Nonetheless, we agree with the commenter's concerns that the look-up tables would have more utility if they better reflected the range of stack properties representative of hazardous waste combustors. Accordingly, we examined the stack parameters for all hazardous waste-burning sources in our data base (except for hydrochloric acid production furnaces that are not eligible for the health-based emission standards). After analyzing the relationships among the various stack parameters (i.e., stack height, stack diameter, stack gas exhaust volume, and exit temperature), we concluded that the look-up table should be modified to treat both stack diameter and stack height as independent variables rather than relying on stack height alone.

We developed separate tables for short-term (i.e., 1-hour) HCl-equivalent

[182] See Table 2 of Appendix A to Subpart DDDDD, Part 63.

emissions limits to protect against acute health effects and long-term (i.e., annual) emission limits to protect against chronic effects from exposures to chlorine and hydrogen chloride. As discussed above, we used the acute Reference Exposure Level (aREL) developed by Cal-EPA as the benchmark for acute health effects. We used EPA's Reference Concentrations (RfC) as the benchmark for chronic health effects from exposures occurring over a lifetime.

Emission limits in the look-up table are expressed in terms of HCl-toxicity equivalent emission rates (lbs/hr). To convert your total chlorine emission rate (lb/hr) to an HCl-equivalent emission rate, you must adjust your chlorine emission rate by a multiplicative factor representing the ratio of the HCl health risk benchmark to the chlorine health risk benchmark. For 1-hour average HCl-equivalent emission rates, the ratio is the ratio of the aREL for HCl (2100 micrograms per cubic meter) to the aREL for chlorine (210 micrograms per cubic meter), or a factor of 10.[183] For annual average emissions, the ratio is the ratio of the RfC for HCl (20 micrograms per cubic meter) to the RfC of chlorine (0.2 micrograms per cubic meter), or a factor of 100. See § 63.1215(b).

We used the SCREEN3 air dispersion model to develop the emission limits in the look-up tables. SCREEN3 is a screening model that estimates air concentrations under a wide variety of meteorological conditions in order to identify the meteorological conditions under which the highest ambient air concentrations are likely to occur and what the magnitude of the ambient air concentrations are likely to be. The SCREEN3 model implements the procedures in EPA's ''Screening Procedures for Estimating the Air Quality Impact of Stationary Sources, Revised'' (EPA–454/R–92–019, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, NC, October 1992). Included are options for estimating ambient air concentrations in simple elevated terrain and complex terrain. Simple elevated terrain refers to terrain elevations below stack top. We did not use the complex terrain option in the development of the look-up tables because of the site-specific nature of plume impacts in areas of complex terrain. Therefore, the look-up tables cannot be used in areas of complex terrain (which we define generally as terrain that rises above stack top). Sources located in complex terrain (i.e., as a practical matter, sources other than those that are located in flat or simple elevated terrain as discussed below and thus cannot use the look-up tables) must use site-specific modeling procedures to establish HCl-equivalent emission rates.

We looked at two generic terrain scenarios for purposes of the look-up table. In one we assumed the terrain rises at a rate of 5 meters for every 100 meter run (i.e., a slope of 5 percent) and that terrain is ''chopped off'' above stack top (following the convention for such analyses in simple elevated terrain). In the other we assumed flat terrain. As can be seen from the tables in § 63.1215, the emission limits with flat terrain are significantly higher than those with simple elevated terrain. To reasonably ensure that the emission limits are not substantially over-stated (e.g., by a factor of 2), the simple elevated terrain table must be used whenever terrain rises to an elevation of one half (½) the stack height within a distance of 50 stack heights.

For both the simple elevated terrain and flat terrain scenarios, we performed model runs for urban and rural dispersion conditions, with and without building downwash. We selected the highest (ambient air concentration) values at each distance from among the four runs for each of the terrain scenarios.

As can be seen from the tables in § 63.1215, the HCl-equivalent emission rate limits range from 0.13 pounds per hour on an annual average (for a 0.3 meter diameter stack that is 5 meters tall that lies within 30 meters of the property boundary) to 340 pounds per hour (for a 4.0 meter diameter stack that is 100 meters tall that lies 5000 meters from the property boundary) when located in simple elevated terrain. In flat terrain, the range is from 0.37 to 1100 pounds per hour on an annual average. This contrasts with the look-up table at proposal, where the comparable range was from 0.0612 pounds per hour (for a 5 meter stack height at a distance of 30 meters) to a maximum of 18 pounds per hour (for stack heights of 50 meters or greater, at distances of 500 meters or greater).

If you have more than one hazardous waste combustor on site, the sum of the ratios for all combustors of the HCl-equivalent emission rate to the HCl-equivalent emission rate limit cannot exceed 1.0. See § 63.1215 (c)(3)(v). This will ensure that the Hazard Index of 1.0 is not exceeded considering emissions from all on-site combustors.

Comment: Several commenters state that facilities should be allowed to establish an averaging period for the total chlorine and chloride feedrate limit that is shorter than an annual rolling average. Commenters are referring to the feedrate limit to ensure compliance with the annual average HCl-equivalent emission rate limit. Commenters are concerned with the data handling issues that could arise from calculating, recording, and reporting an annual rolling average feedrate level that is updated hourly, and note that a shorter averaging period would make the limit more stringent.

Response: We agree with commenters, and conclude, moreover, that a 12-hour averaging period rather than an annual averaging period will be imposed on the vast majority of sources as a practical matter. This is because sources must establish a limit on the feedrate of total chlorine and chloride to ensure compliance with the semivolatile metals emission standards. See § 63.1209(n). The feedrate limit for total chlorine and chloride is established under § 63.1209(n) as the average of the hourly rolling averages for each test run, and the averaging period is 12 hours. Thus, the averaging period for the feedrate limit for semivolatile metals—12-hour rolling average updated hourly—trumps the annual rolling average averaging period that would otherwise apply here.[184]

Sources may also demonstrate compliance with the semivolatile metals standard by assuming all semivolatile metals in feedstreams are emitted. See § 63.1207(m)(2). Sources that do not have emission control equipment, such as most liquid fuel boilers, are particularly likely to use this approach. Under this approach, there is no concern regarding increased volatility of metals as chlorine feedrates increase, and such sources are not subject to a feedrate limit for chlorine for compliance assurance with the semivolatile metal standard. These sources may establish an averaging period for the feedrate of total chlorine and chloride for compliance with the health-based compliance alternative for total chlorine of not to exceed one year.[185]

[183] We note that this factor of 10 ratio of the aRELs of HCl to chlorine is based on current aREL values and is subject to change. You must use current aREL (and RfC) values when you conduct your eligibility demonstration. See § 63.1215(b)(4 and 5).

[184] To also ensure compliance with the annual average HCl-equivalent emission rate limit, however, the numerical value of the feedrate limit established during the semivolatile metals performance test cannot exceed the value calculated as the annual average HCl-equivalent emission rate limit divided by [1 − system removal efficiency], where you demonstrate the total chlorine system removal efficiency during the comprehensive performance test.

[185] We note that we have also applied this ''not-to-exceed'' approach to establishing the duration of

Comment: Several commenters offered suggestions on whether a short-term feedrate limit was needed for total chlorine and chloride (*i.e.*, chlorine) as EPA suggested, and if EPA continues to consider it necessary, how the limit should be established.

One commenter states that it is not necessary to set short-term limits for chlorine feedrates. If EPA concludes that short-term limits are necessary, however, the commenter recommended these options: (1) Cap the feedrate at a level that is extrapolated up to the feedrate associated with Interim Standard for incinerators; (2) if the facility uses the site-specific option to set emission limits, the dispersion models can easily be used to set a 1-hour (or longer) limit; and (3) if the facility uses the look up table (which at proposal provided only annual average HCl-equivalent emission rate limits), a short-term limit can be set based on a multiplier of the annual limit'10 times the annual limit as recommended by documents in EPA's Air Toxics Risk Assessment Reference Library.

Another commenter states that, if EPA were to promulgate a short-term feedrate limit, the EPA-endorsed factor of 0.08 employed to translate maximum hourly concentrations to annual concentrations could be used to identify the maximum hourly feedrate limit.

Finally, another commenter states that extrapolation of the chlorine feedrate (from the level during the comprehensive performance test when the source documents compliance with the annual average HCl-equivalent emission rate limit) should be allowed to 100% of the 1-hour average HCl-equivalent emission rate limit because numerous safety factors have already been included in the health risk threshold values, look-up tables, and modeling demonstration.

Response: At proposal, we explained that sources would establish an annual average feedrate limit on chlorine as the feedrate level during the comprehensive performance test demonstrating compliance with the annual average HCl-equivalent emission rate limit. [186] Only long-term exposures—maximum annual average exposures—need be considered when confirming that the chlorine feedrate during the comprehensive performance test (i.e., average of the hourly rolling averages for each run) is acceptable because the annual exposure Hazard Index limit (i.e., not to exceed 1.0) would always be exceeded before the 1-hour Hazard Index limit (i.e., not to exceed 1.0). Thus, the feedrate limit associated with annual exposures would always be more stringent than the feedrate limit associated with 1-hour exposures. See 69 FR at 21299.

We further explained at proposal, however, the need to establish a short-term feedrate limit for chlorine to ensure that the 1-hour HCl-equivalent emission rate did not exceed the 1-hour average HCl-equivalent emission rate limit due to variability in the chlorine feedrate during the annual averaging period for the feedrate limit. We requested comment on approaches to establish this 1-hour chlorine feedrate limit, including extrapolating feedrates to 100% of the 1-hour average HCl-equivalent emission rate limit. See 69 FR at 21304.

In the final rule we have corrected and refined these procedures. The final rule requires you to establish a long-term chlorine feedrate limit to maintain compliance with the annual average HCl-equivalent emission rate limit as either: (1) The chlorine feedrate during the comprehensive performance test if you demonstrate compliance with the semivolatile metals emission standard during the test (see § 63.1209(o)); or (2) if you comply with the semivolatile metals emission standard under § 63.1207(m)(2) by assuming all metals in the feed to the combustor are emitted, the annual average HCl-equivalent emission rate limit divided by [1 − system removal efficiency] where you demonstrate the system removal efficiency during the comprehensive performance test. See discussion in Part Two, Section IX.H, of this preamble. If you establish the chlorine feedrate limit based on the feedrate during the performance test to demonstrate compliance with the semivolatile metals emission standard, the averaging period for the feedrate limit is a 12-hour rolling average. If you establish the chlorine feedrate limit based on the system removal efficiency during the performance test, the averaging period is up to an annual rolling average.

The final rule also requires you to establish an hourly rolling average chlorine feedrate limit if you determine under § 63.1215(d)(3) that the 1-hour average HCl-equivalent emission rate limit may be exceeded. That feedrate limit is established as the 1-hour HCl-equivalent emission rate limit divided by [1 − system removal efficiency].

Under § 63.1215(d)(3), you must establish an hourly rolling average chlorine feedrate limit unless you determine considering specified criteria that your chlorine feedrates will not increase over the averaging period for the long-term chlorine feedrate limit (*i.e.*, 12-hour rolling average or (up to) annual rolling average) to a level that may result in an exceedance of the 1-hour average HCl-equivalent emission rate limit. The criteria that you must consider are: (1) The ratio of the 1-hour average HCl-equivalent emission rate based on the total chlorine emission rate you select for each combustor to the 1-hour average HCl-equivalent emission rate limit for the combustor; and (2) the potential for the source to vary chlorine feedrates substantially over the averaging period for the long-term chlorine feedrate limit.

For example, if a source's primary chlorine-bearing feedstreams have a relatively constant chlorine concentration over the averaging period for the chlorine feedrate limit to ensure compliance with the annual average HCl-equivalent emission rate limit (*e.g.*, generally 12-hours), as may be the case for commercial sources feeding from large burn tanks or on-site sources where chlorine levels in wastes are fairly constant, you may conclude that there is little probability that 1-hour feedrates would vary substantially over the averaging period. Thus, a 1-hour rolling average chlorine feedrate limit may not be warranted. Even if chlorine feedrates could vary substantially over the long-term feedrate averaging period, however, an hourly rolling average feedrate limit still may not be warranted if the source's 1-hour average HCl-equivalent emission rate is well below the 1-hour HCl-equivalent emission rate limit. See Part Two, Section IX.H, of this preamble for a discussion of the relationship between emission rates, emission rate limits, and feedrate limits.

We disagree with the commenter who states that short-term chlorine feedrate limits are not necessary. The 1-hour average HCl-equivalent emission rate limit could potentially be exceeded for sources with highly variable chlorine feedrates and where the 1-hour HCl-equivalent emission rate is relatively high compared to the 1-hour HCl-equivalent emission rate limit. The 1-hour average HCl-equivalent emission rate limit could be exceeded even though the source remains in compliance with the annual average HCl-equivalent emission rate limit (and,

averaging periods for the limits on all operating parameters established under § 63.1209. See new § 63.1209(r) and USEPA, ''Final Technical Support Document for HWC MACT Standards, Volume IV: Compliance with HWC MACT Standards, September 2005, Section 2.4.6.

[186] We discussed at proposal that the feedrate limit to ensure compliance with the long-term Hazard Index limit of not to exceed 1.0 would be the average of the hourly rolling averages for each test run, with compliance based on an annual average. Note that, under the final rule however, the long-term chlorine feedrate limit is established as the annual average HCl-equivalent emission rate limit divided by [1 − system removal efficiency]. See § 63.1215(g)(2).

moreover, the 12-hour rolling average or (up to) annual rolling average chlorine feedrate limit).

We agree with commenters that suggest that the hourly rolling average chlorine feedrate limit should be extrapolated from performance test feedrates up to 100% of the 1-hour average HCl-equivalent emission rate limit. The final rule requires you to establish the hourly rolling average feedrate limit (if a limit is required under § 63.1215(d)(3)) as the 1-hour HCl-equivalent emission rate limit divided by [1 − system removal efficiency]. Establishing the hourly rolling average feedrate in this manner ensures that the 1-hour HCl-equivalent emission rate limit is not exceeded, and thus that the aREL-based Hazard Index of 1.0 is not exceeded.

We also agree in principle with commenters that suggest that the hourly rolling average feedrate limit be based on the 1-hour average HCl-equivalent emission rate limit which is based on emissions modeling. These commenters suggested that we use a multiplier of 10 or 12.5 (*i.e.*, 1/0.08) to project 1-hour average HCl-equivalent emission rate limits from the annual average HCl-equivalent emission rate limits. Rather than use these approaches to project 1-hour average emissions from annual average emissions, however, we use emissions modeling to develop look-up tables for both 1-hour average HCl-equivalent emission rate limits and annual average HCl-equivalent emission rate limits. For sources that use site-specific risk assessment to demonstrate eligibility, they will use the same models to estimate 1-hour average maximum ambient concentrations. Thus, the final rule uses modeling to establish directly 1-hour average HCl-equivalent emission rate limits rather than approximating those limits from annual average HCl-equivalent emission rate limits as commenters suggest. In summary, the final rule requires you to establish the 1-hour average HCl-equivalent emission rate limit by either using Tables 3 or 4 in § 63.1215 to look-up the limit, or conducting a site-specific risk analysis. Under the site-specific risk analysis option, the 1-hour average HCl-equivalent emission rate limit would be the highest emission rate that the risk assessment estimates would result in an aREL-based Hazard Index not exceeding 1.0 at any off-site receptor location.

We do not agree that the short-term feedrate limit should be capped at the level corresponding to the Interim Standards for incinerators, cement kilns, and lightweight aggregate kilns. The final rule caps the total chlorine emission rate and the annual average HCl-equivalent emission rate limit at the level equivalent to the Interim Standard for total chlorine. Thus, the long-term chlorine feedrate limit (12-hour rolling average or (up to) an annual rolling average) is capped at the level corresponding to the Interim Standards for incinerators, cement kilns, and lightweight aggregate kilns. The hourly rolling average feedrate limit to maintain compliance with the 1-hour average HCl-equivalent emission rate limit, however, can exceed the numerical value of the long-term chlorine feedrate limit because the 1-hour average HCl-equivalent emission rate limit is substantially higher than the annual average HCl-equivalent emission rate limit. Thus, capping at the interim standard level is inappropriate unless the interim standard were somehow re-expressed as a 1-hour limit.

Comment: Many commenters state that requiring prior approval of the eligibility demonstration would be unworkable. Commenters are concerned that the permitting authority may not approve the demonstration prior to the compliance date even though the source has submitted complete and accurate information and has responded to any requests for additional information in good faith. Commenters are also concerned that the permitting authority may disapprove the demonstration too late for the source to take other measures to comply with the total chlorine MACT standard. Once commenter recommends the following alternative approach: (1) If the regulatory agency does not act on a risk demonstration within the 6-month period, it is conditionally deemed approved; and (2) if a risk demonstration is disapproved, the source would have to comply with the MACT emission standards no later than three years after notice of disapproval and, in the interim, sources would comply with current emission limits for total chlorine.

Another commenter suggests that, if the permitting authority has neither approved nor disapproved the eligibility demonstration by the compliance date, the source may begin complying on the compliance date with the alternative health-based limits specified in the eligibility demonstration.

Finally, another commenter states that facilities should be granted a three-year extension of the compliance date if the Agency denies a good-faith eligibility demonstration. The commenter is concerned that sources will not have time to install additional controls or take other measures after a denial is issued but prior to the compliance date.

Response: We agree with commenters that requiring prior approval of the eligibility demonstration may be unworkable for the reasons commenters suggest. We also agree with commenters that sources who make a good-faith eligibility demonstration but whose demonstration is denied by the permitting authority may need additional time to install controls or take other measures to comply with the MACT emission standards.

Accordingly, the final rule does not require prior approval of the eligibility demonstration for existing sources. If your permitting authority has not approved your eligibility demonstration by the compliance date, and has not issued a notice of intent to disapprove your demonstration, you may nonetheless begin complying, on the compliance date, with the HCl-equivalent emission rate limits and associated chlorine feedrate limits you present in your eligibility demonstration.

In addition, the final rule states that the permitting authority should notify you of approval or intent to disapprove your eligibility demonstration within 6 months after receipt of the original demonstration, and within 3 months after receipt of any supplemental information that you submit. A notice of intent to disapprove your eligibility demonstration, whether before or after the compliance date, will identify incomplete or inaccurate information or noncompliance with prescribed procedures and specify how much time you will have to submit additional information or comply with the total chlorine MACT standards. The permitting authority may extend the compliance date of the total chlorine MACT standards to allow you to make changes to the design or operation of the combustor or related systems as quickly as practicable to enable you to achieve compliance with the total chlorine MACT standards.

Comment: One commenter states that proposed § 63.1215(f)(1)(A) should have required sources to conduct a new comprehensive performance test only if there are changes that would decrease the HCl-equivalent emission rate limit below the HCl-equivalent emission rate demonstrated during the comprehensive performance test. Similarly, the commenter suggests that a retest should not be required if a change increases the HCl-equivalent emission rate limit but the source elects to maintain the current feedrate limit.

Another commenter states that the Agency should clarify that if there are any changes that are not controlled by the facility owner/operator, and the

facility is required to change its design or operation to lower chlorine emissions to address the changes, the facility may request up to three years to make such changes.

Response: We generally agree with the commenters and have revised the rule as follows: (1) A new comprehensive performance test is required to reestablish the system removal efficiency for total chlorine only if you change the design, operation, or maintenance of the source in a manner that may decrease the system removal efficiency (e.g., the emission control system is modified in a manner than may decrease total chlorine removal efficiency); and (2) if you use the site-specific risk analysis option for your eligibility demonstration and changes beyond your control (e.g., off-site receptors newly residing or congregating at locations exposed to higher ambient levels than originally estimated) dictate a lower HCl-equivalent emission rate limit and you must make changes to the design, operation, or maintenance of the combustor or related systems to comply with the lower limit, you may request that the permitting authority grant you additional time to make those changes as quickly as practicable.

Comment: Several commenters state that the proposed approach for calculating chlorine emissions to address the potential bias using Method 26/26A attributable to high bromine or sulfur levels in feedstreams is not statistically valid. They indicate that the approach could lead to collection of total chlorine, hydrogen chloride and chlorine data that are contradictory and difficult to apply in a compliance situation. One commenter suggests that using Method 26/26A results for sources with bromine and sulfur dioxide, while recognizing that there is bias in the sampling method, will result in a valid compliance approach.

Response: We agree with commenters that the proposed approach to avoid the bias when feedstreams contain high levels of bromine or sulfur (bromine/chlorine ratio in feedstreams of greater than 5 percent, or sulfur/chlorine ratio in feedstreams of greater than 50 percent) during the comprehensive performance test may be problematic. The proposed approach would have required you to use Method 320/321 or ASTM D 6735–01 for hydrogen chloride measurements, to use Method 26/26A for total chlorine (i.e., hydrogen chloride and chlorine combined) measurements, and to calculate chlorine levels by difference. The potential problem is that chlorine emission levels are generally a very small portion of total chlorine measurements, and variability in the hydrogen chloride or total chlorine measurements due to method imprecision or other factors could result in inaccurate estimations of chlorine emission levels.

We do not agree, however, that using Method 26/26A for chlorine measurements for combustors feeding high levels of bromine or sulfur is acceptable–the chlorine measurement may be biased low. Chlorine emission levels must be determined as accurately as possible given that the long-term health threshold for chlorine is 100 times the threshold for HCl, and the short-term health threshold for chlorine is 10 times the threshold for HCl (i.e., using current RfCs and aRELs). To ensure that a conservative estimate of the chlorine emission rate is used to establish the alternative health-based emission limits and to address commenters' concerns, the final rule requires that you determine chlorine emissions to be the higher of: (1) The chlorine value measured by Method 26/26A, or an equivalent method; or (2) the chlorine value calculated by difference between the combined hydrogen chloride and chlorine levels measured by Method 26/26A, or an equivalent method, and the hydrogen chloride measurement from EPA Method 320/321 or ASTM D 6735–01, or an equivalent method.

Comment: Several commenters state the procedures for calculating HCl-equivalent emission rates cannot merely reference an outside source, such as a Web site, unless that reference specifies that the contents of the source are as of a date certain. To specify use of health threshold values that can change over time provides inadequate opportunity for notice and comment on the regulation.

Response: We believe that the best available sources of health effects information should be used for risk or hazard determinations. To assist us in identifying the most scientifically appropriate toxicity values for our analyses and decisions, the Web site to be used for RfCs identifies pertinent toxicity values using a default hierarchy of sources, with EPA's Integrated Risk Information System (IRIS) being the preferred source. The IRIS process contains internal and external peer review steps and IRIS toxicity values represent EPA consensus values. When adequate toxicity information is not available in IRIS, however, we consult other sources in a default hierarchy that recognizes the desirability of these qualities in ensuring that we have consistent and scientifically sound assessments. Furthermore, where the IRIS assessment substantially lags the current scientific knowledge, we have committed to consider alternative credible and readily available assessments (e.g., the acute Relative Exposure Levels established by the California Office of Health Hazard Assessment). For our use, these alternatives need to be grounded in publicly available, peer-reviewed information. We agree with the commenter that the issue of changing toxicity values is a general challenge in setting health-based regulations. However, we are committed to establishing such regulations that reflect current scientific understanding, to the extent feasible.

C. National Health-Based Standards for Cement Kilns

Comment: One commenter states that our suggestion at proposal that it would be appropriate to establish a single national emission rate type standard applicable to all cement kilns based on the worst-case scenario cement kiln is unduly burdensome as it discounts the benefits of improved dispersion realized by facilities that have invested in taller stacks that minimize downwash effects. The commenter recommends a dual limit for cement kilns such that the HCl equivalent emission rate is limited to both: (1) A 130 ppmv total chlorine emission standard (the Interim Standard) coupled with a chlorine feedrate limit based on a 12-hour rolling average; and (2) a Hazard Index of 1.0.

Response: We have decided not to include a separate national standard for cement kilns in the final rule for several reasons: (1) We have no assurance that the Cl_2/HCl volumetric ratio exhibited during the most recent compliance test, and that was the basis for the commenter documenting in a study [187] that the Hazard Index of 1.0[188] was not exceeded, is representative of ratios in the past or future; (2) the commenter's recommended emission standard for cement kilns—130 ppmv total chlorine emission limit and a Hazard Index of 1.0—is equivalent to the requirements under § 63.1215 applicable to other hazardous waste combustors to establish site-specific emission limits; (3) the MACT standard for total chlorine for cement kilns is 120 ppmv such that the health-based standard that the commenter recommends—130 ppmv,

[187] See Trinity Consultants, ''Analysis of HCl/Cl2 Emissions from Cement Kilns for 112(d)(4) Consideration in the HWC MACT Replacement Standards,'' September 17, 2003.

[188] The HCl/Cl_2 ratio for the total chlorine measurement is important because the current RfC for chlorine is 0.2 μg/m^3 while the current RfC for HCl is 20 μg/m^3. Thus, when calculating HCl-equivalent emission rate limits, chlorine emissions are currently multiplied by a factor of 100.

the Interim Standard—would provide little compliance relief; and (4) even though the final rule does not provide a separate national health-based standard for cement kilns, cement kilns may apply for the health-based compliance alternatives applicable to other hazardous waste combustors.

Prior to publication of the proposed rule, the commenter submitted results of site-specific risk assessments for all cement kiln facilities showing that both the long-term and short term Hazard Index of 1.0 would not be exceeded at any facility assuming: (1) Sources emit total chlorine at the Interim Standard level of 130 ppmv; and (2) total chlorine emissions are apportioned between HCl and chlorine according to the apportionment exhibited during the most recent compliance test.

At proposal, we requested comment on how to ensure that the 130 ppmv concentration-based standard would ensure that total chlorine emission rates (lb/hr) would not increase to levels that may exceed the Hazard Index limit of 1.0 given that: (1) The partitioning ratio between HCl and chlorine could change over time such that a larger fraction of total chlorine could be emitted as chlorine, which has a much lower health risk threshold; and (2) the mass emission rate of total chlorine could increase. See 69 FR at 21306.

The commenter has addressed the concern about the mass emission rate of total chlorine potentially increasing by suggesting that the health-based standard include a limit on the feedrate of total chlorine and chloride at the level used in their risk assessment supporting a separate national standard for cement kilns. The commenter has also addressed the concern about the HCl and chlorine apportionment ratio changing over time by suggesting that the standard also include a requirement that the Hazard Index of 1.0 not be exceeded. We agree that sources need to account for variability in the chlorine to HCl ratio (see § 63.1215(b)(6)) and that periodic checks to ensure that the Hazard Index of 1.0 is not exceeded are needed. We believe the best way to ensure that the health-based compliance alternatives for total chlorine for cement kilns are protective with an ample margin of safety is through the procedures of § 63.1215 where site-specific emission rate limits are established rather than under a separate national standard for cement kilns.

VIII. Implementation and Compliance

A. Compliance Assurance Issues for both Fabric Filters and Electrostatic Precipitators (and Ionizing Wet Scrubbers)

1. Implementation Issues

Comment: Several commenters state that design and performance specifications and explicit detailed test procedures to determine conformance with the specifications are needed so that manufacturers can certify that their bag leak detection systems and particulate matter detection systems meet applicable criteria. Absent design and performance specifications and test procedures, commenters assert that the ''manufacturer's certification'' cannot ensure the performance capabilities of the devices.

Response: In general, we believe adherence to manufacturer's written specifications and recommendations is an appropriate approach to reasonably ensure performance of a bag leak detection system or particulate matter detection system, and we have retained that provision in the final rule. We agree, however, that there may be cases where other procedures are more appropriate than the manufacturer's recommendations to ensure performance of a bag leak detection system or particulate matter detection system. Consequently, the rule allows you to request approval for alternative monitoring procedures under § 63.1209(g)(1).[189] We note that you may use references other than EPA's Guidance Document, ''Fabric Filter Bag Leak Detection Guidance,'' September 1997 to identify appropriate performance specifications for the bag leak detection system or particulate matter detection system, including: PS–11 for PM CEMS; PS–1 for opacity monitors; and CPS–001 for opacity monitoring below 10% opacity. You may use these references to support your request for additions to, or deviations from, manufacturer's specifications.

Comment: One commenter states that bag leak detection systems and particulate matter detection systems should have a detection limit of 1.0 mg/acm to ensure peak performance is maintained rather than explicitly allowing sources to request approval for a detection limit on a site-specific basis as the rule currently allows. Several other commenters state that the bag leak detection system or particulate matter detection system need not have a detection limit as low as 1.0 mg/acm to detect increases in normal emissions. One commenter believes that bag leak detection systems installed on cement kilns should be allowed to have a detection limit of 10 mg/acm because: (1) A detection limit requirement of 10 mg/acm is more than sufficient to protect the particulate matter emission limit and to detect increases in particulate matter concentration given that the current particulate matter emission limit for existing kilns is 63 mg/dscm; (2) a detection limit requirement of 10 mg/acm is consistent with the requirement for bag leak detection systems in Subpart LLL, Part 63, for cement plants that choose to install bag leak detection systems on finish mills and raw mills, for bag leak detection systems and particulate matter detection systems installed on lime kilns under Subpart AAAAAA, and for industrial boilers under Subpart DDDDD; (3) a 10 mg/acm detection limit is achievable using state-of-the-art transmissometers (the actual instrument used in a continuous opacity monitoring system (COMS) at cement plants having kiln stack diameters of 2–3 meters, or greater; and (4) it is unclear if any bag leak detection system device can actually be demonstrated to achieve a 1.0 mg/acm detection limit except by extrapolation from tests conducted at higher dust loadings and theoretical arguments based on signal-to-noise ratios or other parameters. This commenter also recommends that EPA establish a 10 mg/am^3 detection limit for all cement kilns rather than provide for site-specific determinations because allowing site-specific determinations is likely to create confusion in the selection of monitoring devices and further complicate the manufacturer's certification of performance requirements.

Response: The current requirement for the bag leak detection system sensitivity/detection limit applicable to incinerators and lightweight aggregate kilns is 1.0 mg/acm unless you demonstrate under § 63.1209(g)(1) that a lower sensitivity (i.e., higher detection limit) would detect bag leaks. We proposed to apply the bag leak detection system requirements to all hazardous waste combustors equipped with fabric filters and promulgate that requirement today. Although we also requested comment whether detection limits higher than 1.0 mg/acm should be allowed, none of the comments has convinced us to alter our view that the rule should allow higher detection limits on a site-specific basis. Similarly,

[189] See discussion in Part Five, Section III.C, for an explanation of how the alternative monitoring provisions of § 63.1209(g)(1) relate to those of § 63.8(f).

we believe that the same detection limit requirement should apply to particulate matter detection systems that you may elect to use for compliance monitoring for your electrostatic precipitator or ionizing wet scrubber in lieu of site-specific operating parameter limits.

Both bag leak detection systems and particulate matter detection systems must be able to detect particulate emission in the range of normal concentrations. For example, to establish the alarm level for the bag leak detection system, you must first adjust detector gain/sensitivity and response time based on normal operations. Although the alarm level for particulate matter detection systems will be established based on operations during the comprehensive performance test or higher (see discussion below), the detector must be responsive within the range of normal operations for you to effectively minimize exceedances of the alarm level.

The range of normal emission concentrations will generally be well below both the particulate matter standard and emissions during the comprehensive performance test. Consequently, we disagree with commenters that believe the detection limit need only be within the range of emissions at the particulate matter emission standard. On the other hand, normal emissions may be well above 1.0 mg/acm such that a higher detection limit (e.g., 10 mg/acm) may be appropriate on a site-specific basis.

We also disagree with the comment that bag leak detection systems (or particulate matter detection systems) may not be able actually to achieve a 1.0 mg/acm detection limit. EPA is aware of bag leak detection system instruments certified to meet levels of 0.2 mg/m^3 and particulate matter detection systems can readily achieve detection limits well below 1.0 mg/acm.[190]

Comment: One commenter states that a continuous opacity monitoring system (COMS) that can achieve a detection level of 10 mg/acm or less can be used to monitor electrostatic precipitator performance. The commenter believes that allowing a COMS for compliance under Subpart EEE is also appropriate because cement kilns will be operating under the requirements of Subpart LLL (for cement kilns that do not burn hazardous waste) at times, which requires compliance with an opacity standard using a COMS.

Response: You may use a COMS (i.e., transmissometer) that meets the detection limit requirement as discussed above (i.e., 1.0 mg/acm or a higher detection limit that you document under an alternative monitoring petition under § 63.1209(g)(1) would routinely detect particulate matter loadings during normal operations) as the detector for your bag leak detection system or particulate matter detection system.

2. Compliance Issues

Comment: One commenter states that, if the bag leak detection system or particulate matter detection system exceeds the alarm level or an operating parameter limit (OPL) is exceeded, the automatic waste feed cutoff (AWFCO) system must be initiated. Allowing a source to exceed the alarm level for 5% of the time in a 6-month period does not ensure continuous compliance.

Response: Although the AWFCO system must be initiated if an OPL is exceeded, we believe that allowing exceedances of the bag leak detection system or particulate matter detection system alarm level up to 5% of the time in a 6-month period is reasonable. Requiring initiation of the AWFCO for an exceedance of an OPL is reasonable because sources generally can control directly the parameter that is limited. Examples are the feedrate of metals or chlorine, or pressure drop across a wet scrubber. Bag leak detection systems and particulate matter detection systems, however, measure mass emissions of particulate matter, a parameter that is affected by many interrelated factors and that is not directly controllable. We believe that the 5 percent alarm rate is a reasonable allowance for sources due to difficult-to-control variations in particulate matter emissions. More important, although the bag leak detection system and particulate matter detection system measure mass emissions of particulate matter, the detector response is not correlated to particulate matter emission concentrations to the extent necessary for compliance monitoring.[191] Thus, triggering the alarm level is not evidence that the particulate matter emission standard has been exceeded.

The purpose of a BLDS or PMDS is to alert the operator that the PM control device is not functioning properly and that corrective measures must be undertaken. We believe that using a BLDS or PMDS for compliance assurance better minimizes emissions of PM (and metal HAP) than use of operating parameter limits (which are linked to the automatic waste feed cutoff system). APCD operating parameters often have an uncertain relationship to PM emissions while the BLDS and PMDS provide real-time information on actual PM mass emission levels.[192]

Comment: One commenter states that requiring a notification if the bag leak detection system or particulate matter detection system set point is exceeded more than 5% of the time in a 6-month period is not cost-effective. Sources using bag leak detection systems have not linked exceedances to the data logging system and would incur an expense to do so.

Response: We continue to believe that limiting the aggregate duration of exceedances in a 6-month period is a reasonable approach to gage the effectiveness of the operation and maintenance procedures for the combustor. We note that recent MACT standards for several other source categories use this approach, including standards for industrial boilers and process heaters and standards for lime kilns.

Comment: One commenter states that EPA did not present a rationale for requiring a notification within 5 working days if the bag leak detection system or particulate matter detection system set point is exceeded more than 5% of the time during a 6-month period. The commenter notes that this notice is not required under the Subpart DDDDD boiler and process heater MACT. The commenter also notes that the source is required to take corrective measures under both the operation and maintenance plan and bag leak detection systems and particulate matter detection systems requirements. The commenter believes that requiring a report to the permitting authority is duplicative, unnecessary, and increases the burden on regulated facilities without providing additional protection to human health or the environment.

Response: If a source exceeds the alarm set point more than 5% of the time in a 6-month period, it is an indication that the operation and maintenance plan may need to be revised. Requiring the source to report the excess exceedances to the permitting

[190] USEPA, ''Technical Support Document for HWC MACT Standards, Volume IV: Compliance with the HWC MACT Standards,'' September 2005, Appendix C, Section 4.0.

[191] Actually, the BLDS is not correlated at all to PM concentrations, and the alarm level for a PMDS may or may not be approximately correlated to PM concentrations. See § 63.1206(c)(9).

[192] Moreover, for FFs, we are not aware of any APCD operating parameters that correlate well with PM emissions. Thus, sources must use a BLDS or PMDS for compliance assurance. For ESPs and IWSs, we are not aware of generic APCD parameters that correlate well with PM emissions. See discussion below in Section VIII.C of the text. Consequently, although the rule allows sources with ESPs and IWSs to establish site-specific operating parameter limits, sources are encouraged to use a PMDS.

authority serves as a notification that the authority may need to review the operation and maintenance plan with the source to determine if changes are warranted.

We agree with the commenter, however, that it is not necessary to require that the report be submitted within five working days of the end of the 6-month block period. Consequently, the final rule requires you to submit the report within 30 days of the end of the 6-month block period. Allowing 30 days to submit the report rather than 5 days as proposed is reasonable. We are concerned that 5 days may not be enough time to complete the report given that several exceedances toward the end of the 6-month block period may cause you to exceed the 5% time limit and that there may be many individual exceedances that need to be included in the report. We acknowledge that it may take some time to prepare the report given that you must describe the causes of each exceedance and the revisions to the operation and maintenance plan you have made to mitigate the exceedances.

Comment: One commenter notes that there is no guidance on how to calculate when the set-point has been exceeded more than 5 percent of the operating time within a 6 month period. The commenter notes that the MACT for industrial boilers and process heaters provides minimal instruction on how this is to be done, but it is not specific enough to enable facilities to ensure that they are in compliance with this requirement.

Response: For the final rule, we have adopted the procedures specified in the industrial boiler and process heater MACT for calculating the duration of exceedances of the set point. Those procedures are as follows:

1. You must keep records of the date, time, and duration of each alarm, the time corrective action was initiated and completed, and a brief description of the cause of the alarm and the corrective action taken.

2. You must record the percent of the operating time during each 6-month period that the alarm sounds.

3. In calculating the operating time percentage, if inspection of the fabric filter, electrostatic precipitator, or ionizing wet scrubber demonstrates that no corrective action is required, no alarm time is counted.

4. If corrective action is required, each alarm shall be counted as a minimum of 1 hour.

Although the commenter indicates that these procedures are not specific enough to ensure that sources are in compliance with the requirements, the commenter did not indicate the deficiencies or suggest additional requirements. If you need additional guidance on compliance with this provision, you should contact the permitting authority.

Comment: One commenter supports the approach of listing the shutting down of the combustor as a potential—but not mandatory—corrective measure in response to exceeding an alarm set point. Several commenters suggest, however, that EPA should specify that corrective measures could include shutting off the hazardous waste feed rather than shutting down the combustor. Other commenters state that it is inappropriate to imply that shutting down the combustor must be part of a corrective measures program for responding to exceedance of a set point. These commenters believe that the requirement to take corrective action upon the alarm is sufficiently protective. The facility should determine if shutting down the combustor is a necessary response to avoid noncompliance with a standard.

Response: You must operate and maintain the fabric filter, electrostatic precipitator, or ionizing wet scrubber to ensure continuous compliance with the particulate matter, semivolatile metals, and low volatile metals emission standards. Your response to exceeding the alarm set point should depend on whether you may be close to exceeding an operating parameter limit (e.g., ash feedrate limit for an incinerator or liquid fuel boiler equipped with an electrostatic precipitator) or an emission standard. If so, corrective measures should include, as commenters suggest, cutting off the hazardous waste feed. Corrective measures could also include, however, shutting down the combustor as the ultimate immediate corrective measure if an emission standard may otherwise be exceeded. Consequently, the final rule continues to require you to alleviate the cause of the alarm by taking the necessary corrective measure(s) which may include shutting down the combustor. This provision does not imply that shutting down the combustor is the default corrective measure. Rather, it implies that the ultimate immediate response, absent other effective corrective measures, would be to shut down the combustor.

Comment: One commenter states that periods of time when the combustor is operating but the bag leak detection system or particulate matter detection system is malfunctioning should not be considered exceedances of the set-point.

Response: If the bag leak detection system or particulate matter detection system is malfunctioning, the source cannot determine whether it is operating within the alarm set point. Accordingly, it is reasonable to consider periods when the bag leak detection system or particulate matter detection system is malfunctioning as exceedances of the set point.

B. Compliance Assurance Issues for Fabric Filters

Comment: One commenter states that establishing the set point for the bag leak detection system at twice the detector response achieved during bag cleaning as recommended by EPA guidance would not be sensitive enough to detect gradual degradation of the fabric filter, nor would it be low enough to require the operator of the source to take corrective measures that would ensure effective operation of the baghouse over time.

Response: The commenter expresses the same concern that EPA raised at proposal. See 69 FR at 21347. We have concluded, however, that it may be problematic to establish an alarm set point for fabric filters based on operations during the comprehensive performance test. This is because, as noted in earlier responses and at 69 FR at 21233, it is much more difficult to ''detune'' a fabric filter than an electrostatic precipitator to maximize emissions during the performance test.[193] Consequently, emissions from fabric filters that have not been detuned during the performance test may not be representative of the range of normal emissions caused by factors such as bag aging. Baghouse performance degrades over time as bags age. In addition, establishing the alarm set point based on operations during the performance test for baghouses that have not been detuned would establish more stringent compliance requirements on sources that perform the best—the lower the emissions, the lower the alarm set point. This would unfairly penalize the best performing sources.

For these reasons, the final rule requires you to establish the alarm set-point for bag house detection systems using principles provided in USEPA, ''Fabric Filter Bag Leak Detection Guidance,'' (EPA–454/R–98–015, September 1997).

Comment: One commenter states that the bag leak detection system requirement should not apply to the coal mill baghouse for cement kilns with indirect-fired coal mill systems where a fraction of kiln gas is taken

[193] One approach to detune a fabric filter to simulate the extreme high range of normal operations would be to install a butterfly valve that allows a portion of the combustion gas to by-pass a section of the baghouse.

from the preheater and routed to the coal mill and subsequently to a baghouse before entering the stack. The commenter notes that the PM in this gas is nearly exclusively coal dust, and the baghouse is substantially smaller than the baghouse for the kiln.

Response: We believe that a bag leak detection system is a reasonable approach to monitor emissions for the coal mill baghouse to ensure compliance with the particulate matter (and semivolatile and low volatile metals) emission standards. These systems are inexpensive to install and operate. Annualized costs are approximately $24,000.[194] Although the commenter did not suggest an alternative monitoring approach, and we are not aware of a less expensive and effective approach, we note that sources may petition the permitting authority under § 63.1209(g)(1) to request an alternative monitoring approach.

C. Compliance Issues for Electrostatic Precipitators and Ionizing Wet Scrubbers

Comment: Several commenters believe that a particulate matter detection system may not be necessary for monitoring of electrostatic precipitators and ionizing wet scrubbers. Commenters state that site-specific operating parameter limits linked to the automatic waste feed cutoff system can effectively monitor and ensure the performance of electrostatic precipitators and ionizing wet scrubbers. Particulate matter detection systems on cement kilns would have to operate in a high moisture stack environment (all kilns burning hazardous waste that are equipped with electrostatic precipitators are wet process kilns), with the potential for condensation and/or water droplet interference. Commenters state that when water droplets are present, many of these devices are not applicable.

Response: The final rule provides sources equipped with electrostatic precipitators or ionizing wet scrubbers the alternative of using a particulate matter detection system or establishing site-specific operating parameter limits for compliance assurance. If a particulate matter detection system is used, corrective measures must be taken if the alarm set point is exceeded. If the source elects to establish site-specific operating parameter limits, the limits must be linked to the automatic waste feed cutoff system.

In response to commenters' concern that high moisture stack gas may be problematic for particulate matter detection systems, we note that extractive light-scattering detectors and beta gauge detectors can effectively operate in high moisture environments. We acknowledge, however, that the cost of these extractive detector systems is substantially higher than transmissometers or in situ light-scattering detectors.

Comment: One commenter states that EPA must set minimum total power requirements for both ionizing wet scrubbers and electrostatic precipitators because allowing permit officials to establish compliance operating parameters on a site-specific basis frustrates the intention of the CAA by obviating the requirements for federal standards. The commenter asserts that a minimum total power requirement is monitorable, recordable, and reportable, three requirements that are necessary for these facilities to come into, and remain in compliance with, their Title V operating permits.

Other commenters state that electrostatic devices are not easily characterized by operating parameters in a ''one-size-fits-all'' fashion. The significant operating parameters for electrostatic devices are secondary voltage, secondary current, and secondary power (the product of the first two items). The relationship between these parameters and performance of the unit differ between applications and unit types. For example, inlet field power can increase as unit performance appears to decrease. In this case, an operating parameter other than secondary power by field would be more appropriate. The commenter notes that, in its various proposals over the years, EPA has discussed a number of approaches to establish operating parameter limits for electrostatic devices, including: Minimum total secondary power; minimum secondary power by field; pattern of increasing power from inlet to outlet field; and minimum secondary power of the last ⅓ of fields (or the last field). Commenters have also proposed: minimum specific power (secondary power divided by flue gas flow rate); minimum secondary voltage and/or secondary current; and total secondary voltage and/or secondary current. The commenter concludes that it is not surprising that there is so little agreement on the right approach, because different units and applications respond differently. EPA's proposal to let facilities and local regulators determine the best approach is far wiser than regulating from a distance.

Response: We agree with the commenters that state that it is not practicable to establish operating parameter limits that would effectively ensure performance of all electrostatic devices. Accordingly, the final rule continues to allow sources to establish site-specific operating parameter limits for these devices.

We disagree with the commenter's assertion that site-specific operating parameter limits obviate the requirements for federal standards. The site-specific operating parameter limits merely reflect the truism that no two sources are identical and so what each needs to do to comply with the uniform standards may differ. The final rule provides consistent, federally-enforceable emission standards. Necessary flexibility in compliance assurance for those emission standards does not undermine the uniformity of those standards. In addition, we disagree with the commenter's concern that without a minimum power limit, there will be no monitorable, recordable, and reportable Title V permit limits for electrostatic devices. To the contrary, site-specific operating parameter limits can and will be monitored, recorded, reported, and linked to the automatic waste feed cut-off system. And, if a source elects to use a particulate matter detection system in lieu of establishing site-specific operating parameter limits, the detector response will be monitored, recorded, reported, and linked to requirements to take corrective measures if the alarm set point is exceeded.

Comment: One commenter asserts that the use of electrostatic precipitator total power input data (sum of the product of kilovolts times milliamps for each electrostatic precipitator field) is one acceptable approach as a site-specific parameter to monitor electrostatic precipitator performance. Limits on power input for each field (or particular fields) are not warranted.

Response: A limit on total power input to a multifield electrostatic device is generally not an acceptable operating parameter for compliance assurance. We have documented that when total power input was held constant for a four-field electrostatic precipitator while the power input to the fourth field was decreased, emissions of particulate matter doubled from 0.06 gr/dscf to 0.12 gr/dscf. See 66 FR at 35143 (July 3, 2001). Thus, if the total power input during the comprehensive performance test were used as the operating parameter limit, particulate matter emissions could exceed the emission

[194] USEPA, ''Technical Support Document for HWC MACT Standards, Volume IV: Compliance with the HWC MACT Standards,'' September 2005, Appendix C.

standard because of changes in other parameters that were not limited even though total power input did not exceed the parametric limit.

Notwithstanding our concern that a limit on total power input to a multifield electrostatic device is generally not an effective operating parameter for compliance assurance, this does not preclude you from documenting to the permitting authority that total power input is an effective compliance assurance parameter for your source. See § 63.1209(m)(1)(iv).

Comment: Several commenters suggest that the rule should offer various approaches to establish an achievable particulate matter detection system alarm level on a site-specific basis in lieu of the approach we proposed (i.e., average detector response during the comprehensive performance test): (1) Use the 2 times the maximum peak height or 3 times the baseline concepts developed in EPA's bag leak detection guidance documents; (2) allow spiking to set the alarm set point given that PS 11 allows for spiking as a way to calibrate PM CEMs; (3) establish the limit as the 99th percentile upper prediction limit of the average response during each performance test run instead of the average of the test run averages; (4) allow upward extrapolation from the average of the test run averages to some percentage of the particulate matter emissions standard (fraction could be variable depending upon how close to the standard the facility is during the compliance test); or (5) set the alarm point at the maximum test run.

Response: We agree with several of the commenters' suggestions: explicitly allowing spiking (and emission control device detuning) during the comprehensive performance test to maximize controllable operating parameters to simulate the full range of normal operations; and upward extrapolation of the detector response. See discussion below.

The final rule is consistent with commenters' suggestion to establish the alarm level for particulate matter detection systems on fabric filters based on the concepts in the Agency's guidance document on bag leak detection systems. Commenters made this suggestion in response to our request for comments on requiring particulate matter detection systems on fabric filters and establishing the alarm level based on the detector response during the comprehensive performance test. See 69 FR at 21347. The final rule requires bag leak detection systems on all fabric filters and suggests that you establish the alarm level using concepts in the bag leak detection system guidance. [195]

Neither the suggestion to establish the alarm level at the 99th percentile upper prediction limit (UPL99) based on the average response during the comprehensive performance test runs nor the suggestion to establish the alarm level at the maximum test run response would control PM emissions at the level achieved during the performance test or provide some assurance that the PM standard was not being exceeded, unless the detector response is correlated to PM concentrations. For example, if the detector response does not relate linearly to PM concentration (or if the response changes w/changes in particulate characteristics), the UPL99 detector response could relate to a much higher (e.g., 99.9th percentile) PM concentration. In addition, even if the detector response were correlated to PM concentration, there is no assurance that the correlation would be consistent over the range of the average detector response during the performance test to the UPL99 detector response. Note that under PS–11 for PM CEMS, even after complying with rigorous procedures to correlate the detector response to PM concentrations, the detector response may be extrapolated only to 125% of the highest PM concentration used for the correlation. Thus, the final rule does not use these approaches to establish the alarm level.

If you elect to use a particulate matter detection system in lieu of site-specific operating parameters for your electrostatic precipitator or ionizing wet scrubber, you must establish the alarm level using either of two approaches. See Appendix C of USEPA, ''Technical Support Document for HWC MACT Standards, Volume IV: Compliance with the HWV MACT Standards,'' September 2005. Under either approach, you may maximize controllable operating parameters during the comprehensive performance test to simulate the full range of normal operations (*e.g.*, by spiking the ash feedrate and/or detuning the electrostatic device).[196]

You may establish the alarm set-point as the average detector response of the test condition averages during the comprehensive performance test.

Alternatively, you may establish the alarm set point by extrapolating the detector response. Under the extrapolation approach, you must approximate the correlation between the detector response and particulate matter emission concentrations during an initial correlation test. You may extrapolate the detector response achieved during the comprehensive performance test (*i.e.*, average of the test condition averages) to the higher of: (1) A response that corresponds to 50% of the particulate matter emission standard; or (2) a response that correlates to 125% of the highest particulate matter concentration used to develop the correlation.

To establish an approximate correlation of the detector response to particulate matter emission concentrations, you should use as guidance Performance Specification–11 for PM CEMS (40 CFR Part 60, Appendix B), except that you need only conduct only 5 runs to establish the initial correlation rather than a minimum of 15 runs required by PS–11. In addition, the final rule requires you to conduct an annual Relative Response Audit (RRA) for quality assurance as required by Procedure 2—Quality Assurance Requirements for Particulate Matter Continuous Emission Monitoring Systems at Stationary Sources, Appendix F, Part 60.[197] The RRA is required on only a 3-year interval, however, after you pass two sequential annual RRAs.

The rule requires only minimal correlation testing because the particulate matter detection system is used for compliance assurance only—as an indicator for reasonable assurance that an emission standard is not exceeded. The particulate matter detection system is not used for compliance monitoring—as an indicator of continuous compliance with an

[195] Note that a bag leak detection system is a type of particulate matter detection system for purposes of this discussion. A triboelectric detector is normally used for a bag leak detector system because it is very inexpensive and has a low detection limit. A triboelectric detector meets the criterion for a particulate matter detector in a particulate matter detection system in that it detects relative mass emissions of particulate matter within the range of normal emission concentrations. (Note further, however, that a triboelectric detector cannot be correlated to particulate matter concentrations and thus cannot be used as a particulate matter CEMS. Note also that a triboelectric detector cannot be used on sources equipped with electronic control devices.) The alarm level for a bag leak detection system would be established using the concepts discussed in the Agency's guidance document on bag leak detection systems. The alarm level for a particulate matter detection system used on a fabric filter, however, (preferable with a detector other than a tribolectric device that could be correlated to PM concentrations) would be established based on the detector response during the comprehensive performance test.

[196] Note, however, that bypassing or detuning an emission control system could cause PM stratification and could make it difficult to pass the PS–11 performance criteria you use as guidelines for a PMDS.)

[197] You perform an RRA by collecting three simultaneous reference method PM concentration measurements and PM CEMS measurements at the as-found source operating conditions and PM concentration.

emission standard. Because particulate matter detection system correlation testing and quality assurance is much less rigorous than the requirements of PS–11 for a PM CEMS, the particulate matter detection system response cannot be used as credible evidence of exceedance of the emission standard.

D. Fugitive Emissions

Comment: A commenter does not support EPA's proposed approach to allow alternative techniques that can be demonstrated to prevent fugitive emissions without the use of instantaneous pressure limits given that the CAA requires continuous compliance with the standards and given positive pressure events can result in fugitive emissions, irrespective of facility design.

Response: Rotary kilns can be designed to prevent fugitive emissions during positive pressure events. As stated in the February 14, 2002 final rule, and subsequently in the April 20, 2004 proposed rule, there are state-of-the-art rotary kiln seal designs (such as those with shrouded and pressurized seals) which are capable of handling positive pressures without fugitive releases. See 67 FR at 6973 and 69 FR at 21340. We have included documentation of such kiln designs in the docket.[198] Instantaneous combustion zone pressure limits thus may not be necessary to assure continuous compliance with these fugitive emission control requirements. Our approach to allow alternative techniques that have been demonstrated to prevent fugitive emissions is therefore reasonable and appropriate. We note that these alternative techniques must be reviewed and approved by the appropriate delegated regulatory official.[199]

Comment: A commenter disagrees with EPA's clarification that fugitive emission control requirements apply only to fugitives attributable to the hazardous waste, given that the CAA does not distinguish between HAP emissions that come from hazardous waste streams and other HAP emissions.

Response: The fugitive emission control requirements in today's final rule originated from the RCRA hazardous waste combustion fugitive emission control requirements for incinerators and boilers and industrial furnaces.[200] The primary focus of these RCRA requirements is to ensure hazardous waste treatment operations are conducted in a manner protective of human health and the environment.[201] It is therefore appropriate to clarify that the intent of this requirement is to control fugitive emission releases from the combustion of hazardous waste.

Furthermore, MACT requirements for source categories that do not combust hazardous waste (e.g., industrial boilers, Portland cement kilns, and commercial and industrial solid waste incinerators) do not have combustion chamber fugitive emission control requirements for the non-hazardous waste inputs or outputs (e.g., clinker product for cement kilns or coal and natural gas fuels for industrial boilers). We have previously taken the position that emissions not affected by the combustion of hazardous waste (e.g., clinker coolers, raw material handling operations, etc.) are regulated pursuant to the applicable nonazardous waste MACT rules.[202], [203] We conclude the clarification that the fugitive emission control requirements applies only to fugitive emissions that result from the combustion of hazardous waste is appropriate because it regulates emissions attributable to nonhazardous waste streams to the same level of stringency that otherwise would apply if the source did not combust hazardous waste.[204]

Comment: A commenter states that the instantaneous monitoring requirements are inappropriate because (1) EPA has not demonstrated that the average of the top 12% of boilers are capable of operating with no instantaneous deviations from the negative pressure requirements; and (2) these requirements, though not standards themselves, effectively increase the stringency of the standard itself beyond what even the best available technology can achieve.

Response: As previously discussed, the fugitive emission control requirements included in today's rule originated from the RCRA hazardous waste combustion chamber fugitive emission control requirements. These provisions allow sources to control fugitive emissions by ''maintaining the combustion zone pressure lower than atmospheric pressure, or an alternative means of control equivalent to maintenance of combustion zone pressure lower than atmospheric pressure.'' All sources that must comply with the provisions of this rule are, or were, required to control fugitive emissions from the combustion unit pursuant to RCRA.

The monitoring requirements in today's rule do not increase the stringency of the standard beyond what the best available technology can achieve. Although we do not have data that confirm negative pressure is being maintained on an instantaneous basis (as we define it)[205] for at least 12 percent of the boilers, we believe this is current practice and readily achievable by most sources.[206] These requirements have been in force for many years, and there is no basis for stating that they are unachievable (EPA is not aware of industrywide noncompliance with these provisions, the necessary premise of the comment). First, maintaining negative pressure is the option that most boilers elect to implement to demonstrate compliance with the RCRA fugitive emission control requirements. Second, negative pressure is readily achieved on an instantaneous basis in boilers through use of induced draft fans. Third, the requirements we are finalizing today for boilers are identical to the fugitive emission control requirements that hazardous waste incinerators, cement kilns, and lightweight aggregate kilns are currently complying with pursuant to the EEE interim standard regulations. See § 63.1206(c)(5). Most of these sources maintain negative combustion chamber pressure through use of induced draft fans, providing further evidence that continuously maintaining combustion

[198] See USEPA, ''Technical Support Document for the HWC MACT Standards, Volume IV: Compliance With the HWC MACT Standards,'' September 2005, Section 10.

[199] See § 63.1206(c)(5)(i)(C) and (D).

[200] See § 266.102(e)(7) and § 264.345(d).

[201] Section 3004(a) of RCRA requires the Agency to promulgate standards for hazardous waste treatment, storage, and disposal facilities as necessary to protect human health and the environment. The standards for hazardous waste incinerators generally rest on this authority. § 3004(q) of RCRA requires the Agency to promulgate standards for emissions from facilities that burn hazardous waste fuels (*e.g.*, cement and lightweight aggregate kilns, boilers, and hydrochloric acid production furnaces) as necessary to protect human health and the environment.

[202] See 69 FR at 21203 and 64 FR at 52871, and § 63.1206(b)(1)(ii).

[203] Portland cement manufacturing facilities that combust hazardous waste are subject to both Subpart EEE and Subpart LLL, and hydrochloric acid production facilities that combust hazardous waste may be subject to both Subpart EEE and Subpart NNNNN. In these instances Subpart EEE controls HAP emissions from the cement kiln and hydrochloric acid production furnace stack (and also fugitive emissions from the combustion chamber), while Subparts LLL and NNNNN would control HAP emissions from other operations that are not directly related to the combustion of hazardous waste (e.g., clinker cooler emissions for cement production facilities, and hydrochloric acid product transportation and storage for hydrochloric acid production facilities).

[204] This issue has little relevance given that the measures taken to control the fugitive emissions from the combustion of hazardous waste will also control the fugitive emission associated with other feedstreams.

[205] The February 14, 2002 Final Amendments Rule clarifies that that a reasonable pressure monitoring frequency that could meet the intent of ''instantaneous'' would be once every second. See 67 FR at 6974.

[206] Commenters did not provide data to the contrary.

zone pressure lower than ambient pressure is readily achievable by well designed and operated boilers.[207]

We note that use of instantaneous pressure monitoring is not a requirement. A source can elect to implement any of the four compliance options to control combustion system leaks as well as request to use alternative monitoring approaches. See §§ 63.1206(c)(5) and 63.1209(g). The instantaneous pressure monitoring option offers sources a method that satisfies the intent of the rule that can be applied at numerous sources. The inclusion of this requirement in today's rule is thus an attempt to simplify the review process for both regulators and affected sources; the absence of prescriptive compliance options in this case may likely result in time-consuming site-specific negotiations that would prolong the review and approval of comprehensive performance test workplans.

Comment: A commenter believes that requiring an instantaneous waste-feed cutoff when these pressure excursions occur is short-sighted and will result in greater HAP emissions. The commenter recommends EPA instead allow the use of reasonable pressure averaging periods in lieu of instantaneous pressure requirements.

Response: As discussed in the February 14, 2002 Final Amendments Rule, automatic waste feed cutoffs are appropriate non-compliance deterrents, and are necessary whenever an operating limit is exceeded. See 67 FR at 6973. Pressure excursions that result in combustion system leaks (and subsequently lead to automatic waste feed cutoffs) should be prevented by maintaining negative pressure in the combustion zone. We agree that needless triggering of automatic waste feed cutoffs due to short term pressure fluctuations that do not result in combustion system leaks would provide less environmental protection, not more. Today's rule offers three alternative options that do not require the use of instantaneous pressure monitoring to control combustion system leaks. See § 63.1206(c)(5). The use of averaging periods in these alternatives is not prohibited. Sources that elect to use an alternative compliance option must demonstrate that the alternative method is equivalent to maintaining combustion zone pressure lower than ambient pressure or, that the alternative approach prevents fugitive emissions.

[207] The commenter did not provide information that would lead us to conclude that these requirements are harder to implement for boilers than for incinerators, cement kilns, and lightweight aggregate kilns.

E. Notification of Intent To Comply and Compliance Progress Report

1. Notice of Intent To Comply

In the NPRM, we proposed to re-institute the Notification of Intent to Comply (NIC) because we felt that it offered many benefits in the early stages of MACT compliance. As discussed in the 1998 ''fast track'' rule (63 FR 33782) and in the proposal, the NIC serves several purposes: as a planning and communication tool in the early implementation stages, to compensate for lost public participation opportunities when using the RCRA streamlined permit modification procedure to make upgrades for MACT compliance, and as a means to share information and provide public participation opportunities that would be lost when new units are not required to comply with certain RCRA permit requirements and performance standards. Please refer to the proposal at 69 FR 21313–21316 for additional discussion of the regulatory history, purpose, and implementation of the NIC provisions.

Overall, most commenters supported our decision to finalize NIC provisions. However, they also feel that the NIC should only be required for sources that have not completed a NIC previously (i.e., Phase 2 sources or Phase 1 sources that did not meet the previous NIC deadline) and for sources that need to make upgrades to comply with the final standards (i.e., either Phase 1 or Phase 2). They suggest that if sources do not need to make upgrades, then they should not be required to complete the NIC process, if they had done so previously. To require a second NIC would only add to the administrative burden and is not in line with Agency efforts to reduce reporting burdens. We agree that if Phase 1 sources do not need to make upgrades to comply with the Replacement Standards and if they completed the NIC process before, then it is not necessary to do so again.

In addition to the comment discussed above, a few commenters proposed that for sources who must still comply with the NIC because they wish to make upgrades, that the NIC public notice be combined with the Title V re-opening or renewal public notice. They point out that sources with existing Title V permits will have their permits re-opened or renewed to incorporate the new applicable requirements (i.e., Phase 1 Replacement or even Phase 2 Standards) shortly after the NIC public notice and meeting are to occur. Title V permit re-openings and renewals require: public notice, a minimum of 30 days for comment, and an opportunity to request a hearing.

While we do agree that the Title V re-opening and renewal requirements provide adequate information to the public and an opportunity for the public to comment and request a hearing, we are concerned that the timing requirements for the NIC may not correspond with the timing requirements for title V permit reopenings, revisions, and renewals. The public review of the draft NIC and subsequent public meeting are scheduled to occur 9 and 10 months, respectively, after the rule's effective date. On the other hand, Title V permits for major sources that have a remaining permit term of greater than 3 years from the rule's promulgation date will need to be re-opened, but this re-opening may not occur until 18 months beyond the promulgation date of the rule. Also, Title V permits that have a remaining permit term of less than 3 years from the rule's promulgation date will need to be renewed, but the timing of the renewal is contingent upon the individual permit term, not the timing requirements for public review of the draft NIC and public meeting. Thus, we do not believe there is ample opportunity to combine the requirements of the NIC and Title V process for the vast majority of sources.[208] Also, those sources that need to make upgrades to comply with the final standards and that need to modify any applicable conditions in their RCRA permit will not be able to request the streamlined modification procedure (see 40 CFR 270.42(j)) until they meet the NIC requirements. So the earlier they comply with the NIC requirements, the earlier they can begin upgrading their combustion units.

Another commenter suggested a change to the regulations at § 63.1210(c)(1) to account for sources that will cease burning hazardous waste prior to or on the compliance date. The regulations, as proposed, require sources to hold an informal public meeting to discuss anticipated activities described in the draft NIC even if they plan to cease burning hazardous waste. The commenter also suggested a similar change to § 63.1210(b)(2) that requires the draft NIC be made available for public review no later than 30 days

[208] We recognize that there may be instances when states can coordinate the Title V permit re-opening, revision, and renewal process with the NIC timeframe requirements. Where this is possible, we encourage states (or other permitting authorities) to coordinate the two processes. By coordinating the two, duplication with respect to material content and public participation would be eliminated for both sources and states.

prior to the public meeting. We agree with the commenter that it does not make sense to require sources that intend to cease burning hazardous waste to submit a NIC that discusses anticipated activities that will allow them to achieve compliance with the standards. We also agree that it is not necessary for those sources to hold an informal public meeting, since there are no MACT compliance activities to discuss. However, we believe that the public should be provided notice of the draft NIC so that they are aware of the source's intentions to cease burning and the steps (and key dates) the source will undertake to stop hazardous waste combustion activities.

With regard to Phase 2 sources, we had proposed that all Phase 2 sources comply with the same NIC requirements as the Phase 1 sources. Commenters did not express opinions in favor or against the NIC for Phase 2 sources. We believe that the NIC is beneficial in several respects. As mentioned previously, it serves as a planning and communication tool in the early implementation stages, it compensates for lost public participation opportunities when using the RCRA streamlined permit modification procedure to make upgrades for MACT compliance, and it is a tool to share information and provide public participation opportunities that would be lost when new units are not required to comply with certain RCRA permit requirements and performance standards. Ultimately, it creates more public confidence in the permitting process and so promotes a more stable regulatory environment.

For today's rule, we are finalizing our decision to re-institute the NIC provisions for Phase 1 and Phase 2 sources. We are including a few minor changes and clarifications to improve the proposed regulatory language based on commenters' suggestions. Section 63.1210(b) is revised so that Phase 1 sources that previously complied with the NIC requirements, and that do not need to make upgrades to comply with the Replacement Standards, are not required to comply with the NIC again. Sections 63.1210(b)(1)(iv) and (b)(2) have been revised and (c)(5) has been added so that sources that intend to cease burning hazardous waste prior to or on the compliance date are only required to prepare a (draft) NIC, make a draft of the NIC available for public review no later than 9 months after the effective date of the rule, and submit a final NIC to the Administrator no later than one year following the effective date of the rule. Last, we have revised language in § 63.1210(b) based upon a commenter's concerns that the term you ''will'' implies that sources are required meet their ''estimated'' dates for achieving key activities. We have removed ''will'' and replaced it with ''anticipate'' to more accurately represent the objective of the NIC, which is for sources to communicate their plans for complying with the standards in two years.

2. Compliance Progress Report

In the proposal, we explained why we thought a compliance progress report would be beneficial. In short, we believed it would help regulatory agencies determine whether Phase 1 and Phase 2 sources were making sufficient headway in their efforts to meet the compliance date. The progress report would be due to the regulatory agency at the midway point of the 3 year compliance period and would serve to update the information the source provided in its NIC. However, because we do not have any experience to draw upon regarding the value of the progress report, we requested comment on whether or not it should be required.

In response to our request for comment, all commenters were opposed to the progress report. They cited several reasons, with the most consistent one being that the progress report serves no useful purpose and imposes unnecessary additional burdens on sources. As we discussed above, sources and regulatory agencies will be focusing on the NIC as well as initial Title V applications, re-openings, revisions, and renewals during this three year compliance period. We agree with the commenter who noted that there is already significant interaction between sources and regulatory authorities during this period. Furthermore, we learned through implementation of the Interim Standards that some regulatory agencies found it difficult to manage the notices, applications, requests, and test plans that were due prior to the compliance date. Therefore, we have decided not to finalize any compliance progress report requirements for today's rule.

F. Startup, Shutdown, and Malfunction Plan

Comment: One commenter states that an exceedance of a standard or operating requirement during a malfunction should be a violation not only because source owners and operators need an incentive to minimize exceedances caused by malfunctions, but also because an exemption for malfunction periods would violate the plain language of the CAA. The commenter notes that an emission standard is defined by 42 U.S.C. § 7602(k) as a standard that ''limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation of maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard * * *.'' The commenter concludes that a standard that contains a malfunction exemption does not apply ''on a continuous basis'' as required by the statute. Likewise, the commenter concludes that an exemption for startup and shutdown periods would also violate this unambiguous statutory language.

The commenter also notes that, although some courts have held that a technology-based standard must provide some kind of an exemption for unavoidable technology failures, the rationale for such an exemption is that the underlying standard is based on the performance of a particular control technology that cannot be expected to function properly all of the time. The commenter believes that neither the rationale nor the exemption apply to section 112(d) standards, which are not based on the performance of any particular technology but instead must reflect the ''maximum degree of reduction'' that can be achieved, irrespective of the measures used by a source to achieve that reduction. CAA § 112(d)(2).

The commenter states that, even assuming for the sake of argument that EPA has authority to depart from the statutory language and carve out a startup, shutdown, and malfunction exemption, any such exemption must be narrowly drafted to apply only where a source demonstrates that a violation was unavoidable. See, e.g., *Marathon Oil*, 564 F.2d at 1272–73. As EPA recognizes, emission exceedances that occur during SSM events are frequently avoidable. See 69 FR at 21339/3 (noting that ''proper operation and maintenance of equipment'' helps avoid exceedances during startup, shutdown, and malfunction events), 69 FR at 21339/2 (describing the industry view that ''some'' exceedances that occur due to malfunctions are unavoidable). Thus, the commenter concludes that, even if a Marathon Oil-type exemption applies to a § 112(d) standard, it would be unlawful and arbitrary for EPA to exempt sources from liability for all emission exceedances occurring during startup, shutdown, and malfunction events. Rather, such an exemption could only apply where a source demonstrates that a given exceedance was unavoidable.

Many other commenters state that it would be illegal to require compliance with the emission standards and operating requirements during startup, shutdown, and malfunction events. The commenters note that EPA and the courts have long recognized that technology fails at times, despite a source's best efforts to maintain compliance. For this reason, the courts have recognized that technology-based standards such as EPA's § 112(d)(2) MACT standards must account for such unavoidable technology failures if the standards are to be truly ''achievable.'' Thus, the standards must excuse noncompliance with the actual emission standards during startup, shutdown, and malfunction events.

These commenters also note that EPA took the position in the September 1999 final MACT rule for hazardous waste combustors that exceedance of an operating requirement during startup, shutdown, or malfunction events was a violation if hazardous waste remained in the combustion chamber. The commenters note that industry groups challenged the rule, and while the D.C. Circuit did not reach this issue because it vacated the emission standards, it pointed out that ''industry petitioners may be correct that EPA should have exempted HWCs from regulatory limits during periods of startup, shutdown, and malfunction, permitting sources to return to compliance by following the steps of a startup, shutdown, and malfunction plan filed with the Agency.'' *CKRC* v. *EPA*, 255 F.3d 855, 872 (2001). Commenters conclude that, after reading this language, EPA officials wisely decided that hazardous waste combustors should not be required to meet the MACT emission standards and operating limits during startup, shutdown, and malfunction events.

Response: We agree with commenters who state that sources must be exempt from technology-based emission standards and operating limits during startup, shutdown, and malfunction events. Technology is imperfect and can malfunction for reasons that are not reasonably preventable. The regulations must provide relief for such situations. We believe that existing case law supports this position. See, e.g., *Chemical Mfr's Ass'n* v. *EPA*, 870 F. 2d at 228–230 (daily maximum limitations established at 99th percentile reasonable because rules also provide for upset defense for unavoidable *exceedances*); *Marathon Oil* v. *EPA*, 541 F. 2d at 1272–73 (acknowledged by commenter). As commenters noted, the D.C. Circuit also intimated in *CKRC* that some type of exception from compliance with standards during startup, shutdown and malfunction periods was required.

We do not agree with the commenter who contends that the § 112(d) MACT standards are not technology-based standards because they are not based on the performance of any particular technology but instead must reflect the ''maximum degree of reduction'' that can be achieved, irrespective of the measures used by a source to achieve that reduction. On the contrary, the standards must reflect the average performance of the best performing sources, which performance is achieved using technical controls—air pollution control devices, and for some pollutants, hazardous waste feedrate control. Those controls can fail for reasons that are not reasonably preventable. We note further that the situation was the same in the Clean Water Act cases which the commenter seeks to distinguish. Like section 112(d) standards, Clean Water Act standards are technology-based (reflecting Best Practicable Technology or Best Available Technology, see CWA sections 304 (b) and 301 (b)) and do not require use of any particular type of technology. See also *Mossville*, 370 F. 3d at 1242 (EPA must account for foreseeable variability in establishing MACT floor standards).

We agree with the commenter who states that any exemption from the emission standards and operating requirements during malfunctions must apply only where a source demonstrates that a violation was unavoidable. We note that the term malfunction is defined in § 63.2 as ''any sudden, infrequent, and not reasonably preventable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner which causes, or has the potential to cause, the emission limitations in an applicable standard to be exceeded. Failures that are caused in part by poor maintenance or careless operation are not malfunctions.'' We believe this definition largely addresses the commenter's concern.

We acknowledge, however, that emissions can increase during malfunctions and potentially exceed the standards and agree that exceedances must be minimized. Accordingly, the final rule (and the current rule for incinerators, cement kilns, and lightweight aggregate kilns) requires that sources maintain compliance with the automatic hazardous waste feed cutoff system during malfunctions and notify the permitting authority if they have 10 or more exceedances of an emission standard or operating limit during a 6-month block period when hazardous waste is in the combustion chamber. See § 63.1206(c)(2)(v). This will alert the permitting authority that the source's operation and maintenance plan may not be adequate to maintain compliance with the emission standards and that the authority may need to direct the source to revise the plan under § 63.6(e)(3)(vi). Finally, we note that sources must report all excess emissions semiannually under § 63.10(e)(3) if an emission standard or operating limit is exceeded, including during malfunctions.

Comment: One commenter states that any exemption for emission exceedances during startup, shutdown, or malfunction events would violate the RCRA mandate for standards necessary ''to protect human health and the environment.'' 42 U.S.C. 6924(a). The commenter reasons that, because EPA's RCRA standards are health-based rather than technology-based, no unavoidability defense is available. Given that EPA concludes that the hazardous waste combustor MACT rule satisfies both its CAA and RCRA mandates, the emission standards and operating requirements cannot be waived during startup, shutdown, and malfunction events.

Response: We agree that the RCRA mandate to ensure protection of human health and the environment applies at all times, including during startup, shutdown, and malfunction events. Accordingly, the existing MACT requirements for incinerators, cement kilns, and lightweight aggregate kilns give sources the option of continuing to comply with RCRA permit requirements to control emission during these events, or to comply with special MACT requirements that are designed to be proactive and reactive and intended to be equivalent to the incentive to minimize emissions during these events provided by the RCRA requirements. See existing § 63.1206(c)(2)(ii). The special MACT requirements require sources to include proactive measures in the startup, shutdown, and malfunction plan to minimize the frequency and severity of malfunctions and to submit the startup, shutdown, and malfunction plan to the permitting authority for review and approval. We proposed to require boilers and hydrochloric acid production furnaces to comply with those same provisions providing for equivalence between the two sets of requirements, and promulgate those provisions today.

Comment: One commenter states that the rule should clarify the definitions of startup, shutdown, and malfunctions to preclude sources from improperly

classifying as unavoidable exceedances those exceedances that could have been avoided had the source implemented an appropriate operation and maintenance plan. Many other commenters state that the current definitions in § 63.2 clearly define these terms.

Response: We believe the definitions of startup, shutdown, and malfunction are clearly defined in § 63.2, and combined with the startup, shutdown, and malfunction plan requirements, will preclude sources from improperly classifying as malfunctions events that could have been reasonably prevented by following appropriate procedures in the operation and maintenance plan. As discussed above, the definition of malfunction clearly states that failures that are caused in part by poor maintenance or careless operation are not malfunctions.

Comment: One commenter states that all stack bypasses, automatic waste feed cutoffs, and excursions from the operating parameter limits should be considered malfunctions.

Response: All failures resulting in stack bypasses, automatic waste feed cutoff, and excursions from the operating parameter limits are not malfunctions. As discussed above, failures caused in part by poor maintenance or careless operation are not malfunctions.

Comment: One commenter states that the rule should require sources to expand the startup, shutdown, and malfunction plan to address specific proactive measures that the source has considered and is taking to minimize the frequency and severity of malfunctions. Many other commenters believe that it is not necessary to expand the scope of the startup, shutdown, and malfunction plan beyond that required under § 63.6(e)(3) for other MACT source categories.

Response: We do not believe that it is necessary to expand the scope of the startup, shutdown, and malfunction plan generically for all hazardous waste combustors to address specific proactive measures that the source has considered and is taking to minimize the frequency and severity of malfunctions. Imposing additional requirements in particular situations is appropriate, however. For example, as discussed above, this expanded plan is required for sources that elect to meet the RCRA mandate using provisions of the startup, shutdown, and malfunction plan. See § 63.1206(c)(2)(ii). In addition, the plan with expanded scope may be appropriate for sources that have demonstrated an inability to minimize malfunctions. Consequently, the permitting authority should consider expanding the scope of the startup, shutdown, and malfunction plan on a site-specific basis under authority of § 63.6(e)(3)(vii) if the source has excessive exceedances during malfunctions. See § 63.1206(c)(2)(v)(A)(*3*) defining excessive exceedances during malfunctions and requiring reporting of the exceedances in the excess emissions report required under § 63.10(e)(3).

Comment: Two commenters state that all startup, shutdown, and malfunction plans should be submitted for review and approval by the delegated authority and made available for a 60-day public review period. Review and approval of the plans is needed in light of EPA's acknowledgment that most excess emissions would occur during startup, shutdown, and malfunctions. One of these commenters also believes that the regulations should provide for the public review period to be extended as necessary to accommodate a thorough public review. The reviewing authority should be required to provide a written response to public comments explaining any decision to reject a public comment suggesting ways for a facility to limit emissions during startup, shutdown, and malfunction events.

Many other commenters have concerns with requiring review and approval of startup, shutdown, and malfunction plans, except as required under § 63.1206(c)(2)(ii) for sources that elect to meet the RCRA mandate using provisions of the startup, shutdown, and malfunction plan as discussed above.

Response: Commenters express the same views here that they expressed under the rulemaking the Agency recently completed to revise the startup, shutdown, and malfunction plan requirements of the General Provisions applicable to all MACT source categories. See 68 FR at 32589–93 (May 30, 2003).

EPA concluded in that final rule that the Administrator may at any time request in writing that the owner or operator submit a copy of any startup, shutdown, and malfunction plan (or a portion thereof). Upon receipt of such a request, the owner or operator must promptly submit a copy of the requested plan (or a portion thereof) to the Administrator. In addition, the Administrator must request that the owner or operator submit a particular startup, shutdown, or malfunction plan (or a portion thereof) whenever a member of the public submits a specific and reasonable request to examine or to receive a copy of that plan or portion of a plan.

These provisions to provide the Administrator and the public with access to startup, shutdown, and malfunction plans, coupled with the provisions of § 63.6(e)(3)(vii) under which the Administrator must require the source to make changes to a deficient plan, should ensure that startup, shutdown, and malfunction plans are complete and accurate. We note that under § 63.6(e)(3)(vii) the Administrator must require the source to revise the plan if the plan: (1) does not address a startup, shutdown, or malfunction event that has occurred; (2) fails to operate the source (including associated air pollution control and monitoring equipment) during a startup, shutdown, or malfunction event in a manner consistent with the general duty to minimize emissions; (3) does not provide adequate procedures for correcting malfunctioning process and/or air pollution control and monitoring equipment as quickly as practicable; or (4) includes an event that does not meet the definition of startup, shutdown, or malfunction listed in § 63.2.

The commenter advocating that all hazardous waste combustors should be required to submit their startup, shutdown, and malfunction plans for review and approval did not explain why the concerns the Agency expressed in the General Provisions rulemaking (see 68 FR at 32589–93) are not valid for hazardous waste combustors. Accordingly, we do not believe it is appropriate to deviate from the General Provisions to require that all hazardous waste combustors submit their startup, shutdown, and malfunction plans for review.

G. Public Notice of Test Plans

1. What Are the Revised Public Notice Requirements for Test Plans?

Prior to the proposal, it was brought to our attention that the Agency did not provide any direction in the 1999 final rule regarding how and when sources should notify the public, what the notification should include, or where and for how long performance test plans should be made available. Consequently, we proposed to add clarifying language to the § 63.1207(e)(2) public notification requirement for approved performance test and CMS performance evaluation test plans because we believe that providing opportunities for timely and adequate public notice is necessary to fully inform nearby communities of a source's plans to initiate important waste management activities. The proposed clarifications are based upon the *RCRA Expanded Public Participation Rule* (60 FR 63417, December 11, 1995) requirements for

public notification of an impending trial burn test. As a result, we did not feel that the clarifications imposed any new or additional requirements upon sources that will conduct a MACT comprehensive performance test or confirmatory performance test.

Commenters generally supported the clarifications to the public notice.[209] However, they suggested a change to the proposed requirement to provide notice of test plan approval no later than 60 days prior to conducting the test. The basis for suggesting a change is that many sources had not received approval of their test plans 60 days prior to the deadline for initiating their test under the Interim Standards. Moreover, several sources did not receive approval until well after the deadline for initiating the test. The problem created for these sources is that the required 60 day notification of the approved test plan effectively determines when the source will be able to begin its test. In other words, its test would need to be postponed until the approved test plan had been noticed for 60 days. Thus, commenters provided several possible alternatives.

One alternative that would avoid causing delays to testing is to require the public notice when the source submits its test plan. Although this fulfills the notification requirement, this alternative has a shortfall: The notice would occur at least one year (barring any extensions) in advance of the test and given this long period of time, the test plan is likely to be modified prior to approval. A second alternative is to provide notice of the test plan 60 days before the test as before, but regardless of approval status. This alternative is improved over the first, but still faces the same problem of potentially not offering the public an opportunity to view a final approved plan. A third alternative is to issue notice of the test plan as soon as it is approved. With this alternative, the public will have the most up-to-date information; however, it may not be until a few days prior to commencement of the test. Ideally, the second and third alternatives could be combined to provide the best possible chance of providing the public with an approved test plan in a reasonable period of time prior to the test. On the other hand, that would potentially require the facility to issue two notices if the test plan is not approved 60 days prior to the test. We do not believe this would be reasonable given that sources will be focused on activities associated with the impending test.

In consideration of practicality, we believe that the second alternative provides an adequate solution. As we mentioned, the drawback is that the public may not have the opportunity to view an approved test plan. However, we believe it is more important that the public be aware of a source's plans (*i.e.*, how and when) for conducting the performance test.[210] This way, if they have questions, there will be 60 days in which they may contact the regulatory authority or the source before the test is scheduled to begin. This alternative will also eliminate the conflict associated with the confirmatory performance test. The regulations at § 63.1207(e)(1)(ii) specify that a source must submit to the regulatory authority its notice of intent to conduct a confirmatory performance test and the applicable test plans at least 60 calendar days prior to the date the test is to begin. Since we are no longer requiring that the test plans be approved before issuing public notice, sources would then provide notice of their confirmatory performance test plan to the public at the same time they submit their notice of intent and test plans to the regulatory authority. Therefore, we are requiring that sources issue the public notice of test plans 60 days in advance of commencing the performance test, whether their test plans have been approved or not. The regulations at § 63.1207(e)(2) have been revised accordingly.

One last concern related to the public notice of approved test plans involves sources that choose to conduct a performance test without an approved test plan (*e.g.*, both time extensions provided by §§ 63.7(h) and 63.1207(e)(3) have expired or due to other circumstances, the source has elected to begin the test without approval). Because we did not believe any sources would choose or need to do so, we did not propose any guidance or regulations specific to issuing notice to the public of their test plans. Nevertheless, a few commenters raised this possibility indirectly in their discussion of the problematic 60 day notice of approved test plan requirement. The revised proposal addresses this concern by no longer requiring that test plans be approved before issuing public notice. Thus, sources that choose to begin their test without an approved plan will have complied with the requirement to issue public notice. Irrespective of the public notice requirements for noticing test plans, we expect that sources will notify their regulatory authority of their decision to proceed with their test in the absence of plan approval.

2. What Are the Revised Public Notice Requirements for the Petition To Waive a Performance Test?

In the Final Amendments Rule (67 FR 6968, February 14, 2002), the Agency did not provide direction regarding how, when, where, and what should be included in the public notice for a petition for time extension if the Administrator fails to approve or deny test plans.[211] In the proposal, we believed it important to provide clarification regarding when the notice must be issued and what it should contain. Thus, we proposed to revise paragraph § 63.1207(e)(3)(iv).

We received only one comment in response to the proposed requirements. The commenter did not express any concern over the requirements themselves, but rather suggested a change to terminology used. The commenter feels that the terms ''to waive a performance test'' or ''waiver'' as used in § 63.1207(e)(3)(iv) could be confusing to readers when we are actually referring to a time extension for commencing the test. Although we agree the terminology could be confusing, 40 CFR 63.1207(e)(3) clearly uses the term ''waiver'' in the context of an extension of time to conduct the performance test at a later date, implying that the deadline can be waived in this specific situation. The use of the term waiver is derived from the General Provisions requirements for requesting a waiver of performance tests (§ 63.7(h)). Thus, § 63.7(h)(3) provides the basis by which sources may petition, in the form of a waiver, for a time extension under § 63.1207(e)(3). In consideration of the above and that the existing regulations of § 63.1207(e)(3)(i)-(iii) consistently use the term waiver, we do not feel that a change to § 63.1207(e)(3)(iv) is warranted.

H. Using Method 23 Instead of Method 0023A

Comment. Most commenters support our proposal to allow the use of Method 23 instead of Method 0023A if a source includes this request in the comprehensive test plan to the permitting authority. Some commenters believe that Method 23 should be

[209] See 69 FR 21347–21349.

[210] We expect that some source's test plans may be modified after notice is issued and prior to approval or commencement of their test. However, even under the previous regulations, test plans could be modified after they had been approved and public noticed. It is often a necessary consequence as sources continue to prepare the combustion unit for the test.

[211] Sections 63.1207(e)(2) and (e)(3) each require public notice, but neither had provided any direction on how, when, where, and what should be included in their respective notices until today's final rule.

allowed in all cases without prior approval or on a source category basis.

Response. We proposed to allow sources to use Method 23 for dioxin and furan testing instead of SW–846 Method 0023A in situations where the enhanced procedures found in Method 0023A would not increase measurement accuracy. We proposed this change in the July 3, 2001, proposed rule, and again in the April 20, 2004, proposal. See 66 FR at 35137 and 69 FR at 21342.

The final rule promulgates this change as proposed. See § 63.1208(b)(1)(i). You may use Method 23 in lieu of Method 0023A after justifying use of Method 23 as part of your performance test plan that must be reviewed and approved the delegated permitting authority. You may be approved to use Method 23 considering factors including whether previous Method 0023A analyses document that dioxin/furan are not detected, are detected at low levels in the front half of Method 0023A, or are detected at levels well below the emission standard, and the design and operation of the combustor has not changed in a manner that could increase dioxin/furan emissions. We note that coal-fired boilers and combustors equipped with activated carbon injection systems may not be able to support use of Method 23, however, because these sources' stack gas is likely to contain carbonaceous particulate. Thus, these sources are likely to benefit the most from using Method 0023A.

The final rule does not automatically allow use of Method 23 for particular source categories because we cannot assess whether all sources in a category meet the conditions for use of Method 23—generally that quality assurance may not be improved—such as those listed above. These determinations can only be made on a site specific basis by the permitting authority most familiar with the particular source.

Comment: Commenters do not believe that an additional petition process (*i.e.*, under § 63.1209(g)(1)) is necessary before allowing use of Method 23. Instead, EPA should require that the use of Method 23 should be submitted with the test plan to the regulatory agency for approval.

Response: We agree that a separate petition is unnecessary. Sources should include a justification to use Method 23 in the performance test plan that is submitted for review and approval. This will allow the permitting authority to determine whether use of Method 23 is appropriate for the source.

Comment: Two commenters state that ''the justification of the use of Method 23 will not be by the existing system of a petition to EPA, but will be included as a part of the performance test plan that is submitted to the delegated regulatory authority for review and approval. This means that the expertise, training, and decision-making will not be consistent across the country. This is especially a problem because of the severe resource, training and staff reductions among the delegated regulatory authorities across the country and from region to region. The decision to allow or disallow use of Method 23 should come specifically, for each case, from EPA consideration of the submitted justification, based on the knowledge and expertise of trained and experienced EPA staff. This is important for uniformly applying the testing requirements all across the country.''

Response: We disagree, and we believe the responses to comments in today's rule make clear when Method 23 is an acceptable substitute for Method 0023A. If the source has carbon in the flue gas, as is the case with coal-fired boilers, boilers with carbon injection, and other sources likely to have a substantial amount of carbonaceous particulate matter in the flue gas, Method 0023A will generally be preferable because it includes procedures to account for dioxin and furan bound to carbonaceous particulate matter found in the probe and filter. In other situations, Method 23 will generally give the same results at a lower cost.

I. Extrapolating Feedrate Limits for Compliance With the Liquid Fuel Boiler Mercury and Semivolatile Metal Standards

Comment: One commenter questions whether allowing sources to extrapolate metal feedrates downward from the levels achieved during the comprehensive performance test to establish a metal feedrate limit will ensure compliance with the emission standards.

Response: The mercury and semivolatile metals standards for liquid fuel boilers are annual average emission limits where compliance is established by a rolling average mercury feedrate limit with an averaging period not to exceed an annual rolling average (updated hourly).[212] We use this approach because the emissions data used to establish the standards are more representative of normal emissions than compliance test emissions.[213]

As we explained at proposal, to ensure compliance with the mercury and semivolatile metal emission standards for liquid fuel boilers, you must document during the comprehensive performance test a system removal efficiency for the metals and back-calculate from the emission standard a maximum metal feedrate limit that must not be exceeded on an (not to exceed) annual rolling average. See 69 FR at 21311–12. If your source is not equipped with an emission control system (such as activated carbon to control mercury) for the metals in question, however, you must assume zero system removal efficiency. This is because, although a source that is not equipped with an emission control system may be able to document a positive system removal efficiency in a single test, that removal efficiency is not likely to be reproducible. Rather, it is likely to be an artifact of the calculation of emissions and feeds rather than a removal efficiency that can reliably be repeated.

To ensure that you can calculate a valid, reproducible system removal efficiency for sources equipped with a control system that effectively controls the metal in question, you may need to spike metals in the feed during the comprehensive performance test at levels that may result in emissions that are higher than the standard. This is appropriate because compliance with an emission standard derived from normal emissions data is based on compliance with an (not to exceed) annual average feedrate limit calculated as prescribed here, rather than compliance with the emission standard during the comprehensive performance test.[214]

The commenter is concerned that downward extrapolation from the levels achieved during the comprehensive performance test to establish a metal feedrate limit may not ensure

[212] If you select an averaging period for the feedrate limit that is greater than a 12-hour rolling average, you must calculate the initial rolling average as though you had selected a 12-hour rolling average, as provided by § 63.1209 (b)(5)(i). This is reasonable because allowing a longer period of time before calculating the initial rolling average would not effectively ensure compliance with the feedrate limit. You must calculate rolling averages thereafter as the average of the available one-minute values until enough one-minute values are available to calculate the rolling average period you select. We note that this is an approach allowed for calculating rolling averages under different modes of operation at § 63.1209(q)(2)(ii). At that time and thereafter, you update the rolling average feedrate each hour with a 60-minute average feedrate.

[213] See USEPA, ''Technical Support Document for HWC MACT Standards, Volume III: Selection of HWC MACT Standards,'' September 2005, Section 13.

[214] The emission standard accounts for long-term variability by incorporating an (not to exceed) annual averaging period that is implemented by an (not to exceed) annual average chlorine feedrate limit. Thus, because the emission level achieved during the performance test relates to daily (or hourly) variability, an exceedance of the emission standard during the test is not a violation.

compliance with the standard because system removal efficiency may be lower at lower feedrates.

This is a valid concern, and we have investigated it since proposal. We conclude that downward extrapolation of feedrates for the purpose of complying with the mercury and semivolatile metals emission standards for liquid fuel boilers will ensure compliance with the emission standards under the conditions discussed below.

We investigated the theoretical relationship between stack gas emissions and feedrate considering vapor phase metal equilibrium, the chlorine, mercury, and semivolatile metal feedrates for liquid fuel boilers in our data base, and the mercury and semivolatile emission standards for liquid fuel boilers.[215] We considered sources equipped with dry particulate matter controls and sources equipped with wet particulate matter controls.

Sources Equipped with Dry Controls. For sources equipped with dry controls other than activated carbon, mercury is not controlled. Thus, you must assume zero system removal efficiency. Consequently, if you are in the low Btu subcategory and comply with the mercury standard expressed as a mass concentration (µg/dscm), the mercury feedrate limit expressed as an MTEC (maximum theoretical emission concentration, µg/dscm) is equivalent to the emission standard.[216] If you are in the high Btu subcategory and comply with the mercury standard expressed as a hazardous waste thermal emission concentration (lb/MM Btu), the mercury feedrate limit expressed as a hazardous waste thermal feed concentration (lb/MM Btu) is also equivalent to the emission standard.

For semivolatile metals, the theoretical relationship between emissions and feedrate indicates that downward extrapolation introduces only a trivial error'0.17% at an emission rate 100 times the standard irrespective of the level of chlorine present. Id. Nonetheless, to ensure the error is minimal and to be practicable, you should limit semivolatile emissions during the comprehensive performance test to five times the emission standard.

Sources Equipped with Wet Scrubbers. For sources equipped with wet scrubbers, we conclude that the approach we use for semivolatile metals for dry scrubbers will also be appropriate to extrapolate a semivolatile metal feedrate limit for wet scrubbers. To ensure that downward extrapolation of the feedrate limit is conservative and to be practicable, you should limit semivolatile metal emissions during the comprehensive performance test to five times the emission standard.

For mercury, ensuring control with wet systems is more complicated because the level of chlorine present affects the formation of mercuric chloride which is soluble in water and easily controlled by wet scrubbers. Elemental mercury has very low solubility in scrubber water and is not controlled. The worst-case situation for conversion of elemental mercury to soluble mercuric chloride would be when the chlorine MTEC is lowest and the mercury MTEC is highest. We conclude that downward extrapolation of mercury feedrates is conservative for feedstreams that contain virtually no chlorine, *e.g.*, below an MTEC of 100 µg/dscm. In addition, we conclude that downward extrapolation is appropriate[217] for boilers feeding chlorinated feedstreams provided that during the performance test: (1) Scrubber blowdown has been minimized and the scrubber water has reached steady-state levels of mercury prior to the test (*e.g.*, by spiking the scrubber water); (2) scrubber water pH is minimized (*i.e.*, you establish a minimum pH operating limit based on the performance test as though you were establishing a compliance parameter for the total chlorine emission standard); and (3) temperature of the scrubber water is maximized (*i.e.*, you establish a maximum scrubber water temperature limit).

J. Temporary Compliance With Alternative, Otherwise Applicable MACT Standards

Comment: One commenter requests clarification on the requirements applicable to a source that switches to an alternative mode of operation when hazardous waste is no longer in the combustion chamber under the provisions of § 63.1206(b)(1)(ii). The commenter suggests that § 63.1206(b)(1)(ii) can imply that the complete compliance strategy needs to be switched over to the alternative section 112 or 129 requirements, even though compliance with the Subpart EEE requirements for monitoring, notification, reporting, and recordkeeping remains environmentally protective under Subpart EEE. For example, the commenter notes that § 63.1206(b)(1)(ii) could be incorrectly interpreted to require a source to comply with illogical requirements when the source temporarily switches to alternative, otherwise applicable standards, including standards testing and opacity monitoring under the alternative section 112 or 129 requirements. The commenter states that this interpretation makes little sense because a source that temporarily changes its mode of operation will continue to do testing under Subpart EEE, Part 63, or, in the case of opacity, the alternative section 112 requirements for cement kilns would necessarily require duplicate systems and compliance with redundant limits because a source may already be using a bag leak detection system or a particulate matter detection system. The commenter suggests only requiring sources to comply with the otherwise applicable emission standards under the alternative section 112 or 129 requirements while still operating under the various associated compliance requirements of Subpart EEE, part 63.

Response: The commenter requests clarification of § 63.1206(b)(1)(ii), which states that if a source is not feeding hazardous waste to the combustor and the hazardous waste residence time has expired (*i.e.*, the hazardous waste feed to the combustor has been cut off for a period of time not less than the hazardous waste residence time), then the source may elect to comply temporarily with alternative, otherwise applicable standards promulgated under the authority of sections 112 and 129 of the Clean Air Act.[218] As we have explained in previous notices,[219] sources that elect to invoke § 63.1206(b)(1)(ii) to become temporarily exempt from the emission standards and operating requirements of Subpart EEE, Part 63, remain an affected source under Subpart EEE (and only Subpart EEE) until the source is no longer an affected source by meeting the requirements specified in Table 1 of § 63.1200. Of course, a source can elect not to use the alternative requirements for compliance during periods when

[215] USEPA, ''Technical Support Document for HWC MACT Standards, Volume IV: Compliance with the HWC MACT Standards,'' September 2005, Section 2.5 and Appendix B.

[216] Note, however, that you convert the MTEC (µg/dscm) to a mass feedrate (lb/hr) by considering the average gas flowrate of the test run averages during the comprehensive performance test to simply implementation and compliance.

[217] Mercury SRE is constant as the mercury feedrate decreases.

[218] Examples include 40 CFR part 60, subparts CCCC and DDDD for commercial and industrial solid waste incinerators, 40 CFR part 63, subpart LLL for Portland cement manufacturing facilities, 40 CFR part 63, subpart DDDDD for industrial/commercial/institutional boilers and process heaters, and 40 CFR part 63, subpart NNNNN for hydrochloric acid production facilities.

[219] This provision has been discussed in several **Federal Register** notices including 64 FR at 52904 (September 30, 1999), 66 FR at 35090, 35145 (July 3, 2001), 67 FR at 6979 (February 14, 2002), and 69 FR at 21203 (April 20, 2004).

they are not feeding hazardous waste, but, if so, the source must comply with all of the operating and monitoring requirements and emission standards of Subpart EEE at all times.[220] To implement § 63.1206(b)(1)(ii) a source defines the period of compliance with the otherwise applicable sections 112 and 129 requirements as an alternative mode of operation under § 63.1209(q). In order to be exempt from the emission standards and operating requirements of Subpart EEE, a source documents in the operating record that they are complying with the otherwise applicable Section 112 and 129 requirements specified under § 63.1209(q).

The commenter recommends that the complete compliance strategy need not be switched over to the alternative section 112 and 129 requirements when temporarily switching to the alternative standards. In general, we disagree. The intent of § 63.1206(b)(1)(ii) is to ensure that a source is complying with all requirements of sections 112 and 129 as an alternative mode of operation in lieu of the requirements under Subpart EEE. In the 1999 final rule we stated that the source must comply with all otherwise applicable standards under the authority of sections 112 and 129. Specifically, the source must comply with all of the applicable notification requirements of the alternative regulation, comply with all of the monitoring, recordkeeping, and testing requirements of the alternative regulation, modify the Notice of Compliance (or Documentation of Compliance) to include the alternative mode(s) of operation, and note in the operating record the beginning and end of each period when complying with the alternative regulation. See 64 FR at 52904. A source that elects to comply with otherwise applicable standards under § 63.1206(b)(1)(ii) must specify all requirements of those standards, not only the emission standards applicable under the sections 112 and 129 standards, but also the associated monitoring and compliance requirements and notification, reporting, and recordkeeping requirements in the operating record under § 63.1209(q).

The commenter suggests that a source should be able to comply with the otherwise applicable emission standards, while continuing to operate under the associated compliance requirements for the HAP under Subpart EEE. An example would be a cement kiln source complying with the dioxin and furan monitoring requirements under § 63.1209(k) of Subpart EEE for the dioxin and furan standards under § 63.1343(d) under Subpart LLL. We did not determine, when promulgating the provisions of §§ 63.1206(b)(1)(ii) and 63.1209(q)(1), that the monitoring provisions under Subpart EEE are equivalent to the associated monitoring requirements under the otherwise applicable 112 and 129 standards, or indeed, whether they are even well-matched. Such a determination would require notice and opportunity for comment, which we have not provided. However, this should not be interpreted to mean that a similar determination could not be made on a site-specific basis given that the MACT general provisions allow a source to request alternative monitoring procedures under § 63.8(f)(4). Certainly, a source can apply under this provision that the compliance requirements under Subpart EEE satisfy the associated monitoring requirements under the otherwise applicable 112 and 129 standards.

We also disagree with the commenter that emissions testing under the alternative standards of sections 112 and 129 is an example of an illogical requirement under § 63.1206(b)(1)(ii). Performance testing generally is required to demonstrate compliance with the emission standards and to establish limits on specified operating parameters to ensure compliance is maintained. In order to take advantage of the alternative under § 63.1206(b)(1)(ii), a source needs to show that compliance with and establish operating parameter limits for the otherwise applicable standards of sections 112 and 129. Thus, testing in order to establish operating parameter limits will be necessary. However, this does not mean that a separate performance test with the alternative sections 112 or 129 standards is necessarily required. We note that a source can make use of the performance test waiver provision under § 63.7(h) of the general provisions to request that the performance test under the alternative sections 112 and 129 standards be waived because the source is meeting the relevant standard(s) on a continuous basis by continuing to comply with Subpart EEE for the relevant HAP. This approach may be practicable for sources that can demonstrate that their level of performance during testing under Subpart EEE, including the associated operating and monitoring limits, will undoubtedly ensure continuous compliance with the emissions standards and the associated operating limits of alternative sections 112 and 129 standards.

Finally, the commenter notes that Subpart LLL (the alternative section 112 standards for cement kilns) includes opacity monitoring while Subpart EEE may not. The commenter states that this unnecessarily would require duplicate systems and compliance with redundant limits because of the bag leak detection and particulate matter detection system requirements under Subpart EEE. We respond that Subpart LLL specifies opacity as a standard (see § 63.1343(b)(2)), and, therefore, cement kilns subject to Subpart EEE must comply with the opacity standard when electing to comply temporarily with the requirements of Subpart LLL. We note that the opacity standard under Subpart EEE does not apply to cement kilns that are equipped with a bag leak detection system under § 63.1206(c)(8) and to sources using a particulate matter detection system under § 63.1206(c)(9). However, a cement kiln may use an opacity monitor that meets the detection limit requirements as the detector for a bag leak detection system or particulate matter detection system. See Part Four, Section VIII.A-C of the preamble.

K. Periodic DRE Testing and Limits on Minimum Combustion Chamber Temperature for Cement Kilns

Comment: Several commenters oppose the need for cement kilns that burn at locations other than the normal flame zone to demonstrate compliance with the destruction and removal efficiency (DRE) standard during each comprehensive performance test. These commenters recommend that EPA remove the requirement of § 63.1206(b)(7)(ii) for cement kilns citing that existing rule provisions (i.e., the requirements under § 63.1206(b)(5) pertaining to changes that may adversely affect compliance) are sufficient to require additional DRE testing after changes are made that may adversely affect combustion efficiency. Commenters question EPA's position that cement kilns that burn hazardous waste at locations other than the normal flame zone demonstrate a variability in DRE sufficient to justify the expense of re-testing for DRE with each performance test. Commenters point to EPA's data base that includes DRE results from over 30 tests with nearly 250 runs showing consistent DRE results, including sources burning hazardous waste at locations other than the normal flame zone, being achieved by cement kilns. The commenters note several burdens associated with DRE

[220] However, the operating requirements do not apply during startup, shutdown, or malfunction provided that hazardous waste is not in the combustion chamber. See § 63.1206(b)(1)(i).

testing that do not result in improved environmental benefit including the purchase of expensive exotic virgin chemicals for performance testing, the risks to workers and contractors associated with the handling of these chemicals, and increasing the length of operation at stressful kiln operating conditions necessary to conduct DRE testing at minimum combustion chamber temperatures. Alternatively, commenters recommend that EPA revise the DRE requirements such that periodic testing is no longer required for cement kilns (that burn at locations other than the normal flame zone) after they have successfully achieved the DRE standard over multiple testing cycles (e.g., two or three) under similar testing regimes. That is, the source should only be required to demonstrate compliance with the DRE standard a maximum of two or three times until the source (that burns at locations other than the normal flame zone) modifies the system in a manner that could affect the ability of it to achieve the DRE standard.

Response: We are revising the requirements of § 63.1206(b)(7)(ii) such that cement kilns that feed hazardous waste at locations other than the normal flame zone need only demonstrate compliance with the DRE standard during three consecutive comprehensive performance tests provided that the source has successfully demonstrated compliance with the DRE standard in each test and that the design, operation, and maintenance features of each of the three tests are similar. These revisions do not affect sources that burn hazardous waste only in the normal flame zone.[221]

Prior to today's change, we required sources that feed hazardous waste in locations other than the flame zone to perform periodic DRE testing every 5 years to ensure that the DRE standard continues to be achieved over the life of the unit. See § 63.1206(b)(7)(ii). We justified this requirement because of concerns that sources that feed hazardous waste at locations other than the flame zone have a greater potential of varying DRE performance due to their hazardous waste firing practices. As we stated in the 1999 rule, we were concerned that the DRE may vary over time due to the design and operation of the hazardous waste firing system, and that those variations may not be identical or limited through operating limits set during a single DRE test (similar to what we concluded for sources that burn hazardous waste only in the normal flame zone). See 64 FR at 52850.

Commenters now question the need for subsequent DRE testing at cement kilns that feed hazardous waste at locations other than the normal flame zone once a cement kiln demonstrates compliance with the MACT DRE standard. The regulatory requirement for the destruction and removal efficiency standard has proved to be an effective method to determine appropriate process controls necessary for the combustion of hazardous waste. We are not convinced that only one DRE test is sufficient to ensure that a cement kiln that burns hazardous waste at locations other than the normal flame zone will continue to meet the DRE standard because temperatures are lower and gas residence times are shorter at the other firing locations. This is especially true given the industry trend to convert to the more thermally efficient preheater/precalciner kiln manufacturing process.[222] Precalciner kilns use a secondary firing system (i.e., flash furnace) at the base of the preheater tower to calcine the raw material feed outside the rotary kiln. This results in two separate combustion processes that must be controlled '' one in the kiln and the other in the flash furnace. The gas temperature necessary for calcining the limestone raw material in the flash furnace is lower than the temperature required making the clinker product. We conclude, therefore, that it is necessary, in spite of the concerns raised by commenters, to retain periodic DRE testing to ensure continued compliance with the DRE standard necessary for the control of nondioxin/furan organic HAP.

We also acknowledge, however, the concerns raised by the commenters. Our DRE data base of operating cement kilns includes results from approximately 25 DRE tests and nearly 200 runs.[223] All data show compliance with the DRE standard. Of these, approximately one-quarter of the data are from cement kilns that burned hazardous waste at locations other than the normal flame zone (e.g., injecting waste at midkiln in a wet process kiln), but we do not have DRE results from every operating cement kiln. Considering available DRE data and the concerns of the commenters, we believe that DRE testing during three consecutive comprehensive performance tests is sufficient to provide needed certainty about DRE performance while reducing the overall costs and toxic chemical handling concerns to the regulated source. Thus, we are revising the requirements of § 63.1206(b)(7)(ii) such that cement kilns that feed hazardous waste at locations other than the normal flame zone need only demonstrate compliance with the DRE standard during three consecutive comprehensive performance tests provided that the source has successfully demonstrated compliance with the DRE standard in each test and that the design, operation, and maintenance features of each of the three tests are similar. If a facility wishes to operate under new operating parameter limits that could be expected to affect the ability to meet the DRE standard, then the source would need to conduct another DRE test. Once the facility has conducted another three DRE tests under the new operating limits, then subsequent DRE testing would not be required. Accordingly, we are revising the requirements of § 63.1206(b)(7)(ii).

Comment: Several commenters support EPA's proposal to delete the requirement to establish an operating limit on the minimum combustion chamber temperature for dioxin/furans under § 63.1209(k)(1) for cement kilns. These commenters point to the high temperatures of approximately 2500°F required to make the clinker product. These high temperatures are fixed by the reaction kinetics and thermodynamics occurring in the burning zone and cannot be reduced below minimum values at the whim of the operator and still make a marketable product. In addition to deleting the minimum combustion chamber temperature limit for dioxin/furans, commenters also recommend, for similar reasons, that EPA delete the minimum combustion chamber temperature requirement under § 63.1209(j)(1) associated with the destruction and removal efficiency standand. Commenters note that demonstrating the minimum temperature requires operating under stressful operating conditions that can

[221] The DRE demonstration for these sources need be made only once during the operational life of a source, either before or during the initial comprehensive performance test, provided that the design, operation, or maintenance features do not change in a manner that could reasonably be expected to affect the ability to meet the DRE standard. See §§ 63.1206(b)(7) and 63.1207(c)(2)(ii). The source would ensure continued compliance by operating under the operating parameter limits established during this DRE test.

[222] For example, Ash Grove Cement in Chanute, KS replaced their two wet process cement kilns with one preheater/precalciner kiln in 2001. Holcim Inc in Holly Hill, SC has also recently constructed a new preheater/precalciner kiln to replace two wet process cement kilns. Keystone Cement Company in Bath, PA is considering replacing their two wet process cement kilns with a new preheater/precalciner kiln. See docket item OAR–2004–0022–0384.

[223] U.S. EPA, ''Final Technical Support Document for HWC MACT Standards, Volume III: Selection of MACT Standards and Technologies,'' Section 23.4, September 2005.

lead to upset conditions and potentially damage the integrity of the manufacturing equipment. Other commenters oppose, however, deletion of the minimum combustion chamber temperature limit for cement kilns. These commenters state that all combustion sources, including cement kilns, must meet a minimum combustion chamber temperature limit to control dioxin/furans and organic HAP emissions given that some cement kilns feed hazardous waste at locations other than the high temperature clinker-forming zone of the kiln.

Response: We are deleting as proposed the requirement to establish a minimum combustion chamber temperature limit for dioxin/furan under § 63.1209(k)(2) for cement kilns. See 69 FR at 21343. However, we retain the requirement for cement kilns to establish and comply with a minimum combustion chamber temperature limit for the destruction and removal efficiency standard under § 63.1209(j)(1).[224]

As discussed in the 1999 rule, nondioxin/furan organic hazardous air pollutants are controlled by the DRE standard and the carbon monoxide and hydrocarbon standards. See 64 FR at 52848–52852. This standard was not reopened in the present rulemaking. We note, however, that the DRE standard determines appropriate process controls necessary for the combustion of hazardous waste. Establishing and monitoring a minimum temperature of the combustion chamber is a principal factor in ensuring combustion efficiency and destruction of toxic organic compounds. As discussed in the previous response, we believe this is especially true given the industry trend to convert to the more thermally efficient preheater/precalciner kiln manufacturing process, which use two separate combustion processes. We conclude that it is necessary, in spite of the concerns raised by commenters, to retain the minimum combustion chamber temperature limit as related to the DRE standard to ensure that combustion efficiency within the entire kiln system is maintained for the control of nondioxin/furan organic HAP.

However, we acknowledge the difficulties that cement kiln operators face in establishing a minimum combustion chamber temperature limit, including the stressful operating conditions necessary to establish the limit. As we stated at proposal, our data indicate that limiting the gas temperature at the inlet to the particulate matter control device is a critical parameter in controlling dioxin/furan emissions in cement kilns. See 69 FR at 21344. Therefore, we believe that an operating limit on the minimum combustion chamber temperature is less important to ensure compliance with the dioxin/furan standard than to ensure compliance with the DRE standard. Thus, we remove the requirement to establish a minimum combustion chamber temperature limit for dioxin/furan under § 63.1209(k)(2) for cement kilns. This change does not affect the other operating parameter limits under § 63.1209(k) that must be established for dioxin/furans, including a limit on the gas temperature at the inlet to the particulate matter control device.

Comment: One commenter supports the use of previous minimum combustion zone temperature data, regardless of the test age, in lieu of conducting new, stressful DRE testing. That is, if a cement kiln is required to conduct future DRE tests, then the source should not have to re-establish a minimum combustion chamber temperature limit during the new test. Rather, the source should have the option to submit minimum combustion chamber temperature results in lieu of re-establishing the limit.

Response: We reject the commenter's suggestion for reasons discussed above. We believe that it is necessary to retain the link between the minimum combustion chamber temperature limit and the DRE test itself, which will ensure that the combustion efficiency of the entire system will be maintained for the control of nondioxin/furan organic HAP.

Comment: One commenter supports deletion of the minimum combustion chamber temperature requirement for dioxin/furan under § 63.1209(k)(2) for lightweight aggregate kilns.

Response: We reject the commenter's suggestion. Our data base of dioxin/furan emissions data shows substantial variability in test results at each source.[225] This may indicate that factors other than limiting kiln exit gas temperatures may be influencing significantly dioxin/furan formation in lightweight aggregate kilns. As such, we conclude that removing the minimum combustion chamber temperature limit would not be appropriate at this time due to the uncertain nature of dioxin/furan formation in lightweight aggregate kilns. Thus, we are retaining the requirement to establish a minimum combustion chamber temperature limit for dioxin/furans under § 63.1209(k)(2) and § 63.1209(j)(1) for lightweight aggregate kilns.

L. One Time Dioxin and Furan Test for Sources Not Subject to a Numerical Limit for Dioxin and Furan

Comment. Commenters support the one-time dioxin/furan test for sources not subject to a numerical dioxin and furan standard. Commenters agree that previous testing should be allowed to document the one time test.

Response. The final rule requires sources that are not subject to a standard with numerical dioxin and furan levels[226] to conduct a one-time dioxin and furan test as part of their initial comprehensive performance testing: lightweight aggregate kilns that elect to control the gas temperature at the kiln exit rather than comply with a dioxin/furan standard of 0.20 ng TEQ/dscm, solid fuel boilers, liquid fuel boilers with wet or no air pollution control systems, and HCl production furnaces. We will use these data as part of the process of addressing residual risk under CAA section 112(f) and evaluating future MACT standards under section 112(d)(6). The results may also be used as part of the RCRA omnibus permitting process.

Comment. EPA proposed that source not subject to a numerical dioxin and furan limit conduct a dioxin and furan test under worst-case conditions. Commenters state that operating under worst-case conditions is inconsistent with the CAA Section 112(f) process, which is to consider actual (i.e., normal) emissions. Commenters suggest that we require the tests be conducted under normal to above normal conditions.

Response. Section 112 (f) standards evaluate allowable emission levels, although actual emissions levels may also be considered. See 70 FR at 19998–

[224] Under the interim standards, cement kilns must establish and continuously monitor limits on minimum gas temperature in the combustion zone for both the dioxin/furan and DRE standards. As discussed in the preceding paragraph, a source may not need to conduct DRE testing during each comprehensive performance test. If DRE testing is required, then the source will need to establish a minimum combustion zone temperature limit as required under the DRE standard. However, if DRE testing is not required, then (according to the changes made today) the cement kiln will not be required to establish the minimum combustion chamber temperature limit under the dioxin/furan standard during a subsequent comprehensive performance test. The minimum combustion chamber temperature operating limit established during previous testing remains in effect, however.

[225] For example, dioxin/furan emissions from source number 307 range from a low of 0.024 to a high of 57.9 ng TEQ/dscm. See ''Source Category Summary Sheets'' available in the docket or USEPA, ''Final Technical Support Document for HWC MACT Standards, Volume II: HWC Data Base,'' September 2005.

[226] These sources do, however, need to comply with the carbon monoxide or hydrocarbon standards, as well as the DRE standard as surrogates to comply with today's dioxin and furan emissions control requirements.

19999 (April 15, 2005). Although we agree with the commenter that, in general, emissions in the range of normal to maximum are considered for section 112(f) determinations, we believe that dioxin/furan testing to provide information of use in section 112(f) residual risk determinations should be conducted under conditions where controllable operating conditions are maximized to reflect the full range of expected variability of those parameters which can be controlled. This is because dioxin/furan emissions may relate exponentially with the operating conditions that affect formation. We believe that dioxin/furan emissions relate exponentially with gas temperature at the inlet to an ESP or fabric filter,[227] and are concerned that emissions may also relate exponentially with the operating parameters (discussed below) that affect emissions from sources subject to the one-time dioxin/furan emissions test. Emissions testing under operating conditions that are in the range of ''normal to above normal'' may be exponentially lower than emissions under operating conditions reflecting maximum daily variability of the source. Since testing under normal operating conditions makes no effort to assess operating variability, emissions during such testing would fail to reflect expected daily maximum operating variability and so would not represent time-weighted average emissions and would under-represent health risk from chronic exposure.

Although we acknowledge that sources will not exhibit maximum operating variability each day of operation, we believe that it is important to assess the upper range of emissions that these sources may emit to properly evaluate under section 112(f) whether the MACT standards for dioxin/furan for these sources (i.e., absent a numerical emission standard) protect public health with an ample margin of safety.[228]

In addition, we note that emissions reflecting daily maximum variability would be most useful for section 112(d)(6) determinations in the future because they would represent the full range of emissions variability that results from controllable operating conditions.

For these reasons, the final rule requires sources to test under feed and operating conditions that are most likely to reflect maximized expected daily variability of dioxin/furan emissions, as proposed. Such testing is similar to a comprehensive performance test to demonstrate compliance with a numerical dioxin/furan emission standard where operating limits would be established based on operations during the test. As a practical matter, however, we note that many of the operating parameters discussed below, although controllable to some extent, cannot be quantified and cannot be controlled to replicate the condition in a future test. In addition, some operating parameters we identify may not have as strong a relationship to dioxin/furan emissions as others. Consequently, the operating conditions are generally described subjectively.

Based on currently available research, you should consider the following factors to ensure that you conduct the test under operating conditions that seek to fully reflect maximum daily variability of dioxin/furan emissions: (1) Dioxin/furan testing should be conducted at the point in the maintenance cycle for a boiler when the boiler tubes are more fouled and soot-laden, and not after maintenance involving soot or ash removal from the tubes; (2) dioxin/furan testing should be performed following (or during) a period of feeding normal or greater quantities of metals; (3) dioxin/furan testing should be performed while feeding normal or greater quantities of chlorine; (4) the flue gas temperature in some portion of the heat recovery section of a boiler should be within the dioxin formation temperature window of 750 to 400°F during the testing; (5) the testing should not be conducted under optimal combustion conditions (e.g., combustion chamber temperature should be in the range of normal to the operating limit; hazardous waste feedrate and combustor through put should be in the range of normal to maximum); (6) for units equipped with wet air pollution control systems, the testing should be conducted after a high solids loading has developed in the scrubber system (consistent with normal operating cycles); and (7) for solid fuel boilers, the sulfur content of the coal should be equivalent to or lower than normal coal sulfur levels (within the range of sulfur levels that the source utilizes), and the gas temperature at the inlet to the electrostatic precipitator or fabric filter should be close to the operating limit. In addition, unless sulfur compounds are routinely fed to the boler, dioxin/furan testing should not be performed after a period of firing high sulfur fuel or injection of sulfur additives. See 69 FR at 21308 for more information.

Comment: Commenters state that we should delete the one-time testing requirement for dioxin and furans. The Clean Air Act at Section 114(a)(1)(D) allows EPA to request ''any person'' to sample emissions. Applying the Section 114 authority to an entire subcategory of sources is overly broad, particularly in the context of having already established appropriate surrogates for dioxin and furan in a MACT rule. Commenters are not aware of EPA taking this approach in previous efforts. (Section 114 requests have focused on collecting existing information from sources facing future MACT standards). Commenters oppose this approach because it established a precedent they do not favor, and will bring about significant costs and difficulties to provide the data. They suggest that we delete the proposed requirements for a one-time dioxin and furan test.

Response: We believe that section 114(a)(1)(D) of the Clean Air Act provides us the authority to require sources to conduct a one time test to generate data which can be used in making later section 112 (f) determinations for the source category. The results of the testing may also inform the section 112(d)(6) review and the RCRA omnibus permitting processes. The fact that section 114 specifically indicates that a purpose of gathering information under section 114 is to assist in developing national rules indicates that the provision can have wide sweep extending to all sources in a category. See 69 FR at 21307–308 for a full explanation.

We believe a dioxin and furan test costs approximately $10,000 when conducted along with other testing. We do not believe this cost is significant, and sources must only perform this test once, not more frequently as would be the case to ensure compliance with a standard. We also allow sources to use prior testing to meet this requirement, and allow sources to use ''data in lieu'' so they can test one source if they have more than one of the same identical sources.

We do not believe that obtaining these data will be difficult, and note that the permitting authority can assist sources in planning their tests.

M. Miscellaneous Compliance Issues

Comment: Several commenters state that § 63.1206(c)(3)(iv) requiring an automatic waste feed cutoff (AWFCO) if

[227] See USEPA, ''Technical Support Document for HWC MACT Standards, Volume IV: Compliance,'' July 1999, Chapter 3.

[228] Dioxin/furan are some of the most toxic compounds known due to their bioaccumulation potential and wide range of health effects, including carcinogenesis, at exceedingly low doses. Exposure via indirect pathways is a chief reason that Congress singled out dioxin/furan for priority MACT control in CAA section 112(c)(6). See S. Rep. No. 128, 101st Cong. 1st Sess. at 154–155.

a parameter linked to the AWFCO is exceeded should be revised to reflect § 63.1206(c)(2)(v)(A)(1). Section 63.1206(c)(2)(v)(A)(1) states that, if the AWFCO is affected by a malfunction such that the malfunction itself prevents immediate and automatic cutoff of the hazardous waste feed, you must cease feeding hazardous waste as quickly as possible.

Response: We agree with commenters in principle, but note that the automatic waste feed cutoff system may fail for reasons other than a malfunction. That is, equipment or other failures are malfunctions only if they meet the definition of malfunction at § 63.2. Failures that result from improper maintenance or operation are not malfunctions. Consequently, the final rule revises § 63.1206(c)(3)(iv) to state that if the AWFCO is affected by a failure such that the failure itself prevents immediate and automatic cutoff of the hazardous waste feed, you must cease feeding hazardous waste as quickly as possible. Revised § 63.1206(c)(3)(iv) does not refer to malfunctions, however, because the AWFCO system may fail for reasons other than a malfunction. The reference in § 63.1206(c)(2)(v)(A)(1) to malfunctions is appropriate because that paragraph addresses requirements during malfunctions.

Comment: Several commenters note that the proposed rule did not include a sunset provision for the Interim Standards applicable to incinerators, cement kilns, and lightweight aggregate kilns after the compliance date of the standards we promulgate today (i.e., the ''permanent replacement standards''). Commenters are concerned that, although the Agency intends for the replacement standards to be more stringent than the Interim Standards, that may not be the case in all situations because of the different format used for some of the replacement standards. For example, several of the replacement standards for cement kilns and lightweight aggregate kilns are expressed as hazardous waste thermal emissions.

Response: Although we are promulgating the replacement standards in a format that ensures they are not less stringent than the Interim Standards, we agree with commenters that not sunsetting the Interim Standards may lead to confusion as to which standards apply. Consequently, we include a sunset provision in today's rule for the Interim Standards. The Interim Standards will be superseded by the final rule promulgated today on the compliance date.

We note, however, that the Interim Standards for total chlorine continue to apply to sources that establish health-based limits for total chlorine under § 63.1215. Consequently, we have incorporated the total chlorine Interim Standards in § 63.1215 as they apply as a cap to the health-based emission limits.

Comment: Several commenters state that the rule should allow extrapolation of ash and chlorine feedrates to establish feedrate limits corresponding to the particulate matter and total chlorine standards. Commenters believe the rationale we use to allow extrapolation of metals feedrates is also applicable to ash and chlorine.

Response: The final rule does not allow you to extrapolate ash and chlorine feedrates achieved during the comprehensive performance test to establish feedrate limits comparable to the particulate matter and total chlorine emission standards.

We do not allow extrapolation of ash to the particulate matter emission standard because particulate matter (i.e., soot) may form in the combustor, particularly at times of unstable combustion conditions. Consequently, extrapolating from ash feedrates may underestimate particulate matter emissions and may not ensure compliance with the particulate matter emission standard.

We do not allow extrapolation of chlorine feedrates to the total chlorine emission standard because chlorine feedrate is an operating parameter limit to ensure compliance with the semivolatile metal emission standard. Because an increase in chlorine feedrate can increase the volatility of semivolatile metals and we do not know the precise relationship among chlorine feedrate, metal volatility, and metals emissions, extrapolating the chlorine feedrate achieved during the comprehensive performance test to a feedrate comparable to the total chlorine emission standard may not ensure compliance with the semivolatile metal emission standard. If a source complies with the semivolatile metals emission standard under § 63.1207(m)(2) where the performance test is waived, however, by assuming zero system removal efficiency and limiting the semivolatile feedrate (expressed as a maximum theoretical emission concentration) to the level of the emission standard, the source may request under § 63.1209(g)(1) to extrapolate chlorine feedrates during the comprehensive performance test up to the total chlorine emission standard.

Comment: Several commenters state that the proposed regulatory language under §§ 63.1206(b)(9)(i) and 63.1206(b)(10)(i) is inconsistent with the proposed preamble, which states that sources should be allowed to petition for alternative standards provided they submit information showing that HAP contributions to emissions from the raw materials are preventing the source from achieving the emissions standard though the source is using MACT control.[229] The commenters state that the proposed regulatory language, despite the intent signaled in the proposed preamble, inappropriately excludes the provisions of §§ 63.1206(b)(9)(i) and 63.1206(b)(10)(i) as an alternative option when complying with the replacement emission standards under §§ 63.1220 and 63.1221.

Response: We agree with the commenters. The proposed regulatory text inadvertently excluded the alternative standard provisions from use by cement and lightweight aggregate kilns under the replacement standards. Accordingly, we are revising the introductory text of §§ 63.1206(b)(9)(i) and 63.1206(b)(10)(i) by making the alternative standards available under the replacement standards.

Comment: One commenter states that the availability of the alternative standard for mercury under § 63.1206(b)(10)(i) should not be conditioned upon mercury being present only at levels below the detection limit in raw materials, as specified under § 63.1206(b)(10)(i)(B). The commenter suggests that the approach for mercury should be the same as for other HAP such as semi- and low volatile metals under § 63.1206(b)(10)(i)(A).

Response: The commenter misreads the alternative standard provisions under § 63.1206(b)(10)(i). We note that § 63.1206(b)(10) includes two separate provisions for cement kilns. The first provision allows sources to petition for an alternative standard when a source cannot achieve a standard because of HAP metal or chlorine concentrations in their raw material feedstocks cause an exceedance of a standard despite the source's use of MACT control. See § 63.1206(b)(10)(i)(A). The term ''regulated metals'' specified in § 63.1206(b)(10)(i)(A) includes mercury, semivolatile metals, and low volatile metals. The second provision allows a source to petition for an alternative mercury standard when mercury is not present at detectable levels in the source's raw materials. § 63.1206(b)(10)(i)(B). These two provisions are indeed separate as

[229] For example, see 69 FR at 21268.

discussed in the 1999 rule. See 64 FR at 52962–967. Also note that the conjunction separating paragraphs (b)(10)(i)(A) and (b)(10)(i)(B) is ''or,'' not ''and.''

Given the potential confusion of the term ''regulated metals,'' we are clarifying the regulatory text by specifying the three metal HAP volatility groups that comprise the term ''regulated metals.'' See revised § 63.1206(b)(10)(i)(A). Finally, given that the alternative standard provisions are similar for lightweight aggregate kilns, we are also clarifying §§ 63.1206(b)(9)(i)(A) and (b)(9)(iv).

IX. Site-Specific Risk Assessment Under RCRA

A. What Is the Site-Specific Risk Assessment Policy?

The Site-Specific Risk Assessment (SSRA) Policy has undergone several revisions since its inception in the 1993 draft Combustion Strategy. Currently, it is the same policy as we expressed in the 1999 final rule preamble. In the 1999 rule, we recommended that for hazardous waste combustors subject to the Phase 1 MACT standards, permitting authorities should evaluate the need for an SSRA on a case-by-case basis. Further, while SSRAs are not anticipated to be necessary for every facility, they should be conducted where there is some reason to believe that operation in accordance with the MACT standards alone may not be protective of human health and the environment. For hazardous waste combustors not subject to the Phase 1 standards, we continued to recommend that SSRAs be conducted as part of the RCRA permitting process. See 64 FR 52841. Since 1999, we have provided additional clarification of the appropriate use of the SSRA policy and technical guidance in an April 10, 2003 memorandum from OSWER's Assistant Administrator to the EPA Regional Administrators entitled, ''Use of the Site-Specific Risk Assessment Policy and Guidance for Hazardous Waste Combustion Facilities'' (see Docket # OAR–2004–0022–0083). Most importantly, in this memorandum we reiterated that where a permitting authority concludes that a risk assessment is necessary for a particular combustor, the basis for this decision must be substantiated in each case. The factual and technical basis for any decisions to conduct a risk assessment must be included in the administrative record for the facility per 40 CFR 124.7, 124.8, 124.9, and 124.18. In addition, if the facility, or any other party, files comments on a draft permit decision objecting to the permitting authority's conclusions regarding the need for a risk assessment, the permitting authority must respond fully to the comments. Any permit conditions determined to be necessary based either on the SSRA, or because the facility declined to conduct an SSRA, also must be documented and supported in the administrative record.

Today, we are codifying additional regulatory language providing authority for SSRAs while maintaining the same basic SSRA policy. It is important to note that all of the requirements of Part 124 referred to above will continue to apply to actions taken in accordance with the additional regulatory language we are codifying. The SSRA regulatory provisions, which establish that the need for an SSRA should be determined on a case-by-case basis, apply equally to both Phase 1 and Phase 2 sources.

B. Why Might SSRAs Continue To Be Necessary for Sources Complying With Phase 1 Replacement Standards and Phase 2 Standards?

EPA conducted a national evaluation of human health and ecological risk for the MACT standards as proposed in the 1996 NPRM and then revised the evaluation to include more facilities for the 1999 final rulemaking. Based on the results of the final national risk evaluation for hazardous air pollutants (excluding non-dioxin products of incomplete combustion), we concluded that sources complying with the MACT standards generally would not pose an unacceptable risk to human health or the environment. For today's final rule, we did not conduct another national risk assessment as we did for the 1999 rule. Rather, for both the April 20, 2004 NPRM and today's final rule we conducted a comparative risk analysis, comparing the Phase 1 Replacement and Phase 2 Standards to the 1999-promulgated Phase 1 Standards, to determine if there were any significant differences that might influence or impact the potential risk. Similar to the proposal, the comparative analysis conducted for today's final rule focused on several key characteristics: emission rates, stack height, stack gas buoyancy, meteorological conditions (which include a number of variables), population parameters including density and radial distribution, and correlations among the characteristics themselves. The results of the comparative analysis suggest that the MACT standards for both Phase 1 and Phase 2 sources are generally protective. Therefore, separate national emissions standards under RCRA are unnecessary. See Part Seven: How Does the Final Rule Meet the RCRA Protectiveness Mandate? Although we have concluded that the Phase 1 Replacement and Phase 2 standards are generally protective, as we discussed in the 2004 proposal (69 FR 21325), there may be instances where we cannot assure that emissions from each source will be protective of human health and the environment, and therefore an SSRA may be necessary. Furthermore, it should be noted that, just as for the risk assessment for the 1999 rule, the comparative analysis does not account for cumulative emissions at a source or background exposures from other sources.

Before discussing factors that may lead permit authorities to consider whether or not to conduct an SSRA, it should be noted that the Agency generally does not expect that facilities that have conducted risk assessments will have to repeat them. As we explained in the 1999 final rule preamble, changes to comply with the MACT standards should not cause an increase in risk for the vast majority of facilities given that the changes will likely be the addition of pollution control equipment or a reduction in the hazardous waste being burned (see 64 FR 52842). Instances where a facility may need to repeat a risk assessment would be related to changes in conditions that would likely lead to increased risk. For example, if the only changes at a facility relate to the exposed population (a new housing development is constructed within a few square miles of the source), what was once determined to be protective under a previous risk assessment may now be beyond acceptable levels. Another example would be where a hazardous waste burning cement kiln that previously monitored hydrocarbons in the main stack elects to install a mid-kiln sampling port for carbon monoxide or hydrocarbon monitoring to avoid restrictions on hydrocarbon levels in the main stack. Thus, the stack hydrocarbon emissions may increase (64 FR 52843, footnote 29). In such situations, we would anticipate that the risk assessment would not have to be entirely redone. It may be as limited as collecting relevant new data for comparison purposes, leading to a decision not to repeat any portion of a risk assessment. Or, it may be more inclusive such that modifications would be made to specific inputs to or aspects of the risk assessment using data from a previous risk assessment, risk burn or comprehensive performance test. In recognition of this, we have added an additional factor to the list of factors at § 270.10(l)(1) to indicate that a previously conducted risk assessment

would be relevant in evaluating changes in conditions that may lead to increased risk. The factor reads as follows: ''Adequacy of any previously conducted risk assessment, given any subsequent changes in conditions likely to affect risk.'' The following discussion is intended mainly to address facilities that have not yet conducted an SSRA (i.e., where it has been determined that one is needed).

In the proposal we discussed our conclusion that almost all of the proposed standards for Phase 1 sources were equivalent to or more stringent than the 1999 final standards, with the exception of the mercury standard for new and existing LWAKs and the total chlorine standard for new LWAKs. However, there are additional standards for Phase 1 sources finalized in today's rulemaking that are less stringent than the 1999 final standards. In addition to those discussed in the proposal, the following standards are less stringent than the 1999 final standards: mercury for new cement kilns and semi-volatile metals for existing cement kilns; dioxin/furan for existing and new LWAKs, mercury for existing and new LWAKs, and total chlorine for existing and new LWAKs. Because these standards exceed the levels which were evaluated in the 1999 national risk assessment, especially with respect to mercury and dioxin/furan standards for which the national risk assessment showed high end risks at or near levels of concern, permit authorities may decide on a case-by-case basis that an SSRA is appropriate to determine whether the less stringent Replacement standards are protective. In addition, the comparative analysis results suggest concern regarding the dioxin/furan standard for LWAKs and thus, permit authorities may consider site-specific factors in determining whether the standard is sufficiently protective.

Specific to Phase 2 sources, we mentioned earlier that we conducted the same comparative risk analysis for Phase 2 sources as we did for Phase 1 sources (i.e., by comparing the Phase 2 standards to the 1999 final standards for Phase 1 sources). Although several MACT standards for Phase 2 sources are more stringent than the BIF standards under RCRA, there are a few MACT standards that may be cause for concern on a case-by-case basis, as they are either less stringent than some of the 1999 final standards or the comparative risk analysis suggests concern. They are: The particulate matter standard (and certain metals such as antimony and thallium), mercury standard, and total chlorine standard for solid fuel-fired boilers (SFBs); the dioxin/furan standard (carbon monoxide or total hydrocarbon as surrogate controls, versus a numerical standard) for HCl production furnaces; and the dioxin/furan standard for liquid fuel-fired boilers (LFBs) with dry APCDs. In addition, dioxin/furan emissions data for LFBs with wet or no APCDs indicate an observed level (1.4 ng TEQ/dscm) of more than three times the highest dioxin/furan standard evaluated in the 1999 national risk assessment (69 FR 21285).[230] Thus, these standards may warrant site-specific risk consideration, especially with respect to the dioxin/furan standards. That is, due to the complexity of the dioxin/furan formation mechanism and given the toxicity of dioxin/furans,[231] an SSRA may be needed based on the specific emission levels of each source not subject to a numerical standard. For additional discussion on the protectiveness of standards, please refer to Part Seven: How Does the Final Rule Meet the RCRA Protectiveness Mandate?

There are also site-specific factors beyond the standards that can be important to the SSRA decision making process. As discussed in the proposal, examples include a source's proximity to a water body or endangered species habitat, repeated occurrences of contaminant advisories for nearby water bodies, the number of hazardous air pollutant emission sources within a facility and the surrounding community, whether or not the waste feed to the combustor is made up of persistent, bioaccumulative or toxic contaminants, and sensitive receptors with potentially significantly different exposure pathways, such as Native Americans (69 FR 21326). Also, there are several uncertainties inherent in the 1999 national risk assessment.[232] Thus, the same uncertainties related to the fate and transport of mercury in the environment and the biological significance of mercury exposures in fish (i.e., once mercury has been transformed into methylmercury, it can be ingested by the lower trophic level organisms where it can bioaccumulate in fish tissue), as well as the risk posed by non-dioxin products of incomplete combustion, remain today and may influence a permitting authority's decision. Last, we are finalizing the option for Phase 2 area sources to comply with specific MACT standards as provided by CAA § 112(c)(6) specific pollutants authority. These area sources may need to conduct an SSRA for the remaining RCRA standards that they choose to comply with (i.e., since they do not address the potential risk from indirect exposures to long-term deposition of metals onto soils and surface waters).[233]

In addition to the examples provided in the previous paragraph, we also expressed that an SSRA may be necessary with respect to the proposed thermal emission standards. With respect to Phase 1 sources, we had noted in the proposal that the thermal emission standards for semi-volatile and low volatile metals for cement kilns and LWAKs may be of concern because they directly address emissions attributable to hazardous waste versus a source's total HAP metal emissions. See 69 FR 21326. However, we are requiring sources to comply with both the thermal emission standards and the Interim Standards in today's final rulemaking, since compliance with the thermal emission standards may not always assure compliance with the Interim Standards. As a result, the thermal emission standards for cement kilns and LWAKs no longer pose the uncertainties that they had in the proposal.[234] In regard to Phase 2 sources, the concern at the time of proposal was with respect to the thermal emission standards for liquid fuel-fired boilers. However, the comparative analysis for today's final rulemaking for liquid fuel-fired boilers, which is based on total stack emissions from these sources while assuming compliance with the thermal standards, does not suggest that risks for LFBs are cause for concern (except as otherwise noted, e.g., dioxins).

C. What Changes Are EPA Finalizing With Respect to the Site-Specific Risk Assessment Policy?

In the 1999 final rule preamble, we included a revised site-specific risk assessment (SSRA) policy recommendation to account for promulgation of the new technology-based CAA MACT standards for Phase

[230] The comparative analysis did not specifically suggest concern as it has for other source categories, but per the reference to the proposal, we have some concern regarding the protectiveness of the standard.

[231] There is ongoing uncertainty in cancer and other health effects levels for chlorinated dioxins and furans.

[232] Uncertainties stem from a lack of information regarding the behavior of mercury in the environment and a lack of sufficient emissions data and parameter values (e.g., bioaccumulation values) for nondioxin products of incomplete combustion. See 64 FR 52840–52841.

[233] Currently, there are only five area sources that this may apply to; they are interim status units in the process of conducting an SSRA as part of their final permits.

[234] An exception would be the semivolatile metal Interim standard for existing cement kilns, which is less stringent than the 1999 final standard. As we noted, permit authorities may consider the need for an SSRA as a result.

1 sources. We recommended that permitting authorities evaluate the need for an SSRA on a case-by-case basis for hazardous waste combustors subject to the Phase 1 MACT standards. For hazardous waste combustors not subject to the Phase 1 standards, we continued to recommend that SSRAs be conducted as part of the RCRA permitting process if necessary to protect human health and the environment. We indicated that the RCRA omnibus provision authorized permit authorities to require applicants to submit SSRA results where an SSRA was determined to be necessary. For the reasons described in the previous subsection, we believe that additional controls may be necessary on a site-specific basis to ensure that adequate protection is achieved in accordance with RCRA.

Consequently, because SSRAs are likely to continue to be necessary at some facilities (mainly those that have not previously conducted an SSRA), we concluded that it is more appropriate to include a regulatory provision that explicitly provides for the permit authority to require SSRAs on a case-by-case basis and add conditions to RCRA permits based on SSRA results. Therefore, instead of relying on RCRA § 3005(c)(3) and its associated regulations at § 270.10(k) when permitting authorities conduct or require a risk assessment on a site-specific basis (i.e., as applicable to those newly entering the RCRA permit process), we had proposed to codify the authorities provided by sections 3004(a) and (q) and 3005(b). See proposed regulations at 69 FR 21383–21384, §§ 270.10(l) and 270.32(b)(3). In proposing to codify these authorities, we stated that we were not requiring that SSRAs automatically be conducted for hazardous waste combustion units, but that the decision of whether or not a risk assessment is necessary must be made based upon relevant factors associated with an individual combustion unit and that there are combustion units for which an SSRA will not be necessary. Further, we explained that the proposed language would provide notice to the regulated community that an SSRA may be necessary to support a source's permit, while reminding the permit agency of the need to evaluate whether an SSRA would be necessary on a site-specific basis.

Despite our efforts to explain that by codifying these provisions, we are only modifying the statutory authority under which we implement the SSRA policy while maintaining the same SSRA policy from a substantive standpoint, commenters generally opposed EPA's proposed codification. The comment most frequently presented was that the proposed regulatory language is not helpful to anyone (i.e., regulated community, the public or permitting agencies), is redundant with the omnibus authority, and sets an extremely low hurdle for regulators to require SSRAs.

We disagree that the new regulatory language is not helpful and that it sets an extremely low hurdle for regulators to require SSRAs. We believe that the new provisions are beneficial in two ways: (1) They provide notice to the regulated community and public that an SSRA may be necessary to support a source's permit; and (2) they remind the permitting agencies of the importance of evaluating whether an SSRA would be necessary on a site-specific basis. The new regulatory provision in no way expands or supplements the authority on which EPA had previously relied—i.e., omnibus and § 270.10(k), thus it does not provide any more or less authority to permit authorities (i.e., lower or raise the hurdle) to require SSRAs. We agree that, because the proposed language provides permitting authorities with no greater authority than the omnibus authority, it is somewhat duplicative of § 270.10(k). However, as noted, EPA believes this provision offers important benefits to both the agency and the regulated community, and as explained further below, EPA has adopted a slightly modified version of the proposal pursuant to RCRA § 3004(a) and § 3005(b). See also discussion in subsection F.

Another common view expressed by commenters is that, although extensive risk assessments that have been performed for more than a decade, showing lack of risk to human health and the environment, EPA continues to require SSRAs without a technical evaluation of the historical results. To the contrary, EPA Regional permit writers have found that certain chemicals (especially dioxin and mercury)[235] pose excess risk in certain circumstances—even under the Interim Standards—and consequently find it necessary to assess risk to human health and the environment based on site-specific conditions at the facility. In EPA Regions 7 and 10 for example, some facilities have RCRA risk-based permit conditions that establish more frequent sampling or limits on feed rate for specified metals to ensure that ecologically sensitive areas are not adversely impacted.

Many commenters also state that CAA § 112(f) residual risk process is the appropriate method to assess risk for hazardous waste combustors complying with MACT, not RCRA risk assessments. Specifically, one commenter argued that EPA lacked statutory authority to rely on the omnibus provisions to require SSRA and SSRA-based controls on the grounds that § 112(f) of the Clean Air Act establishes a specific provision to control any residual risk from combustor emissions. We disagree with commenters for two reasons. First, as we explained in the 1999 final rule preamble, the omnibus provision is a RCRA statutory requirement and the CAA does not override RCRA. Promulgation of the MACT standards, therefore, does not duplicate, supersede, or otherwise modify the omnibus provision or its applicability to the sources covered by today's rule. Second, the SSRA under RCRA is usually conducted prior to issuance of the final permit. The CAA residual risk determination is generally made eight years after promulgation of the MACT standards for a source category. Accordingly, a permit authority currently facing a permit decision could not rely on these yet unwritten residual risk standards to resolve its identified concern that the MACT standard may not be sufficiently protective at an individual site. In addition, even though we believe that § 3005(c)(3) and its associated regulations provide the authority to require and perform SSRAs and to write permit conditions based on SSRA results, we are not relying on these provisions as the authority for § 270.10(l). Rather, we are relying on §§ 3004(a) and (q) and 3005(b). See 69 FR 21327.

With respect to the costs incurred when conducting an SSRA, several commenters raised the concern that our approximations do not include portions of actual costs (e.g., data gathering, QA/QC, and third party consultants, risk assessors, and plant personnel time to coordinate and review SSRA efforts and collect facility data), thus resulting in artificially low costs. Commenters cited additional reasons why they feel that EPA's cost estimates are too low including our assumptions that: (1) SSRAs are a one-time or infrequent cost; (2) most SSRAs fall under ''normal'' versus ''unusual'' situations; and (3) the cost of conducting a risk burn during a

[235] Dioxin is a common risk driver due to ongoing uncertainty in cancer and other health effects levels for chlorinated dioxins and furans. Mercury is also a common risk driver due to uncertainties implicit in the quantitative mercury analysis. See discussion in Part Seven, Section II. and 65 FR 52997. Thus, it is not uncommon for permit authorities to require risk-based RCRA permit limits (based on risk assessment results) to control emissions of these pollutants.

trial burn adds only 20% more to the cost.

Regarding the comment that we did not include actual costs for our estimates of overall costs to conduct an SSRA, we agree that some costs were overlooked. We did include the costs related to conducting an SSRA under ''normal'' and ''unusual'' conditions, SSRA data collection in conjunction with a regular performance burn, and a full independent risk burn including protocol, sampling, analysis, and report. However, we did not capture facility time associated with data collection and management related to the SSRA. Consequently, we have revised our cost estimate for performing these activities; see chapter 4 of the background document entitled, Assessment of the Potential Costs, Benefits, and Other Impacts of the Hazardous Waste Combustion MACT Replacement Standards—Final Rule, October 12, 2005.

In response to the broader comment that our cost estimates are too low (for several reasons mentioned previously), we agree that our estimate of a 20% additional cost to conduct a risk burn with a trial burn may have been conservative and therefore, we have adjusted our previous estimate to include a range of 20% to 40%. The total SSRA cost range has also been updated from $141K–$370K to $157K–$815K.[236] With respect to our assumption that the majority of SSRAs are conducted under ''normal'' conditions (lending to overall lower cost estimates), we do believe that the majority of future SSRAs will fall under the ''normal'' conditions.[237] We believe this is appropriate due to: lack of new facilities coming on-line for which there is no previous test data; availability of commercial modeling software; and finalization of the ''Human Health Risk Assessment Protocol for Hazardous Waste Combustion Facilities'' guidance, or ''HHRAP'' guidance. However, we do recognize that some facilities can be more complex than others in the hazardous waste combustion universe. Therefore, we have identified a portion of facilities that are likely to incur ''unusual'' costs for a future SSRA and have revised our cost analysis to reflect inclusion of these higher-cost facilities. See background document, Assessment of the Potential Costs, Benefits, and Other Impacts of the Hazardous Waste Combustion MACT Replacement Standards—Final Rule, October 12, 2005.

Also, we maintain our assumption that SSRAs generally represent a one-time cost unless a facility significantly changes its operations or if receptors change such that an increase in risk is anticipated as a result. Even so, as explained earlier in subsection B., we would anticipate that the risk assessment would not have to be entirely redone. It may be as limited as collecting relevant new data for comparison purposes, leading to a decision not to repeat any portion of a risk assessment. Or, it may be more inclusive such that modifications would be made to specific inputs to or aspects of the risk assessment using data from a previous risk assessment, risk burn or comprehensive performance test. With respect to chemical weapons demilitarization facilities, we recognize that due to their specialized waste streams and multiple treatment units, SSRAs, in many cases, are not one-time events and as a result, their SSRA costs are relatively high. The high costs can be attributed to the necessity for each chemical weapons demilitarization facility to perform surrogate trial burns and then agent trial burns for each furnace and each agent campaign (e.g., GB (Sarin), VX, and HD (Sulfur Mustard)). For example, a chemical weapons demilitarization facility would conduct GB trial burns on all the furnaces and then complete destruction of the GB stockpile, followed by VX trial burns and VX stockpile and finally, the HD trial burns and the HD stockpile. This effectively extends the input to the risk assessment of the trial burn data over most of the operational life of the facility.

Last, several commenters raised the concern that EPA's proposal to codify the authority to require SSRAs on a case-by-case basis and add conditions to RCRA permits based on SSRA results, violates the due process protections afforded under the current structure, where SSRAs are required and performed pursuant to RCRA § 3005(c)(3) omnibus authority. Commenters were further concerned that the proposed language in § 270.10(l) would remove existing procedural safeguards by allowing the Agency to require a very expensive SSRA before the draft permit is even issued, thus violating EPA's own procedural standards as well as due process. It appears as though commenters believe that the procedures (and procedural protections) currently applicable whenever an SSRA is conducted are unique to circumstances in which the permitting authority proceeds under the authority of RCRA § 3005(c)(3)—the ''omnibus'' provision. This is incorrect. All of the specific procedural requirements the commenters have raised would be applicable whether the permitting authority proceeded under § 270.10(l), as EPA proposed, or pursuant to RCRA § 3005(c)(3) and § 270.10(k), as is the current practice.

All of the requirements established in Part 124 continue to apply, whether EPA proceeds under § 270.10(l) or under § 270.10(k). As we discussed in the proposal, the basis for the decision to conduct a risk assessment, or to request additional information to evaluate risk or determine whether a risk assessment is necessary, must be included in the administrative record for the facility and made available to the public during the comment period for the draft permit. See 40 CFR 124.7 [statement of basis]; 124.9 [administrative record for draft permit]; 124.18 [administrative record for final permit]. If the facility, or any other party, files comments on a draft permit decision objecting to the permitting authority's conclusions regarding the need for a risk assessment, the permitting authority must respond fully to the comments. Any permit conditions determined to be necessary based either on the SSRA, or because the facility declined to conduct an SSRA, also must be documented and supported in the administrative record.

The commenters' concern that § 270.10(l) allows the permitting authority to require the SSRA prior to the issuance of a draft permit, and therefore the applicant would have no opportunity to comment or challenge that determination, is equally unfounded. There is effectively no practical or substantive distinction between the circumstance when a permit authority communicates the decision that an SSRA is necessary to issue the permit prior to issuing the draft permit, or as part of the draft permit. In either case, if a facility refuses to provide a risk assessment or data to support a risk assessment requested under this provision, the regulations at part 124 make clear that the appropriate recourse is for the permit authority to deny the permit (See 40 CFR 124.3(d); 124.6(b) and 270.10(c). The basis for the denial would essentially be the same in either case—that the information before the agency gives rise to a concern that the MACT may not be sufficiently protective,

[236] The high end of this range applies only to those systems operating under ''unusual conditions'' (the available data suggest that there are only five such facilities).

[237] Normal conditions assume use of previously collected performance burn data, use of standard commercial modeling software that meet Agency guidance, and limited interactions with State and Federal oversight authorities. Unusual conditions assume the need for site-specific modeling, extensive interactions with stakeholders and regulators, an extended time frame, and targeted ecological analyses.

which the agency is unable to dispel based on the information before it. Consequently, the permit authority cannot determine that the permit meets RCRA's standard for permit issuance. An as noted above, all of the requirements of Part 124 would apply to actions taken in accordance with § 270.10(l). For additional discussion on this issue, please refer to the Response to Comments background document for this final rule.[238]

Despite the many reasons offered by commenters opposing our proposal, we continue to believe that our proposed approach is appropriate. As discussed in the proposal (69 FR 21327) and in the previous subsection, although the Phase 1 Replacement and Phase 2 standards provide a high level of protection (i.e., they are generally protective) to human health and the environment, thereby allowing us to nationally defer the RCRA emission requirements to MACT, additional controls may be necessary on an individual source basis to ensure that adequate protection is achieved in accordance with RCRA. Until today, we have relied exclusively upon RCRA § 3005(c)(3) and its associated regulations at § 270.10(k) when conducting or requiring an SSRA. We continue to believe that § 3005(c)(3) and its associated regulations provide the authority to require and perform SSRAs and to write permit conditions based on SSRA results. In fact, as the next subsection will explain, EPA will likely continue to include permit conditions based on the omnibus authority in some circumstances when conducting these activities, and state agencies in states with authorized programs will continue to rely on their own authorized equivalent. However, because SSRAs are likely to continue to be necessary at some facilities, we are finalizing the authority to require them on a case-by-case basis and add conditions to RCRA permits based on SSRA results under the authority of RCRA §§ 3004(a) and (q) and 3005(c). Therefore, we are finalizing §§ 270.10(l) and 270.32(b)(3) with some minor modifications to provide further clarification of the Agency's intent.

D. How Will the New SSRA Regulatory Provisions Work?

The new regulatory provisions are finalized under both base program authority (§ 3004(a) and § 3005(b)) and HSWA authority (§ 3004(q)). That is, changes made to regulations applicable to boilers are promulgated under HSWA authority, whereas changes made to regulations applicable to incinerators are promulgated under non-HSWA authority. Consequently, when it is determined that an SSRA is needed, the applicability of these provisions will vary according to the type of combustion unit (whether it is regulated under 3004(q), or only 3004(a) and 3005(b)), and the authorization status of the state. Depending on the facts, the new authority would be applicable, or the omnibus provision would remain the principal authority for requiring SSRAs and imposing risk-based conditions where appropriate. See 69 FR 21327.

According to the state authorization section of this preamble (see Part Five, Section IV.), EPA does not consider these provisions to be either more or less stringent than the pre-existing federal program, since they simply make explicit an authority that has been and remains available under the omnibus authority and its implementing regulations. Thus, states with authorized equivalents to the federal omnibus authority will not be required to adopt these provisions, so long as they interpret their omnibus authority broadly enough to require risk assessments where necessary.[239]

The provisions of §§ 270.10(l) and 270.32(b)(3) adopted in today's rule are substantially similar to the provisions EPA proposed. Section 270.10(l) continues to explicitly provide that a permit authority has the authority to evaluate, on a case-by-case basis, the need for an SSRA. EPA has also retained its proposed language that explicitly provides that, where an SSRA is determined to be necessary, the permit authority may require a permittee or an applicant to conduct an SSRA, or to provide the regulatory agency with the information necessary to conduct an SSRA on behalf of the permittee/applicant. The final provision also essentially retains the standard laid out in the proposal: that a permit authority may decide that an SSRA is warranted based on a conclusion that additional controls beyond those required pursuant to 40 CFR parts 63, 264, 265, or 266 may be needed to ensure protection of human health and the environment under RCRA. In § 270.32(b)(3), EPA has also explicitly codified the authority for permit authorities to require that the applicant provide information, if needed, to make the decision of whether an SSRA should be required.

However, EPA has adopted some further clarifications to the final provisions in response to comments. In response to comments that the regulatory language EPA had proposed still fails to provide the regulated community with adequate notice that an SSRA might be required, and what that might entail, EPA has included additional language to address those issues. Specifically, EPA has included a sentence stating that the information required under § 270.10(l) can include the information necessary to evaluate the potential risk to human health and/or the environment resulting from both direct and indirect exposure pathways. EPA has also added language to remind permit authorities that the determination that the MACT standards may not be sufficiently protective is to be based only on factors relevant to the potential risk from the hazardous waste combustion unit at the site, and has provided a list of factors to guide the permit authority in making that determination. See subsections E. and F. for further discussion. The applicability language of §§ 270.19, 270.22, 270.62, and 270.66 also has been amended to allow a permit authority that has determined that an SSRA is necessary to continue to apply the relevant requirements of these sections on a case-by-case basis and as they relate to the performance of the SSRA after the source has demonstrated compliance with the MACT standards.

As previously noted, the requirements at 40 CFR Part 124 continue to apply to actions taken to implement § 270.10(l). Thus, if the permitting authority concludes that a risk assessment or additional information is necessary for a particular combustor, the permitting authority must provide the factual and technical basis for its decision in the permit's administrative record and must make it available to the public during the comment period for the draft permit. If the facility or any other party files comments on a draft permit decision objecting to the permitting authority's conclusions regarding the need for an SSRA, the authority must respond fully to the comments. In addition, the SSRA must be included in the administrative record and made available to the public during the comment period. Any additional conditions and limitations determined to be necessary as a result of the SSRA must be documented and supported in the administrative record as well.[240]

[238] See final Response to Comment to the HWC MACT Standards, Volume 5, Miscellaneous.

[239] Authorized states are required to modify their programs only when EPA enacts federal requirements that are more stringent or broader in scope than existing federal requirements. This applies to regulations promulgated under both HSWA and non-HSWA authorities.

[240] Additional clarification on the appropriate use of the SSRA policy and technical guidance is provided in the April 10, 2003 memorandum from Marianne Lamont Horinko entitled ''Use of the Site-

E. What Were Commenters' Reactions to EPA's Proposed Decision Not To Provide National Criteria for Determining When an SSRA Is or Is Not Necessary?

In the proposal, we stated that we were not proposing national criteria (e.g., guiding factors) for determining when an SSRA is necessary. Although we had developed a list of qualitative guiding factors for permit authorities to consult when considering the need for an SSRA in the September 1999 final rulemaking (revised from the April 1996 NPRM), we never intended for them to comprise an exclusive list for several reasons. Mainly, we felt that the complexity of multi-pathway risk assessments precluded the conversion of the qualitative guiding factors into more definitive criteria. See 69 FR 21328.

Commenters generally agreed that the risk assessment guidance and policy should not be codified. They agreed in principle that it is important to keep the decision to require an SSRA flexible because factors vary from facility to facility. However, several commenters raised the concern that the proposed language of § 270.10 (l) was too vague. For example, one commenter suggested that any additional guidance clarifying how risk assessments should be performed and that providing standards or goals to be achieved by the operating conditions would be helpful. Another commenter felt that EPA should identify specific factors that the regions and authorized states should consider, and specific criteria that should be met, before requiring an SSRA or additional emission controls or other standards. We agree with commenters that additional guidance would be beneficial and have taken a number of actions in this regard. First, EPA is adopting a more detailed regulatory provision that provides a non-exclusive list of guiding factors for permit authorities to use in determining whether the MACT will be sufficiently protective at an individual site, and consequently, whether an SSRA is warranted. Section 270.10(l) now requires that the permit writer's evaluation of whether compliance with the standards of 40 CFR part 63, Subpart EEE alone is protective of human health or the environment be based on factors relevant to the potential risk from a hazardous waste combustion unit, including, as appropriate, any of the specifically enumerated factors. These factors reflect the eight guiding factors that EPA has discussed in several rule preambles. See 61 FR 17372, 64 FR 52842, and 69 FR 21328. However, EPA has also incorporated a few minor revisions to reflect the standards promulgated today, and to reflect the fact that the factors will be codified.

EPA has revised the language of the factors so that the language is consistent between the provisions. Consistency of phrasing is generally more important in regulations, which are binding, than in guidance. For example, some of the factors listed in the 1999 preamble used the phrase ''presence or absence'' while other used the phrase ''identities and quantities.'' EPA has adopted the phrase ''identities and quantities,'' on the grounds that it more precisely expresses the concept intended by both phrases. EPA has also made minor revisions to reduce redundant text, and to shorten the provisions, in the interests of clarity. For example, rather than addressing the proximity of receptors in two factors, EPA addresses this issue in a single factor. However, nothing contained in either of the original factors was deleted as part of this revision. None of the revisions described here substantively change the issues to be considered from those contained in the original eight guiding factors.

In addition to these minor technical revisions, EPA has included language to clarify that one potentially relevant factor for consideration is the ''identities and quantities of persistent, bioaccumulative or toxic pollutants considering enforceable controls in place to limit those pollutants.'' This reflects changes made between the proposed and final MACT standards (e.g., the proposed rule called for beyond-the-floor dioxin limits for some sources; those were not promulgated in the final rule).

Another change is the EPA has deleted the factor that listed ''concerns raised by the public.'' The regulation will allow the decision to be based on any one of the listed factors, and public concern, unaccompanied by an identifiable risk, would not provide an adequate basis for determining that an SSRA was warranted.

Finally, as discussed previously in subsection B., EPA has added an additional factor to indicate that a previously conducted risk assessment would be relevant in evaluating changes in conditions that may lead to increased risk. The factor reads as follows: ''Adequacy of any previously conducted risk assessment, given any subsequent changes in conditions likely to affect risk.'' See § 270.10(l)(1).

One commenter raised the concern that the eight guiding factors the Agency specified in its **Federal Register** notice at 64 FR 52842 (September 30, 1999) did not adequately focus on the central question of whether there are likely to be emissions that would be uncontrolled under the Subpart EEE final rule. They argued that, as an example, under guiding factor #5, if the waste containing highly toxic constituents are being addressed by the Subpart EEE standards, the fact that there might be such wastes should not justify an SSRA. The commenter apparently misunderstands that the factors were not intended to function as stand-alone criteria for requiring an SSRA—i.e., to use their example, the commenter believes that the mere fact that highly toxic constituents are present in the waste would justify an SSRA without consideration of whether the MACT emission standards were sufficiently protective. This is an incorrect reading of EPA's proposed regulation. Rather, the factors were always intended to function as considerations that might be relevant to the determination of whether the MACT was sufficiently protective. However, the regulatory structure EPA has adopted in the final rule makes perfectly clear that the critical determination is that ''compliance with the standards of 40 CFR part 63, Subpart EEE alone may not be protective of human health or the environment.'' Further, the provision states that this determination is to be based only on factors relevant to the potential risk from the hazardous waste combustion unit, including, as appropriate, the listed factors. EPA believes that these provisions make clear that the determination of whether to require an SSRA is to be based on consideration of the conditions at the facility site, including, for example, an evaluation of all enforceable controls in place to limit emissions. Further discussion of EPA's revised provisions can be found in subsection F.

Second, as discussed in more detail below, EPA is issuing a revised risk assessment guidance document that we believe will provide additional insight to help users. While clearly delineating between risk management and risk assessment, the HHRAP explains in great detail a recommended process for performing and reporting on cost-effective, scientifically defensible risk assessments. It includes numerous recommended defaults, while at the same time is flexible enough to incorporate site-specific values. Although the HHRAP provides numerous recommendations, it remains merely guidance and consequently leaves the final decisions up to the permitting authority. We believe that

Specific Risk Assessment Policy and Guidance for Hazardous Waste Combustion Facilities.'' (See Docket # OAR–2004–0022–0083).

the revised HHRAP guidance will provide further assistance to permit writers, risk assessors and facilities in determining whether or not to conduct an SSRA and what and how much information is required for the SSRA.

F. What Are EPA's Responses to the Cement Kiln Recycling Coalition's Comments on the Proposal and What is EPA's Final Decision on CKRC's Petition?

In the proposal, we provided a lengthy discussion in response to CKRC's petition for rulemaking (69 FR 21325–21331). In its petition, CKRC presented two requests with respect to SSRAs: (1) That EPA repeal the existing SSRA policy and technical guidance because CKRC believes that the policy and guidance ''are regulations issued without appropriate notice and comment rulemaking procedures''; and (2) after EPA repeals the policy and guidance, ''should EPA believe it can establish the need to require SSRAs in certain situations, CKRC urges EPA undertake an appropriate notice and comment rulemaking process seeking to promulgate regulations establishing such requirements.'' Additionally, CKRC stated that it does ''not believe that these SSRAs are in any event necessary or appropriate'' and that they disagree with EPA's use of the RCRA omnibus provision as the authority to conduct SSRAs. Finally, CKRC raised three general concerns: (1) Whether an SSRA is needed for hazardous waste combustors that will be receiving a RCRA permit when the combustor is in full compliance with the RCRA boiler and industrial furnace regulations and/or with the MACT regulations; (2) how an SSRA should be conducted; and (3) what is the threshold level for a ''yes'' or ''no'' decision that additional risk-based permit conditions are necessary. We believe our tentative decision in the proposal addressed each request and concern presented in their petition. However, in its comments, CKRC has restated many of the same issues with new emphasis. Thus, we believe it is appropriate to address their major comments in the following paragraphs.[240a]

1. Whether SSRAs Are Necessary for Facilities in Full Compliance With BIF or MACT Regulations

In its comments, CKRC continues to question the need for any SSRAs at facilities that are in full compliance with the MACT EEE standards. CKRC also states that ''[our] Petition challenged EPA to explain why, if there is any need for SSRAs at all under RCRA, there is a rational basis for why it has limited the entire SSRA program to hazardous waste combustors.'' They argue that, ''The point is that if the ''omnibus'' words in RCRA mean what EPA says they mean for hazardous waste combustors, why do they not mean the same thing for all of the other TSD facilities that also pose the same kind of ''what-if'' hypotheticals that EPA throws out in its preamble?''

As discussed above in subsection B., and in greater detail below, EPA believes that risk assessments will continue to be necessary at some facilities. For example, based on the inconclusive results from the national risk assessment conducted for the 1999 final rule and the comparative risk analysis conducted for today's rule, EPA is not able to conclude that all MACT standards will be sufficiently protective for every facility (e.g., non-dioxin PICs not previously modeled, no numerical dioxin/furan emission standard for solid fuel-fired boilers, liquid fuel-fired boilers with wet or no APCDs, and hydrochloric acid production furnaces, etc.). EPA also provided examples of site-specific factors that might lead risk assessors to decide that the MACT standards may not be sufficiently protective, and therefore an SSRA may be necessary (e.g., if a source's emissions are comprised of persistent bioaccumulative or toxic contaminants). EPA also discussed this issue at length in both the 2004 proposal, and the 1999 rule preamble. See 69 FR 21326 and 64 FR 52842. Given these uncertainties, the SSRA provides significant support for the Agency's 1006(b) determination supporting the elimination of separate RCRA emission standards for MACT EEE facilities.

We disagree that our discussion of standards (and site-specific factors) that may warrant a risk evaluation at certain types of facilities are mere ''what-if'' hypotheticals. The examples that we discussed in both the earlier preambles and above were based on the 1999 national risk assessment and a comparative risk analysis, which concluded that either there was not enough information to make a definitive protectiveness determination or that uncertainty in cancer and other health effects levels of dioxin and furans, for instance, make it difficult to draw conclusions about potential risks. Furthermore, the discussions with respect to the protectiveness of certain standards (i.e., some are less stringent today than the 1999 standards) in subsection B., present a reasonable basis for permitting authorities to consider whether or not risk should be evaluated. In support of our position that the examples we have provided in the 1999 final rule preamble, the 2004 proposed rule preamble, and this final rule, are more than ''what-if'' hypotheticals, we have placed copies of completed risk assessments where risk-based limits were found to be necessary in the docket for today's final rule (see OAR–2004–0022).

The CKRC fails to acknowledge that there are many aspects of hazardous waste combustors and the combustion process itself, which make this category of TSD facilities different from others, and which factor heavily into our SSRA policy. Consider that many combustion facilities feed a wide array of waste streams comprised of many hazardous constituents. The combustion of these constituents results in complex chemical processes (which are difficult to predict) occurring throughout the combustion unit. The end product is stack emissions comprised of a variety of compounds different from those that enter the process, and thus are difficult to predict because they can vary greatly based on the many variables of the individual combustion unit, making them difficult to address (*i.e.*, there are no specific emissions standards to limit certain compounds such as products of incomplete combustion). For example, in attempting to maximize the destruction of organic compounds, products of incomplete combustion are often generated as a consequence. Further, due to stack dispersion, hazardous waste combustors have the potential to affect several square miles. Other types of TSD facilities' operations typically do not encompass such complex processes or have the potential to adversely affect receptors for several square miles.

It should be noted that hazardous waste combustors are not the only type of TSD subjected to site-specific evaluations of risk. We take a site-specific approach to regulating miscellaneous units under Part 264, subpart X. Because it is not possible to develop performance standards and emission limits for each type of treatment unit that may fall under this broad category, we rely on general environmental performance standards to meet our mandate under §§ 3004 (a) and (q) that standards governing the operation of hazardous waste facilities be protective of human health and the environment. For example, § 264.601(c) requires ''Prevention of any release that may have adverse effects on human

[240a] CKRC provided numerous comments organized by subtitles. Rather than relying on this format in the preamble, we have organized the comments and responses according to the concerns initially raised in the petition, and consistent with the discussion presented in the proposal.

health or the environment due to migration of waste constituents in the air, considering: * * * (6) the potential for health risks caused by human exposure to waste constituents; and * * *'' For all intents and purposes, subparts X units are subject to SSRAs as well.

In addition, the question of whether an SSRA continues to be necessary is partly a function of the fact that EPA is seeking to rely on CAA MACT standards in order to eliminate RCRA emissions standards for these facilities. As noted above, because the MACT is technology-based, and because of uncertainties in our national risk assessments, permit writers' ability to conduct an SSRA in individual cases provides important support for our deferral.

RCRA §§ 3004(a) and (q) mandate that standards governing the operation of hazardous waste combustion facilities be protective of human health and the environment. To meet this mandate, we originally developed national combustion standards under RCRA, taking into account the potential risk posed by direct inhalation of the emissions from these sources. With advancements in risk assessment science since promulgation of the original national standards (*i.e.*, 1981 for incinerators and 1991 for boilers and industrial furnaces), it became apparent that the risk posed by indirect exposure (*e.g.*, ingestion of contaminants in the food chain) to long-term deposition of metals, dioxins/furans and other organic compounds onto soils and surface waters should be assessed in addition to the risk posed by direct inhalation exposure to these contaminants. We also recognized that the national assessments performed in support of the original hazardous waste combustor standards did not take into account unique and site-specific considerations which might influence the risk posed by a particular source. Therefore, until EPA was able to revise its regulations, to ensure the RCRA mandate was met on a facility-specific level for all hazardous waste combustors, we strongly recommended that site-specific risk assessments (SSRAs), including evaluations of risk resulting from both direct and indirect exposure pathways, be conducted as part of the RCRA permitting process. In those situations where the results of an SSRA showed that a facility's operations could pose an unacceptable risk (even after compliance with the RCRA national regulatory standards), additional risk based, site-specific permit conditions could be imposed pursuant to RCRA's omnibus authority, § 3005(c)(3).

Rather than establish separate emission standards under RCRA, EPA decided to coordinate its revisions to the RCRA emissions standards for hazardous waste combustors with the adoption of the MACT standards pursuant to § 112(d) of the CAA. See 64 FR 52832. In the rulemaking establishing the MACT standards for incinerators, cement kilns and lightweight aggregate kilns (Phase 1 sources), relying on RCRA § 1006(b), EPA determined that in most cases, the MACT standards would be sufficiently protective that separate RCRA emission standards and operating conditions would not need to be included in the facility's RCRA permit. However, for a variety of reasons, EPA lacked sufficient factual basis to conclude that a complete deferral of RCRA requirements could be supported for all facilities.

Section 1006(b) conditions EPA's authority to reduce or eliminate RCRA requirements on the Agency's ability to demonstrate that the integration meets RCRA's protectiveness mandate (42 U.S.C. 6005(b)(1)). See *Chemical Waste Management* v. *EPA*, 976 F.2d 2, 23, 25 (D.C. Cir. 1992). To support its RCRA § 1006(b) determination, EPA conducted a national evaluation of both direct and indirect human health and ecological risks to determine if the MACT standards would satisfy the RCRA mandate to protect human health and the environment. That evaluation, however, did not quantitatively assess the proposed standards with respect to mercury and nondioxin products of incomplete combustion. This was due to a lack of adequate information regarding the behavior of mercury in the environment and a lack of sufficient emissions data and parameter values (*e.g.*, bioaccumulation values) for nondioxin products of incomplete combustion. Since it was not possible to suitably evaluate the proposed standards for the potential risk posed by mercury and nondioxin products of incomplete combustion, in order to support our 1006(b) determination, we continued to recommend that SSRAs be conducted for some facilities as part of the permitting process until we could conduct a further assessment once final MACT standards were promulgated and implemented. Specifically, we recommended that for hazardous waste combustors subject to the Phase 1 MACT standards—hazardous waste burning incinerators, cement kilns and light-weight aggregate kilns—permitting authorities should evaluate the need for an SSRA on a case-by-case basis. We further stated that while SSRAs are not anticipated to be necessary for every facility, they should be conducted where there is some reason to believe that operation in accordance with the MACT standards alone may not be protective of human health and the environment. For hazardous waste combustors not subject to the Phase 1 standards, we continued to recommend that SSRAs be conducted as part of the RCRA permitting process. See 64 FR 52841. As discussed in subsection B., EPA believes that SSRAs may continue to be necessary for some Phase 1 facilities. For the Phase 2 sources, our comparative risk analysis generally indicates that, although the MACT standards for Phase 2 sources are appreciably more stringent than the current RCRA BIF standards, an SSRA may be necessary to confirm that a facility will operate in a way that is protective of human health and the environment.

Thus, for both Phase 1 and Phase 2 sources, we continue to believe that SSRAs may be necessary for some facilities.[241] We generally believe the MACT standards will be protective; in most cases they are substantially more protective than the existing RCRA part 264, 265, and 266 requirements. However, because HWCs manage hazardous waste and process it by burning and emitting the by-products into the air, a multitude of potential exposure pathways exist. These exposure pathways can also vary substantially based on site-specific factors associated with an individual combustion unit and the surrounding site. Such factors make it difficult for the Agency to conclude that a single, national risk assessment provides adequate factual support for its determination that the technology-based MACT standards will be sufficiently protective. This is further complicated by the fact that, for certain parameters, the Agency lacked sufficient information to quantitatively assess the risk, but is relying on a combination of quantitative and qualitative assessments of the MACT standards' protectiveness.

Nonetheless, EPA does not believe that the uncertainty is so great that it would preclude a deferral under 1006(b) for the affected categories of facilities; nor does EPA believe that these uncertainties necessarily support requiring a risk assessment for all such facilities. Conditions at the facility

[241] As discussed in section B., we expect that facilities that have previously conducted an SSRA will not need to conduct another in consideration of today's final standards. Only those facilities newly subject to the RCRA permitting requirements, or existing sources where changes in conditions could lead to increased risk, may need to conduct or modify an existing SSRA.

might confirm that the MACT standards are sufficiently protective, without the need for a facility-wide risk assessment. For example, if the results of the MACT testing demonstrated that the facility's dioxin emissions fall below the levels estimated in the database EPA used for its comparative risk assessment, the uncertainties in EPA's comparative risk assessment would not, by itself, support a decision to require an SSRA. Such decisions require an evaluation of the conditions at the site, and EPA believes it important to retain the flexibility for permit authorities to take these conditions into account. Accordingly, EPA believes that the regulatory structure adopted in today's rule strikes the appropriate balance between these competing factors.

In response to EPA's statement in the proposal that non-HAP emissions, which were beyond the direct scope of MACT, may pose risk which could necessitate an SSRA (69 FR 21326), CKRC pointed out that the same could be said for other types of TSDs, such as landfills, land treatment systems, etcetera, and EPA has not addressed this point in its preamble. As previously noted, combustion units are distinct from other types of TSDs due to the wide array of waste streams being fed to the unit, the complex chemical processes throughout the combustion unit, stack emissions comprised of a wide variety of compounds that are difficult to address, and the potential to impact receptors for several square miles due to stack dispersion. A further distinction is that EPA is seeking to rely on the MACT standards to eliminate national RCRA stack emissions standards under § 1006(b). Unless EPA can affirmatively demonstrate that RCRA's protectiveness standards are met, the Agency cannot eliminate RCRA requirements. A number of uncertainties remain concerning the protectiveness of the MACT standards based on the uncertainties remaining in the supporting national risk assessment and comparative analysis, and the variability of site-specific factors from one facility to another. Permitting authorities' ability to resolve these uncertainties through the use of the SSRA, where appropriate, provides important support for the Agency's 1006(b) finding. Furthermore, as we have noted, under omnibus, to the extent permitting authorities believe there are problems with other types of TSDs, they can impose requirements and request additional information, including an SSRA in accordance with § 270.10(k). Also as previously noted, Part 264, subpart X specifically incorporates site-specific consideration of risk into its regulatory framework.

Next, CKRC comments that EPA has a non-discretionary duty under CAA § 112(f) to address and take care of any ''residual risk'' from MACT facilities in the future in any event. We discussed why we do not believe that the residual risk process should or can take the place of an SSRA under RCRA in subsection C. of this SSRA preamble, as well as in the 1999 rule preamble (64 FR 52843). In short, because the residual risk standards have not yet been established, permit writers cannot rely on this process in reaching current permitting decisions or in acting on currently pending permit applications.

2. Codification of EPA's Technical Guidance

In response to our explanation in the proposal that risk assessment guidelines should be flexible and reflect current science, CKRC gave three comments: (1) Not a word of the current SSRA guidelines has been changed in 3 years; (2) it is easy to write regulations that have provisions that might be applied differently in different situations, and at least many basic, fundamental points can go in regulations, while some details can be in guidance—EPA writes regulations accompanied by ''fill in the small details'' guidance all the time; and (3) EPA seems to have no real problems with regulatory fixes anyway. In addition, CKRC provides several comments related to the previous three throughout their comment document, which are addressed below.

None of these comments address the specific issue EPA raised, which is that, while it certainly is possible to codify our risk assessment guidance, for a variety of reasons, we disagree that it would be appropriate to issue these technical recommendations as a regulation. As we previously explained, risk assessment—especially multi-pathway, indirect exposure assessment—is a highly technical and evolving field. Any regulatory approach EPA might codify in this area is likely to become outdated, or at least artificially constraining, shortly after promulgation in ways that EPA cannot anticipate now. In support of this, we noted specific examples of problems we experienced in implementing the BIF regulations. See 69 FR 21330. Further, we explained that at the time of codification, BIF risk assessments were not intended to address indirect routes of exposure, thus making the parameters easier to implement. Today, however, risk assessments are more complex due to the necessary inclusion of multi-pathway and indirect exposure routes. Given the complexity of multi-pathway and indirect exposure assessments and the fact that risk science is continuously evolving, it would be difficult and again, overly constraining, to codify risk parameters today. We note as well, in this regard, that several commenters agreed that codification of EPA's risk assessment guidance would be too constraining for both the agency and the regulated community.

We also believe that a guidance approach is consistent with the fact that permit authorities must make site-specific decisions whether to do risk assessments at all. We think that it makes little sense to allow this kind of flexibility regarding whether to do a risk assessment and for what purposes, while prescribing how one must be conducted if one is required. In fact, permitting authorities, in some cases, have developed their own guidance methodologies responsive to the specific needs associated with their facilities. For example, North Carolina, Texas, and New York have each developed their own risk assessment methodologies. Further, facilities that choose to conduct SSRAs themselves can choose alternative approaches in applying methodologies as well. We think this flexibility employed in the field supports our judgment that risk assessment methodologies should not be codified. CKRC's comments failed to address any of these issues.

Turning to the remainder of CKRC's specific points—CKRC's assertion that the technical guidance has not been amended in the past three years is inaccurate. A revised HHRAP guidance, that has been amended to take into account the technical recommendations from both the public comments and peer review, is published in conjunction with this rule. In addition, as noted above, in some cases, permitting authorities have developed their own methodologies responsive to the specific needs associated with their facilities.

With respect to CKRC's third point, the regulatory corrections made to the MACT rules were necessary either to fix an error or omission or to resolve potential legal issues. To codify technical tools and chemical information pertinent to the risk process simply is not prudent, as this information is continually changing and would almost always be out of date. Granted, when this information is presented in guidance, it can just as easily become outdated, however, facilities and risk assessors are free to use the most up-to-date air modeling tools and toxicity values available (i.e., they would not be bound to regulations requiring the use of obsolete tools and

information). We continue to believe that publishing our technical recommendations as regulation would remove much of the flexibility that is important in evaluating risk on a site-specific basis.

CKRC discounts EPA's statement that codification of risk assessment is the exception arguing that ''Neither TSCA or CERCLA, however, specifically commands EPA to define the type of information necessary for a permit application through the rulemaking process as RCRA does. Moreover, the TSCA and CERCLA examples EPA cites are not analogous to the situation where a permit applicant can be denied a permit—or at least strung through months or years of tortuous and costly submissions, revision, and resubmission—to obtain a permit.''

Even if TSCA and CERCLA were not considered to be analogous, that does not change EPA's fundamental rationale that codification of highly technical risk assessment guidance is not appropriate. EPA does not believe that RCRA § 3005(b) requires EPA to codify an exhaustive list of every possible piece of information that might be required in a permit. To some extent, that is the reason for having a permit process—to allow site specific conditions to be taken into account. Nevertheless, EPA has revised part 270, pursuant to RCRA § 3004(a) and § 3005(b) to specifically provide that a risk assessment may be necessary, where there is reason to believe that the MACT standards may not be sufficiently protective. This was done wholly to address the petitioner's concern that the current regulations do not adequately provide notice that an SSRA might be necessary as part of a permit application. This provision, while it does not provide as much detail as the petitioner wishes, clearly ''defines the type of information necessary for a permit application.''

CKRC complains that the Agency did not address in its proposed response the petitioner's discussion of the ''strong case law compelling the conclusion that 'guidance' documents EPA has issued for conducting SSRAs must be subjected to notice-and-comment rulemaking.'' EPA has chosen not to respond to CKRC's legal interpretation because we believe that it is clear that the guidance documents do not impose mandatory requirements, and therefore need not be issued by notice and comment rulemaking. Nevertheless, EPA notes that in the proposal, the Agency explained that we were in the process of reviewing the guidance documents, and, to the extent we found language that could be construed as limiting discretion, we committed to revise the documents to make clear that they are non-binding. See 69 FR 21329. We specifically noted that CKRC indicated in its petition that, in its view, the documents contain language that could be construed as mandatory. While EPA does not necessarily agree, and believes that, in context, it is clear that the recommendations in the documents are discretionary, EPA nonetheless reviewed the documents to ensure that they are carefully drafted. Consequently, under the standards articulated in *Appalachian Power Co.* v. *EPA*, 208 F.3d 1015 (D.C. Cir. 2000) and subsequent case law, the final HHRAP guidance is truly guidance and does not require notice-and-comment rulemaking. The HHRAP explains in great detail an acceptable process for performing and reporting on cost-effective, scientifically defensible risk assessments. It includes numerous recommended defaults, while at the same time provides the risk assessor or facility full opportunity to incorporate site-specific values in place of the defaults. The HHRAP offers numerous recommendations, but requires nothing. EPA has placed a copy of the final guidance document in the docket for today's action (see OAR–2004–0022).

CKRC believes that EPA's technical guidance imposes information requirements upon the RCRA permit applicant that are not contained in any regulations and in fact exceed by orders of magnitude any information requirements contained in the part 270 regulations. We disagree that anything contained in HHRAP is ''required'' in any way. Moreover, to the extent any individual facility believes the information requested is inappropriate or unnecessary, they can challenge that as part of the permitting process.

Lastly, CKRC argues that ''The procedures EPA has been using to issue and revise the SSRA guidance do not by any measure comply with the full panoply of procedures and protections offered by the APA process. Most critically, when EPA merely solicits comments on draft guidance documents, it has no duty to respond to comments and provide a rational basis and justification in defense of its choices in the face of comments. EPA is essentially running its entire SSRA program on the basis of ''draft'' guidance versions for which EPA has never to this day prepared any response to comments.'' As previously noted, EPA believes the final HHRAP is merely guidance and therefore, EPA is not required to proceed through notice and comment rulemaking pursuant to § 553 of the APA. However, because we want the HHRAP guidance to be useful and clear, we have solicited public review and comment. As a result, it has been improved over the years by including revisions to the guidance based upon feedback from users of the guidance and from experience in the field. A response to comments document has been prepared and released along with the final HHRAP and final MACT rules, even though the Agency was not required to do so. More to the point, because it is only guidance, sources will have the opportunity to raise questions or comments on anything in the guidance as part of the permitting process and the permitting authority will be required to respond to those comments as part of the permitting process. See 40 CFR part 124. Sources will also have the right to challenge the responses or use of the guidance as part of the permitting process.

3. Codification of Criteria for Determining That Additional Risk-Based Permit Conditions or an SSRA Is Necessary

CKRC argues that EPA's proposed regulatory changes should not be considered as a partial grant because EPA has not codified specific criteria in the proposed regulations for permit authorities to use to decide whether to require an SSRA; to set the risk levels that are deemed protective; or to otherwise provide any further definition as to what it means to protect human health and the environment.

In its petition, CKRC requested that after we repeal the policy and guidance (per the first request), ''should EPA believe it can establish the need to require SSRAs in certain situations, CKRC urges EPA to undertake an appropriate notice and comment rulemaking process seeking to promulgate regulations establishing such requirements.'' As discussed at length in both the proposal (69 FR 21325–21327) and the preceding paragraphs, we believe that we have established certain circumstances where the MACT standards may not be protective and that an SSRA may be warranted, based on relevant site-specific factors associated with an individual combustion unit. Consequently, we are finalizing regulations that explicitly authorize permitting authorities to conduct or require an SSRA on a site-specific basis. This, in our view, grants the second of CKRC's requests. Our response directly addresses a number of CKRC's concerns: (1) Through a notice and comment rulemaking process, EPA has established circumstances in which an SSRA may be necessary; and (2) EPA's regulations will now explicitly

acknowledge that an SSRA might be necessary as part of the permitting process, thereby addressing the petitioner's concern that EPA's past approach of relying on RCRA's omnibus authority to implement this policy violates the requirements of RCRA § 3005(b). And as discussed further below, EPA has codified criteria for permit authorities to use to determine whether to require an SSRA.

While it does not provide exactly what CKRC requested, the regulated community has had a full opportunity to comment on the need for an SSRA both as part of the 1999 rulemaking and, again, as part of this rulemaking to adopt the provisions of § 270.10(l), which contain an explicit reference to the potential need for an SSRA as part of the permitting process pursuant to RCRA § 3004(a) and § 3005(b). As previously explained, § 270.10(k) does not explicitly mention the potential for an SSRA to be required. Although the rule does not identify a priori that an SSRA will be required in an individual circumstance, but defers that determination to the permitting process, the final rule reflects EPA's findings that an SSRA is not anticipated to be necessary in every circumstance—only where site-specific conditions give the permit authority reason to believe that additional controls beyond those required pursuant to 40 CFR parts 63, 264, 265, or 266 may be necessary to protect human health and the environment.

CKRC argues that EPA's decision not to codify national criteria renders the regulation impermissibly vague, and therefore, ''in their view totally deficient as a legal matter.'' The petitioner argues that the rule is essentially ''a bootstrap attempt to avoid rulemaking requirements by establishing 'rules' that give no more guidance or direction than general terms in the statute and in no way channel the decision maker's discretion or put the public on notice of anything.'' According to CKRC, this unbridled discretion is manifest in three ways: (1) No criteria explain how a permit writer is to decide whether to require an SSRA; need merely to conclude ''reason to believe''; (2) there are absolutely no limits on what type of information or assessments the permit writer may demand and the proposed reg. does not even hint at what type of information or assessments might be demanded; and (3) there is not a word of guidance or specification as to what it means to ''ensure protection of human health and the environment.'' The petitioner argues that as a consequence, the proposed § 270.10(l) would be struck down as a ''standardless regulation.''

EPA disagrees that the provisions at § 270.10(l) are impermissibly vague, or otherwise inconsistent with the cases the petitioner cites. In the cited cases the courts found that the regulated entity bore the entire burden of determining how to comply with the challenged regulation in the complete absence of a government-generated standard or guidance. See *Maryland* v. *EPA*, 530 F.2d 215, 220 (4th Cir. 1975); *South Terminal Corp* v. *EPA*, 504 F.2d 646, 670 (1st Cir. 1974). This is entirely distinct from the regulations codified at § 270.10(l).

In § 270.10(l) EPA identified the standard for when a risk assessment may be necessary: where the regulatory authority identifies factors or conditions at the facility that indicate that the MACT standards may not be sufficiently protective, and defers the articulation of the more precise requirement to the permitting process, where the onus falls on the permitting authority to identify the basis for its determination. Until the permitting authority provides this further guidance, the regulated entity incurs no obligation. The mere fact that specific factors or facility conditions that form the basis for the determination that an SSRA is warranted will be subsequently identified through the permitting process does not invalidate the regulation. See *Ethyl Corp* v. *EPA*, 306 F.3d 1144, 1149–1150 (D.C. Cir. 2002).

The regulation also identifies the categories of information that might be required for MACT EEE facilities: The information must be necessary to determine whether additional controls are needed to ensure protection of human health and the environment; it can include the information necessary to evaluate the potential risk from both direct and indirect exposure pathways; or it can include the information necessary to determine whether such an assessment is necessary. Here as well, EPA's reliance on the permitting process to provide further specification of the required information is not improper.

Moreover, as discussed above in subsection C., in response to commenters' concerns, EPA has revised § 270.10(l) to provide more detail, both with respect to the basis for the determination that an SSRA is necessary, and with respect to the type of information the permit authority might need. EPA has added language to remind permit authorities that the determination that the MACT standards may not be sufficiently protective is to be based only on factors relevant to the potential risk from the hazardous waste combustion unit at the site. EPA has also added language to § 270.10(l) to identify guiding factors for permitting authorities to consult in determining whether the MACT will be sufficiently protective at an individual site. Although the list of guiding factors is not all-inclusive, they offer a structure for risk managers (as well as the regulated community) to use to frame the evaluation of whether a combustor's potential risk may or may not be acceptable.

Finally, we note that, unlike the circumstances in the cited cases, § 270.10 is promulgated in the context of an existing permitting regime. The regulatory standards at 40 CFR part 124 provide further structure for both the regulated community and the permit authority. For similar reasons, EPA disagrees that the cited cases compel the Agency to establish risk levels that are deemed protective, or to otherwise provide any further definition as to what it means to protect human health and the environment. We discussed at length throughout the proposal the reasons we believe it would not be appropriate to codify either an exclusive set of national criteria for determining that an SSRA (or additional risk-based permit conditions) would be necessary, or a uniform risk level. The decision to require an SSRA is inherently site specific, thus permitting authorities need to have the flexibility to evaluate a range of factors that can vary from facility to facility. See 69 FR 21328–21331. CKRC has neither presented new factual or policy reasons that would cause the Agency to reconsider the tentative decisions presented in the proposal, nor specifically addressed the issues underlying EPA's decision. Instead, the petitioner has merely reiterated the concerns presented in its petition and its general disagreement with EPA's decision.

EPA also disagrees that its new regulatory structure grants permit writers unbridled discretion for many of the same reasons that EPA does not believe that § 270.10(l) is impermissibly vague. As EPA has previously explained, the requirements at Part 124 continue to apply to actions taken to implement § 270.10(l). Moreover, the language of § 270.10(l) makes clear that the onus initially falls on the permitting authority to identify the basis for its conclusion that the MACT standards may not be sufficiently protective. As both part 124 et. seq., and EPA's preamble discussions make clear, facilities will continue to have the opportunity to comment on and challenge the determination. See §§ 124.10, 124.11, and 124.19. The

regulatory structure adopted in § 270.10(l) mirrors the structure Congress established in sections 3004 and 3005; although 3004 directs EPA to establish national standards, section 3005 recognizes that those standards will be applied on a case-by-case basis through the permitting process, to allow site-specific conditions to be taken into account, and to supplement those standards as necessary.

EPA has also provided recommendations through guidance on how an SSRA can be conducted. Although the recommendations are not binding, they provide risk managers (as well as the facility) with a starting point from which to determine whether a combustor's potential risk may or may not be acceptable.

CKRC argues that it appears that rather than following the statutory authorities and requirements to review and amend regulations every 3 years as necessary (RCRA § 2002(b)), EPA decided to take the easy way out and impose, through non-rulemaking ''guidance'', massive, costly, and confusing requirements leaving unbridled discretion to its permit writers.

We disagree that the Agency has attempted to avoid rulemaking in this context. EPA has conducted several rulemakings to amend our regulations. The first was in 1999, when we adopted revised emission standards under the authority of both § 112(d) of the CAA and RCRA to more rigorously control toxic emissions from burning hazardous waste in incinerators, cement kilns, and lightweight aggregate kilns. See 64 FR 52828. At the time, we noted that ''today's rule fulfills our 1993 and 1994 public commitments to upgrade emission standards for hazardous waste combustors.'' We have continued to revise our regulations consistent with and based on the facts before the Agency, taking into account the arguments presented in CKRC's petition. As explained above, we believe that the facts do not support granting all of CKRC's requests. Rather we believe that the MACT standards will generally be protective, and that permit authorities should reach the decision to require an SSRA based on a variety of factors and concerns specific to their sites. In addition, as previously addressed, we believe that our risk assessment guidance should remain as guidance. Several other commenters agree that the guidance should not be codified.

The petitioner argues that the regulation EPA has proposed to adopt is so vague, that it is essentially not a regulation, and that consequently, even if finalized, it would not be sufficient to comply with the requirement in RCRA § 3005(b) to specify in regulations, the information necessary to obtain a permit. They compare the level of detail in § 270.10(l) to the lengthy regulations (codified in 40 CFR part 270) specifying in great detail the information required when one is submitting a RCRA permit application, arguing that ''these regulations cover 75 pages of fine print in Code of Federal Regulations,'' to demonstrate that this regulation would be insufficient under RCRA § 3005(b). In further support of this argument, CKRC cites *Ethyl Corporation* v. *EPA*, 306 F.3d 1144 (D.C. Cir. 2002).

EPA disagrees that its regulations are in any way inconsistent with the decision in *Ethyl Corp.* At issue in that case was a regulation issued pursuant to section 206(d) of the CAA. Section 206(d) provides that EPA ''shall, by regulation, establish methods and procedures for making tests under this section.'' 42 U.S.C. 7525(d). The court found that ''with CAP 2000, [the challenged regulation] the EPA does not claim to have itself articulated even a vague durability test. Rather CAP 2000 requires that 'the manufacturer shall propose a durability program' for EPA approval. 40 CFR 86.182301(a). It thus falls on the forbidden side of the line.'' *Ethyl Corp.*, 306 F.3d at 323–324. The Court distinguished the challenged regulation from the situation in which an agency issues a ''vague'' regulation, and relies on subsequent proceedings to flesh out the specific details. And as the court explained, where ''Congress had not specified the level of specificity expected of the agency, we held that the agency was entitled to broad deference in picking the suitable level.'' 306 F.3d at 323 (citing *American Trucking Associations* v. *DOT*, 166 F.3d 374 (D.C. Cir. 1999) and *New Mexico* v. *EPA,* 114 F.3d 290 (D.C. Cir. 1997).

In § 270.10(l) EPA has articulated the standard for when a risk assessment may be necessary: where the regulatory authority has identified factors or conditions at the facility that indicate that the MACT standards may not be sufficiently protective. EPA has also adopted a list of factors on which permit writers are to rely in reaching this determination. EPA has also identified the categories of information that might be required for MACT EEE facilities: The information must be necessary to determine whether additional controls are needed to ensure protection of human health and the environment; it can include the information necessary to evaluate the potential risk from both direct and indirect exposure pathways; or it can include the information necessary to determine whether such an assessment is necessary. While it does not provide as much detail as the petitioner wishes, this provision unquestionably ''defines the type of information necessary for a permit application.''

Thus, the issue turns on the level of specificity that RCRA § 3005(b) requires, and EPA does not believe that RCRA § 3005(b) requires EPA to publish a list of every possible piece of information that might be required in a permit. Section 3005(b) merely establishes a broad directive that ''each application for a permit under this section shall contain such information as may be required under regulations promulgated by the Administrator,'' and that it shall include the information contained in subsections (1) and (2), leaving to EPA's discretion to determine the level of specificity at which to promulgate regulations. To some extent, this reflects the reason for having a permit process—to allow site specific conditions to be taken into account. The regulatory structure adopted in § 270.10 mirrors the structure Congress established in RCRA § 3004 and § 3005. Despite the petitioner's comparison to the length of part 270, the length of these provisions are not indicative of any determination of the precise level of detail that § 3005(b) requires, but reflects the fact that EPA has adopted requirements specific to individual types of units. Moreover, notwithstanding the petitioner's characterization, the language at § 270.10(l) is comparable to many other provisions in 40 CFR part 270. See, for example: §§ 270.14(b)(8); 270.16(h)(1)–(2); 270.22(a)(6)(i)(C); 270.22(c).

Lastly, CKRC argues that the proposed regulation is particularly problematic, because it extends beyond ''information'' that may already exist. CKRC says that it is one thing to demand that a party go out and gather existing information, but another thing to demand that an applicant conduct ''assessments.'' Moreover, nothing in the regulations prohibits a permit authority from demanding revised assessments, and even more revised assessments. We agree that permit authorities have the authority to require facilities to provide additional information beyond that which already exists. However, based on feedback from EPA Regional permit writers, SSRAs generally represent a one-time cost. We do not expect that facilities that have conducted risk assessments will have to repeat them. As discussed in the 1999 final rule preamble, changes to comply with the MACT standards should not cause an increase in risk for the vast majority of facilities given that the changes, in all

probability, will be the addition of pollution control equipment or a reduction in the hazardous waste being burned (see 64 FR 52842). Instances where a facility may need to repeat a risk assessment would be related to changes in conditions that would likely lead to increased risk.[242] In such situations, we would anticipate that the risk assessment would not have to be entirely redone. It may be as limited as collecting relevant new data for comparison purposes, leading to a decision not to repeat any portion of a risk assessment. Or, it may be more inclusive such that modifications would be made to specific inputs to or aspects of the risk assessment using data from a previous risk assessment, risk burn or comprehensive performance test. As discussed in subsection B., we have added a new regulatory provision to indicate a previously conducted risk assessment would be relevant in evaluating changes in conditions that may lead to increased risk. The factor reads as follows: ''Adequacy of any previously conducted risk assessment, given any subsequent changes in conditions likely to affect risk.''

4. EPA's Cost Estimates for SSRAs

CKRC raised several objections to our cost estimates for conducting an SSRA, and provided higher cost estimates ($200K to $1M, with upper bound of $1.3M). We suggested in the proposal, that the higher cost figures provided by CKRC were likely incurred prior to the 1998 release of the Human Health Risk Assessment Protocol (HHRAP) guidance document. We believe our lower cost estimates can be attributed to the fact that we based them on the conduct of future SSRAs that will benefit from substantially better guidance and commercially available software.

Multiple issues regarding the cost information we provided in the proposal are raised by CKRC. The first of five issues is that CKRC believes that EPA's methods for calculating costs associated with future SSRAs do not include data gathering costs, QA/QC, third party consultants in addition to risk assessors and plant personnel time to coordinate and review SSRA efforts and collect facility data. We disagree with this statement in part; the estimates developed by the Agency do include data gathering costs, QA/QC, and third-party consultants. (Refer to the proposed rule's support document entitled: Preliminary Cost Assessment for Site Specific Risk Assessment, November 2003, Docket # OAR–2004–0022; and the Assessment of the Potential Costs, Benefits, and Other Impacts of the Hazardous Waste Combustion MACT Replacement Standards—Final Rule, October 12, 2005, for a description of how the estimates were arrived at.) However, we agree with CKRC that the method used to develop SSRA costs does not capture facility time associated with data collection and management related to the SSRA. Consequently, we have adjusted our SSRA cost estimates to account for these activities by incorporating costs associated with time needed for facility data collection and management efforts associated with the SSRA, and will assume that engineering staff are required to perform these tasks.

The second issue concerns the extent to which cement kiln SSRAs are consistent with EPA's ''normal'' assumptions. We do not question the accuracy of the costs submitted by CKRC. However, it is not clear that the costs submitted by CKRC represent typical future costs for SSRA implementation at all facilities in the universe. Certain of the CKRC cost estimates (e.g., those submitted by Ash Grove and Holcim) reflect implementation of SSRAs over a number of years in the 1990s, while SSRA implementation was in its early stages. In other cases (e.g., estimates provided by Solite) costs appear to be consistent with EPA estimates. While we do not dispute the accuracy of these costs, earlier costs are likely to reflect the deliberative process common with early SSRAs.

For the third issue, CKRC's points out that EPA's estimate of 20 percent additional cost for adding a risk burn during a trial burn may be low; CKRC asserts that additional test costs can add up to 40 percent depending on the circumstances. We agree with this and have adjusted the range of total SSRA costs as necessary to assure that a range of additional test costs for separate risk burns (20 to 40 percent incremental cost) are included. For revised figures, see background document, Assessment of the Potential Costs, Benefits, and Other Impacts of the Hazardous Waste Combustion MACT Replacement Standards—Final Rule, October 12, 2005.

CKRC's fourth issue is that EPA does not appear to include more than evaluations of stack emissions in its estimates of SSRA costs. We disagree with this comment. The estimates of SSRA costs developed by the Agency reflect total contractor costs for performing an SSRA at a facility under different sets of conditions, and are not limited to stack emissions.

In the fifth cost-related issue, CKRC asserts that EPA's average estimates might be reasonable if the SSRA process were limited to the submission and acceptance of one SSRA effort. CKRC contends, however, that its members' experiences with SSRAs have involved coordination with state and regional offices and multiple revisions and submissions. Again, we do not question the experiences and costs of specific facilities. However, we anticipate that the 2003 Memorandum, Use of the Site-Specific Risk Assessment Policy and Guidance for Hazardous Waste Combustion Facilities, and the Human Health Risk Assessment Protocol for Hazardous Waste Combustion Facilities guidance, which is finalized and released in conjunction with today's rule, will provide facilities and regulators with a clearer understanding of SSRA policy and guidance and will support a more efficient SSRA process. EPA's future SSRA cost estimates are based on current or recent cost data from multiple practitioners, and likely reflect a more efficient process than that experienced by some CKRC members in the 1990s.

X. Permitting

As discussed in the proposal, we believe that the permitting approach we adopted in the 1999 final rule is still the most appropriate means to avoid duplication to the extent practicable and to streamline requirements. Thus, both Phase 1 and Phase 2 sources will comply with their RCRA emission limits and operating requirements until they demonstrate compliance with the MACT standards by conducting a comprehensive performance test (CPT), submitting a Notification of Compliance (NOC) documenting compliance to the Administrator or delegated state, and then requesting to have their RCRA permits modified to remove the duplicative RCRA requirements (unless a sunset clause had been added previously that inactivates specified requirements upon compliance with MACT).[243] Ultimately, the MACT air emissions and related operating requirements will reside in the CAA Title V permit, while all other aspects

[242] For example, hazardous waste burning cement kilns that previously monitored hydrocarbons in the main stack may elect to install a mid-kiln sampling port for carbon monoxide or hydrocarbon monitoring to avoid restrictions on hydrocarbon levels in the main stack. Thus, their hydrocarbon emissions may increase. (64 FR 52843, footnote 29.) Another example would be if the only change at a facility relates to the exposed population; what was acceptable in a previous risk assessment may not be any longer.

[243] Although we expect that the vast majority of Phase 1 sources will have had their RCRA permits modified by the time this rule is promulgated, we acknowledge that there may be a few permits yet to be modified.

of the combustion unit and the facility (*e.g.*, corrective action, general facility standards, other combustor specific concerns such as material handling, risk-based emission limits and operating requirements, and other hazardous waste management units) will remain in the RCRA permit. A new pictorial timeline has been provided to highlight milestones of the MACT compliance process. See figure 1 at the end of this section.

A. What is the Statutory Authority for the RCRA Requirements Discussed in this Section?

EPA is finalizing amendments to modify RCRA permits in today's rule pursuant to sections 1006(b), 2002, 3004, 3005 and 7004(b) of RCRA. 42 U.S.C. §§ 6905(b), 6912, 6924, 6905, and 6074. Our approach is likewise consistent with section 112(n)(7) of the Clean Air Act which indicates that EPA should strive to harmonize requirements under section 112 and RCRA requirements for hazardous waste combustion sources. With respect to the regulatory framework that is discussed in this section, we are finalizing the process to eliminate the existing RCRA stack emissions national standards for hazardous air pollutant for Phase 2 sources as we had done for Phase 1 sources in the 1999 final rule. That is, after submittal of the NOC established by today's rule and, where applicable, once RCRA permit modifications are completed at individual facilities, RCRA national stack emission standards will no longer apply to these hazardous waste combustors (unless risk-based permit conditions are determined necessary).

We originally issued emission standards under the authority of section 3004(a) and (q) of RCRA, which calls for EPA to promulgate standards ''as may be necessary to protect human health and the environment.'' We believe that the final MACT standards are generally protective of human health and the environment, and that separate RCRA emission standards are not needed to protect human health and the environment. See Part Seven, How Does the Final Rule Meet the RCRA Protectiveness Mandate? for a discussion of this topic. RCRA section 1006(b) directs EPA to integrate the provisions of RCRA for purposes of administration and enforcement and to avoid duplication, to the maximum extent practicable, with the appropriate provisions of the Clean Air Act (and other federal statutes). This integration must be done in a way that is consistent with the goals and policies of these statutes. Therefore, based on its findings regarding the protectiveness of the MACT standards, and pursuant to section 1006(b), EPA is generally eliminating the existing RCRA stack emission standards to avoid duplication with the new MACT standards. The amendments made today to allow new combustion units to comply with the MACT standards upon start-up, versus the RCRA stack emissions national standards, are based on the principle of avoiding duplication between programs.

We are not stating that RCRA permit conditions to control emissions from these sources will never be necessary, only that the national RCRA standards appear to be unnecessary. Under the authority of RCRA's ''omnibus'' clause section 3005(c)(3); (see §§ 270.32(b)(2) and (b)(3)), RCRA permit authorities may impose additional terms and conditions on a site-specific basis as may be necessary to protect human health and the environment. Thus, if MACT standards are not protective in an individual instance, RCRA permit writers will establish permit limits that are protective.

In RCRA, Congress gave EPA broad authority to provide for public participation in the RCRA permitting process. Section 7004(b) of RCRA requires EPA to provide for, encourage and assist public participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program under the Act.

B. Did Commenters Express any Concerns Regarding the Current Permitting Requirements?

Generally speaking, commenters favor maintaining the permitting approach and requirements referred to above. This approach was finalized in the 1999 rule and has been implemented, and in a few cases is currently being implemented, for Phase 1 sources complying with the Interim Standards Rule. However, several commenters raised similar concerns regarding certain aspects of the transition process from RCRA to MACT and Title V permitting.

1. Removal of Duplicative RCRA Permit Conditions

One comment is in regard to Phase 1 sources that have been fully transitioned (i.e., have had duplicative RCRA permit conditions and requirements removed or that have been ''sunsetted'') to compliance with the Interim Standards that may need to make upgrades to comply with the revised Phase 1 MACT Standards. The concern is that Phase 1 sources needing to make upgrades for MACT should be able to do so without a RCRA permit modification (unless risk-based conditions are present). We agree with the commenters that as long as the technology upgrades (e.g., equipment changes to upgrade air pollution control equipment) do not affect any remaining conditions in the RCRA permit, the regulations do not require a permit modification. For those Phase 1 sources that need to make upgrades to comply with the revised standards, they should address the specific upgrades in their draft Notification of Intent to Comply (NIC) and during the informal NIC public meeting so that the regulatory authority and public are aware of the source's activities and plans for compliance. We encourage early communication between the source and the RCRA permit writer to ensure a common understanding of whether a RCRA permit modification will be needed.

Additionally, Phase 1 sources must comply with the provisions of § 63.1206(b)(5) for changes in facility design. We do not anticipate that upgrades made to comply with the Replacement Standards will adversely affect a source's compliance with the Interim Standards. Therefore, consistent with § 63.1206(b)(5)(ii), sources must document the change in their operating record, revise their NOC and resubmit it to the permitting authority (per § 63.9(h)), and, as necessary, revise their start-up, shutdown, and malfunction plan.[244]

Several commenters felt that we should re-emphasize the importance of removing duplicative RCRA permit conditions and requirements. We agree with the commenters that this is an important action for regulatory agencies. In addition to comments received, we also have learned through the implementation process for the Interim Standards, that some state agencies are not removing duplicative requirements from the RCRA permit. We have clearly stated in several preambles and guidance documents that we believe it is appropriate to retain only the RCRA risk-based conditions that are more stringent than the applicable MACT limits (i.e., if the RCRA condition has been determined to limit risk to an acceptable level and is necessary to protect human health and the environment) in the RCRA permit after

[244] The requirements in § 63.1206(b)(5)(ii) call for sources to revise (as necessary) the performance test plan, DOC, NOC, and start-up, shutdown, and malfunction plan. For sources complying with the Interim Standards, it is not necessary to revise the performance test plan or the DOC, since they were developed in preparation for compliance with the Interim Standards.

compliance with MACT.[245] However, we also acknowledge that in certain cases it may not be clear which compliance requirement is more stringent. For example, standards under MACT are expressed as concentration based limits (micrograms/dry standard cubic meter) while certain RCRA standards are expressed as mass emission rate limits (grams/second). Also, averaging times between the two programs differ: MACT requires hourly rolling averages whereas RCRA requires instantaneous values. This is an unfortunate consequence of moving compliance from a risk-based program to a technology-based program. Because we cannot definitively say when a RCRA requirement is more stringent than a MACT requirement and consistently apply it to all sources, we are relying on sources and permitting agencies to work together to determine which requirement is more stringent. If the MACT requirement is determined to be more stringent, the permitting agency can remove the requirement from the RCRA permit.

In adopting a permitting approach to place the MACT air emissions and related operating requirements in the CAA Title V permit and to keep all other aspects of the combustion unit and the facility in the RCRA permit, our intent was and still is, to minimize duplication to the extent practicable and to eliminate the potential for dual enforcement. We view it as an unnecessary duplication of effort between programs as well as an unnecessary expenditure of resources and costs for both facilities and regulatory authorities to maintain a RCRA permit and a Title V permit that contain duplicative requirements, when there are viable mechanisms (i.e., Class 1 modification procedure at 270.42 Appendix I, section A.8, or Class 2 or 3 if a state has not adopted the Class 1 procedure) in place to avoid doing so.

Nevertheless, we believe that states should have the flexibility to decide how they will allocate their resources, which is why we did not include a single transition approach for implementing agencies to follow in the 1999 rule or in today's rule. So, in such cases where a state agency chooses not to adopt the transition language (i.e. the Class 1 modification procedure at 270.42 Appendix I, section A.8) into their state requirements (e.g., because the state's procedures are broader in scope or more stringent than the federal requirements) or is unable to reach an agreement between its RCRA and air programs regarding which standards are more stringent, the Title V permitting authority should document these issues, including any continuing RCRA permit requirements, in the title V permit's statement of basis (40 CFR §§ 70.7(a)(5) and 71.7(a)(5)). This will help to ensure that the source is clear regarding its compliance obligations, which is a main goal of the Title V program. Further, for purposes of clarification and as a matter of courtesy, we urge regulatory authorities that choose to impose dual compliance requirements, to also provide a written justification to the source explaining the reasons for their decisions.

2. Transition of Interim Status Phase 2 Units From RCRA to CAA Permits

In response to our discussion in the proposal regarding RCRA permitting for interim status Phase 2 units (69 FR 21324), two commenters suggest that EPA establish policy and/or regulation that discourage further RCRA permitting work for interim status Phase 2 sources. Their comments are directed our statement in the proposal that the RCRA combustion permitting procedures in 40 CFR part 270 also continue to apply until you demonstrate compliance. As noted in this statement, we intended for Phase 2 sources to continue to be subject to RCRA permitting requirements for air emissions standards and related operating parameters, including trial burn planning and testing, until they have demonstrated compliance with the MACT standards by conducting a comprehensive performance test and submitting an NOC to the Agency. However, we also provided several factors that should be taken into consideration when determining whether to proceed with the RCRA permit process such as: the facility's permit status at the time the MACT rule becomes final, the facility's anticipated schedule for MACT compliance, the priorities and schedule of the regulatory agency, and the level of environmental concern at a given site (69 FR 21324).

To support their position, the commenters noted that time and resources would be conserved and duplicative and overlapping activities could be minimized if Phase 2 sources were permitted solely via Title V. Also, they argued that it would avoid expending resources to modify the RCRA permit once the source has demonstrated compliance with MACT. We agree with commenters that every effort should be made to conserve resources and avoid duplication to the extent possible. However, we do not believe it is appropriate to establish policy or regulation that permitting authorities must suspend the RCRA permit process (whether it pertains to interim status or renewals), especially in cases where considerable time and effort has been invested and the permit is close to final issuance. As before, we strongly encourage sources and regulatory authorities to work together to establish an approach that will provide for the most practical transition. For example, we strongly recommend that sunset provisions be included in a permit that will be issued well in advance of compliance with MACT to avoid duplication and a later modification to remove the duplicative RCRA conditions. Also, it would make more sense to transition a source to MACT compliance prior to issuing the RCRA permit if it will comply with MACT early.

3. Transition From Compliance With the Interim Standards to the Replacement Standards

A specific question that has been raised relates to the applicable standards and operating parameters that the source must comply with during the period between the rule's effective date for the Phase 1 Replacement Standards and submission of their new NOC. Upon the publication date of the rule, the Replacement Standards (and Phase 2 Standards) will become effective and sources will have 3 years to come into compliance. During this 3-year period, Phase I sources' existing title V permits will either be reopened to include the Replacement Standards, or the permitting authority will have incorporated the Replacement Standards during permit renewal. In this example, a Phase 1 source's Title V permit has been reopened, revised, or renewed and includes the Replacement Standards, the compliance date has not yet passed, no new documentation of compliance (DOC) for the replacement standards has been included in the operating record, and the source has not yet conducted a comprehensive performance test and submitted a new NOC (therefore it still has an NOC containing the operating parameters for compliance with the Interim Standards).

In the above scenario, the question asked is whether the source should comply with the Interim Standards in the current NOC or the Replacement Standards in the Title V permit. The

[245] As an example, a RCRA permit could specify a higher minimum operating temperature than what is necessary for the facility to achieve compliance with MACT. The lower minimum operating temperature under MACT may be sufficient, unless the RCRA permit authority determines that the higher RCRA temperature is necessary to limit risk to an acceptable level for that facility. There should be a connection between the RCRA limit and protection of human health and the environment when retaining a RCRA limit.

source should comply with the Interim Standards until the compliance date of the Replacement Standards. Although the Title V permit now includes the Replacement Standards, the permit will also include the Replacement Standards' future compliance date. With regard to the transition from the Interim Standards NOC to the Replacement Standards DOC, we are revising the regulations at § 63.1211(c) to render the NOC, which documented compliance with the Interim Standards, inapplicable upon inclusion of the DOC for the Replacement Standards in the operating record by the compliance date. Thus, the source will not be placed in a situation where it must continue to ensure compliance with the operating parameters established in the NOC for the Interim Standards, while seeking to comply with the Replacement Standards and operating parameters in its DOC. Although it can be assumed that the source would still be able to comply with its Interim Standard-based NOC because the Replacement Standards are the same as or more stringent than the Interim Standards, we believe that the revision to render the previous NOC inapplicable provides a clearer and more sensible approach.

4. Changes to Title V Permits

Both the Replacement Standards and the Phase 2 Standards will necessitate permit reopenings or revisions to some existing title V permits; other permits will incorporate the requirements upon renewal. 40 CFR §§ 70.7 and 71.7 include the requirements for Title V permit revisions, reopenings, and renewals. Also, approved Title V permitting authorities may have additional requirements. Please refer to the appropriate permitting authority and its individual Title V permits program to determine the necessary requirements and procedures.

With respect to incorporating minor revisions into the Title V permit, one commenter had asked, for example, whether revisions made to the NOC to reflect minor operating changes could be incorporated into the permit by reference rather than through the reopening procedures. Determining the appropriate Title V permit reopening or revision requirements is based on the nature of the change and the source specific permit terms and conditions, and is therefore difficult to generalize. We recommend that sources work with their Title V permit authorities to determine the appropriate requirements and procedures that are applicable to any specific situation. However, we would like to note that, when incorporating requirements by reference into the Title V permit is appropriate, this does not necessarily obviate the need for permit revisions if the material incorporated by reference is subsequently revised. For more information on incorporation by reference, please refer to the Office of Air Quality Planning and Standards' ''White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program'' (March 5, 1996), Section II.E.2.c. This paper can be found at: *http://www.epa.gov/ttn/oarpg/t5/memoranda/wtppr-2.pdf.*

C. Are There Any Changes to the Proposed Class 1 Permit Modification Procedure?

In the NPRM, we proposed a new Class 1, with prior Agency approval, permit modification procedure to help further minimize potential conflicts between the RCRA permit requirements and MACT requirements. See 69 FR 21384 and proposed § 270.42(k). During implementation of the Interim Standards for Phase 1 sources, it became evident that there are two significant instances where RCRA permit limits may overlap with MACT requirements: during initial (and future) performance testing and during the period between placement of the documentation of compliance (DOC) in the operating record and the final modification of the RCRA permit after receipt of the NOC. We discussed several existing approaches (e.g., a class 2 or 3 modification, request for approval submitted via the RCRA trial burn plan or coordinated MACT/RCRA test plan, or through a temporary authorization) for addressing these instances, noting that none provided an optimal solution.

All commenters agreed that the new Class 1 modification procedure is the appropriate and most efficient method to enable specific RCRA permit conditions to be waived during instances of overlap referred to above. However, a few commenters were concerned with the requirements in proposed § 270.42(k)(2)(ii) and (k)(3), that require sources to submit their permit modification request upon approval of the test plan and the requirement for the Director to approve or deny the request within 30 days, or within 60 days with an extension. This timeframe is feasible only for those sources that have received approval of their test plans at least 60 days prior to their scheduled date for commencing their performance test. We acknowledged the potential impracticality of this requirement in the proposal, but at the time believed that few sources, if any, would conduct their performance tests without an approved test plan. While this still may be true, we have learned that sources who received extensions for testing (so that they would have an approved plan), typically commenced their test shortly after approval. Consequently, this still would not allow enough time to review and approve the permit modification before the test begins. Thus, the new Class 1 modification would be of no benefit to facilities that conduct their tests without an approved test plan, or to facilities that received extensions and need to begin their tests upon or shortly after approval of the test plan. Also, we found one other circumstance where the timeframes could be problematic: If a permitting agency has allowed sources to begin pretesting/testing upon approval of the test plan. Again, a source would not be able to have RCRA permit requirements waived in time to begin its test.

We agree with commenters that the proposed requirements in 270.42(k)(2)(ii) and (iii) do not provide any flexibility to waive RCRA permit limits for sources that (1) do not have an approved test plan but choose to conduct their test; (2) are granted an extension to their test date because they do not yet have an approved test plan; and (3) may begin testing upon approval of their test plans. Our original intent to require prior Agency approval for the new Class 1 permit modification procedure was to ensure that the proposed test conditions would be sufficiently protective when specific RCRA requirements are waived and that a source has met the regulatory requirements for performance test plans. We still believe that review and approval is an important step; however, we also believe it should not be a barrier and therefore, should occur in advance of a source commencing its performance test. As a result, we have revised the proposed regulatory language in 270.42(k)(2)(i) to specify that sources submit their permit modification requests with their test plans, to allow potentially up to one year for approval (*i.e.,* the performance test plan is due one year before the test is to begin). Also, so that approval does not impede the commencement of the performance test, we have revised the proposed language in 270.42(k)(2)(ii) so that the Director can choose whether to issue approval of the permit modification request contingent upon approval of the performance test plan.[246] In that respect,

[246] In all likelihood, we anticipate that the RCRA permit authority will have reviewed the modification request along with the test plans, worked with its Air counterparts and the source to resolve any concerns, and have prepared the permit

Continued

the RCRA permit authority would continue to have an extra measure of assurance in circumstances that may demand it.

D. What Permitting Approach Is EPA Finalizing for New Units?

1. Why Did EPA Propose a Separate Permitting Approach?

As discussed in the proposal, the current RCRA regulations at §§ 264.340, 265.340, 266.100, 270.19, 270.22, 270.62, and 270.66 do not address how or when new combustion units will comply with the MACT standards. Consequently, the part 270 regulations imply that a new unit must obtain a complete RCRA permit before it can demonstrate compliance with the MACT standards. It was never our intent for new units to develop a trial burn plan and provide suggested conditions for the various phases of operation in the RCRA permit application, given that these conditions will become inactive or need to be removed from their permits upon demonstrating compliance with MACT. To rectify our previous omission, we suggested several options that would allow units newly entering the RCRA permit process [247] (and that will comply with the Subpart EEE requirement upon start-up) to forego certain RCRA permit requirements and performance standards. In developing the options that would enable new units to forego certain RCRA requirements, we noted the importance of public participation opportunities under the MACT/CAA framework equivalent to those provided under the RCRA framework. Thus, each option was constructed in such a way that would streamline the RCRA requirements, but continue to provide early and frequent public participation commensurate with the requirements of the RCRA Expanded Public Participation Rule (60 FR 63417, December 11, 1995).

2. What Options Did EPA Propose for Permitting New Units?

In our preferred approach, we proposed that new units not be required to develop a trial burn plan and provide suggested conditions for the various phases of operation in their RCRA permit application. Instead, new units would only be required to address the remaining RCRA activities at the facility in their permit application (or modification request) including corrective action, general facility standards, other combustor specific concerns such as materials handling, risk-based emission limits and operating requirements, and other hazardous waste management units. While this approach appears to be ideal from the standpoint of reducing the regulatory burden to sources and RCRA permit authorities, we noted that even though a new unit will be required to meet the RCRA public participation requirements as part of the permit application process, the operations and emission information specific to the combustor would no longer be provided. Thus, we focused on certain compliance activities under the MACT/CAA framework (i.e., the Notification of Intent to Comply requirements) that would allow for combustor-specific information to be made available to the public as it would have been under the full RCRA permit process.

Regarding the three additional approaches or ''options'', each considered a different point in the RCRA permit process where a new unit could ''transition'' to compliance with the MACT standards (see 69 FR 21319). Under the first option, a new unit could transition to MACT compliance after it had submitted its RCRA Part B application. The Part B however, would not include the trial burn plan information. The new unit would only be required to discuss the compliance activities related to the combustor as part of the RCRA informal public meeting. In the second option, we proposed that a new unit would transition after its RCRA permit has been issued. Here, the new unit would be required to develop a trial burn plan which provided its proposed operations and emissions information and to discuss its compliance activities via the RCRA informal public meeting. Then, a permit would be issued, but it would not contain operating and emissions requirements in order to avoid a future modification to remove them. For the third option, the transition point would have been after the new unit places the DOC in its operating record, which is the compliance point for MACT. This option is more inclusive than the second because it requires the new unit to have a draft permit that covers the construction and shakedown period.

3. Which Option Is EPA Finalizing?

For today's final rule, we are adopting our preferred, proposed approach: new units will not be required to follow the full RCRA permitting process for establishing combustor operations and emissions. Thus, new units are not subject to the combustor-specific RCRA permit requirements and performance standards (i.e., to develop a trial burn plan, provide suggested conditions for the various phases of operation in their permit application, and subsequently operate under those conditions). However, because these units remain hazardous waste treatment units, they are still required to obtain a RCRA permit, or to modify an existing RCRA permit to include a new unit, prior to construction. They need only address the remaining hazardous waste management activities at the facility in their permit application (or modification request) including corrective action, general facility standards, other combustor specific concerns such as materials handling, risk-based emission limits and operating requirements, and other hazardous waste management units. As we noted in the previous section and will discuss again more thoroughly in the next section, we are relying on the NIC process to provide the public with the combustor-specific information that previously would have been provided under the full RCRA permit process.

Almost all commenters supported our preferred approach to not require that new units complete the full RCRA permit process and to rely on the NIC requirements and the MACT/CAA framework to provide a level of public participation that is commensurate with the requirements under RCRA. Commenters generally agreed that our preferred approach achieves this goal while streamlining the RCRA permit process for new units. One commenter felt that the Title V and New Source Review programs (NSR) provide sufficient requirements to regulate new combustion units. We disagree that either or both of those programs fully address the hazardous waste and public participation components commensurate with that provided by the approach we are finalizing today. For instance, a unit may be constructed and operating before a Title V permit is issued, which directly conflicts with RCRA's early public participation requirements. Also, in some instances, public participation may not be a required component of state issued NSR permits (see footnote regarding public participation and SIPs below). However, we do believe that the NSR program will play an important role regarding the exchange of information, as we will discuss in the section below. With respect to the remaining three options presented in the proposal (69 FR 21319–

modification approval prior to issuance of the test plan approval.

[247] Units ''newly'' entering the RCRA permit process refers to a newly constructed facility, thus newly constructed hazardous waste combustion unit; an existing facility that constructs a new unit; or an existing facility that converts a non-hazardous fuel combustion unit to a hazardous waste fuel combustion unit.

21320) that suggested a transitional approach (i.e., each option explored progressive points in the RCRA permit process where facilities could transfer over to MACT without fully completing the RCRA process), nearly all commenters were in agreement that they would require more work to implement than is necessary and consequently oppose them.

4. How Will Permitting for New Units Work?

In the proposed rule, we created an approach that utilizes the NIC requirements and the MACT/CAA framework with the intent of ensuring that the requirements of the RCRA Expanded Public Participation Rule would continue to be fulfilled. The four requirements for public participation as they relate to hazardous waste combustion units are: (1) Permit applicants must hold an informal public meeting before applying for a permit; (2) permit agencies must announce the submission of a permit application which will tell community members where they can view the application while the agency reviews it; (3) permitting agencies may require a facility to set up an information repository at any point during the permitting process if warranted; and (4) permitting agencies must notify the public prior to a trial (or test) burn.

As discussed in the preamble to the proposal (69 FR 21318), we believe that the NIC process addresses the first two RCRA public participation requirements. The NIC process requires a source to make its draft NIC, which discusses the source's plan for coming into compliance with the MACT standards, available for public review and to hold an informal public meeting to discuss the activities contained in the NIC. While the NIC process gives the public an early opportunity to participate in the unit's compliance planning process early on, a few components are still missing before we can consider the first 2 RCRA public participation requirements to be fulfilled under the MACT framework. One component is that there is no permit action associated with the NIC requirements. However, the NSR program can provide a permit mechanism that will determine whether or not a source may be constructed.[248] The steps associated with obtaining an NSR permit, or a ''pre-construction'' permit, are similar, but not necessarily identical to that required under RCRA. They are: (1) Preparation of the permit application (sources must provide the location, design, construction, and operation information) and participation in pre-application meetings; (2) issuance of permit application completeness determination by the State; (3) development and negotiation of draft permit; (4) opportunity for public notice and comment on the draft permit; (5) response of permitting authority to public comments; (6) possible administrative and judicial appeals; and (7) permit issuance/denial.[249]

A second component is that the NIC does not provide the information on the proposed combustor operations or emissions information that would normally be available as part of the RCRA process. To address these gaps between RCRA and MACT, we are requiring an approach similar to that which was proposed. New sources must: (1) Prepare a draft NIC and make it available to the public at the same time as their RCRA pre-application meeting notice; (2) provide a draft of their comprehensive performance test (CPT) plan (to the public) to coincide with the draft NIC and RCRA pre-application meeting notices; and (3) hold their NIC public meeting with their RCRA informal public meeting. The first two requirements ensure that the public is provided with most of the same information that would have been available via the RCRA trial burn plan prior to the source burning hazardous waste. Other information not required by the NIC or CPT plan, such as the combustion unit's design specifications will, in most cases, be available to the public through the NSR permit application. We recommend that sources submit a copy of their NSR permit application to the RCRA permit authority so that this information is readily available for development of the RCRA permit. The third requirement allows the public to inquire and comment on both the new unit's proposed activities and operations. By requiring new sources to develop, notice, and hold a combined public meeting that encompasses the NIC, draft CPT plan, and RCRA pre-application notice information, the public will be provided with all information related to the combustor's compliance plans as well as its operating plans and emissions estimates prior to burning hazardous waste. See new requirements in § 63.1212.

With respect to the requirements we are finalizing today, we received only one comment that expressed concern. The concern is that the requirement to submit the CPT plan is too early in the compliance process. For example, the RCRA application is submitted approximately 2–3 years before start-up whereas the CPT plan is required 1.5 years after the final NIC is due.[250] The commenter feels that the facility would not have enough time to learn about the ''detailed nuances of the system''. However, the commenter does note that it is possible to submit the CPT plan, but it will not be as complete or refined as it would be if it was submitted according to the deadline for existing units. We agree with the commenter that a considerable amount of planning is required of the source to be able to draft the CPT plan at such an early stage, but we are only requiring that a draft of the CPT plan be made available, with the final CPT plan due 6 months prior to the source's compliance date. Moreover, at this early stage, we liken the development of the draft CPT plan to the development of the trial burn plan. Even though it may not be as complete or refined as it will be when the final CPT plan is due, we believe that it will still be of benefit to the public and the regulatory authority, but also to the source in terms of advance planning for the design of the unit through start-up of the unit.

The components thus far, have satisfied the first (2) two RCRA public participation requirements. The third RCRA public participation requirement enables a regulatory authority to evaluate the need for and require a facility to establish and maintain an information repository. The establishment of an information repository is typically required only when there are concerns or unique information needs of a community. The purpose of the information repository is to make information regarding the facility (and combustion unit) available to the public during the permit issuance process and during the life of the permit. In the preamble, we noted that

[248] We believe that the majority of new units will be classified as major sources for NSR permitting (requiring either prevention of significant deterioration or nonattainment permits), however, those that do not, will likely be required to obtain a minor NSR permit. In few cases, new sources (e.g., newly constructed as opposed to modified) may not be required to obtain an NSR permit if its potential to emit does not exceed the NSR threshold level.

[249] With respect to numbers 4 and 5, many States omitted the public participation steps in their federally approved SIPs. This was the reason why Sierra Club had been opposed to our efforts to simply rely on NSR permitting to provide public participation opportunities that would have been otherwise provided under the traditional RCRA permit process for new units. Today, however, many SIPs have been revised to address public participation requirements.

[250] Comprehensive performance test plans are required to be submitted one year in advance of the scheduled test. The submittal date would be as late as 2.5 years after the effective date of the rule assuming no extensions are granted.

although the Title V permit process contains a provision that any materials relevant to the permit decision be made available to interested persons (see § 70.7(h)(2) and § 71.11(d)), the information may not be made available until well after the combustor is constructed and operating. Consequently, we have chosen to adopt additional provisions under the NIC requirements that parallel the requirements of § 124.33.

We had proposed two options that would allow a regulatory authority to require, on a case-by-case basis, a source to establish an information repository specific to the combustor. The first option was to place such a provision in the NIC regulations and the second option was to amend the applicability language in § 124.33 to include combustion sources that will comply with Part 63, subpart EEE upon start-up. Two commenters felt that the second option would create problems as far as organization (i.e., by modifying the RCRA regulations to include a provision solely for new units complying with MACT). We agree that the second option could be confusing and that it would be more appropriate to keep all new requirements for new units in one set of regulations. Therefore, we are finalizing a provision that will allow for an information repository to be established specific to the combustor (recall that a repository established pursuant to the RCRA permit will include documents relevant to the facility only), if deemed appropriate, under the NIC regulations. See new § 63.1212(c). Under the NIC regulations, the repository could include the NIC, test plans, draft Title V permit and application, reports, et cetera.

The fourth and final RCRA public participation requirement to be fulfilled is for the regulatory authority to notify the public of an impending trial burn or test burn. As discussed in the RCRA Expanded Public Participation Rule, the RCRA permit authority will typically provide the notice at least 30 days in advance of the test (60 FR 63426, December 11, 1995). Similarly, the MACT regulations require an existing or new unit to provide notice to the public that the CPT plan (and the continuous monitoring system performance evaluation test plan) is available for review. The regulations in § 63.1207(e)(2) fulfill this requirement. Although the CPT plan may not be approved before the public is notified, the intent is to provide notice to the public of a future test. We believe that the MACT regulations provide public notice of the test plans that are commensurate with the RCRA regulations and thus, no additional regulatory revisions or amendments are needed.

4.a. Process for New Units Seeking an Initial RCRA Permit

We anticipate that the process for new units seeking an initial permit will work as follows. Any new unit would begin the process by developing and compiling the information necessary for the RCRA draft permit (e.g., information required for the part A application at § 270.13, the relevant general information for the part B application according to Part 270) and the applicable NSR permit.[251] The information needed to compile the draft NIC and draft CPT plan would be gathered simultaneously, as if the source were developing the trial burn plan. When the source has compiled its RCRA permit application, draft NIC and draft CPT plan, it would submit a RCRA pre-application meeting notice at least 30 days prior to the date scheduled for the RCRA informal public meeting according to §§ 124.31(b) and (d). At the time of the RCRA pre-application meeting notice, the source would also issue notice of the NIC public meeting (at least 30 days prior to the NIC meeting) according to § 63.1210(c)(3), so that the two meetings can occur at the same time. In order for the public to be able to view all information relevant to the combustor before the combined RCRA pre-application and NIC public meeting, the source would make the draft NIC and draft CPT plan available to the public for review at the same time the notices for the meetings are issued. To aid the RCRA permit authority in its development of the draft RCRA permit (*i.e.*, mainly for purposes of evaluating risk), we strongly recommend that the source also provide copies of the draft NIC, draft CPT plan, and NSR application (if applicable) to the RCRA permit authority. It is our hope that the availability of information will expedite the development of the draft permit. All notices should be presented to the public in sufficient time to allow for a combined RCRA informal public meeting and NIC public meeting.

Following the combined public meeting, the source will submit its RCRA permit application and the RCRA regulatory authority will prepare and issue a draft permit. The public will then have an opportunity to comment on the draft permit and request a public hearing. Upon resolution of any issues surrounding the draft permit, a final RCRA permit will be issued. The RCRA process is the same as before, but should be reasonably shorter. Finally, the new unit may begin burning hazardous waste when it can assure it will operate in compliance with the MACT standards (*i.e.*, by placing a documentation of compliance in its operating record on the day it begins burning hazardous waste). See new regulatory language at § 63.1212(c). To aid readers in understanding the above process, we have included a pictorial timeline. Please see figure 2.

Finally, it may also be feasible to combine an NSR pre-application meeting and public notice of the draft NSR permit with the process described above. Thus, we recommend that sources work closely with their Air and RCRA permit agencies so that the NSR public notices and meetings may be coordinated with the RCRA and NIC notices and meetings so time and resources are efficiently utilized.

4.b. Process for New Units Modifying an Existing RCRA Permit

The process of adding a new unit to an existing permit is accomplished through a Class 3 permit modification (see § 270.42 (c) for requirements). The requirements governing public notices of the draft NIC, draft CPT plan, and holding a combined public meeting are essentially the same as new units seeking an initial permit. The process is as follows. The source prepares and submits its RCRA permit modification request (and if applicable, NSR application). It must then publish a notice of the modification request seven days later, followed by a public meeting no earlier than 15 days after publication of the notice for the modification request, and no later than 15 days before the close of the 60-day comment period. As with new units that are submitting an initial RCRA permit application, it is also important for sources seeking to modify their permit to coordinate their NIC public meeting with their RCRA permit modification public meeting. This is made possible due to the flexibility of the NIC public meeting; it can be held any time prior to the 10 month deadline. After the combined public meeting and the close of the comment period, the permit authority will either grant or deny the modification request. If approved, the source may then begin construction or modification of the unit. To aid readers in understanding the timing of the

[251] Because the information required for NSR permit is less comprehensive than a RCRA permit, it allows for a much shorter time period for issuance. The average time for issuing a PSD permit, for example, after receiving an application is slightly more than 7 months, but varies depending upon public involvement and negotiation of the application content. USEPA. Docket A–2001–19, Document II–A–01. *NSR 90-Day Review Background Paper*, June 22, 2001.

above process, we have included a pictorial timeline. Please see figure 2.

Again, it may be feasible to combine an NSR pre-application meeting and public notice of the draft NSR permit with the process described above. Thus, we recommend that sources work closely with their Air and RCRA permit agencies so that the NSR public notices and meetings may be coordinated with the RCRA and NIC notices and meetings so time and resources are efficiently utilized.

E. What Other Permitting Requirements Were Discussed in the Proposal?

At proposal, we discussed where most Phase 1 sources would be in terms of their transition from their RCRA permit requirements to compliance with the MACT Interim Standards (see 69 FR 21321). The transition process was discussed with respect to both the RCRA permit and the Title V permit. However, when we discussed the Title V permit requirements in the proposal, we did not elaborate on the transition between the Interim Standards and Replacement Standards. Because we believe that such a discussion would be helpful to readers, we have included general information describing how the transition process would work for most sources in Section B. Did Commenters Express any Concerns Regarding the Current Permitting Requirements?, subsections 3 and 4.

For Phase 2 sources, we proposed the same permitting approach as we did for Phase 1 sources. Today, we are finalizing as proposed, the following for Phase 2 sources: (1) the new Phase 2 emissions standards will be placed only in the CAA regulations at 40 CFR part 63, subpart EEE, and be implemented through the air program; (2) with few exceptions, the analogous standards in the RCRA regulations no longer apply once a facility demonstrates compliance with the MACT standards in subpart EEE and any duplicative requirements have been removed from the RCRA permit; and (3) the new standards will be incorporated into operating permits issued under Title V of the CAA rather than be incorporated into RCRA permits. Consequently, we are finalizing the proposed changes to §§ 270.22 and 270.66 to implement the above. Also applicable to Phase 2 sources via today's final rule are the changes and additions we finalized in the 1999 final rule for Phase 1 sources. These include a streamlined RCRA permit modification procedure to allow sources to make upgrades to comply with MACT (§§ 270.42(j) and 270.42 appendix I, section L.9), a second streamlined RCRA permit modification procedure to remove conditions from a permit that are no longer applicable (§ 270.42 appendix I, section A.8), an addition to § 270.235 to specify conditions for start-up, shutdown, and malfunction plan and integrate them with the CAA program, and an amendment to the interim status regulations at § 270.72 to exempt interim status facilities from the reconstruction limitation when making upgrades to comply with MACT.

Also, we are finalizing three new permitting changes that are applicable to both Phase 1 and 2 sources. Two have been discussed previously in this section and are: (1) A new streamlined RCRA permit modification procedure designed to reduce overlap during the transition from RCRA to MACT (§§ 270.42(k) and 270.42, appendix I, L.10); and (2) regulatory provisions stating that new units are no longer subject to the full array of RCRA combustion permitting requirements. The third change is discussed above in Section IX. Site-Specific Risk Assessment Under RCRA and finalizes our response to a petition for rulemaking with respect to site-specific risk assessments (SSRAs). As part of this change we have decided to adopt regulatory language that specifically provides clarification of authority for RCRA permit writers to evaluate the need for and, where appropriate, require SSRAs and to add conditions to RCRA permits that they determine, based on the results of an SSRA, are necessary to protect human health and the environment.

Last, as explained in part four section II.A, we are finalizing our decision to regulate emissions of dioxin/furans, mercury, polycyclic organic matter, and polychlorinated biphenyls from Phase 2 area sources under section 112(d).[252] This means that Phase 2 area sources are subject to MACT standards only for these hazardous air pollutants (HAP) in the final rule. To reiterate, they are: Dioxin/furans, mercury, and polycyclic organic matter (controlled by the surrogates DRE and carbon monoxide/hydrocarbon). For the remaining HAP (hydrogen chloride and chlorine gas and metals other than mercury), Phase 2 area sources may either comply with the MACT standards for Phase 2 major sources or continue complying with the RCRA standards and requirements of their RCRA permit.

In the 2004 proposal, we stated that we were not making a positive area source finding for Phase 2 area sources as we have for Phase 1 area sources (69 FR 21212 and 21325). Regardless of this, however, the Phase 2 area sources are still subject to the requirement to obtain a Title V permit because they are subject to section 112 standards under this subpart. See § 502(a) of the CAA and 40 CFR §§ 70.3(b)(2) and 71.3(b)(2).

It is important to note that the Title V applications for the Phase 2 area sources will need to contain emissions information relative to all regulated air pollutants (to determine applicable requirements, fees, etc.) that are being emitted from the units subject to the MACT standards, not just the specific HAP pollutants regulated by the MACT standards (see §§ 70.5(c)(3)(i) and 71.5(c)(3)(i)). Although, the permit itself would contain standards only for the HAP subject to MACT standards (the § 112(c)(6) HAP). A Phase 2 area source which chooses to control hydrogen chloride, chlorine gas, and metals other than mercury by continuing to comply with the relevant RCRA standards and the requirements of its RCRA permit should note this choice in its Title V application and cite to the relevant requirements of this subpart. This will help ensure that the permitting authority is aware that these requirements apply in lieu of the MACT standards for Phase 2 major sources. The permitting authority should also document this choice in the statement of basis for the source's Title V permit. See §§ 70.7(a)(5) and 71.7(a)(5). Finally, for the units at a source which are subject to the subpart EEE MACT standards, all CAA applicable requirements to which these units are subject, *e.g.*, State Implementation Plan requirements, not just the relevant Subpart EEE requirements, must be included in the Title V permits issued to these sources. See §§ 70.3(c)(2) and 71.3(c)(2). For more information regarding § 112(c)(6) and how it relates to Phase 2 area sources, see Part Four, Section II.A., ''Area Source Boilers and Hydrochloric Acid Production Furnaces''.

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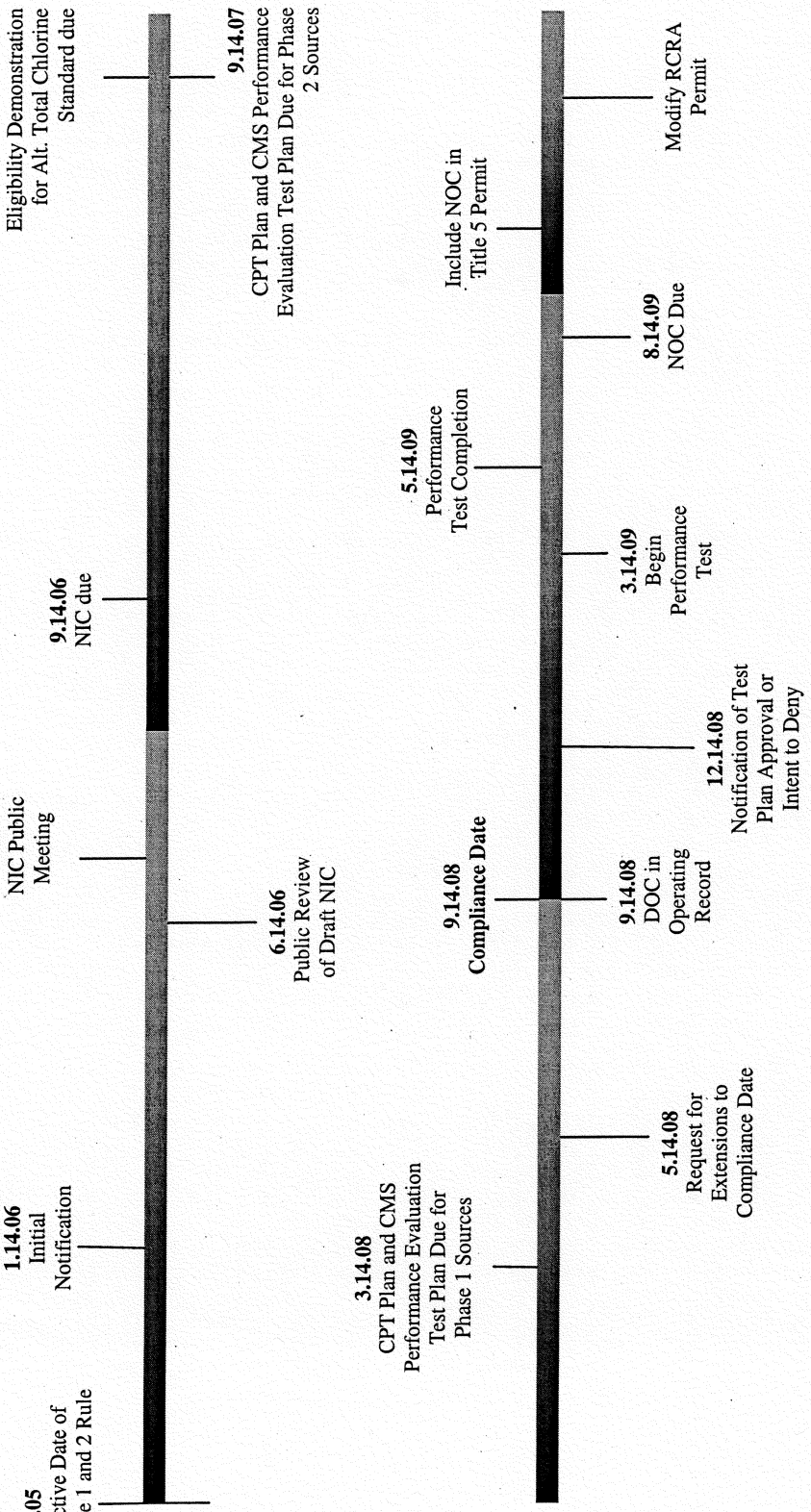
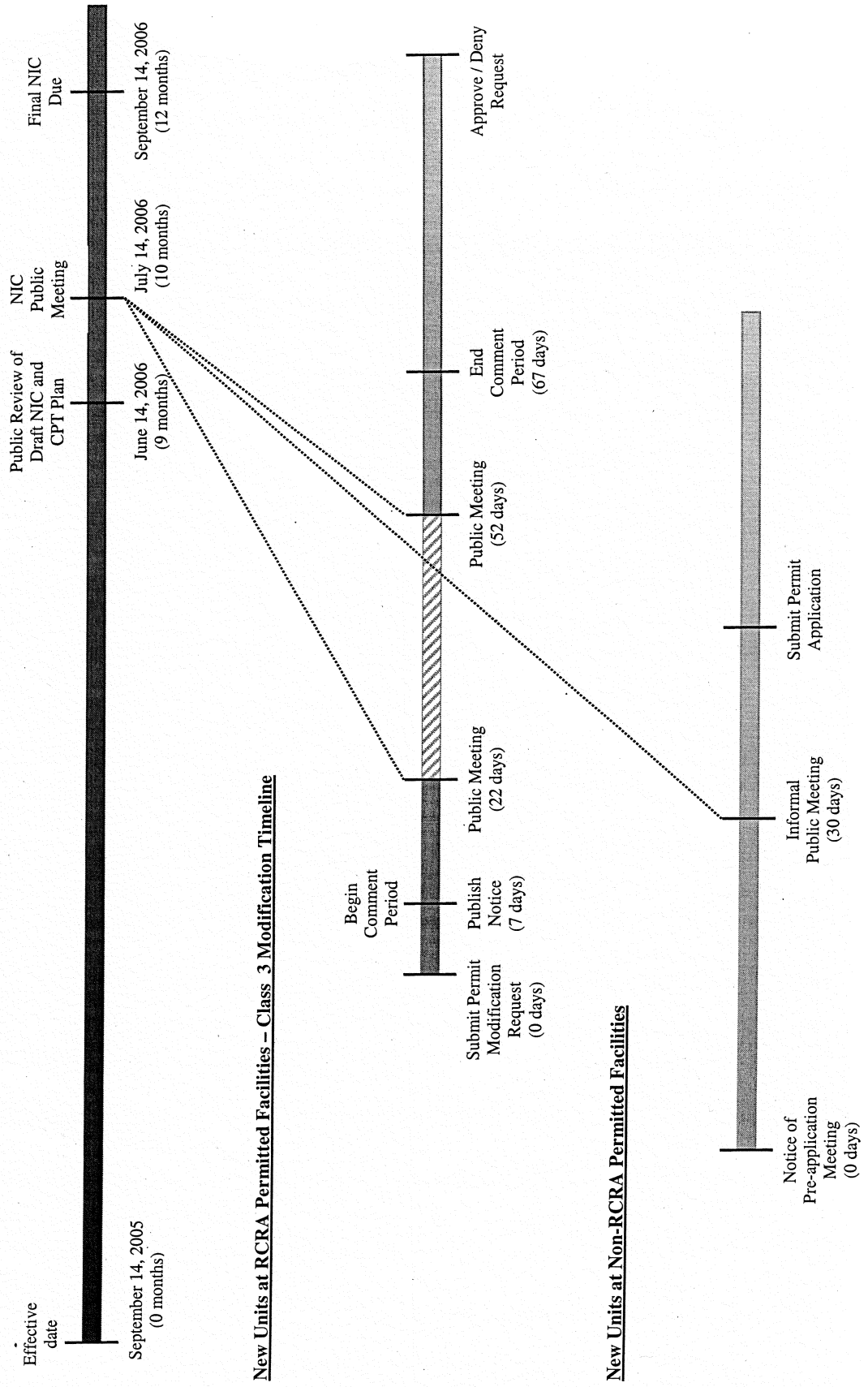
[252] As explained in the Comment Response Document vol. V, although § 502(a) allows EPA to exempt area sources from title V permitting requirements if EPA finds that those requirements would be (among other things) ''unnecessarily burdensome'', we believe that Title V requirements remain appropriate for these sources given the highly toxic nature of the HAP and the importance of affording opportunity for public participation as provided for in the Title V permit issuance process.

Figure 1. Time Line for Phase 1 Replacement Standards and Phase 2 Standards[253]



[253] Because of the variability of the Title V program requirements, most Title V permit actions (application due dates, revisions, reopenings, etc.) are not included in this timeline. Please refer to the particular source's current Title V permit status, the Title V regulations, and the individual permitting authority's Title V program requirements.

Figure 2. NIC and CPT Plan Time Line for New Units



Part Five: What Are the CAA Delegation Clarifications and RCRA State Authorization Requirements?

I. Authority for This Rule

Today's rule amends the promulgated standards located at 40 CFR part 63, subpart EEE. It amends the standards for the Phase 1 source categories—incinerators, cement kilns, and lightweight aggregate kilns that burn hazardous waste, and it also amends subpart EEE to establish MACT standards for the Phase 2 source categories—boilers and hydrochloric acid production furnaces that burn hazardous waste. Additionally, this rule amends several RCRA regulations located in 40 CFR part 270 to reflect changes in applicability, addition of a new permit modification procedure, and additions related to site-specific assessments and permitting.

II. CAA Delegation Authority

Before discussing the clarifications being finalized today, it is important to first highlight a few key aspects of delegation authority. Recall from the proposal that a state, local, or tribal (S/L/T) agency must be delegated authority under CAA section 112(l) before it can exercise the delegable provisions' authorities. The delegable authorities can be found in 40 CFR 63.91(g)(1)(i), also known as Category I Authorities. A S/L/T agency that has applied for and received delegation authority can approve: test plans, requests for minor and in most cases, intermediate changes to monitoring and test methods, performance test waivers, and several other Category I Authorities. Please note that even though a S/L/T agency may have an approved Title V permit program, it cannot exercise delegable authorities or be the primary enforcement authority if it has not received delegation authority under CAA section 112(l). Moreover, when a S/L/T agency has not taken delegation of a section 112 standard, the agency can only incorporate the section 112 standard's requirements into its Title V permits, (and then implement and enforce these requirements through its title V permits) when it has adequate authority under State, local, or tribal law which allows it to conduct the above actions without delegation. See, *e.g.*, the proposed Federal Plan for Commercial and Industrial Solid Waste Incinerators, November 25, 2002 (67 FR 70640, 70652). Please also refer to 69 FR 21335 of the proposal and the fact sheet entitled, Clean Air Act Delegation for the HWC NESHAP at: *http://www.epa.gov/epaoswer/hazwaste/combust/toolkit/factshts.htm* to learn more about the advantages of receiving delegation authority.

Also, we would like to point out that there are several delegation options that S/L/T agencies can receive. Regardless, many S/L/T agencies choose the ''straight delegation'' option when applying for delegation approval. Straight delegation means that these agencies have agreed to implement and enforce federal MACT standards as they have been written in the promulgated requirements. As a result, many EPA Regions and states have established memoranda of agreement that essentially provide automatic delegation of each future MACT, as opposed to the state applying for delegation of each future MACT, which requires a rulemaking to implement. For more information related to the delegation options and procedures, please refer to the fact sheet, Clean Air Act Delegation for the HWC NESHAP at: *http://www.epa.gov/epaoswer/hazwaste/combust/toolkit/factshts.htm* and EPA's delegation website at: *http://www.epa.gov/ttnatw01/112(l)/112-lpg.html.*

III. Clarifications to CAA Delegation Provisions for Subpart EEE

In the proposal, we discussed the need to provide additional clarification for the delegable and non-delegable authorities within Subpart EEE based upon our implementation experience with the Phase 1 Interim Standards and the Clarifications to Existing National Emissions Standards for Hazardous Air Pollutants Delegation' Provisions final rule published on June 23, 2003 (68 FR 37334). Although the June 23, 2003 final rule provided clarification and streamlined the delegable provisions for each existing NESHAP, it overlooked several non-delegable and delegable authorities within Subpart EEE. It provided clarification on the non-delegable authorities of Subpart EEE as they relate to major alternatives to the standards themselves and to test methods, monitoring, or recordkeeping and reporting under the General Provisions.[254] However, it omitted major alternatives specific to Subpart EEE such as: test methods under §§ 63.1208(b) and 63.1209(a)(1); monitoring under § 63.1209(a)(5) and; recordkeeping and reporting under § 63.1211(a) through (d). Therefore, the following paragraphs will explain which authorities in Subpart EEE are delegable and are not delegable to S/L/T agencies that have been delegated authority and will provide some examples of or references to alternative requests associated with each delegable or non-delegable provisions authority.

To review, the regulations at 40 CFR 63.90 define three types of alternative requests. Alternative requests or ''changes'' to a particular delegable or non-delegable provision are classified as major, intermediate, or minor depending upon the degree (*i.e.*, potential to be nationally significance, potential to reduce the stringency of the standard, etc.) of change being requested. An alternative request that qualifies as a major change is not delegable to S/L/T agencies, even when they have delegation authority. These requests must be sent to the EPA Region or, if it concerns a test method under §§ 63.7(e)(2)(ii) and (f), 63.1208(b) and 63.1209(a)(1) or a standard under §§ 63.1200, 63.1206(a), or 63.1216–63.1221, then it must be sent to our Office of Air Quality Planning and Standards (OAPQS).[255] An alternative request that qualifies as an intermediate or minor change is delegable. However, the EPA Region may choose whether or not they will delegate authority to S/L/T agencies to approve intermediate and, even some minor changes during the delegation approval process. In addition to the regulations, the guidance document entitled, How to Review and Issue Clean Air Act Applicability Determinations and Alternative Monitoring (EPA 305–B–99–004, February 1999) provides a listing of delegable and non-delegable authorities in Tables 1 and 2, as well as descriptions and examples of major, intermediate, and minor changes in Attachment 1.

A. Alternatives to Requirements

Any change to a promulgated standard is considered a major change and as noted above, must be sent to OAQPS (see contact information in footnote). The reason why a change to a standard must be sent to EPA Headquarters is because the change must be established through national rulemaking, regardless of the degree of change sought. Thus, only OAQPS can approve alternative requests for changes to standards. Additionally, any change to applicability requirements and compliance dates (*e.g.*, requirements that ensure that the standards are achieved as EPA intended) are also

[254] For example, the final rule included approval of alternatives to requirements in §§ 63.1200, 63.1203, through 63.1205, and 63.1206(a); approval of major alternatives to test methods under § 63.7(e)(2)(ii) and (f); approval of major alternatives to monitoring under § 63.8(f) and; approval of major alternatives to recordkeeping and reporting under § 63.10(f).

[255] For contact information, please visit *www.epa.gov/ttn/emc/staffdir.html.*

considered major and also must be sent to OAQPS for approval. Specific to Subpart EEE, alternative requirement requests including those pursuant to §§ 63.1200, 63.1206(a), or 63.1216–63.1221 are considered major changes and consequently are non-delegable. The regulations at § 63.1214(c) correctly identified the requirements in Subpart EEE, however we have revised them today (as we proposed) to reflect the new sections that house the Phase 1 Replacement Standards and Phase 2 Standards.

There are a few exceptions to the above, however. Subpart EEE incorporates specific provisions for sources to request alternative standards which are delegable because they have been established through rulemaking. In fact, several alternative standards are self-implementing meaning that the source only need specify in their DOC which standard it will comply with. The alternative to the particulate matter standard in § 63.1206(b)(14) and the emissions averaging standards for cement kilns with in line kiln raw mills and preheater or preheater/precalciner kilns with dual stacks in § 63.1204(d) and (e) are three examples. There are also alternative standards that sources may petition to comply with. They include: Alternatives to the standards for existing and new LWAKs at § 63.1206(9) and cement kilns at § 63.1206(b)(10) and the alternative risk-based standard for total chlorine at § 63.1215. Sources choosing to comply with these alternative standards must receive approval from their delegated S/L/T agency prior to implementing them.[256] With respect to changes to compliance dates, requests under § 63.1213 specifically allow sources to request an extension to the compliance date for the installation of pollution prevention or waste minimization controls. Again, because this provision has been specified in subpart EEE, it is not considered a major change and is delegable.

B. Alternatives to Test Methods

With respect to test methods, we noted above that the final delegations rule stated that major alternatives to the test methods at §§ 63.7(e)(2)(ii) and (f) were not delegable. Therefore, as we proposed, it is necessary to add major alternatives to 63.1208(b), which specifies the test methods sources must use to determine compliance with subpart EEE. Also, we are adding the CEMS monitoring requirement under § 63.1209(a)(1). It is regarded as a test method because it serves as a benchmark method for demonstrating compliance with the emission standards. Both sections are delegable to S/L/T agencies as long as they have been delegated authority and as long as the alternative requests comprise minor or intermediate changes. However, a major change to either of these test method sections must be sent to OAQPS for approval.[257] Only OAQPS can approve major changes to test methods because they are designated in the standard as the means for determining compliance with an emission standard. The proposed revisions to § 63.1214 are finalized today to include major alternatives to test methods under §§ 63.1208(b) and 63.1209(a)(1) as non-delegable authorities.

C. Alternatives to Monitoring

For monitoring, the final delegations rule stated that major alternatives to monitoring at § 63.8(f) were not delegable, but did not reference monitoring specific to subpart EEE. In subpart EEE, the monitoring requirements are located in § 63.1209. This section also includes two provisions specific to alternative monitoring, thus removing some of the ''guesswork'' when trying to discern whether a request for change is minor, intermediate, or major. One is located at § 63.1209(a)(5), Petitions to use CEMS for other standards and the other is located at § 63.1209(g)(1), Alternative monitoring requirements other than continuous emissions monitoring systems. Each is discussed in the following paragraphs.

In the proposal, we explained that a request to use other monitoring in lieu of a CEMS is always considered a major change due to CEMS generally being considered a more accurate measure of compliance. However, if a source requests to use a CEMS in lieu of a required operating parameter, it may be considered an intermediate change. Since publication of the proposal, performance specifications have been promulgated for PM CEMS (and mercury CEMS).[258] Consequently, today we view requests per § 63.1209(a)(5) to use PM CEMS as intermediate changes to monitoring. Although the implementation of PM CEMS according to PS–11 (69 FR 1786 and 40 CFR part 60, Appendix B; January 12, 2004) and Procedure 2 (see also 40 CFR part 60, Appendix F) is largely ''self-implementing,'' sources wishing to apply to use of PM CEMS should develop and submit QA/QC plans specifying audit frequencies to account for site-specific stack conditions. We believe that other site-specific issues that may need to be addressed prior to use of the CEMS, such as a source's request to deviate from PS–11 or a source's selection of the correct correlation curve(s), are properly addressed under EPA's established policies and procedures for alternative method requests. We believe that a petition to use PM CEMS under § 63.8(f) is still the appropriate mechanism, but that sources can submit their petitions to their delegated S/L/T agency for review and approval, and we recommend that EPA Regional offices work with these agencies to monitor implementation. Thus, with the exception of petitions to use PM CEMS in lieu of an operating parameter which is considered an intermediate change, we are finalizing our proposed revision to § 63.1214(c) to include major alternatives to monitoring under § 63.1209(a)(5) as a non-delegable authority.

Section 63.1209(g)(1), Alternative monitoring requirements other than continuous emissions monitoring systems, contains the other alternative monitoring provision. This provision allows sources to request alternative monitoring methods to monitor compliance, except for those standards that must be monitored with a CEMS (e.g., those in § 63.1209(a)(1)), and to request a waiver of an operating parameter limit. We provided several examples of alternative parameter monitoring for which a request may be submitted under this section in the proposal at 69 FR 21337. They include use of: a different detector, different monitoring location, a different method as recommended by the manufacturer, or a different averaging period that is more stringent than the applicable standard. In the proposal, we stated that we believe the majority of requests submitted pursuant to § 63.1209(g)(1) are not major and discussed in the preamble amending the language in § 63.1209(g)(1) so that these types of changes could be reviewed and approved by the delegated S/L/T agency. However, when we added

[256] The alternative risk-based standard for total chlorine at § 63.1215 requires sources to submit their eligibility demonstration to both the delegated S/L/T agency and to the Risk and Exposure Assessment Group in Research Triangle Park, NC for review, even though the delegated S/L/T agency can grant or deny approval.

[257] For contact information, please visit *www.epa.gov/ttn/emc/staffdir.html.*

[258] Although performance specifications have been promulgated for mercury CEMS, there has not been as much experience in implementing these devices for hazardous waste combustion sources (or similar sources) as there has been for PM CEMS at this time. Therefore, we believe it appropriate to continue sending requests to use mercury CEMS in lieu of an operating parameter to the appropriate EPA Region for review and approval.

language to § 63.1209(g)(1) to allow for the above, we inadvertently referred to an approved Title V program instead of a S/L/T agency which has taken delegation of subpart EEE. We have corrected and finalized the proposed language. Therefore, whether minor or intermediate, requests under § 63.1209(g)(1) may be sent to your delegated S/L/T agency for review and approval.

Please note that 63.1209(g)(1) cannot be used when requesting major changes to the monitoring required by the standard. Such changes typically involve new unproven monitoring methods. Unproven monitoring methods refer to those where the technology or procedures are not generally accepted by the scientific community (§ 63.90(a)). If you are uncertain whether your request constitutes a new unproven monitoring method, which is considered a major change, you should submit your request to your EPA Region. The regulatory language in 63.1209(g)(1) has been revised to reflect this clarification.

D. Alternatives to Recordkeeping and Reporting.

As with the others, the final delegation provisions' rule only cited the waiver of recordkeeping and reporting requirements of § 63.10(f) as a non-delegable provision. Thus, it is necessary to add the relevant subpart EEE recordkeeping and reporting requirements of § 63.1211. Section 63.1211 is delegable in its entirety to S/L/T agencies unless an alternative request is determined to be a major change. An alternative request that is a major change, such as decreases in record retention for all records, must be sent to your EPA Region for review and approval. Similar to the monitoring section, § 63.1211 contains a specific alternative provision. Section 63.1211(d) Data Compression, allows sources to request to use data compression techniques to record data from CMS and CEMS on a frequency less than that required by § 63.1209. We view the alternative request to be a minor change because available guidance provides criteria for defining fluctuation and data compression limits. See 64 FR 52961 and 52962, September 30, 1999. Therefore, requests submitted under 63.1211(d) can be consistently evaluated by delegated S/L/T agencies. Section 63.1214(c) has been revised to specify that major alternatives to 63.1211(a)—(c) are non-delegable authorities.

E. Other Delegation Provisions

Although not discussed in the proposal, it is important to note that issuing applicability determinations is another delegable authority. The EPA document How to Review and Issue Clean Air Act Applicability Determinations and Alternative Monitoring (EPA 305–B–99–004, February 1999) provides guidance regarding who has the lead for issuing applicability determinations. In general, Regions may delegate the authority to issue applicability determinations to S/L/T agencies when the determinations are routine in nature. However, delegation of authority for certain applicability determinations should be retained by the Regions. These include applicability determinations that: (1) Are unusually controversial or complex; (2) have bearing on more than one state or district (are multi-Regional); (3) appear to create conflict with previous policy or determinations; (4) are a legal issue which has not previously been considered (a matter of first impression); or (5) raise new policy questions. It is recommended that Regional offices require notification when S/L/T agencies issue applicability determinations.

IV. RCRA State Authorization and Amendments to the RCRA Regulations

Under section 3006 of RCRA, EPA may authorize qualified states to administer their own hazardous waste programs in lieu of the federal program within the state. Following authorization, EPA retains enforcement authority under sections 3008, 3013, and 7003 of RCRA, although authorized states have primary enforcement responsibility. The standards and requirements for state authorization are found at 40 CFR Part 271.

Prior to enactment of the Hazardous and Solid Waste Amendments of 1984 (HSWA), a State with final RCRA authorization administered its hazardous waste program entirely in lieu of EPA administering the federal program in that state. The federal requirements no longer applied in the authorized state, and EPA could not issue permits for any facilities in that state, since only the state was authorized to issue RCRA permits. When new, more stringent federal requirements were promulgated, the state was obligated to enact equivalent authorities within specified time frames. However, the new federal requirements did not take effect in an authorized state until the state adopted the federal requirements as state law.

In contrast, under RCRA section 3006(g) (42 U.S.C. 6926(g)), which was added by HSWA, new requirements and prohibitions imposed under HSWA authority take effect in authorized states at the same time that they take effect in unauthorized states. EPA is directed by the statute to implement these requirements and prohibitions in authorized states, including the issuance of permits, until the state is granted authorization to do so. While states must still adopt HSWA related provisions as state law to retain final authorization, EPA implements the HSWA provisions in authorized states until the states do so.

Authorized states are required to modify their programs only when EPA enacts federal requirements that are more stringent or broader in scope than existing federal requirements. RCRA section 3009 allows the states to impose standards more stringent than those in the federal program (see also 40 CFR 271.1). Therefore, authorized states may, but are not required to, adopt federal regulations, both HSWA and non-HSWA, that are considered less stringent than previous federal regulations.

We discussed in the proposal which RCRA regulations we intended to amend and their impact on state authorization procedures. Today, we are finalizing those amendments in §§ 270.10, 270.22, 270.32, 270.42, 27062, 270.66, and 270.235. In addition, we are amending the regulations in §§ 264.340 and 266.100 to reflect changes that have been made based upon comments. Today's amendments fall under both HSWA and non-HSWA authorities. That is, changes made to regulations applicable to boilers and industrial furnaces are promulgated under HSWA authority, whereas changes made to regulations applicable to incinerators are promulgated under non-HSWA authority. [259] All of the amendments made today are considered to be either less stringent or equivalent to the existing Federal program, which means that states are not required to adopt and seek authorization for these provisions regardless of whether they are finalized under non-HSWA or HSWA authorities. Nevertheless, we strongly encourage states to become authorized for today's amendments.

[259] When new requirements and prohibitions (that are more stringent than the previous federal regulations) are imposed under non-HSWA authority, the new federal requirements do not take effect in an authorized state until the state adopts the federal requirements as law. Conversely, when imposed under HSWA authority, the new federal requirements are federally enforceable in an authorized state until the necessary changes to a state's authorization are approved by EPA.

Experience has shown that when states have been authorized for previous amendments (i.e., those finalized in the 1999 rule) that were intended to facilitate the transition from the RCRA program to MACT and the CAA Title V program, the process has proven to be less cumbersome. For a more detailed discussion of non-HSWA and HSWA authorities with respect to how and when they take effect, please refer to the proposal's preamble discussion at 69 FR 21338.

Several RCRA sections that have been enacted as part of HSWA apply to today's rule: 3004(o), 3004(q), and 3005(c)(3). Thus, if a state is not authorized for the boiler and industrial furnace regulations, these provisions are federally enforceable in an authorized state until the necessary changes to a state's authorization are approved by us. See RCRA section 3006, 42 U.S.C. 6926. We are adding today's requirements to Table 1 in 271.1(j) where rulemakings promulgated pursuant to HSWA authority are identified.

Part Six: Impacts of the Final Rule

I. What Are the Air Impacts?

Table 1 below shows the emissions reductions achieved by the final rule for all existing hazardous waste combustors. For Phase I sources—incinerators, cement kilns, and lightweight aggregate kilns—the emission reductions represent the difference in emissions between sources controlled to today's standards and estimated emissions when complying with the interim MACT standards promulgated on February 13, 2002. Thus, the significant emissions reductions already achieved by the interim standards are not reflected in the estimates shown in Table 1.[260] For Phase II sources—solid fuel boilers, liquid fuel boilers, and hydrochloric acid production furnaces—the reductions represent the difference in emissions between today's standards and the current baseline of control provided by 40 CFR part 266, subpart H.

Nationwide baseline HAP and particulate matter emissions from hazardous waste combustors are estimated to be approximately 12,650 tons per year at the current baseline level of control. Depending on the number of facilities demonstrating compliance with health-based compliance alternatives for total chlorine, the total reduction of HAP and particulate matter for existing sources could be between approximately 2,260 and 3,380 tons per year. A discussion of the emission estimates methodology and results are presented in ''Technical Support Document for HWC MACT Replacement Standards, Volume V: Emission Estimates and Engineering Costs'' that is available in the docket.

TABLE 1.—NATIONWIDE ANNUAL EMISSIONS REDUCTIONS OF HAP AND OTHER POLLUTANTS

Pollutant	Estimated emission reductions (tons per year)
Dioxin/furans[1]	0.20
All HAP metals	19.5
Mercury	0.21
Semivolatile metals (Cd, Pb)	2.9
Low volatile metals (As, Be, Cr)	6.5
Other metals (Co, Mn, Ni, Sb, Se)	9.9
HCl and chlorine gas[2]	1220
Particulate matter	2,140

[1] Dioxin/furan emission reductions are expressed as grams TEQ per year.

[2] We are promulgating health-based compliance alternatives for total chlorine for hazardous waste combustors other than hydrochloric acid production furnaces in lieu of the MACT technology-based emission standards (see Part Four, Section VII of the preamble for details). Given that a number of sources may elect to comply with the health-based compliance alternatives, the estimated reductions of total chlorine represent an upper bound estimate.

II. What Are the Water and Solid Waste Impacts?

We estimate that water usage for existing sources will increase between 400 million and 1.6 billion gallons per year as a result of today's rule. The upper range estimate represents the water usage assuming no sources elect to comply with the health-based compliance alternatives for total chlorine, while the lower range estimate represents water usage assuming all sources elect the alternative. Water usage increases are estimated for reducing combustion gas temperatures with evaporated spray coolers for dioxin/furan control as well as for new particulate matter and acid gas air pollution control equipment. The increased water usage will also result in an increase in wastewater generation. Depending on the number of sources that elect to comply with the health-based compliance alternatives for total chlorine, we also estimate that up to 775 million gallons of wastewater may be generated.

We estimate that the generation of solid waste will increase between approximately 8,700 tons and 12,200 tons per year depending on the number of sources that elect to comply with the health-based compliance alternatives for total chlorine. Of these totals, approximately 250 tons per year will be classified as hazardous waste subject to RCRA Subtitle C regulations. We estimate the remainder—between 8,450 and 11,950 tons per year—will be classified and managed as a non-hazardous industrial waste subject to Subtitle D of RCRA. The costs associated with these disposal and water requirements are accounted for in the annualized compliance cost estimates. A discussion of the methodology used to estimate impacts is presented in ''Technical Support Document for HWC MACT Replacement Standards, Volume V: Emission Estimates and Engineering Costs'' that is available in the docket. We note that the nonair quality health and environmental impacts effects for both floor and beyond-the-floor options are discussed in the technical support document and are part of our consideration of such factors under section 112(d)(2).

III. What Are the Energy Impacts?

We estimate that the national annual energy usage as a result of this rule will increase between approximately 73 million and 85 million kilowatt hours (kWh) depending on the number of sources that elect to comply with the health-based compliance alternatives for total chlorine. The increase results from the electricity required to operate air pollution control equipment installed to meet the standards. The increase energy usage costs are accounted for in the annualized compliance cost estimates. A discussion of the methodology used to estimate impacts is presented in ''Technical Support Document for HWC MACT Replacement Standards, Volume V: Emission Estimates and Engineering Costs.'' We note that the energy effects for both floor and beyond-the-floor options are discussed in the technical support document and are part of our consideration of such factors under section 112(d)(2).

IV. What Are the Control Costs?

Control costs, as presented in this section, refer only to engineering, operation, and maintenance costs associated with unit/system upgrades necessary to meet the final standards. These costs do not incorporate any market-based adjustments. All costs presented in this section are annualized estimates in 2002 dollars.

[260] USEPA, ''Final Technical Support Document for HWC MACT Standards, Volume V: Emission Estimates and Engineering Costs,'' Section 3, July 1999.

We estimate there are a total of 267 sources [261] that may be subject to requirements of this final rule. Of this total, there are 116 boilers (104 liquid fuel boilers plus 12 solid fuel boilers), 92 on-site incinerators, 25 cement kilns, 15 commercial incinerators, nine (or seven) lightweight aggregate kilns, and ten hydrochloric acid (HCl) production furnaces.

Total national private sector engineering costs for the final standards are estimated at $40.2 million per year.[262] This estimate reflects total non market adjusted upgrade costs (engineering, plus administrative and permitting), excluding chlorine control costs.[263] All Phase II sources combined (liquid fuel boilers, coal fired boilers, and HCl production furnaces) represent 86 percent of this total. The average private sector engineering cost, *excluding* permitting and administrative, is projected to be highest for liquid fuel boilers, at $256,300 per source. Coal fired boilers are second at approximately $170,246 per source. Total engineering costs to cement kilns and HCl production furnaces are estimated to average $113,600, and $16,645 per source, respectively. Commercial incinerators are projected to experience engineering costs averaging $12,300 per source. On-site incinerators and LWAKs will face the lowest engineering costs at $10,200 and $3,330, respectively.

For all Phase I sources (141 sources; commercial incinerators, on-site incinerators, cement kilns, and lightweight aggregate kilns), total average annualized non market-adjusted compliance costs (*including* permitting and administrative [264]) are estimated at $39,700 per source. The combined Phase II sources (126 sources; solid and liquid fuel-fired boilers and hydrochloric acid production furnaces) have total average annualized non market-adjusted compliance costs of approximately $274,500 per source. Across all sectors covered by today's rule (Phase I and Phase II sources), total annualized compliance costs were found to average $150,500 per source.

Private sector engineering costs (control) costs have also been assessed on a per ton (U.S.) basis. Captive energy recovery sources (solid and liquid fuel-fired boilers, and hydrochloric acid production furnaces) burned a total of 944,667 tons of hazardous waste in 2003. These facilities are projected to experience the highest average incremental control costs, at approximately $37 per ton of waste burned. Commercial energy recovery sources (cement kilns and LWAKs), burning an estimated 999,076 tons in 2003, are projected to experience average incremental control costs of approximately of $3.00 per ton. Captive (on-site) and commercial incinerators burn an estimated 925,828 tons and 447,524 tons per year, respectively. These sources are estimated to experience average incremental engineering costs of $2.15 per ton and $0.80 per ton, respectively.

The aggregate control costs presented in this section do not reflect the anticipated real world cost burden on the economy. Any market disruption, such as the requirements in this final rule, will cause a short-term disequilibrium in the hazardous waste burning market, resulting in a natural economic process designed to reach the new market equilibrium. Actual cost impacts to society are more accurately measured by taking into account market adjustments in the targeted industry, plus secondary (societal) costs. Total market-adjusted costs plus secondary costs are commonly termed Social Costs, and are generally less than total engineering costs due to efficiencies implemented during the market adjustment process. Social Costs theoretically represent the total real world costs of all goods and services society must give up in order to gain the added protection to human health and the environment. Social Costs are presented in Part VI of this Section.[265]

V. What Are the Economic Impacts?

Economic impacts may be measured through several factors. This section presents estimated economic impacts relative to market exits, waste reallocations, and employment impacts. Economic impacts presented in this section are distinct from social costs, which correspond only to the estimated monetary value of market disturbances.

A. Market Exit Estimates

The hazardous waste combustion industry operates in a dynamic market, with systems entering and exiting the market on a routine basis. Our analysis defines ''market exit'' as ceasing to burn hazardous waste. We have projected post-rule hazardous waste combustion system market exits based on economic feasibility only. Social, liability, and informational issues are not incorporated into our market exit analysis.

Market exit estimates are derived from a breakeven analysis designed to determine system viability. This analysis is subject to several assumptions, including: Cost assumptions concerning the per sector baseline cost of hazardous waste burning, cost estimates for necessary pollution control devices (including operation and maintenance), prices for combustion services, and estimated waste quantities burned at these facilities. It is important to note that, for most sectors, exiting the hazardous waste combustion market is not equivalent to closing a plant. (Actual plant closure may occur only in the case of a commercial incinerator closing all systems.)

We estimate that 39 systems, representing about 15 percent of the total affected universe, may stop burning hazardous waste in response to the final standards. Approximately 59,000 tons of hazardous waste may be diverted from these closed systems.

These estimates assume no chlorine controls are put in place as a direct result of the rule.[266] Of the estimated 39 market exits, 26 are projected to be on-site incinerators and 8 are liquid fuel boilers. Three commercial incinerator systems may exit the market in response to the final rule. However, these systems are considered economically marginal in the baseline. Two coal-fired boiler systems are also projected to exit the market. No cement kilns, lightweight aggregate kilns, or HCl production furnaces are projected to exit the market as a result of the final rule. Market exit estimates were found to be identical

[261] For purposes of this discussion, a source is defined as the air pollution control system associated with one or more hazardous waste combustion unit(s). A facility may operate one or more sources. Note that this total includes two LWAK units limited by system burn constraints. Exclusion of these two units results in a total of 265 independent sources.

[262] Not included here are total annual government costs. These costs, with or without chlorine control, are approximately $0.5 million/year.

[263] We are finalizing the incorporation of section 112(d)(4) of the Clean Air Act to establish risk-based standards for total chlorine for hazardous waste combustors (except for hydrochloric acid production furnaces). The low-end of this cost range assumes all facilities emit total chlorine levels below risk-based levels of concern. Under this scenario, no total chlorine controls are assumed to be necessary. The total engineering cost with chlorine control is estimated at $46.7 million/year.]

[264] See Exhibit 4–3 in the economic assessment background document.

[265] Beyond-the-Floor standards were assessed for all floors. These findings are available in Appendix F and G of the engineering background document: See: Final Technical Support Document for HWC MACT Standards, Volume V—Emissions Estimates and Engineering Costs.

[266] Even though we are allowing sources (except hydrochloric acid production furnaces) to invoke § 112(d)(4) in lieu of MACT chlorine control requirements, we have not attempted to estimate the following: (1) The total number of sources that may elect to implement this provision, and, (2) what level of control may be necessary following a § 112(d)(4) risk-based determination, since this would vary on a site-by-site basis.

when the cost of chlorine control is included in the model.

B. Waste Reallocations

Some on-site combustion systems (sources) may no longer be able to cover their hazardous waste burning costs as a result of final rule requirements. These sources are projected to divert or reroute their wastes to different hazardous waste combustion sources (usually some type of commercial unit).[267] For multiple system facilities, this diversion may include on-site (non-commercial) waste consolidation among fewer systems at the same facility. Under current market conditions, non-combustion alternatives are generally not economically feasible, and in any case, would normally be unable to achieve the RCRA Land Disposal Restriction Treatment standards, which are based on the performance of combustion technology (which optimizes destruction of organic HAP).

As mentioned above, our economic model indicates that approximately 59,000 tons (U.S.) of hazardous waste may be reallocated. This figure represents approximately 1.8 percent of the total 2003 quantity of hazardous waste burned at all sources. On-site consolidations account for nearly 24 percent (13,915 tons) of all diverted waste. Commercial incinerators are projected to receive the vast majority (42,722 tons, or 73 percent) of all off-site waste reallocations. Cement kilns and LWAKs are projected to receive the remaining reallocation (2,289 tons). Currently, there is more than adequate capacity to accommodate all off-site hazardous waste diversions.

C. Employment Impacts

Today's rule is projected to induce employment shifts across all affected sectors. These shifts may occur as specific combustion facilities find it no longer economically feasible to keep all of their systems running, or to stay in the hazardous waste market at all. When this occurs, workers at these locations may lose their jobs or experience forced relocations. At the same time, the rule is projected to result in positive employment impacts, as new purchases of pollution control equipment stimulate additional hiring in the pollution control manufacturing sector, and as additional staff are required at selected combustion facilities to accommodate reallocated waste and/or various compliance activities.

1. Employment Impacts—Dislocations (Losses)

Employment dislocations in the combustion industry are projected to occur when facilities consolidate waste into fewer systems, or when a facility exits the hazardous waste combustion market altogether. Operation and maintenance labor hours are expected to be reduced for each system that stops burning hazardous waste. For each facility that completely exits the market, employment dislocations may also include supervisory and/or administrative personnel.

Total employment dislocations resulting from implementation of the final standards are estimated at 310 full-time-equivalent (FTE) jobs. On-site incinerators account for about 62 percent of this total, followed by commercial incinerators (about 24 percent), and liquid-fuel boilers (about 12 percent). The large number of on-site incinerators drives the impacts within this sector.

2. Employment Impacts—Positive

In addition to employment dislocations, our analysis indicates that today's rule may also result in positive employment impacts. These positive impacts are projected to occur to both the air pollution control industry and to combustion firms as they hire personnel to accommodate reallocated waste and/or comply with the various requirements of the rule. Hazardous waste combustion sources are projected to need additional operation and maintenance personnel for the new pollution control equipment and other compliance activities, such as new reporting and record keeping requirements.

The total annual positive employment impact associated with the final standards is estimated at 323 FTEs. Positive employment impacts to the air pollution control industry[268] are projected at 93 FTEs, or about 29 percent of this total. At 183 jobs, liquid-fuel boilers are projected to experience the greatest positive employment impact among all combustors.

While it may appear that our analysis suggests overall net positive employment impacts, such a conclusion would be inappropriate. Because the positive employment impacts and employment dislocations occur in different sectors of the economy, they should not be added together. Doing so would mask important distributional effects of the rule. In addition, these employment estimates reflect within sector impacts only and therefore do not account for potential displacements across sectors. This may occur if investment funds are diverted from other areas of the larger economy.

VI. What Are the Social Costs and Benefits of the Final Rule?

The value of any regulatory action is traditionally measured by the net change in social welfare that it generates. Our economic assessment conducted in support of today's final rule evaluated compliance (control) costs, and economic impacts, as discussed above. The Assessment also analyzed social costs, benefits, small entity impacts, and other impacts (e.g., children's health, unfunded mandates). To conduct this analysis, we examined the current combustion market and practices, developed and implemented a methodology for examining compliance and social costs, applied an economic model to analyze industry economic impacts (discussed above), examined benefits, and followed appropriate guidelines and procedures for examining equity considerations, children's health, and other impacts. The data applied in this analysis were the most recently available at the time of the analysis. Because our data were limited, the findings from these analyses should be more accurately viewed as national estimates.

A. Combustion Market Overview

The hazardous waste industry consists of three key segments: hazardous waste generators, fuel blenders/intermediaries, and hazardous waste burners. Hazardous waste is combusted at four main types of facilities: commercial incinerators, on-site incinerators, waste burning kilns (cement kilns and lightweight aggregate kilns), and industrial boilers. Commercial incinerators are generally larger in size and designed to manage virtually all types of solids, as well as liquid wastes. On-site incinerators are more often designed as liquid-injection systems that handle liquids and pumpable solids. Waste burning kilns and boilers generally burn hazardous wastes to generate heat and power for their manufacturing processes.

As discussed above, we have identified a total of 267 hazardous waste burning sources (systems) currently in operation in the United States. Liquid fuel-boilers account for 104 sources, followed by on-site incinerators at 92 sources. Cement kilns, hydrochloric acid production furnaces, and commercial incinerators account for 25, 10, and 15 sources, respectively. Solid

[267] This analysis includes the cost of waste transport to alternative combustion sources, burning fees, and purchase of alternative fuels (if appropriate).

[268] Manufacturers and distributors of air pollution control devices are projected to increase sales as a result of this action.

fuel boilers and lightweight aggregate kilns make up the remainder, at 12 and nine systems, respectively. These 267 sources are operated at a total of 145 different facilities. A single facility may have one or more combustion systems. Facilities with multiple systems may have different types of hazardous waste burning units. Combustion systems operating at chemical manufacturing facilities (NAICS 325) were found to account for about 70 percent of the total number of facilities and manage about 58 percent of all hazardous waste burned in 2003.

The EPA Biennial Reporting System (BRS) reports a total demand for all combusted hazardous waste, across all facilities, at 3.32 million tons (U.S. ton) in 2003. Commercial energy recovery (cement kilns and lightweight aggregate kilns) burned about 30 percent of this total. Hazardous waste destruction at on-site incinerators and commercial incinerators accounted for 28 percent and 13 percent, respectively. Captive energy recovery accounted for the remainder, at 29 percent of the total.

About 65 percent of all hazardous waste burned in 2003 was organic liquids. This is followed by solids (14 percent), inorganic liquids (11 percent), and sludges (10 percent). Hazardous gases were found to represent a negligible portion, at about 0.08 percent of the total quantity burned in 2003. In terms of hazardous waste generating sources, the Basic Organic Chemical Manufacturing e sector (NAICS 325) generated approximately 32 percent of all hazardous waste burned in 2001, followed by pesticides and agricultural chemicals, business services, organic fibers, medicinal chemicals, pharmaceuticals, plastics materials and resins, petroleum, and miscellaneous.

Companies that generate large quantities of uniform hazardous wastes generally find it more economical and efficient to combust these wastes on-site using their own noncommercial systems. Commercial incineration facilities manage a wide range of hazardous waste streams generated in small to medium quantities by diverse industries. Cement kilns, lightweight aggregate kilns, and boilers derive heat and energy by burning high-Btu (solvents and organics) liquid hazardous wastes.[269] Sometimes these wastes are blended with fossil fuels where system operators choose to not derive all of their energy input from hazardous waste.

Regulatory requirements, liability concerns, and economics influence the demand for hazardous waste combustion services. Regulatory forces influence the demand for combustion by mandating certain hazardous waste treatment standards (land disposal restriction requirements, etc.). Liability concerns of waste generators affect combustion demand because combustion, by destroying organic wastes, greatly reduces the risk of future environmental problems. Finally, if alternative waste management options are more expensive, hazardous waste generators will likely choose to send their wastes to combustion facilities in order to increase overall profitability.

Throughout much of the 1980s, hazardous waste combustors enjoyed a strong competitive position and generally maintained a high level of profitability. During this period, EPA regulations helped stimulate a greatly expanded market. In addition, federal permitting requirements, as well as powerful local opposition to siting of new incinerators, constrained the entry of new combustion systems. As a result, combustion prices rose steadily, ultimately reaching record levels in 1987. The high profits of the late 1980s induced many firms to enter the market, in spite of the difficulties and delays anticipated in the permitting and siting process.

Hazardous waste markets have changed significantly since the late 1980s. In the early 1990s, substantial overcapacity resulted in fierce competition, declining prices, poor financial performance, numerous project cancellations, system consolidations, and facility closures. Since the mid 1990s, several additional combustion facilities have closed, while many of those that have remained open have consolidated their operations. Available (prior to this final rule) excess commercial capacity is currently estimated at about 21 percent of the total 2003 quantity combusted.

B. Baseline Specification

Proper and consistent baseline specification is vital to the accurate assessment of incremental costs, benefits, and other economic impacts associated with today's rule. The baseline essentially describes the world absent the rule. The incremental impacts of today's rule are evaluated by predicting post MACT compliance responses with respect to the baseline. The baseline, as applied in this analysis, is the point at which today's rule is promulgated. Thus, incremental cost and economic impacts are projected beyond the standards established in the February 13, 2002 Interim Standards Final Rule.

C. Analytical Methodology and Findings—Social Cost Analysis

Total social costs include the value of resources used to comply with the standards by the private sector, the value of resources used to administer the regulation by the government, and the value of output lost due to shifts of resources away from the current market equilibrium. To evaluate these shifts in resources and changes in output requires predicting changes in behavior by all affected parties in response to the regulation, including responses of directly-affected entities, as well as indirectly-affected private parties.

For this analysis, social costs are grouped into two categories: Economic welfare (changes in consumer and producer surplus), and government administrative costs. The economic welfare analysis conducted for today's rule uses a simplified partial equilibrium approach. In this analysis, changes in economic welfare are measured by summing the changes in consumer and producer surplus. This simplified approach bounds potential economic welfare losses associated with the rule by considering two scenarios: Compliance costs assuming no market adjustments, and market adjusted compliance costs.

The annualized private sector compliance (engineering) costs of $40.2 million, as presented in Section IV, assume no market adjustments. Our best estimate of total social costs incorporates rational market adjustments and all government costs. Under this scenario, increased compliance (engineering) costs are examined in the context of likely incentives hazardous waste combustion facilities have to continue burning, and the competitive balance in the market.

Total annualized market-adjusted net private-sector costs are estimated at $22.1 million.[270] In addition to the net private sector costs, total annual government costs are approximately $0.50 million. Thus, our best estimate of total social costs of this final rule is $22.6 million per year.

The $22.1 million figure incorporates a net gain to selected Phase I sources and an estimated $3.6 million cost

[269] Many cement kilns are also able to burn a certain level of non liquid waste.

[270] We are finalizing alternative risk-based total chlorine standards for hazardous waste combustors (ecept for hydrochloric acid production furnaces). The net private sector costs of $22.1 million/year may be considered a lower-bound estimate that assumes facilities emit total chlorine (TCI) below risk-based levels of concern (i.e., no TCI controls are assumed to be necessary). Total net private sector market-adjusted costs would increase to approximately $28.1 million per year if we were to assume all sources were to comply with technology-based TCI standards (as opposed to the risk-based standards).

(price) increase to pre-existing customers of commercial hazardous waste combustion facilities. On-site incinerators are projected to experience total market-adjusted cost increases of approximately $1.5 million/year. All phase II sources account for approximately $31.9 million in increased costs. Our economic model indicates that, of the Phase I source categories, commercial incinerators, cement kilns, and LWAKs would experience net gains following all market adjustments. The total net gain for these three source categories is estimated at $14.8 million per year. Commercial incinerators would receive about 98 percent of the total gain ($14.5 million/year). Gains to commercial facilities occur due to marginally higher prices, increased waste receipts, and relatively low upgrade costs, when compared to the other sources.

D. Analytical Methodology and Findings—Benefits Assessment

This section discusses the monetized and non monetized benefits to human health and the environment potentially associated with today's final rule. Monetized human health benefits are derived from reductions in particulate matter (PM) and dioxin/furan exposure, and are based on a Value of Statistical Life (VSL) estimate of $6.2 million.[271] Non monetized benefits are associated with human health, ecological, and waste minimization factors.

1. Monetized Benefits

Total monetized human health benefits for the final standards are estimated to range from $5.61 million/year to $6.31 million/year. This estimate includes human health benefits associated with avoided PM and dioxin/furans exposure. The range is driven by alternative discount rate assumptions (no discount rate, 3 percent, or 7 percent) for mortality valuation. PM benefits represent 99 percent of the total monetized human health benefits.

Particulate Matter

Results from our risk assessment extrapolation procedure[272] are used to evaluate incremental human health benefits potentially associated with particulate matter emission reductions from hazardous waste combustion facilities. This analysis applied avoided human health benefits factors from the March 2004 Assessment document,[273] combined with more recent emissions estimates for particulate matter.

Reduced PM emissions are estimated to result in monetized human health benefits of approximately $6.29 million per year. This is an undiscounted figure. Avoided PM morbidity cases account for $3.42 million of this total, and include: respiratory illness, cardiovascular disease, chronic bronchitis, work loss days, and minor restricted activity. Chronic bronchitis accounts for approximately 89 percent of the total value of avoided PM morbidity cases. All morbidity cases are assumed to be avoided within the first year following reduced PM emissions and are not discounted under any scenario.

Avoided premature deaths (mortality) are valued at $2.87 million per year, undiscounted. Assuming a discount rate of three and seven percent, PM mortality benefits would be $2.52 million and $2.19 million, respectively. Our discounted analysis of PM mortality benefits assumes that 30 percent of premature mortalities occur during the first year, 50 percent occur evenly from the second through the fifth years, and the remaining 20 percent occur evenly from the sixth through the twentieth years.[274] Due to limitations in the risk analysis, this assessment of PM benefits does not consider corresponding health benefits associated with the reduction of HAP metals carried by the PM.

Dioxin/furan—Dioxin/furan emissions are projected to be reduced by a total of 0.2 grams per year under the final standards. In the July 23, 1999 Addendum to the Assessment, cancer risk reductions linked to consumption of dioxin-contaminated agricultural products accounted for the vast majority of the 0.36 cancer cases per year that were expected to be avoided due to the 1999 standards. Cancer risk reductions associated with the final standards are expected to be less than 0.36 cases per year, but greater than zero.

At this time, the Agency is still using a cancer risk slope factor of 1.56×10^5 $[mg/kg/day]^{-1}$ for dioxin. This cancer slope factor is derived from the Agency's 1985 health assessment document for polychlorinated dibenzo-p-dioxins[275] and represents an upper bound 95th percentile confidence limit of the excess cancer risk from a lifetime exposure. For the past several years the Agency has been conducting a reassessment of the human health risks associated with dioxin and dioxin-like compounds. In October of 2004 this reassessment[276] was delivered to the National Academy of Sciences (NAS) for review.

Evidence compiled from this draft reassessment indicates that the carcinogenic effects of dioxin/furans may be six times as great as believed in 1985, reflecting an upper bound cancer risk slope factor of 1×10^6 $[mg/kg/day]^{-1}$ for some individuals. Agency scientists' more likely (central tendency) estimates (derived from the ED_{01} rather than the LED_{01}) result in slope factors and risk estimates that are within 2–3 times of the upper bound estimates (i.e., between 3×10^5 $[mg/kg/day]^{-1}$ and 5×10^5 $[mg/kg/day]^{-1}$) based on the available epidemiological and animal cancer data. However, risks could be as low as zero for some individuals. Use of the alternative upper bound cancer risk slope factor could result in a higher human health monetized health benefit associated with premature cancer deaths avoided in response to the final standard for dioxin/furans. The assessment of upper bound cancer risk using this alternative slope factor should not be considered current Agency policy. The standards for dioxin in today's final rule were not based on this draft reassessment.

Total non-discounted human health benefits associated with projected dioxin reductions are estimated at $0.02 million/year. These benefits may range from $0.01 million/year to nearly zero, applying a discount rate of 3 percent and 7 percent, respectively. Our discounted estimates incorporate an assumed latency period of 21 and 34 years from exposure to death.

2. Non-Monetized Benefits

We examined, but did not monetize human health benefits potentially associated with reduced exposure to lead, mercury, and total chlorine. Non monetized ecological benefits

[271] Monetized benefits associated with avoided premature mortality reflect a VSL range of $1.1 million to $11.4 million, with a central VSL estimate of $6.2 million. These values are derived from willingness-to-pay based VSL estimates presented in U.S. EPA, Regulatory Impact Analysis for the Final Clean Air Interstate Rule, March 2005.

[272] Inferential Risk Analysis in Support of Standards for Emissions of Hazardous Air Pollutants from Hazardous Waste Combustors.

[273] Assessment of the Potential Costs, Benefits, and Other Impacts of the Hazardous Waste Combustion MACT Replacement Standards: Proposed Rule, March 2004 (Chapter 6), and Addendum to the Assessment.

[274] See: U.S. EPA. March 2005. Regulatory Impact Analysis for the Final Interstate Air Quality Rule.

[275] USEPA, 1985. Health Assessment Document for Polychlorinated Dibenzo-p-Dioxins. EPA/600/8-84/014F. Final Report. Office of Health and Environmental Assessment. Washington, DC. September, 1985.

[276] U.S.EPA. Exposure and Human Health Reassessment of 2,3,7,8-Tetrachlorodibenzo-p-Dioxin (TCDD) and Related Compounds National Academy Sciences (NAS) Review Draft, December 2003. [**Note:** Toxicity risk factors presented in this document should not be considered EPA's official estimate of dioxin toxicity, but rather reflect EPA's ongoing effort to reevaluate dioxin toxicity].

potentially associated with reductions in dioxin/furan; selected metals, total chlorine, and particulate matter were also examined. Finally, waste minimization is examined as a non-monetized benefit.

Lead—The final standards are expected to reduce lead emissions by approximately 2.5 tons per year. In comparison, the 1999 standards were expected to reduce lead emissions by 89 tons per year, and were expected to reduce cumulative lead exposures for two children, ages zero to five, to less than 10 μg/dL. The lead benefits associated with these final standards are therefore expected to be modest. The final standards will also result in reduced lead levels for children of sub-populations with especially high levels of exposure. Children of subsistence fishermen, commercial beef farmers, and commercial dairy farmers who face the greatest levels of cumulative lead exposure may also experience comparable reductions in overall exposure as a result of the MACT standards.

Mercury—The HWC MACT final standards are expected to reduce mercury emissions by approximately 0.21 tons per year, approximately 93 percent less than the four-ton reduction expected under the 1999 Standards. We do not attempt to quantify the mercury-related benefits associated with today's final standards. However, because the reduction in mercury emissions represents a fraction of the reduction expected under the 1999 Standards, the mercury-related benefits of the final standards are likely to be less than the corresponding benefits under the 1999 Standards.

To characterize the benefits associated with reduced mercury emissions, the 1999 Assessment measured changes in hazard quotients for populations living near hazardous waste combustion facilities. For any given population, the hazard quotient is the ratio of the actual level of exposure to a safe level of exposure. A hazard quotient greater than one implies that a population is potentially at risk. The exposure quotient analysis in the 1999 Assessment found that the measurable benefits of reduced mercury emissions under the 1999 Standards were likely to be small because baseline exposures were relatively low. In addition, many of the studies examining the adverse health effects of mercury are inconclusive. Over the past several years, however, scientists have conducted three large-scale studies of individuals in the Faroe Islands, New Zealand, and the Seychelles Islands examining the relationship between mercury exposure in women and the neuro-development of their unborn children.[277] The New Zealand and Faroe Islands studies both found a statistically significant relationship between maternal methylmercury exposure and IQ decrements in the unborn children of these women. In its 2000 report on the toxicological effects of methylmercury, the National Research Council suggested that integrating the results of all three studies could be useful for risk assessment purposes.[278] Such an integrative risk assessment, later published by Ryan et al. in 2005, served as the basis of the Agency's health effects analysis for the Clean Air Mercury Rule (CAMR).[279] The regulatory impact analysis for CAMR summarizes several of the adverse health effects that may be linked to mercury and reviews the epidemiological literature examining the link between these effects and exposure to mercury.[280]

Total Chlorine—We were not able to quantify the benefits associated with reductions in total chlorine emissions. Total chlorine is a combination of hydrogen chloride and chlorine gas. The final standards are projected to reduce total annual chlorine emissions by about 107 tons per year[281] (HCl production furnaces only). Hydrogen chloride is corrosive to the eyes, skin, and mucous membranes. Acute inhalation can cause eye, nose, and respiratory tract irritation and inflammation, and pulmonary edema. Chronic occupational inhalation has been reported to cause gastritis, bronchitis, and dermatitis in workers. Long term exposure can also cause dental discoloration and erosion. Chlorine gas inhalation can cause bronchitis, asthma and swelling of the lungs, headaches, heart disease, and meningitis. Acute exposure causes more severe respiratory and lung effects, and can result in fatalities in extreme cases. The exposure levels established under 112(d)(4) are expected to reduce chlorine exposure for people in close proximity to hazardous waste combustion facilities, and are therefore likely to reduce the risk of all associated health effects.

Ecological Benefits—We examined ecological benefits through a comparison of the 1999 Assessment and today's final standards. Ecological benefits in the 1999 Assessment were based on reductions of approximately 100 tons per year in dioxin/furans and selected metals. Lead was the only pollutant of concern for aquatic ecosystems, while mercury appeared to be of greatest concern for terrestrial ecosystems. Dioxin/furan and lead emission reductions also provided some potential benefits for terrestrial ecosystems. The final standards are expected to reduce dioxin/furan and selected metal emissions by about 12 percent to 13 percent of the 1999 estimate, resulting in fewer incremental benefits than those estimated for the 1999 Assessment (and later, for the 2002 Interim Standards). However, the 1999 Assessment did not estimate the ecological benefits of MACT standards for hazardous waste burning industrial boilers and HCl production furnaces. These systems were excluded from the universe in 1999 but are part of the universe addressed by today's final standards. As a result, while the total ecological benefits of the final rule are likely to be modest, areas near facilities with boilers may enjoy more significant ecological benefits under the final standards than areas near facilities that have already complied with the 2002 Interim standards.

Mercury, lead, and chlorides are among the HAPs that can cause damage to the health and visual appearance of

[277] Grandjean, P., K. Murata, E. Budtz-Jorgensen, and P. Weihe. 2004. ''Autonomic Activity in Methylmercury Neurotoxicity: 14–Year Follow-Up of a Faroese Birth Cohort.'' Journal of Pediatrics.144:169–76; Kjellstrom, T., P. Kennedy, S. Wallis, A. Stewart, L. Friberg, B. Lind, P. Witherspoon, and C. Mantell. 1989. Physical and mental development of children with prenatal exposure to mercury from fish. Stage 2: Interviews and psychological tests at age 6. National Swedish Environmental Protection Board Report No. 3642; Crump, K.S., T. Kjellstrom, A.M. Shipp, A. Silvers, and A. Stewart. 1998. ''Influence of prenatal mercury exposure upon scholastic and psychological test performance: benchmark analysis of a New Zealand cohort.'' Risk Analysis. 18(6):701–713; Davidson, P.W., G.J. Myers, C. Cox, C. Axtell, C. Shamlaye, J. Sloane-Reeves, E. Cernichiari, L. Needham, A. Choi, Y. Wang, M. Berlin, and T.W. Clarkson. 1998. ''Effects of prenatal and postnatal methylmercury exposure from fish consumption on neurodevelopment: outcomes at 66 months of age in the Seychelles Child Development Study.'' Journal of the American Medical Association. 280(8):701–707; and Myers, G.J., P.W. Davidson, C. Cox, C.F. Shamlaye, D. Palumbo, E. Cernichiari, J. Sloane-Reeves, G.E. Wilding, J. Kost, L.S. Huang, and T.W. Clarkson. 2003. ''Prenatal methylmercury exposure from ocean fish consumption in the Seychelles child development study.'' Lancet. 361(9370):1686–92.

[278] National Research Council of the National Academy of Sciences, Toxicological Effects of Methylmercury. 2000, p. 299.

[279] Ryan, L.M. Effects of Prenatal Methylmercury on Childhood IQ: A Synthesis of Three Studies. Report to the U.S. Environmental Protection Agency, 2005; U.S. EPA. Regulatory Impact Analysis of the Clean Air Mercury Rule: Final Report. March 2005.

[280] U.S. EPA. Regulatory Impact Analysis of the Clean Air Mercury Rule: Final Report. March 2005.

[281] This is a lower bound estimate that assumes all other sources will implement 112(d)(4) and will not move to reduce TCl emissions from current baseline levels.

plants.[282] While the total value of forest health is difficult to estimate, visible deterioration in the health of forests and plants can cause a measurable change in recreation behavior. Several studies that measure the change in outdoor recreation behavior according to forest health have attempted to place a value on aesthetic degradation of forests.[283] Although these studies are available, additional research is needed to fully understand the effects of these Haps on the forest ecosystem. Thus, these benefits are not quantified in this analysis.

Emissions that are sufficient to cause structural and aesthetic damage to vegetation are likely to affect growth as well. Little research has been done on the effects of compounds such as chlorine, heavy metals (as air pollutants), and PM on agricultural productivity.[284] Even though the potential for visible damage and production decline from metals and other pollutants suggests the final standards could increase agricultural productivity, we have not monetized the benefits of these changes.

3. Waste Minimization Benefits

Facilities that burn hazardous waste and remain in operation following implementation of the final standards are expected to experience marginally increased costs as a result of these standards. This will result in an incentive to pass these increased costs on to their customers in the form of higher combustion prices. In the 1999 Assessment we conducted a waste minimization analysis to inform the expected price change. The analysis concluded that the demand for hazardous waste combustion is relatively inelastic. While a variety of waste minimization alternatives are available for managing hazardous waste streams that are currently combusted, the costs of these alternatives generally exceed the cost of combustion. When the additional costs of compliance with the MACT standards are taken into account, waste minimization alternatives still tend to exceed the higher combustion costs. This relative inelasticity suggests that, in the short term, large reductions in the amount of hazardous waste requiring combustion are not likely to occur. However, over the longer term (*i.e.* as production systems are updated), companies may continue to seek alternatives to expensive hazardous waste-management. This may include process adjustments that result, to some degree in source reduction of hazardous waste and the increased generation of non hazardous waste. To the extent that increases in combustion prices provide additional incentive to adopt more efficient processes, the final standards may contribute to longer term process-based hazardous waste minimization efforts.

No hazardous waste minimization impacts are captured in our quantitative analysis of costs and benefits.[285] A quantitative assessment of the benefits associated with waste minimization may result in double-counting of some of the benefits described earlier. For example, waste minimization may reduce emissions of hazardous air pollutants and therefore have a positive effect on public health. Furthermore, emission reductions beyond those necessary for compliance with the final standards are not addressed in the benefits assessment. In addition, waste minimization is likely to result in specific types of benefits not captured in this Assessment. For example, waste generators that engage in waste minimization may experience a reduction in their waste handling costs and could also reduce the risk related to waste spills and waste management. Finally, waste minimization procedures potentially stimulated by today's action may result in additional costs to facilities that implement these technologies. These factors have not been assessed in our analysis but are likely to at least partially offset corresponding benefits.

4. Conclusion

Total non-discounted monetized human health benefits associated with the final standards are estimated at $6.31 million/year. Annualized discounted benefits were found to range from $5.61 million to $5.95 million/year. The range reflects an alternative discount rate of 3 percent and 7 percent for mortality benefits.

It is important to emphasize that monetized benefits represent only a portion of the total benefits associated with this rule. A significant portion of the benefits are not monetized, as discussed above, due to data and analytical limitations. Specifically, ecological benefits, and human health benefits associated with reductions in chlorine, mercury, and lead are not quantified or monetized. In some regions these benefits may be significant. In addition, specific sub-populations near combustion facilities, including children and minority populations, may be disproportionately affected by environmental risks and may therefore enjoy more significant benefits. Visibility benefits associated with reduced PM are also expected from this final rule. For a complete discussion of the methodology, data, findings, and limitations associated with our benefits analysis the reader is encouraged to review the Assessment document,[286] and the Addendum to the Assessment.

Part Seven: How Does the Final Rule Meet the RCRA Protectiveness Mandate?

As discussed in more detail below, we believe today's final standards are generally protective of human health and the environment. We therefore finalize and apply these standards, in most instances, in lieu of the RCRA air emission standards applicable to these sources.

I. Background

Section 3004(a) of RCRA requires the Agency to promulgate standards for hazardous waste treatment, storage, and disposal facilities as necessary to protect human health and the environment. The standards for hazardous waste incinerators generally rest on this authority. In addition, § 3004(q) requires the Agency to promulgate standards for emissions from facilities that burn

[282] Although the primary pollutants which are detrimental to vegetation aesthetics and growth are tropospheric ozone, sulfur dioxide, and hydrogen fluoride (three pollutants which are not regulated in the MACT standards), some literature exists on the relationship between metal deposition and vegetation health. (Mercury Study Report to Congress Volume VI, 1997) (Several studies are cited in this report.)

[283] See, for example, Brown, T.C. et al. 1989, Scenic Beauty and Recreation Value: Assessing the Relationship, In J. Vining, ed., *Social Science and Natural Resources Recreation Management,* Westview Press, Boulder, Colorado; this work studies the relationship between forest characteristics and the value of recreational participation. Also see Peterson, D.G. et al. 1987, Improving Accuracy and Reducing Cost of Environmental Benefit Assessments. Draft Report to the U.S. EPA, by Energy and Resource Consultants, Boulder, Colorado; Walsh et al. 1990, Estimating the public benefits of protecting forest quality, Journal of Forest Management, 30:175–189., and Homes et al. 1992, Economic Valuation of Spruce-Fir Decline in the Southern Appalachian Mountains: A comparison of Value Elicitation Methods. Presented at the Forestry and the Environment: Economic Perspectives Conference, March 1, 1992 Jasper, Alberta, Canada for estimates of the WTP of visitors and residents to avoid forest damage.

[284] MacKenzie, James J., and Mohamed T. El-Ashry, *Air Pollution's Toll on Forests and Crops* (New Haven, Yale University Press, 1989).

[285] Note that this rule does, in fact, consider hazardous waste feed control. Feed control can be implemented by each source through waste minimization procedures. See: Final Technical Support Document for HWC MACT Standards, Volume V–Emissions Estimates and Engineering Costs.

[286] Assessment of the Potential Costs, Benefits, and Other Impacts of the Hazardous Waste Combustion MACT Final Rule Standards. September 2005.

hazardous waste fuels (e.g., cement and lightweight aggregate kilns, boilers, and hydrochloric acid production furnaces) as necessary to protect human health and the environment. Using RCRA authority, the Agency has established emission (and other) standards for hazardous waste combustors that are either entirely risk-based (e.g., site-specific standards for metals under the Boiler and Industrial Furnace rule), or are technology-based but determined by a generic risk assessment to be protective (e.g., the DRE standard for incinerators and BIFs).

The MACT standards finalized today implement the technology-based regime of CAA § 112(d). There is, however, a residual risk component to air toxics standards. Section 112(f) of the Clean Air Act requires the Agency to impose, within eight years after promulgation of the technology-based standards promulgated under § 112(d) (i.e., the authority for today's final standards), additional controls if needed to protect public health with an ample margin of safety or to prevent adverse environmental effect.

RCRA § 1006(b) directs that EPA ''integrate all provisions of [RCRA] for purposes of administration and enforcement and * * * avoid duplication, to the maximum extent possible, with the appropriate provisions of the Clean Air Act * * * '' Thus, although considerations of risk are not ordinarily part of the MACT process, in order to avoid duplicative standards where possible, we have evaluated the protectiveness of the standards finalized today.

As noted above, under RCRA, EPA must promulgate standards ''as may be necessary to protect human health and the environment.'' RCRA § 3004(a) and (q). Technology-based standards developed under CAA § 112 do not automatically satisfy this requirement, but may do so in fact. See 59 FR at 29776 (June 6, 1994) and 60 FR at 32593 (June 23, 1995) (RCRA regulation of secondary lead smelter emissions unnecessary at this time given stringency of technology-based standard and pendency of § 112(f) determination). If the MACT standards, as a factual matter, are sufficiently protective to also satisfy the RCRA mandate, then no independent RCRA standards are required. Conversely, if MACT standards are inadequate, the RCRA authorities would have to be used to fill the gap.

II. Evaluation of Protectiveness

For the purpose of satisfying the RCRA statutory mandates, the Agency has conducted an evaluation of the degree of protection afforded by the MACT standards being finalized today. We have not conducted a comprehensive risk assessment for this rulemaking as was done for incinerators, cement kilns, and lightweight aggregate kilns in the 1999 MACT rule where we concluded that the promulgated standards were generally protective and therefore, the RCRA standards need not be retained. However, we noted that in certain instances, permit authorities may invoke the omnibus authority (RCRA § 3005(c)(3) and its implementing regulations at § 270.10(k)) if there is some reason to believe that additional controls beyond those required pursuant to 40 CFR parts 63, 264, 265, and 266 may be needed to ensure protection of human health and the environment under RCRA.

For this final rule, we instead compared the risk-related characteristics of the sources covered by the 1999 rule to the sources covered by today's rule (e.g., estimated emissions, stack characteristics, meteorology, and population). For a description of the methodology and technical discussion of its application, see ''Inferential Risk Analysis in Support of Standards for Emissions of Hazardous Air Pollutants from Hazardous Waste Combustors,'' in the docket for today's rule. We performed a large array of statistical comparisons and from these we attempted to make inferences about whether risks would be expected to be about the same, less than, or greater than the risks estimated for 1999 rule. We think the comparative analysis lends additional support to our view that today's final standards are generally protective. We received no comments either in support of or in opposition to our use of the comparative analysis to evaluate the protectiveness of the standards being finalized today or our view that the standards are generally protective.

While we regard the final standards as generally protective, the comparative analysis suggests some concern for solid fuel-fired boilers (SFBs) with regard to the particulate matter standard (and certain metals such as antimony and thallium), mercury, and total chlorine standards (other than the alternative risk-based chlorine standards). The analysis also suggests some concern for hydrochloric acid (HCl) production furnaces with regard to the dioxin/furan standard, where carbon monoxide and total hydrocarbon serve as surrogate control. However, because both SFBs and HCl production furnaces comprise such small source categories (4 SFB facilities and 8 HCl production facilities), it is difficult to reach firm conclusions. For example, for SFBs it was not possible to conduct hypothesis tests that could be considered valid involving correlations among variables for a number of variables in the analysis because of the small number of data points and the power of the tests to detect differences for those that were conducted was very low, which greatly diminishes the value of the results. (Indeed, no differences in correlations were found for SFBs at the 0.1 significance level—the level of significance that was used in the analysis.) Similarly, for HCl production furnaces the power of the tests to detect differences in correlations was quite low. It must be noted that the comparative analysis methodology was not intended for comparisons that involve relatively few facilities because it is grounded in tests of hypotheses and levels of statistical significance which generally require substantial amounts of data to produce firm conclusions. Nevertheless, in consideration of the indications of possible risks for the aforementioned standards, permit authorities may want to consider site-specific factors in determining whether or not the MACT standards are sufficiently protective for facilities that fall into these categories.

The comparative analysis may also raise possible concerns for lightweight aggregate kilns (LWAKs) and liquid fuel-fired boilers (LFBs) with dry APCDs with regard to the dioxin/furan standards, in view of the ongoing uncertainty in cancer and other health effects levels for chlorinated dioxins and furans. In particular, some recent estimates of the carcinogenicity of these compounds that consider both human and animal data, are higher than earlier estimates derived from animal data alone. However, like SFBs and HCl production furnaces, LWAKs and LFBs with dry APCDs both comprise small source categories (3 LWAK facilities and 7 dry APCD LFB facilities). This makes it very difficult to reach firm conclusions and suggests the need to consider site-specific factors in determining whether the MACT standards are sufficiently protective in these instances.

Except as noted, we believe today's final standards provide a substantial degree of protection to human health and the environment. We therefore do not believe that we need to retain the existing RCRA standards for boilers and hydrochloric acid production furnaces (just as we found that existing RCRA standards for incinerators, cement kilns, and lightweight aggregate kilns were no longer needed after the 1999 rule). However, as previously discussed in

more detail in Part Four, Section IX, site-specific risk assessments may be warranted on an individual source basis to ensure that the MACT standards provide adequate protection in accordance with RCRA.

Part Eight: Statutory and Executive Order Reviews

I. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 [58 FR 51735 (October 4, 1993)] the Agency, in conjunction with OMB's Office of Information and Regulatory Affairs (OIRA), must determine whether a regulatory action is ''significant'' and therefore subject to OMB review and the full requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a ''significant regulatory action'' because this action may raise novel legal or policy issues due to the methodology applied in development of the final standards. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations are documented in the public record.

The total social costs for this rule are estimated at $22.6 million per year [287]. This figure is significantly below the $100 million threshold established under point number one above. Thus, this rule is not considered to be an economically significant action. However, in an effort to comply with the spirit of the Order, we have prepared an economic assessment in support of today's final rule. This document is entitled: Assessment of the Potential Costs, Benefits, and Other Impacts of the Hazardous Waste Combustion MACT Final Rule Standards, September 2005. We have also prepared an Addendum to this Assessment entitled: Addendum to the Assessment of the Potential Costs, Benefits, and Other Impacts of the Hazardous Waste Combustion MACT Final Rule Standards, September 2005. This Addendum captures changes made to the rulemaking following completion of the full Assessment document. The Assessment and Addendum were designed to adhere to analytical requirements established under Executive Order 12866, and corresponding Agency and OMB guidance; subject to data, analytical, and resource limitations. Findings presented under Part Six of this Preamble were developed in accordance with this guidance. The RCRA docket established for today's rulemaking maintains a copy of the Assessment and Addendum for public review. Interested persons are encouraged to read both documents to gain a full understanding of the analytical methodology, findings, and limitations associated with this report.

II. Paperwork Reduction Act

We have prepared an Information Collection Request (ICR) document (ICR No. 1773.08) listing the information collection requirements of this final rule, and have submitted it for approval to the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act, U.S.C. 3501 *et seq.* OMB has assigned a control number 2050–0171 for this ICR. This ICR is available for public viewing in the EPA Docket Center, Room B102, 1301 Constitution Avenue NW., Washington, DC. Copy may also be obtained from the EDOCKET on the EPA Web site, or by calling (202) 566–1744. The information collection requirements are not enforceable until OMB approves them.

The public burden associated with this final rule is projected to affect 238 HWC units and is estimated to average 211 hours per respondent annually. The reporting and recordkeeping cost burden is estimated to average $5,640 per respondent annually.

Burden means total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose, or provide information to or for a Federal agency. That includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9. When this ICR is approved by OMB, the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

The EPA requested comments (see 70 FR 20748, Apr. 21, 2005) on the need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques.

III. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq., generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act, or any other statute. This analysis must be completed unless the agency is able to certify that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

The RFA provides default definitions for each type of small entity. Small entities are defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not

[287] This figure includes approximately $0.5 million/year in total government costs. Total social costs would increase to approximately $28.6 million per year if we were to assume all sources were to comply with technology-based TC1 standards.

have a significant economic impact on a substantial number of small entities. We have determined that hazardous waste combustion facilities are not owned by small governmental jurisdiction or nonprofit organizations. Therefore, only small businesses were analyzed for small entity impacts. For the purposes of the impact analyses, small entity is defined either by the number of employees or by the dollar amount of sales. The level at which a business is considered small is determined for each North American Industrial Classification System (NAICS) code by the Small Business Administration.

Affected individual waste combustors (incinerators, cement kilns, lightweight aggregate kilns, solid and liquid fuel-boilers, and hydrochloric acid production furnaces) will bear the impacts of today's rule. These units will incur direct economic impacts (positive or negative) as a result of today's rule. Few of the hazardous waste combustion facilities affected by this rule were found to be owned by small businesses, as defined by the Small Business Administration (SBA). From our universe of 145 facilities, we identified eight facilities that are currently owned by small businesses. Four of these facilities are liquid boilers, two are on-site incinerators, one is a cement kiln, and one is a lightweight aggregate kiln (LWAK). Our analysis indicates that none of these facilities are likely to incur annualized compliance costs greater than one percent of gross annual corporate revenues. Cost impacts of the final standards were found to range from less than 0.01 percent to 0.46 percent of annual gross corporate revenues.

The reader is encouraged to review our regulatory flexibility screening analysis prepared in support of this determination. This analysis is incorporated as Appendix H of the *Assessment* document, and updated in the *Addendum*.

IV. Unfunded Mandates Reform Act of 1995

Signed into law on March 22, 1995, the Unfunded Mandates Reform Act (UMRA) calls on all federal agencies to provide a statement supporting the need to issue any regulation containing an unfunded federal mandate and describing prior consultation with representatives of affected state, local, and tribal governments.

Today's final rule is not subject to the requirements of sections 202, 204 and 205 of UMRA. In general, a rule is subject to the requirements of these sections if it contains ''Federal mandates'' that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Today's final rule does not result in $100 million or more in expenditures for any of these categories. The aggregate annualized social cost for today's rule is estimated at $22.6 million.

V. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the regulation.

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in the Order. The rule focuses on requirements for facilities burning hazardous waste, without affecting the relationships between Federal and State governments. Thus, Executive Order 13132 does not apply to this rule. Although section 6 of Executive Order 13132 does not apply to this rule, EPA did include various State representatives on our Agency workgroup. These representatives participated in the development of this rule.

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

Executive Order 13175: Consultation and Coordination with Indian Tribal Governments (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' Our Agency workgroup for this rule included Tribal representation. We have determined that this final rule does not have tribal implications, as specified in the Order. No Tribal governments are known to own or operate hazardous waste combustors subject to the requirements of this final rule. Furthermore, this rule focuses on requirements for all regulated sources without affecting the relationships between tribal governments in its implementation, and applies to all regulated sources, without distinction of the surrounding populations affected. Thus, Executive Order 13175 does not apply to this rule.

VII. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045: ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR. 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. Today's final rule is not subject to the Executive Order because it is not economically significant as defined under point one of the Order, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

VIII. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 Fed. Reg. 28355 (May 22, 2001)). This rule, as finalized, will not seriously disrupt energy supply, distribution patterns, prices, imports or exports. Furthermore, this rule is not an economically significant action under Executive Order 12866.

IX. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rulemaking involves environmental monitoring or measurement. Both Performance Based Measurement System (PBMS) and specific measurement methods are finalized under this rule. The PBMS approach is intended to be more flexible and cost-effective for the regulated community; it is also intended to encourage innovation in analytical technology and improved data quality. Where allowed, EPA is not precluding the use of any method, whether it constitutes a voluntary consensus standard or not, as long as it meets the performance criteria specified.

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

Executive Order 12898, ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations' (February 11, 1994) requires us to complete an analysis of today's rule with regard to equity considerations. The Order is designed to address the environmental and human health conditions of minority and low-income populations. This section briefly discusses potential impacts (direct or disproportional) today's rule may have in the area of environmental justice.

We have recently analyzed demographic data from the U.S. Census, and have previously examined data from two other reports: ''Race, Ethnicity, and Poverty Status of the Populations Living Near Cement Plants in the United States'' (EPA, August 1994) and ''Race, Ethnicity, and Poverty Status of the Populations Living Near Hazardous Waste Incinerators in the United States'' (EPA, October 1994). These reports examine the number of low-income and minority individuals living near a relatively large sample of cement kilns and hazardous waste incinerators and provide county, state, and national population percentages for various sub-populations. The demographic data in these reports provide several important findings when examined in conjunction with the risk reductions projected from today's rule.

We find that combustion facilities, in general, are not located in areas with disproportionately high minority and low-income populations. However, there is evidence that hazardous waste burning cement kilns are somewhat more likely to be located in areas that have relatively higher low-income populations. Furthermore, there are a small number of commercial hazardous waste incinerators located in highly urbanized areas where there is a disproportionately high concentration of minorities and low-income populations within one and five mile radii. The reduced emissions at these facilities due to today's rule could represent meaningful environmental and health improvements for these populations. Overall, today's rule should not result in any adverse or disproportional health or safety effects on minority or low-income populations. Any impacts on these populations are likely to be positive due to the reduction in emissions from combustion facilities near minority and low-income population groups. The Assessment document available in the RCRA docket established for today's rule discusses our Environmental Justice analysis.

XI. Congressional Review

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

List of Subjects

40 CFR Part 9

Environmental protection, Reporting and recordkeeping requirements.

40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Incorporation by reference, Reporting and recordkeeping requirements.

40 CFR Part 260

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Reporting and recordkeeping requirements.

40 CFR Part 264

Environmental protection, Air pollution control, Hazardous waste, Insurance, Packaging and containers, Reporting and recordkeeping requirements, Security measures, Surety bonds.

40 CFR Part 265

Environmental protection, Air pollution control, Hazardous waste, Insurance, Packaging and containers, Reporting and recordkeeping requirements.

40 CFR Part 266

Environmental protection, Energy, Hazardous waste, Recycling, Reporting and recordkeeping requirements.

40 CFR Part 270

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous materials transportation, Hazardous waste, Reporting and recordkeeping requirements.

40 CFR Part 271

Administrative practice and procedure, Hazardous materials transportation, Hazardous waste, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: September 14, 2005.

Stephen L. Johnson,

Administrator.

■ For the reasons set out in the preamble, title 40, chapter I, of the Code of Federal Regulations is amended as follows:

PART 9—OMB APPROVALS UNDER THE PAPERWORK REDUCTION ACT

■ 1. The authority citation for part 9 continues to read as follows:

Authority: 7 U.S.C. 135 *et seq.*, 136–136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601–2671; 21 U.S.C. 331j, 346a, 348; 31 U.S.C. 9701; 33 U.S.C. 1251 *et seq.*, 1311, 1313d, 1314, 1318, 1321, 1326, 1330, 1342, 1344, 1345 (d) and (e), 1361; E.O. 11735, 38 FR 21243, 3 CFR, 1971–1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g–1, 300g–2,

300g–3, 300g–4, 300g–5, 300g–6, 300j–1, 300j–2, 300j–3, 300j–4, 300j–9, 1857 *et seq.*, 6901–6992k, 7401–7671q, 7542, 9601–9657, 11023, 11048.

■ 2. Section 9.1 is amended in the table under center heading ''National Emission Standards for Hazardous Air Pollutants for Source Categories'' by adding entry ''63.1200–63.1221'' in numerical order to read as follows:

§ 9.1 OMB approvals under the Paperwork Reduction Act.

* * * * *

40 CFR citation	OMB control No.
* * * * * * *	
National Emission Standards for Hazardous Air Pollutants for Source Categories [3]	
* * * * * * *	
63.1200–63.1221	2050–0171

[3] The ICRs referenced in this section of the table encompass the applicable general provisions contained in 40 CFR part 63, subpart A, which are not independent information collection requirements.

* * * * *

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

■ 1. The authority citation for part 63 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

■ 2. Section 63.14 is amended by:
■ a. Removing paragraphs (i)(1) and (i)(2).
■ b. Redesignating paragraph (i)(3) as (i)(1).
■ c. Adding and reserving new paragraph (i)(2).
■ d. Revising paragraph (k).

The revisions and additions read as follows:

§ 63.14 Incorporations by reference.

* * * * *

(i) * * *

(2) [Reserved]

* * * * *

(k) The following materials are available for purchase from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161, (703) 605–6000 or (800) 553–6847; or for purchase from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 512–1800:

(1) The following methods as published in the test methods compendium known as ''Test Methods for Evaluating Solid Waste, Physical/Chemical Methods,'' EPA Publication SW–846, Third Edition. A suffix of ''A'' in the method number indicates revision one (the method has been revised once). A suffix of ''B'' in the method number indicates revision two (the method has been revised twice).

(i) Method 0023A, ''Sampling Method for Polychlorinated Dibenzo-*p*-Dioxins and Polychlorinated Dibenzofuran Emissions from Stationary Sources,'' dated December 1996 and in Update III, IBR approved for § 63.1208(b)(1) of Subpart EEE of this part.

(ii) Method 9071B, ''n-Hexane Extractable Material (HEM) for Sludge, Sediment, and Solid Samples,'' dated April 1998 and in Update IIIA, IBR approved for § 63.7824(e) of Subpart FFFFF of this part.

(iii) Method 9095A, ''Paint Filter Liquids Test,'' dated December 1996 and in Update III, IBR approved for §§ 63.7700(b) and 63.7765 of Subpart EEEEE of this part.

(2) [Reserved]

■ 3. Section 63.1200 is amended by:
■ a. Revising the introductory text.
■ b. Revising paragraph (a)(2).
■ c. Adding entry (4) in Table 1 in paragraph (b).

The revisions and additions read as follows:

§ 63.1200 Who is subject to these regulations?

The provisions of this subpart apply to all hazardous waste combustors: hazardous waste incinerators, hazardous waste cement kilns, hazardous waste lightweight aggregate kilns, hazardous waste solid fuel boilers, hazardous waste liquid fuel boilers, and hazardous waste hydrochloric acid production furnaces. Hazardous waste combustors are also subject to applicable requirements under parts 260 through 270 of this chapter.

(a) * * *

(2) Both area sources and major sources subject to this subpart, but not previously subject to title V, are immediately subject to the requirement to apply for and obtain a title V permit in all States, and in areas covered by part 71 of this chapter.

(b) * * *

TABLE 1 TO § 63.1200.—HAZARDOUS WASTE COMBUSTORS EXEMPT FROM SUBPART EEE

If	And If	Then
* * * * * * *		
(4) You meet the definition of a small quantity burner under § 266.108 of this chapter		You are not subject to the requirements of this subpart (Subpart EEE).

* * * * *

■ 4. Section 63.1201 is amended in paragraph (a) by revising the definitions of ''Hazardous waste combustor'', ''New source'', and ''TEQ'', and adding definitions for ''Btu'', ''Hazardous waste hydrochloric acid production furnace'', ''Hazardous waste liquid fuel boiler'', ''Hazardous waste solid fuel boiler'', and ''System removal efficiency'' in alphabetical order to read as follows:

§ 63.1201 Definitions and acronyms used in this subpart.

(a) * * *

Btu means British Thermal Units.

* * * * *

Hazardous waste combustor means a hazardous waste incinerator, hazardous waste burning cement kiln, hazardous waste burning lightweight aggregate kiln, hazardous waste liquid fuel boiler, hazardous waste solid fuel boiler, or hazardous waste hydrochloric acid production furnace.

* * * * *

Hazardous waste hydrochloric acid production furnace and *Hazardous Waste HCl production furnace* mean a halogen acid furnace defined under § 260.10 of this chapter that produces aqueous hydrochloric acid (HCl) product and that burns hazardous waste at any time.

* * * * *

Hazardous waste liquid fuel boiler means a boiler defined under § 260.10 of this chapter that does not burn solid fuels and that burns hazardous waste at any time. Liquid fuel boiler includes boilers that only burn gaseous fuel.

* * * * *

Hazardous waste solid fuel boiler means a boiler defined under § 260.10 of this chapter that burns a solid fuel and that burns hazardous waste at any time.

* * * * *

New source means any affected source the construction or reconstruction of which is commenced after the dates specified under §§ 63.1206(a)(1)(i)(B), (a)(1)(ii)(B), and (a)(2)(ii).

* * * * *

System removal efficiency means [1 − Emission Rate (mass/time) / Feedrate (mass/time)] X 100.

* * * * *

TEQ means the international method of expressing toxicity equivalents for dioxins and furans as defined in U.S. EPA, Interim Procedures for Estimating Risks Associated with Exposures to Mixtures of Chlorinated Dibenzo-p-dioxins and -dibenzofurans (CDDs and CDFs) and 1989 Update, March 1989.

* * * * *

■ 5. Section 63.1203 is amended by:

■ a. Revising an undesignated center heading above the section heading.

■ b. Revising the section heading.

■ c. Revising paragraph (c)(3)(2).

The revisions and additions read as follows:

Interim Emissions Standards and Operating Limits For Incinerators, Cement Kilns, and Lightweight Aggregate Kilns

§ 63.1203 What are the standards for hazardous waste incinerators that are effective until compliance with the standards under § 63.1219?

* * * * *

(c) * * *

(3) * * *

(ii) You must specify one or more POHCs that are representative of the most difficult to destroy organic compounds in your hazardous waste feedstream. You must base this specification on the degree of difficulty of incineration of the organic constituents in the hazardous waste and on their concentration or mass in the hazardous waste feed, considering the results of hazardous waste analyses or other data and information.

* * * * *

■ 6. The section heading to § 63.1204 and paragraph (c)(3)(ii) are revised to read as follows:

§ 63.1204 What are the standards for hazardous waste burning cement kilns that are effective until compliance with the standards under § 63.1220?

* * * * *

(c) * * *

(3) * * *

(ii) You must specify one or more POHCs that are representative of the most difficult to destroy organic compounds in your hazardous waste feedstream. You must base this specification on the degree of difficulty of incineration of the organic constituents in the hazardous waste and on their concentration or mass in the hazardous waste feed, considering the results of hazardous waste analyses or other data and information.

* * * * *

■ 7. The section heading to § 63.1205 and paragraph (c)(3)(ii) are revised to read as follows:

§ 63.1205 What are the standards for hazardous waste burning lightweight aggregate kilns that are effective until compliance with the standards under § 63.1221?

* * * * *

(c) * * *

(3) * * *

(ii) You must specify one or more POHCs that are representative of the most difficult to destroy organic compounds in your hazardous waste feedstream. You must base this specification on the degree of difficulty of incineration of the organic constituents in the hazardous waste and on their concentration or mass in the hazardous waste feed, considering the results of hazardous waste analyses or other data and information.

* * * * *

■ 8. Section 63.1206 is amended by:

■ a. Revising paragraph (a).

■ b. Revising paragraphs (b)(1)(ii), (b)(6) introductory text, (b)(7)(i)(A), (b)(7)(ii), (b)(9)(i) introductory text, (b)(9)(i)(A), (b)(9)(iv)(A), (b)(9)(vi), (b)(9)(vii) introductory text, (b)(9)(viii)(D), (b)(9)(ix)(D), (b)(10)(i) introductory text, (b)(10)(i)(A), (b)(10)(vi), (b)(10)(vii) introductory text, (b)(10)(viii)(D), (b)(10)(ix)(D), (b)(11), (b)(13)(i) introductory text, (b)(13)(ii), and (b)(14).

■ c. Adding paragraph (b)(16).

■ d. Revising paragraphs (c)(1)(i) introductory text, (c)(3)(iv), (c)(6)(iii)(B) introductory text, (c)(6)(iv) introductory text, and (c)(7).

■ e. Adding paragraphs (c)(8) and (c)(9).

The revisions and additions read as follows:

§ 63.1206 When and how must you comply with the standards and operating requirements?

(a) *Compliance dates.* (1) *Compliance dates for incinerators, cement kilns, and lightweight aggregate kilns that burn hazardous waste.* (i) *Compliance date for standards under §§ 63.1203, 63.1204, and 63.1205.* (A) *Compliance dates for existing sources.* You must comply with the emission standards under §§ 63.1203, 63.1204, and 63.1205 and the other requirements of this subpart no later than the compliance date, September 30, 2003, unless the Administrator grants you an extension of time under § 63.6(i) or § 63.1213.

(B) *New or reconstructed sources.* (*1*) If you commenced construction or reconstruction of your hazardous waste combustor after April 19, 1996, you must comply with the emission standards under §§ 63.1203, 63.1204, and 63.1205 and the other requirements of this subpart by the later of September 30, 1999 or the date the source starts operations, except as provided by paragraph (a)(1)(i)(B)(*2*) of this section. The costs of retrofitting and replacement of equipment that is installed specifically to comply with this subpart, between April 19, 1996 and a source's compliance date, are not considered to be reconstruction costs.

(*2*) For a standard under §§ 63.1203, 63.1204, and 63.1205 that is more stringent than the standard proposed on April 19, 1996, you may achieve compliance no later than September 30, 2003 if you comply with the standard proposed on April 19, 1996 after September 30, 1999. This exception does not apply, however, to new or

reconstructed area source hazardous waste combustors that become major sources after September 30, 1999. As provided by § 63.6(b)(7), such sources must comply with the standards under §§ 63.1203, 63.1204, and 63.1205 at startup.

(ii) *Compliance date for standards under §§ 63.1219, 63.1220, and 63.1221.* (A) *Compliance dates for existing sources.* You must comply with the emission standards under §§ 63.1219, 63.1220, and 63.1221 and the other requirements of this subpart no later than the compliance date, October 14, 2008, unless the Administrator grants you an extension of time under § 63.6(i) or § 63.1213.

(B) *New or reconstructed sources.* (*1*) If you commenced construction or reconstruction of your hazardous waste combustor after April 20, 2004, you must comply with the new source emission standards under §§ 63.1219, 63.1220, and 63.1221 and the other requirements of this subpart by the later of October 12, 2005 or the date the source starts operations, except as provided by paragraph (a)(1)(ii)(B)(*2*) of this section. The costs of retrofitting and replacement of equipment that is installed specifically to comply with this subpart, between April 20, 2004, and a source's compliance date, are not considered to be reconstruction costs.

(*2*) For a standard under §§ 63.1219, 63.1220, and 63.1221 that is more stringent than the standard proposed on April 20, 2004, you may achieve compliance no later than October 14, 2008, if you comply with the standard proposed on April 20, 2004, after October 12, 2005. This exception does not apply, however, to new or reconstructed area source hazardous waste combustors that become major sources after October 14, 2008. As provided by § 63.6(b)(7), such sources must comply with the standards under §§ 63.1219, 63.1220, and 63.1221 at startup.

(2) *Compliance dates for solid fuel boilers, liquid fuel boilers, and hydrogen chloride production furnaces that burn hazardous waste for standards under §§ 63.1216, 63.1217, and 63.1218.* (i) *Compliance date for existing sources.* You must comply with the standards of this subpart no later than the compliance date, October 14, 2008, unless the Administrator grants you an extension of time under § 63.6(i) or § 63.1213.

(ii) *New or reconstructed sources.* (A) If you commenced construction or reconstruction of your hazardous waste combustor after October 12, 2005, you must comply with the new source emission standards of this subpart by the later of October 12, 2005, or the date the source starts operations, except as provided by paragraph (a)(2)(ii)(B) of this section. The costs of retrofitting and replacement of equipment that is installed specifically to comply with this subpart, between April 20, 2004, and a source's compliance date, are not considered to be reconstruction costs.

(B) For a standard in the subpart that is more stringent than the standard proposed on April 20, 2004, you may achieve compliance no later than October 14, 2008, if you comply with the standard proposed on April 20, 2004, after October 12, 2005. This exception does not apply, however, to new or reconstructed area source hazardous waste combustors that become major sources after October 14, 2008. As provided by § 63.6(b)(7), such sources must comply with this subpart at startup.

(3) *Early compliance.* If you choose to comply with the emission standards of this subpart prior to the dates specified in paragraphs (a)(1) and (a)(2) of this section, your compliance date is the earlier of the date you postmark the Notification of Compliance under § 63.1207(j)(1) or the dates specified in paragraphs (a)(1) and (a)(2) of this section.

(b) * * *

(1) * * *

(ii) When hazardous waste is not in the combustion chamber (i.e., the hazardous waste feed to the combustor has been cut off for a period of time not less than the hazardous waste residence time) and you have documented in the operating record that you are complying with all otherwise applicable requirements and standards promulgated under authority of sections 112 (e.g., 40 CFR part 63, subparts LLL, DDDDD, and NNNNN) or 129 of the Clean Air Act in lieu of the emission standards under §§ 63.1203, 63.1204, 63.1205, 63.1215, 63.1216, 63.1217, 63.1218, 63.1219, 63.1220, and 63.1221; the monitoring and compliance standards of this section and §§ 63.1207 through 63.1209, except the modes of operation requirements of § 63.1209(q); and the notification, reporting, and recordkeeping requirements of §§ 63.1210 through 63.1212.

* * * * *

(6) *Compliance with the carbon monoxide and hydrocarbon emission standards.* This paragraph applies to sources that elect to comply with the carbon monoxide and hydrocarbon emissions standards of this subpart by documenting continuous compliance with the carbon monoxide standard using a continuous emissions monitoring system and documenting compliance with the hydrocarbon standard during the destruction and removal efficiency (DRE) performance test or its equivalent.

* * * * *

(7) * * * (i) * * *

(A) You must document compliance with the Destruction and Removal Efficiency (DRE) standard under this subpart only once provided that you do not modify the source after the DRE test in a manner that could affect the ability of the source to achieve the DRE standard.

* * * * *

(ii) *Sources that feed hazardous waste at locations other than the normal flame zone.* (A) Except as provided by paragraph (b)(7)(ii)(B) of this section, if you feed hazardous waste at a location in the combustion system other than the normal flame zone, then you must demonstrate compliance with the DRE standard during each comprehensive performance test;

(B)(*1*) A cement kiln that feeds hazardous waste at a location other than the normal flame zone need only demonstrate compliance with the DRE standard during three consecutive comprehensive performance tests provided that:

(*i*) All three tests achieve the DRE standard in this subpart; and

(*ii*) The design, operation, and maintenance features of each of the three tests are similar;

(*iii*) The data in lieu restriction of § 63.1207(c)(2)(iv) does not apply when complying with the provisions of paragraph (b)(7)(ii)(B) of this section;

(*2*) If at any time you change your design, operation, and maintenance features in a manner that could reasonably be expected to affect your ability to meet the DRE standard, then you must comply with the requirements of paragraph (b)(7)(ii)(A) of this section.

* * * * *

(9) * * * (i) You may petition the Administrator to request alternative standards to the mercury or hydrogen chloride/chlorine gas emission standards of this subpart, to the semivolatile metals emission standards under §§ 63.1205, 63.1221(a)(3)(ii), or 63.1221(b)(3)(ii), or to the low volatile metals emissions standards under §§ 63.1205, 63.1221(a)(4)(ii), or 63.1221(b)(4)(ii) if:

(A) You cannot achieve one or more of these standards while using maximum achievable control technology (MACT) because of raw material contributions to emissions of mercury, semivolatile metals, low

volatile metals, or hydrogen chloride/chlorine gas; or

* * * * *

(iv) * * * (A) The alternative standard petition you submit under paragraph (b)(9)(i)(A) of this section must include data or information documenting that raw material contributions to emissions prevent you from complying with the emission standard even though the source is using MACT, as defined under paragraphs (b)(9)(viii) and (ix) of this section, for the standard for which you are seeking relief.

* * * * *

(vi) You must include data or information with semivolatile metals, low volatile metals, and hydrogen chloride/chlorine gas alternative standard petitions that you submit under paragraph (b)(9)(i)(A) of this section documenting that semivolatile metals, low volatile metals, and hydrogen chloride/chlorine gas emissions attributable to the hazardous waste only will not exceed the emission standards of this subpart.

(vii) You must not operate pursuant to your recommended alternative standards in lieu of emission standards specified in this subpart:

* * * * *

(viii) * * *

(D) For hydrogen chloride/chlorine gas, a hazardous waste chlorine feedrate corresponding to an MTEC of 2,000,000 µg/dscm or less, and use of an air pollution control device with a hydrogen chloride/chlorine gas removal efficiency of 85 percent or greater.

(ix) * * *

(D) For hydrogen chloride/chlorine gas, a hazardous waste chlorine feedrate corresponding to an MTEC of 14,000,000 µg/dscm or less, and use of an air pollution control device with a hydrogen chloride/chlorine gas removal efficiency of 99.6 percent or greater.

(10) * * * (i) You may petition the Administrator to request alternative standards to the mercury or hydrogen chloride/chlorine gas emission standards of this subpart, to the semivolatile metals emission standards under §§ 63.1204, 63.1220(a)(3)(ii), or 63.1220(b)(3)(ii), or to the low volatile metals emissions standards under §§ 63.1204, 63.1220(a)(4)(ii), or 63.1220(b)(4)(ii) if:

(A) You cannot achieve one or more of these standards while using maximum achievable control technology (MACT) because of raw material contributions to emissions of mercury, semivolatile metals, low volatile metals, or hydrogen chloride/chlorine gas; or

* * * * *

(vi) You must include data or information with semivolatile metals, low volatile metals, and hydrogen chloride/chlorine gas alternative standard petitions that you submit under paragraph (b)(10)(i)(A) of this section documenting that emissions of the regulated metals and hydrogen chloride/chlorine gas attributable to the hazardous waste only will not exceed the emission standards in this subpart.

(vii) You must not operate pursuant to your recommended alternative standards in lieu of emission standards specified in this subpart:

* * * * *

(viii) * * *

(D) For hydrogen chloride/chlorine gas, a hazardous waste chlorine feedrate corresponding to an MTEC of 720,000 µg/dscm or less.

(ix) * * *

(D) For hydrogen chloride/chlorine gas, a hazardous waste chlorine feedrate corresponding to an MTEC of 420,000 µg/dscm or less.

(11) *Calculation of hazardous waste residence time.* You must calculate the hazardous waste residence time and include the calculation in the performance test plan under § 63.1207(f) and the operating record. You must also provide the hazardous waste residence time in the Documentation of Compliance under § 63.1211(c) and the Notification of Compliance under §§ 63.1207(j) and 63.1210(d).

* * * * *

(13) * * *

(i) Cement kilns that feed hazardous waste at a location other than the end where products are normally discharged and where fuels are normally fired must comply with the carbon monoxide and hydrocarbon standards of this subpart as follows:

* * * * *

(ii) Lightweight aggregate kilns that feed hazardous waste at a location other than the end where products are normally discharged and where fuels are normally fired must comply with the hydrocarbon standards of this subpart as follows:

(A) Existing sources must comply with the 20 parts per million by volume hydrocarbon standard of this subpart;

(B) New sources must comply with the 20 parts per million by volume hydrocarbon standard of this subpart.

(14) *Alternative to the particulate matter standard for incinerators.* (i). *General.* In lieu of complying with the particulate matter standards under § 63.1203, you may elect to comply with the following alternative metal emission control requirements:

(ii) *Alternative metal emission control requirements for existing incinerators.* (A) You must not discharge or cause combustion gases to be emitted into the atmosphere that contain cadmium, lead, and selenium in excess of 240 µg/dscm, combined emissions, corrected to 7 percent oxygen; and,

(B) You must not discharge or cause combustion gases to be emitted into the atmosphere that contain antimony, arsenic, beryllium, chromium, cobalt, manganese, and nickel in excess of 97 µg/dscm, combined emissions, corrected to 7 percent oxygen.

(iii) *Alternative metal emission control requirements for new incinerators.* (A) You must not discharge or cause combustion gases to be emitted into the atmosphere that contain cadmium, lead, and selenium in excess of 24 µg/dscm, combined emissions, corrected to 7 percent oxygen; and,

(B) You must not discharge or cause combustion gases to be emitted into the atmosphere that contain antimony, arsenic, beryllium, chromium, cobalt, manganese, and nickel in excess of 97 µg/dscm, combined emissions, corrected to 7 percent oxygen.

(iv) *Operating limits.* Semivolatile and low volatile metal operating parameter limits must be established to ensure compliance with the alternative emission limitations described in paragraphs (e)(2) and (e)(3) of this section pursuant to § 63.1209(n), except that semivolatile metal feedrate limits apply to lead, cadmium, and selenium, combined, and low volatile metal feedrate limits apply to arsenic, beryllium, chromium, antimony, cobalt, manganese, and nickel, combined.

* * * * *

(16) *Compliance with subcategory standards for liquid fuel boilers.* You must comply with the mercury, semivolatile, low volatile metal, and total chlorine standards for liquid fuel boilers under § 63.1217 as follows:

(i) You must determine the as-fired heating value of each batch of hazardous waste fired by each firing system of the boiler so that you know the mass-weighted heating value of the hazardous waste fired at all times.

(ii) If the as-fired heating value of the hazardous waste is 10,000 Btu per pound or greater, you are subject to the thermal emission concentration standards (lb/million Btu) under § 63.1217.

(iii) If the as-fired heating value of the hazardous waste is less than 10,000 Btu/lb, you are subject to the mass or volume emission concentration

standards (μg/dscm or ppmv) under § 63.1217.

(iv) If the as-fired heating value of hazardous wastes varies above and below 10,000 Btu/lb over time, you are subject to the thermal concentration standards when the heating value is 10,000 Btu/lb or greater and the mass concentration standards when the heating value is less than 10,000 Btu/lb. You may elect to comply at all times with the more stringent operating requirements that ensure compliance with both the thermal emission concentration standards and the mass or volume emission concentration standards.

* * * * *

(c) * * * (1) * * * (i) You must operate only under the operating requirements specified in the Documentation of Compliance under § 63.1211(c) or the Notification of Compliance under §§ 63.1207(j) and 63.1210(d), except:

* * * * *

(3) * * *

(iv) *Failure of the AWFCO system.* If the AWFCO system fails to automatically and immediately cutoff the flow of hazardous waste upon exceedance of a parameter required to be interlocked with the AWFCO system under paragraph (c)(3)(i) of this section, you have failed to comply with the AWFCO requirements of paragraph (c)(3) of this section. If an equipment or other failure prevents immediate and automatic cutoff of the hazardous waste feed, however, you must cease feeding hazardous waste as quickly as possible.

* * * * *

(6) * * *

(iii) * * *

(B) Be trained under the requirements of, and certified under, one of the following American Society of Mechanical Engineers (ASME) standards: QHO–1–1994, QHO–1a–1996, or QHO–1–2004 (Standard for the Qualification and Certification of Hazardous Waste Incinerator Operators). If you elect to use the ASME program:

* * * * *

(iv) Control room operators of cement kilns, lightweight aggregate kilns, solid fuel boilers, liquid fuel boilers, and hydrochloric acid production furnaces must be trained and certified under:

* * * * *

(7) *Operation and maintenance plan*—(i) You must prepare and at all times operate according to an operation and maintenance plan that describes in detail procedures for operation, inspection, maintenance, and corrective measures for all components of the combustor, including associated pollution control equipment, that could affect emissions of regulated hazardous air pollutants.

(ii) The plan must prescribe how you will operate and maintain the combustor in a manner consistent with good air pollution control practices for minimizing emissions at least to the levels achieved during the comprehensive performance test.

(iii) This plan ensures compliance with the operation and maintenance requirements of § 63.6(e) and minimizes emissions of pollutants, automatic waste feed cutoffs, and malfunctions.

(iv) You must record the plan in the operating record.

(8) *Bag leak detection system requirements.* (i) If your combustor is equipped with a baghouse (fabric filter), you must continuously operate either:

(A) A bag leak detection system that meets the specifications and requirements of paragraph (c)(8)(ii) of this section and you must comply with the corrective measures and notification requirements of paragraphs (c)(8)(iii) and (iv) of this section; or

(B) A particulate matter detection system under paragraph (c)(9) of this section.

(ii) *Bag leak detection system specification and requirements.* (A) The bag leak detection system must be certified by the manufacturer to be capable of continuously detecting and recording particulate matter emissions at concentrations of 1.0 milligrams per actual cubic meter unless you demonstrate, under § 63.1209(g)(1), that a higher detection limit would routinely detect particulate matter loadings during normal operations;

(B) The bag leak detection system shall provide output of relative or absolute particulate matter loadings;

(C) The bag leak detection system shall be equipped with an alarm system that will sound an audible alarm when an increase in relative particulate loadings is detected over a preset level;

(D) The bag leak detection system shall be installed and operated in a manner consistent with available written guidance from the U.S. Environmental Protection Agency or, in the absence of such written guidance, the manufacturer's written specifications and recommendations for installation, operation, and adjustment of the system;

(E) The initial adjustment of the system shall, at a minimum, consist of establishing the baseline output by adjusting the sensitivity (range) and the averaging period of the device, and establishing the alarm set points and the alarm delay time;

(F) Following initial adjustment, you must not adjust the sensitivity or range, averaging period, alarm set points, or alarm delay time, except as detailed in the operation and maintenance plan required under paragraph (c)(7) of this section. You must not increase the sensitivity by more than 100 percent or decrease the sensitivity by more than 50 percent over a 365 day period unless such adjustment follows a complete baghouse inspection which demonstrates the baghouse is in good operating condition;

(G) For negative pressure or induced air baghouses, and positive pressure baghouses that are discharged to the atmosphere through a stack, the bag leak detector shall be installed downstream of the baghouse and upstream of any wet acid gas scrubber; and

(H) Where multiple detectors are required, the system's instrumentation and alarm system may be shared among the detectors.

(iii) *Bag leak detection system corrective measures requirements.* The operating and maintenance plan required by paragraph (c)(7) of this section must include a corrective measures plan that specifies the procedures you will follow in the case of a bag leak detection system alarm. The corrective measures plan must include, at a minimum, the procedures used to determine and record the time and cause of the alarm as well as the corrective measures taken to correct the control device malfunction or minimize emissions as specified below. Failure to initiate the corrective measures required by this paragraph is failure to ensure compliance with the emission standards in this subpart.

(A) You must initiate the procedures used to determine the cause of the alarm within 30 minutes of the time the alarm first sounds; and

(B) You must alleviate the cause of the alarm by taking the necessary corrective measure(s) which may include, but are not to be limited to, the following:

(*1*) Inspecting the baghouse for air leaks, torn or broken filter elements, or any other malfunction that may cause an increase in emissions;

(*2*) Sealing off defective bags or filter media;

(*3*) Replacing defective bags or filter media, or otherwise repairing the control device;

(*4*) Sealing off a defective baghouse compartment;

(*5*) Cleaning the bag leak detection system probe, or otherwise repairing the bag leak detection system; or

(*6*) Shutting down the combustor.

(iv) *Excessive exceedances notification.* If you operate the

combustor when the detector response exceeds the alarm set-point more than 5 percent of the time during any 6-month block time period, you must submit a notification to the Administrator within 30 days of the end of the 6-month block time period that describes the causes of the exceedances and the revisions to the design, operation, or maintenance of the combustor or baghouse you are taking to minimize exceedances. To document compliance with this requirement:

(A) You must keep records of the date, time, and duration of each alarm, the time corrective action was initiated and completed, and a brief description of the cause of the alarm and the corrective action taken;

(B) You must record the percent of the operating time during each 6-month period that the alarm sounds;

(C) In calculating the operating time percentage, if inspection of the fabric filter demonstrates that no corrective action is required, no alarm time is counted; and

(D) If corrective action is required, each alarm shall be counted as a minimum of 1 hour.

(9) *Particulate matter detection system requirements for electrostatic precipitators and ionizing wet scrubbers.* If your combustor is equipped with an electrostatic precipitator or ionizing wet scrubber, and you elect not to establish under § 63.1209(m)(1)(iv) site-specific control device operating parameter limits that are linked to the automatic waste feed cutoff system under paragraph (c)(3) of this section, you must continuously operate a particulate matter detection system that meets the specifications and requirements of paragraph (c)(9)(i) through (iii) of this section and you must comply with the corrective measures and notification requirements of paragraphs (c)(9)(iv) through (v) of this section.

(i) *Particulate matter detection system requirements.*—(A) The particulate matter detection system must be certified by the manufacturer to be capable of continuously detecting and recording particulate matter emissions at concentrations of 1.0 milligrams per actual cubic meter unless you demonstrate, under § 63.1209(g)(1), that a higher detection limit would routinely detect particulate matter loadings during normal operations;

(B) The particulate matter detector shall provide output of relative or absolute particulate matter loadings;

(C) The particulate matter detection system shall be equipped with an alarm system that will sound an audible alarm when an increase in relative or absolute particulate loadings is detected over the set-point

(D) You must install, operate, and maintain the particulate matter detection system in a manner consistent with the provisions of paragraph (c)(9) of this section and available written guidance from the U.S. Environmental Protection Agency or, in the absence of such written guidance, the manufacturer's written specifications and recommendations for installation, operation, maintenance and quality assurance of the system;

(E) You must include procedures for installation, operation, maintenance, and quality assurance of the particulate matter detection system in the site-specific continuous monitoring system test plan required under § 63.8(e)(3) of this chapter.

(F) Where multiple detectors are required to monitor multiple control devices, the system's instrumentation and alarm system may be shared among the detectors.

(G) You must establish the alarm set-point as provided by either paragraph (c)(9)(ii) or paragraph (c)(9)(iii) of this section.

(ii) *Establishing the alarm set-point without extrapolation.* (A) The alarm set-point is the average of the test run averages of the detector response achieved during the comprehensive performance test demonstrating compliance with the particulate matter emission standard.

(B) During the comprehensive performance test, you may simulate emission concentrations at the upper end of the range of normal operations by means including feeding high levels of ash and detuning the emission control equipment.

(C) You must comply with the alarm set-point on a 6-hour rolling average, updated each hour with a one-hour block average that is the average of the detector responses over each 15-minute block;

(iii) *Establishing the alarm set-point with extrapolation.* You may extrapolate the average of the test run averages of the detector response achieved during the comprehensive performance test as provided by paragraph (c)(9)(iii)(A) of this section to establish an alarm level after you approximate the correlation of the detector response to particulate matter concentration as prescribed by paragraph (c)(9)(iii)(B) of this section. You must comply with the extrapolated alarm set-point on a 6-hour rolling average, updated each hour with a one-hour block average that is the average of the detector responses over each 15-minute block.

(A) You may extrapolate the detector response up to a particulate matter concentration that is 50% of the particulate matter emission standard or 125% of the highest particulate matter concentration used to develop the correlation under paragraph (c)(9)(iii)(B) of this section, whichever is greater. The extrapolated emission concentration must not exceed the particulate matter emission standard.

(B) To establish an approximate correlation of the detector response to particulate matter emission concentrations, you should use as guidance Performance Specification-11 for PM CEMS (40 CFR Part 60, Appendix B), except that you need only conduct 5 runs to establish the initial correlation under Section 8.6 of Performance Specification 11.

(C) For quality assurance, you should use as guidance Procedure 2 of Appendix F to Part 60 of this chapter and the detector manufacturer's recommended procedures for periodic quality assurance checks and tests, except that:

(*1*) You must conduct annual Relative Response Audits as prescribed by Procedure 2 of Appendix F to Part 60 of this chapter (Section 10.3(6));

(*2*) You need only conduct Relative Response Audits on a 3-year interval after passing two sequential annual Relative Response Audits.

(D) An exceedance of the particulate matter emission standard by a particulate matter detection system for which particulate emission concentrations have been approximately correlated with the detector response under paragraph (c)(9)(iii) of this section is not evidence that the standard has been exceeded. The approximate correlation is used for compliance assurance to determine when corrective measures must be taken rather than for compliance monitoring.

(iv) *Particulate matter detection system corrective measures requirements.* The operating and maintenance plan required by paragraph (c)(7) of this section must include a corrective measures plan that specifies the procedures you will follow in the case of a particulate matter detection system alarm. The corrective measures plan must include, at a minimum, the procedures used to determine and record the time and cause of the alarm as well as the corrective measures taken to correct the control device malfunction or minimize emissions as specified below. Failure to initiate the corrective measures required by this paragraph is failure to ensure compliance with the emission standards in this subpart.

(A) You must initiate the procedures used to determine the cause of the alarm within 30 minutes of the time the alarm first sounds; and

(B) You must alleviate the cause of the alarm by taking the necessary corrective measure(s) which may include shutting down the combustor.

(v) *Excessive exceedances notification.* If you operate the combustor when the detector response exceeds the alarm set-point more than 5 percent of the time during any 6-month block time period, you must submit a notification to the Administrator within 30 days of the end of the 6-month block time period that describes the causes of the exceedances and the revisions to the design, operation, or maintenance of the combustor or emission control device you are taking to minimize exceedances. To document compliance with this requirement:

(A) You must keep records of the date, time, and duration of each alarm, the time corrective action was initiated and completed, and a brief description of the cause of the alarm and the corrective action taken;

(B) You must record the percent of the operating time during each 6-month period that the alarm sounds;

(C) In calculating the operating time percentage, if inspection of the emission control device demonstrates that no corrective action is required, no alarm time is counted; and

(D) If corrective action is required, each alarm shall be counted as a minimum of 1 hour.

■ 9. Section 63.1207 is amended by:
■ a. Revising paragraph (b)(1).
■ b. Adding paragraph (b)(3).
■ c. Revising paragraphs (c)(1) and (c)(2)(iii).
■ d. Adding paragraph (c)(3).
■ e. Revising paragraph (d)(4)(i).
■ f. Revising paragraphs (e)(2) and (e)(3)(iv).
■ g. Revising paragraphs (f)(1)(ii)(D), (f)(1)(x) introductory text, (f)(1)(xiii), (f)(1)(xiv), (f)(1)(xvi), and (f)(1)(xxv).
■ h. Adding paragraph (f)(1)(xv).
■ i. Revising paragraph (h)(2)(i).
■ j. Revising paragraph (j)(3).
■ k. Revising paragraph (l)(1) introductory text.
■ l. Revising paragraph (m)(2) introductory text.

The revisions and additions read as follows:

§ 63.1207 What are the performance testing requirements?

* * * * *

(b) * * *

(1) *Comprehensive performance test.* You must conduct comprehensive performance tests to demonstrate compliance with the emission standards provided by this subpart, establish limits for the operating parameters provided by § 63.1209, and demonstrate compliance with the performance specifications for continuous monitoring systems.

* * * * *

(3) *One-Time Dioxin/Furan Test for Sources Not Subject to a Numerical Dioxin/Furan Standard.* For solid fuel boilers and hydrochloric acid production furnaces, for lightweight aggregate kilns that are not subject to a numerical dioxin/furan emission standard under § 63.1221, and liquid fuel boilers that are not subject to a numerical dioxin/furan emission standard under § 63.1217, you must conduct a one-time emission test for dioxin/furan under feed and operating conditions that are most likely to reflect daily maximum operating variability, similar to a dioxin/furan comprehensive performance test.

(i) You must conduct the dioxin/furan emissions test no later than the deadline for conducting the initial comprehensive performance test.

(ii) You may use dioxin/furan emissions data from previous testing to meet this requirement, provided that:

(A) The testing was conducted under feed and operating conditions that are most likely to reflect daily maximum operating variability, similar to a dioxin/furan compliance test;

(B) You have not changed the design or operation of the source in a manner that could significantly affect stack gas dioxin/furan emission concentrations; and

(C) The data meet quality assurance objectives that may be determined on a site-specific basis.

(iii) You may use dioxin/furan emissions data from a source to represent emissions from another on-site source in lieu of testing (i.e., data in lieu of testing) if the design and operation, including hazardous waste feed and other feedstreams, of the sources are identical.

(iv) You must include the results of the one-time dioxin/furan emissions test with the results of the initial comprehensive performance test in the Notification of Compliance.

(v) You must repeat the dioxin/furan emissions test if you change the design or operation of the source in a manner that may increase dioxin/furan emissions.

(c) * * * (1) *Test date.* Except as provided by paragraphs (c)(2) and (c)(3) of this section, you must commence the initial comprehensive performance test not later than six months after the compliance date.

(2) * * * (iii) The data in lieu test age restriction provided in paragraph (c)(2)(i)(A) of this section does not apply for the duration of the interim standards (i.e., the standards published in the **Federal Register** on February 13, 2002, 67 FR 6792). See 40 CFR parts 63, 264, 265, 266, 270, and 271 revised as of July 1, 2002. Paragraph (c)(2)(i)(A) of this section does not apply until EPA promulgates permanent replacement standards pursuant to the Settlement Agreement noticed in the **Federal Register** on November 16, 2001 (66 FR 57715).

* * * * *

(3) For incinerators, cement kilns, and lightweight aggregate kilns, you must commence the initial comprehensive performance test to demonstrate compliance with the standards under §§ 63.1219, 63.1220, and 63.1221 not later than 12 months after the compliance date.

(d) * * *

(4) * * * (i) *Waiver of periodic comprehensive performance tests.* Except as provided in paragraph (c)(2) of this section, you must conduct only an initial comprehensive performance test under the interim standards (i.e., the standards published in the **Federal Register** on February 13, 2002); all subsequent comprehensive performance testing requirements are waived under the interim standards. The provisions in the introductory text to paragraph (d) and in paragraph (d)(1) of this section do not apply until EPA promulgates permanent replacement standards pursuant to the Settlement Agreement noticed in the **Federal Register** on November 16, 2001.

* * * * *

(e) * * *

(2) You must make your site-specific test plan and CMS performance evaluation test plan available to the public for review no later than 60 calendar days before initiation of the test. You must issue a public notice to all persons on your facility/public mailing list (developed pursuant to 40 CFR 70.7(h), 71.11(d)(3)(i)(E) and 124.10(c)(1)(ix)) announcing the availability of the test plans and the location where the test plans are available for review. The test plans must be accessible to the public for 60 calendar days, beginning on the date that you issue your public notice. The location must be unrestricted and provide access to the public during reasonable hours and provide a means for the public to obtain copies. The notification must include the following information at a minimum:

(i) The name and telephone number of the source's contact person;

(ii) The name and telephone number of the regulatory agency's contact person;

(iii) The location where the test plans and any necessary supporting documentation can be reviewed and copied;

(iv) The time period for which the test plans will be available for public review; and

(v) An expected time period for commencement and completion of the performance test and CMS performance evaluation test.

(3) * * *

(iv) *Public notice.* At the same time that you submit your petition to the Administrator, you must notify the public (e.g., distribute a notice to the facility/public mailing list developed pursuant to 40 CFR 70.7(h), 71.11(d)(3)(i)(E) and 124.10(c)(1)(ix)) of your petition to waive a performance test. The notification must include all of the following information at a minimum:

(A) The name and telephone number of the source's contact person;

(B) The name and telephone number of the regulatory agency's contact person;

(C) The date the source submitted its site-specific performance test plan and CMS performance evaluation test plans; and

(D) The length of time requested for the waiver.

(f) * * *

(1) * * *

(ii) * * *

(D) The Administrator may approve on a case-by-case basis a hazardous waste feedstream analysis for organic hazardous air pollutants in lieu of the analysis required under paragraph (f)(1)(ii)(A) of this section if the reduced analysis is sufficient to ensure that the POHCs used to demonstrate compliance with the applicable DRE standards of this subpart continue to be representative of the most difficult to destroy organic compounds in your hazardous waste feedstreams;

* * * * *

(x) If you are requesting to extrapolate metal feedrate limits from comprehensive performance test levels under §§ 63.1209(l)(1)(v) or 63.1209(n)(2)(vii):

* * * * *

(xiii) For cement kilns with in-line raw mills, if you elect to use the emissions averaging provision of this subpart, you must notify the Administrator of your intent in the initial (and subsequent) comprehensive performance test plan, and provide the information required by the emission averaging provision;

(xiv) For preheater or preheater/precalciner cement kilns with dual stacks, if you elect to use the emissions averaging provision of this subpart, you must notify the Administrator of your intent in the initial (and subsequent) comprehensive performance test plan, and provide the information required by the emission averaging provision;

(xv) If you request to use Method 23 for dioxin/furan you must provide the information required under § 63.1208(b)(1)(i)(B);

(xvi) If you are not required to conduct performance testing to document compliance with the mercury, semivolatile metals, low volatile metals, or hydrogen chloride/chlorine gas emission standards under paragraph (m) of this section, you must include with the comprehensive performance test plan documentation of compliance with the provisions of that section.

* * * * *

(xxv) If your source is equipped with a dry scrubber to control hydrogen chloride and chlorine gas, you must document in the comprehensive performance test plan key parameters that affect adsorption, and the limits you establish for those parameters based on the sorbent used during the performance test, if you elect not to specify and use the brand and type of sorbent used during the comprehensive performance test, as required by § 63.1209(o)(4)(iii)(A); and

* * * * *

(h) * * *

(2) * * *

(i) Operations when stack emissions testing for dioxin/furan, mercury, semivolatile metals, low volatile metals, particulate matter, or hydrogen chloride/chlorine gas is being performed; and

* * * * *

(j) * * *

(3) See §§ 63.7(g), 63.9(h), and 63.1210(d) for additional requirements pertaining to the Notification of Compliance (*e.g.*, you must include results of performance tests in the Notification of Compliance).

* * * * *

(l) *Failure of performance test*—(1) *Comprehensive performance test.* The provisions of this paragraph do not apply to the initial comprehensive performance test if you conduct the test prior to your compliance date.

* * * * *

(m) * * *

(2) You are not required to conduct performance tests to document compliance with the mercury, semivolatile metals, low volatile metals, or hydrogen chloride/chlorine gas emission standards under the conditions specified in this paragraph (m)(2). You are deemed to be in compliance with an emission standard if the twelve-hour rolling average maximum theoretical emission concentration (MTEC) does not exceed the emission standard:

* * * * *

■ 10. Section 63.1208 is amended by removing and reserving paragraph (a) and revising paragraphs (b)(1)(i) and (b)(5) to read as follows:

§ 63.1208 What are the test methods?

(a) [Reserved]

(b) * * *

(1) * * * (i) To determine compliance with the emission standard for dioxins and furans, you must use:

(A) Method 0023A, Sampling Method for Polychlorinated Dibenzo-*p*-Dioxins and Polychlorinated Dibenzofurans emissions from Stationary Sources, EPA Publication SW–846 (incorporated by reference— see § 63.14); or

(B) Method 23, provided in appendix A, part 60 of this chapter, after approval by the Administrator.

(*1*) You may request approval to use Method 23 in the performance test plan required under § 63.1207(e)(i) and (ii).

(*2*) In determining whether to grant approval to use Method 23, the Administrator may consider factors including whether dioxin/furan were detected at levels substantially below the emission standard in previous testing, and whether previous Method 0023 analyses detected low levels of dioxin/furan in the front half of the sampling train.

(*3*) Sources that emit carbonaceous particulate matter, such as coal-fired boilers, and sources equipped with activated carbon injection, will be deemed not suitable for use of Method 23 unless you document that there would not be a significant improvement in quality assurance with Method 0023A.

* * * * *

(5) *Hydrogen chloride and chlorine gas*—(i) *Compliance with MACT standards.* To determine compliance with the emission standard for hydrogen chloride and chlorine gas (combined), you must use:

(A) Method 26/26A as provided in appendix A, part 60 of this chapter; or

(B) Methods 320 or 321 as provided in appendix A, part 63 of this chapter, or

(C) ASTM D 6735–01, Standard Test Method for Measurement of Gaseous Chlorides and Fluorides from Mineral Calcining Exhaust Sources—Impinger Method to measure emissions of hydrogen chloride, and Method 26/26A to measure emissions of chlorine gas, provided that you follow the provisions in paragraphs (b)(5)(C)(*1*) through (*6*) of this section. ASTM D 6735–01 is available for purchase from at least one of the following addresses: American Society for Testing and Materials (ASTM), 100 Barr Harbor Drive, Post Office Box C700, West Conshohocken, PA 19428–2959; or ProQuest, 300 North Zeeb Road, Ann Arbor, MI 48106.

(*1*) A test must include three or more runs in which a pair of samples is obtained simultaneously for each run according to section 11.2.6 of ASTM Method D6735–01.

(*2*) You must calculate the test run standard deviation of each set of paired samples to quantify data precision, according to Equation 1 of this section:

$$RSD_a = (100)\,\text{AbsoluteValue}\left[\frac{C1_a - C2_a}{C1_a + C2_a}\right] \qquad \text{(Eq. 1)}$$

Where:

RSD_a = The test run relative standard deviation of sample pair a, percent.

$C1_a$ and $C2_a$ = The HCl concentrations, milligram/dry standard cubic meter (mg/dscm), from the paired samples.

(*3*) You must calculate the test average relative standard deviation according to Equation 2 of this section:

$$RSD_{TA} = \frac{\sum_{a=1}^{p} RSD_a}{p} \qquad \text{(Eq. 2)}$$

Where:

RSD_{TA} = The test average relative standard deviation, percent.

RSD_a = The test run relative standard deviation for sample pair a.

p = The number of test runs, ≥3.

(*4*) If RSDTA is greater than 20 percent, the data are invalid and the test must be repeated.

(*5*) The post-test analyte spike procedure of section 11.2.7 of ASTM Method D6735–01 is conducted, and the percent recovery is calculated according to section 12.6 of ASTM Method D6735–01.

(*6*) If the percent recovery is between 70 percent and 130 percent, inclusive, the test is valid. If the percent recovery is outside of this range, the data are considered invalid, and the test must be repeated.

(ii) *Compliance with risk-based limits under § 63.1215.* To demonstrate compliance with emission limits established under § 63.1215, you must use Method 26/26A as provided in appendix A, part 60 of this chapter, Method 320 as provided in appendix A, part 63 of this chapter, Method 321 as provided in appendix A, part 63 of this chapter, or ASTM D 6735–01, Standard Test Method for Measurement of Gaseous Chlorides and Fluorides from Mineral Calcining Exhaust Sources—Impinger Method (following the provisions of paragraphs (b)(5)(C)(*1*) through (*6*) of this section), except:

(A) For cement kilns and sources equipped with a dry acid gas scrubber, you must use Methods 320 or 321 as provided in appendix A, part 63 of this chapter, or ASTM D 6735–01 to measure hydrogen chloride, and the back-half, caustic impingers of Method 26/26A as provided in appendix A, part 60 of this chapter to measure chlorine gas; and

(B) For incinerators, boilers, and lightweight aggregate kilns, you must use Methods 320 or 321 as provided in appendix A, part 63 of this chapter, or ASTM D 6735–01 to measure hydrogen chloride, and Method 26/26A as provided in appendix A, part 60 of this chapter to measure total chlorine, and calculate chlorine gas by difference if:

(*1*) The bromine/chlorine ratio in feedstreams is greater than 5 percent; or

(*2*) The sulfur/chlorine ratio in feedstreams is greater than 50 percent.

* * * * *

■ 11. Section 63.1209 is amended by:

■ a. Revising paragraphs (a)(1)(ii), (a)(1)(iv)(D), (a)(1)(v)(D), and (a)(5).

■ b. Revising paragraph (b)(2)(ii).

■ c. Revising the heading of paragraph (g)(1) introductory text and paragraph (g)(1)(i).

■ d. Adding paragraph (g)(1)(iv).

■ e. Revising paragraphs (k)(1)(i) and (k)(2)(i).

■ f. Revising paragraph (l)(1).

■ g. Revising paragraphs (m)(1)(iv) introductory text and (m)(3).

■ h. Revising paragraph (n)(2).

■ i. Revising the heading of paragraph (o) introductory text and paragraph (o)(1).

■ j. Adding paragraph (r).

The revisions read as follows:

§ 63.1209 What are the monitoring requirements?

(a) * * *

(1) * * *

(ii) (A) *Cement kilns under § 63.1204*—Except as provided by paragraphs (a)(1)(iv) and (a)(1)(v) of the section, you must use a COMS to demonstrate and monitor compliance with the opacity standard under §§ 63.1204(a)(7) and (b)(7) at each point where emissions are vented from these affected sources including the bypass stack of a preheater or preheater/precalciner kiln with dual stacks.

(B) *Cement kilns under § 63.1220*—Except as provided by paragraphs (a)(1)(iv) and (a)(1)(v) of the section and unless your source is equipped with a bag leak detection system under § 63.1206(c)(8) or a particulate matter detection system under § 63.1206(c)(9), you must use a COMS to demonstrate and monitor compliance with the opacity standard under §§ 63.1220(a)(7) and (b)(7) at each point where emissions are vented from these affected sources including the bypass stack of a preheater or preheater/precalciner kiln with dual stacks.

(C) You must maintain and operate each COMS in accordance with the requirements of § 63.8(c) except for the requirements under § 63.8(c)(3). The requirements of § 63.1211(c) shall be complied with instead of § 63.8(c)(3); and

(D) Compliance is based on a six-minute block average.

* * * * *

(iv) * * *

(D) To remain in compliance, all six-minute block averages must not exceed the opacity standard.

(v) * * *

(D) To remain in compliance, all six-minute block averages must not exceed the opacity standard.

* * * * *

(5) *Petitions to use CEMS for other standards.* You may petition the Administrator to use CEMS for compliance monitoring for particulate matter, mercury, semivolatile metals, low volatile metals, and hydrogen chloride and chlorine gas under § 63.8(f) in lieu of compliance with the corresponding operating parameter limits under this section.

* * * * *

(b) * * *

(2) * * *

(ii) *Accuracy and calibration of weight measurement devices for activated carbon injection systems.* If you operate a carbon injection system, the accuracy of the weight measurement device must be ± 1 percent of the weight being measured. The calibration of the device must be verified at least once each calendar quarter at a frequency of approximately 120 days.

* * * * *

(g) * * *

(1) *Requests to use alternatives to operating parameter monitoring requirements.* (i) You may submit an application to the Administrator under this paragraph for approval of alternative operating parameter monitoring requirements to document compliance with the emission standards of this subpart. For requests to use additional CEMS, however, you must use paragraph (a)(5) of this section and § 63.8(f). Alternative requests to operating parameter monitoring requirements that include unproven monitoring methods may not be made under this paragraph and must be made under § 63.8(f).

* * * * *

(iv) *Dual Standards that incorporate the Interim Standards for HAP metals.* (A) *Semivolatile and Low Volatile Metals.* You may petition the Administrator to waive a feedrate operating parameter limit under paragraph (n)(2) of this section for either the emission standards expressed in a thermal emissions format or the interim standards based on documentation that the feedrate operating parameter limit is not needed to ensure compliance with the relevant standard on a continuous basis.

(B) *Mercury.* You may petition the Administrator to waive a feedrate operating parameter limit under paragraph (l)(1) of this section for either the feed concentration standard under §§ 63.1220(a)(2)(i) and (b)(2)(i) or the interim standards based on documentation that the feedrate operating parameter limit is not needed to ensure compliance with the relevant standard on a continuous basis.

* * * * *

(k) * * *

(1) * * * (i) For sources other than a lightweight aggregate kiln, if the combustor is equipped with an electrostatic precipitator, baghouse (fabric filter), or other dry emissions control device where particulate matter is suspended in contact with combustion gas, you must establish a limit on the maximum temperature of the gas at the inlet to the device on an hourly rolling average. You must establish the hourly rolling average limit as the average of the test run averages.

* * * * *

(2) * * * (i) For sources other than cement kilns, you must measure the temperature of each combustion chamber at a location that best represents, as practicable, the bulk gas temperature in the combustion zone. You must document the temperature measurement location in the test plan you submit under §§ 63.1207(e) and (f);

* * * * *

(l) *Mercury.* * * *

(1) *Feedrate of mercury.* (i) For incinerators and solid fuel boilers, when complying with the mercury emission standards under §§ 63.1203, 63.1216 and 63.1219, you must establish a 12-hour rolling average limit for the total feedrate of mercury in all feedstreams as the average of the test run averages.

(ii) For liquid fuel boilers, when complying with the mercury emission standards of § 63.1217, you must establish a rolling average limit for the mercury feedrate as follows on an averaging period not to exceed an annual rolling average:

(A) You must calculate a mercury system removal efficiency for each test run and calculate the average system removal efficiency of the test run averages. If emissions exceed the mercury emission standard during the comprehensive performance test, it is not a violation because the averaging period for the mercury emission standard is (not-to-exceed) one year and compliance is based on compliance with the mercury feedrate limit with an averaging period not-to-exceed one year.

(B) If you burn hazardous waste with a heating value of 10,000 Btu/lb or greater, you must calculate the mercury feedrate limit as follows:

(*1*) The mercury feedrate limit is the emission standard divided by [1 − system removal efficiency].

(*2*) The mercury feedrate limit is a hazardous waste thermal concentration limit expressed as pounds of mercury in hazardous waste feedstreams per million Btu of hazardous waste fired.

(*3*) You must comply with the hazardous waste mercury thermal concentration limit by determining the feedrate of mercury in all hazardous waste feedstreams (lb/hr) at least once a minute and the hazardous waste thermal feedrate (MM Btu/hr) at least once a minute to calculate a 60-minute average thermal emission concentration as [hazardous waste mercury feedrate (lb/hr) / hazardous waste thermal feedrate (MM Btu/hr)].

(*4*) You must calculate a rolling average hazardous waste mercury thermal concentration that is updated each hour.

(*5*) If you select an averaging period for the feedrate limit that is greater than a 12-hour rolling average, you must calculate the initial rolling average as though you had selected a 12-hour rolling average, as provided by paragraph (b)(5)(i) of this section. You must calculate rolling averages thereafter as the average of the available one-minute values until enough one-minute values are available to calculate the rolling average period you select. At that time and thereafter, you update the rolling average feedrate each hour with a 60-minute average feedrate.

(C) If you burn hazardous waste with a heating value of less than 10,000 Btu/lb, you must calculate the mercury feedrate limit as follows:

(*1*) You must calculate the mercury feedrate limit as the mercury emission standard divided by [1 − System Removal Efficiency].

(*2*) The feedrate limit is expressed as a mass concentration per unit volume of stack gas (μg/dscm) and is converted to a mass feedrate (lb/hr) by multiplying it by the average stack gas flowrate of the test run averages.

(*3*) You must comply with the feedrate limit by determining the mercury feedrate (lb/hr) at least once a minute to calculate a 60-minute average feedrate.

(*4*) You must update the rolling average feedrate each hour with this 60-minute feedrate measurement.

(*5*) If you select an averaging period for the feedrate limit that is greater than a 12-hour rolling average, you must calculate the initial rolling average as though you had selected a 12-hour rolling average, as provided by paragraph (b)(5)(i) of this section. You must calculate rolling averages thereafter as the average of the available one-minute values until enough one-minute values are available to calculate the rolling average period you select. At that time and thereafter, you update the rolling average feedrate each hour with a 60-minute average feedrate.

(D) If your boiler is equipped with a wet scrubber, you must comply with the following unless you document in the performance test plan that you do not feed chlorine at rates that may substantially affect the system removal efficiency of mercury for purposes of establishing a mercury feedrate limit based on the system removal efficiency during the test:

(*1*) Scrubber blowdown must be minimized during a pretest conditioning period and during the performance test:

(*2*) Scrubber water must be preconditioned so that mercury in the

water is at equilibrium with stack gas at the mercury feedrate level of the performance test; and

(*3*) You must establish an operating limit on minimum pH of scrubber water as the average of the test run averages and comply with the limit on an hourly rolling average.

(iii) For cement kilns:

(A) When complying with the emission standards under §§ 63.1220(a)(2)(i) and (b)(2)(i), you must:

(*1*) Comply with the mercury hazardous waste feed concentration operating requirement on a twelve-hour rolling average;

(*2*) Monitor and record in the operating record the as-fired mercury concentration in the hazardous waste (or the weighted-average mercury concentration for multiple hazardous waste feedstreams);

(*3*) Initiate an automatic waste feed cutoff that immediately and automatically cuts off the hazardous waste feed when the as-fired mercury concentration operating requirement is exceeded;

(B) When complying with the emission standards under §§ 63.1204, 63.1220(a)(2)(ii) and (b)(2)(ii), you must establish a 12-hour rolling average limit for the total feedrate of mercury in all feedstreams as the average of the test run averages;

(C) Except as provided by paragraph (l)(1)(iii)(D) of this section, when complying with the hazardous waste feedrate corresponding to a maximum theoretical emission concentration (MTEC) under §§ 63.1220(a)(2)(iii) and (b)(2)(iii), you must:

(*1*) Comply with the MTEC operating requirement on a twelve-hour rolling average;

(*2*) Monitor and record the feedrate of mercury for each hazardous waste feedstream according to § 63.1209(c);

(*3*) Monitor with a CMS and record in the operating record the gas flowrate (either directly or by monitoring a surrogate parameter that you have correlated to gas flowrate);

(*4*) Continuously calculate and record in the operating record a MTEC assuming mercury from all hazardous waste feedstreams is emitted;

(*5*) Initiate an automatic waste feed cutoff that immediately and automatically cuts off the hazardous waste feed when the MTEC operating requirement is exceeded;

(D) In lieu of complying with paragraph (l)(1)(iii)(C) of this section, you may:

(*1*) Identify in the Notification of Compliance a minimum gas flowrate limit and a maximum feedrate limit of mercury from all hazardous waste feedstreams that ensures the MTEC calculated in paragraph (l)(1)(iii)(B)(*4*) of this section is below the operating requirement under paragraphs §§ 63.1220(a)(2)(iii) and (b)(2)(iii); and

(*2*) Initiate an automatic waste feed cutoff that immediately and automatically cuts off the hazardous waste feed when either the gas flowrate or mercury feedrate exceeds the limits identified in paragraph (l)(1)(iv)(D)(*1*) of this section.

(iv) For lightweight aggregate kilns:

(A) When complying with the emission standards under §§ 63.1205, 63.1221(a)(2)(i) and (b)(2)(i), you must establish a 12-hour rolling average limit for the total feedrate of mercury in all feedstreams as the average of the test run averages;

(B) Except as provided by paragraph (l)(1)(iv)(C) of this section, when complying with the hazardous waste feedrate corresponding to a maximum theoretical emission concentration (MTEC) under §§ 63.1221(a)(2)(ii) and (b)(2)(ii), you must:

(*1*) Comply with the MTEC operating requirement on a twelve-hour rolling average;

(*2*) Monitor and record the feedrate of mercury for each hazardous waste feedstream according to § 63.1209(c);

(*3*) Monitor with a CMS and record in the operating record the gas flowrate (either directly or by monitoring a surrogate parameter that you have correlated to gas flowrate);

(*4*) Continuously calculate and record in the operating record a MTEC assuming mercury from all hazardous waste feedstreams is emitted;

(*5*) Initiate an automatic waste feed cutoff that immediately and automatically cuts off the hazardous waste feed when the MTEC operating requirement is exceeded;

(C) In lieu of complying with paragraph (l)(1)(iv)(B) of this section, you may:

(*1*) Identify in the Notification of Compliance a minimum gas flowrate limit and a maximum feedrate limit of mercury from all hazardous waste feedstreams that ensures the MTEC calculated in paragraph (l)(1)(iv)(B)(*4*) of this section is below the operating requirement under paragraphs §§ 63.1221(a)(2)(ii) and (b)(2)(ii); and

(*2*) Initiate an automatic waste feed cutoff that immediately and automatically cuts off the hazardous waste feed when either the gas flowrate or mercury feedrate exceeds the limits identified in paragraph (l)(1)(iv)(C)(*1*) of this section.

(v) *Extrapolation of feedrate levels.* In lieu of establishing mercury feedrate limits as specified in paragraphs (l)(1)(i) through (iv) of this section, you may request as part of the performance test plan under §§ 63.7(b) and (c) and §§ 63.1207 (e) and (f) to use the mercury feedrates and associated emission rates during the comprehensive performance test to extrapolate to higher allowable feedrate limits and emission rates. The extrapolation methodology will be reviewed and approved, as warranted, by the Administrator. The review will consider in particular whether:

(A) Performance test metal feedrates are appropriate (*i.e.*, whether feedrates are at least at normal levels; depending on the heterogeneity of the waste, whether some level of spiking would be appropriate; and whether the physical form and species of spiked material is appropriate); and

(B) Whether the extrapolated feedrates you request are warranted considering historical metal feedrate data.

* * * * *

(m) * * *

(1) * * *

(iv) *Other particulate matter control devices.* For each particulate matter control device that is not a fabric filter or high energy wet scrubber, or is not an electrostatic precipitator or ionizing wet scrubber for which you elect to monitor particulate matter loadings under § 63.1206(c)(9) of this chapter for process control, you must ensure that the control device is properly operated and maintained as required by § 63.1206(c)(7) and by monitoring the operation of the control device as follows:

* * * * *

(3) *Maximum ash feedrate.* Owners and operators of hazardous waste incinerators, solid fuel boilers, and liquid fuel boilers must establish a maximum ash feedrate limit as a 12-hour rolling average based on the average of the test run averages. This requirement is waived, however, if you comply with the particulate matter detection system requirements under § 63.1206(c)(9).

(n) * * *

(2) *Maximum feedrate of semivolatile and low volatile metals.* (i) *General.* You must establish feedrate limits for semivolatile metals (cadmium and lead) and low volatile metals (arsenic, beryllium, and chromium) as follows, except as provided by paragraph (n)(2)(vii) of this section.

(ii) For incinerators, cement kilns, and lightweight aggregate kilns, when complying with the emission standards under §§ 63.1203, 63.1204, 63.1205, and 63.1219, and for solid fuel boilers when complying with the emission standards

under § 63.1216, you must establish 12-hour rolling average limits for the total feedrate of semivolatile and low volatile metals in all feedstreams as the average of the test run averages.

(iii) *Cement kilns under § 63.1220*—(A) When complying with the emission standards under §§ 63.1220(a)(3)(i), (a)(4)(i), (b)(3)(i), and (b)(4)(i), you must establish 12-hour rolling average feedrate limits for semivolatile and low volatile metals as the thermal concentration of semivolatile metals or low volatile metals in all hazardous waste feedstreams. You must calculate hazardous waste thermal concentrations for semivolatile metals and low volatile metals for each run as the total mass feedrate of semivolatile metals or low volatile metals for all hazardous waste feedstreams divided by the total heat input rate for all hazardous waste feedstreams. The 12-hour rolling average feedrate limits for semivolatile metals and low volatile metals are the average of the hazardous waste thermal concentrations for the runs.

(B) When complying with the emission standards under §§ 63.1220(a)(3)(ii), (a)(4)(ii), (b)(3)(ii), and (b)(4)(ii), you must establish 12-hour rolling average limits for the total feedrate of semivolatile and low volatile metals in all feedstreams as the average of the test run averages.

(iv) *Lightweight aggregate kilns under § 63.1221*—(A) When complying with the emission standards under §§ 63.1221(a)(3)(i), (a)(4)(i), (b)(3)(i), and (b)(4)(i), you must establish 12-hour rolling average feedrate limits for semivolatile and low volatile metals as the thermal concentration of semivolatile metals or low volatile metals in all hazardous waste feedstreams as specified in paragraphs (n)(2)(iii)(A) of this section.

(B) When complying with the emission standards under §§ 63.1221(a)(3)(ii), (a)(4)(ii), (b)(3)(ii), and (b)(4)(ii), you must establish 12-hour rolling average limits for the total feedrate of semivolatile and low volatile metals in all feedstreams as the average of the test run averages.

(v) *Liquid fuel boilers under § 63.1217.* (A) *Semivolatile metals.* You must establish a rolling average limit for the semivolatile metal feedrate as follows on an averaging period not to exceed an annual rolling average.

(*1*) *System removal efficiency.* You must calculate a semivolatile metal system removal efficiency for each test run and calculate the average system removal efficiency of the test run averages. If emissions exceed the semivolatile metal emission standard during the comprehensive performance test, it is not a violation because the averaging period for the semivolatile metal emission standard is one year and compliance is based on compliance with the semivolatile metal feedrate limit that has an averaging period not to exceed an annual rolling average.

(*2*) *Boilers that feed hazardous waste with a heating value of 10,000 Btu/lb or greater.* You must calculate the semivolatile metal feedrate limit as the semivolatile metal emission standard divided by [1 − System Removal Efficiency].

(*i*) The feedrate limit is a hazardous waste thermal concentration limit expressed as pounds of semivolatile metals in all hazardous waste feedstreams per million Btu of hazardous waste fed to the boiler.

(*ii*) You must comply with the hazardous waste semivolatile metal thermal concentration limit by determining the feedrate of semivolatile metal in all hazardous waste feedstreams (lb/hr) and the hazardous waste thermal feedrate (MM Btu/hr) at least once a minute to calculate a 60-minute average thermal emission concentration as [hazardous waste semivolatile metal feedrate (lb/hr) / hazardous waste thermal feedrate (MM Btu/hr)].

(*iii*) You must calculate a rolling average hazardous waste semivolatile metal thermal concentration that is updated each hour.

(*iv*) If you select an averaging period for the feedrate limit that is greater than a 12-hour rolling average, you must calculate the initial rolling average as though you had selected a 12-hour rolling average, as provided by paragraph (b)(5)(i) of this section. You must calculate rolling averages thereafter as the average of the available one-minute values until enough one-minute values are available to calculate the rolling average period you select. At that time and thereafter, you update the rolling average feedrate each hour with a 60-minute average feedrate.

(*3*) *Boilers that feed hazardous waste with a heating value less than 10,000 Btu/lb.* (*i*) You must calculate the semivolatile metal feedrate limit as the semivolatile metal emission standard divided by [1 − System Removal Efficiency].

(*ii*) The feedrate limit is expressed as a mass concentration per unit volume of stack gas (μg/dscm) and is converted to a mass feedrate (lb/hr) by multiplying it by the average stack gas flowrate (dscm/hr) of the test run averages.

(*iii*) You must comply with the feedrate limit by determining the semivolatile metal feedrate (lb/hr) at least once a minute to calculate a 60-minute average feedrate.

(*iv*) You must update the rolling average feedrate each hour with this 60-minute feedrate measurement.

(*v*) If you select an averaging period for the feedrate limit that is greater than a 12-hour rolling average, you must calculate the initial rolling average as though you had selected a 12-hour rolling average, as provided by paragraph (b)(5)(i) of this section. You must calculate rolling averages thereafter as the average of the available one-minute values until enough one-minute values are available to calculate the rolling average period you select. At that time and thereafter, you update the rolling average feedrate each hour with a 60-minute average feedrate.

(B) *Chromium. (1) Boilers that feed hazardous waste with a heating value of 10,000 Btu/lb or greater.* (*i*) The feedrate limit is a hazardous waste thermal concentration limit expressed as pounds of chromium in all hazardous waste feedstreams per million Btu of hazardous waste fed to the boiler.

(*ii*) You must comply with the hazardous waste chromium thermal concentration limit by determining the feedrate of chromium in all hazardous waste feedstreams (lb/hr) and the hazardous waste thermal feedrate (MM Btu/hr) at least once a minute to calculate a 60-minute average thermal emission concentration as [hazardous waste chromium feedrate (lb/hr) / hazardous waste thermal feedrate (MM Btu/hr)]. You must update the rolling average feedrate each hour with this 60-minute average feedrate measurement.

(*2*) *Boilers that feed hazardous waste with a heating value less than 10,000 Btu/lb.* You must establish a 12-hour rolling average limit for the total feedrate (lb/hr) of chromium in all feedstreams as the average of the test run averages. You must update the rolling average feedrate each hour with a 60-minute average feedrate measurement.

(vi) *LVM limits for pumpable wastes.* You must establish separate feedrate limits for low volatile metals in pumpable feedstreams using the procedures prescribed above for total low volatile metals. Dual feedrate limits for both pumpable and total feedstreams are not required, however, if you base the total feedrate limit solely on the feedrate of pumpable feedstreams.

(vii) *Extrapolation of feedrate levels.* In lieu of establishing feedrate limits as specified in paragraphs (l)(1)(i) through (iii) of this section, you may request as part of the performance test plan under §§ 63.7(b) and (c) and §§ 63.1207(e) and (f) to use the semivolatile metal and low

volatile metal feedrates and associated emission rates during the comprehensive performance test to extrapolate to higher allowable feedrate limits and emission rates. The extrapolation methodology will be reviewed and approved, as warranted, by the Administrator. The review will consider in particular whether:

(A) Performance test metal feedrates are appropriate (*i.e.*, whether feedrates are at least at normal levels; depending on the heterogeneity of the waste, whether some level of spiking would be appropriate; and whether the physical form and species of spiked material is appropriate); and

(B) Whether the extrapolated feedrates you request are warranted considering historical metal feedrate data.

* * * * *

(o) *Hydrogen chloride and chlorine gas.* * * *

(1) *Feedrate of total chlorine and chloride.* (i) *Incinerators, cement kilns, lightweight aggregate kilns, solid fuel boilers, and hydrochloric acid production furnaces.* You must establish a 12-hour rolling average limit for the total feedrate of chlorine (organic and inorganic) in all feedstreams as the average of the test run averages.

(ii) *Liquid fuel boilers.* (A) *Boilers that feed hazardous waste with a heating value not less than 10,000 Btu/lb.* (*1*) The feedrate limit is a hazardous waste thermal concentration limit expressed as pounds of chlorine (organic and inorganic) in all hazardous waste feedstreams per million Btu of hazardous waste fed to the boiler.

(*2*) You must establish a 12-hour rolling average feedrate limit as the average of the test run averages.

(*3*) You must comply with the feedrate limit by determining the mass feedrate of hazardous waste feedstreams (lb/hr) at least once a minute and by knowing the chlorine (organic and inorganic) content and heating value (million Btu/lb) of hazardous waste feedstreams at all times to calculate a 60-minute average feedrate measurement as [hazardous waste chlorine feedrate (lb/hr) / hazardous waste thermal feedrate (million Btu/hr)]. You must update the rolling average feedrate each hour with this 60-minute average feedrate measurement.

(B) *Boilers that feed hazardous waste with a heating value less than 10,000 Btu/lb.* You must establish a 12-hour rolling average limit for the total feedrate of chlorine (organic and inorganic) in all feedstreams as the average of the test run averages. You must update the rolling average feedrate each hour with a 60-minute average feedrate measurement.

* * * * *

(r) *Averaging periods.* The averaging periods specified in this section for operating parameters are not-to-exceed averaging periods. You may elect to use shorter averaging periods. For example, you may elect to use a 1-hour rolling average rather than the 12-hour rolling average specified in paragraph (l)(1)(i) of this section for mercury.

■ 12. Section 63.1210 is amended by:
■ a. Revising the table in paragraph (a)(1) and the table in paragraph (a)(2).
■ b. Redesignating paragraph (b) as (d).
■ c. Adding new paragraph (b).
■ d. Adding new paragraph (c).

The revisions and additions read as follows:

§ 63.1210 What are the notification requirements?

(a) * * *

(1) * * *

Reference	Notification
63.9(b)	Initial notifications that you are subject to Subpart EEE of this Part.
63.9(d)	Notification that you are subject to special compliance requirements.
63.9(j)	Notification and documentation of any change in information already provided under § 63.9.
63.1206(b)(5)(i)	Notification of changes in design, operation, or maintenance.
63.1206(c)(7)(ii)(C)	Notification of excessive bag leak detection system exceedances.
63.1207(e), 63.9(e) 63.9(g)(1) and (3)	Notification of performance test and continuous monitoring system evaluation, including the performance test plan and CMS performance evaluation plan.[1]
63.1210(b)	Notification of intent to comply.
63.1210(d), 63.1207(j), 63.1207(k), 63.1207(l), 63.9(h), 63.10(d)(2), 63.10(e)(2).	Notification of compliance, including results of performance tests and continuous monitoring system performance evaluations.

[1] You may also be required on a case-by-case basis to submit a feedstream analysis plan under § 63.1209(c)(3).

(2) * * *

Reference	Notification, request, petition, or application 6
63.9(i)	You may request an adjustment to time periods or postmark deadlines for submittal and review of required information.
63.10(e)(3)(ii)	You may request to reduce the frequency of excess emissions and CMS performance reports.
63.10(f)	You may request to waive recordkeeping or reporting requirements.
63.1204(d)(2)(iii), 63.1220(d)(2)(iii)	Notification that you elect to comply with the emission averaging requirements for cement kilns with in-line raw mills.
63.1204(e)(2)(iii), 63.1220(e)(2)(iii)	Notification that you elect to comply with the emission averaging requirements for preheater or preheater/precalciner kilns with dual stacks.
63.1206(b)(4), 63.1213, 63.6(i), 63.9(c)	You may request an extension of the compliance date for up to one year.
63.1206(b)(5)(i)(C)	You may request to burn hazardous waste for more than 720 hours and for purposes other than testing or pretesting after making a change in the design or operation that could affect compliance with emission standards and prior to submitting a revised Notification of Compliance.
63.1206(b)(8)(iii)(B)	If you elect to conduct particulate matter CEMS correlation testing and wish to have federal particulate matter and opacity standards and associated operating limits waived during the testing, you must notify the Administrator by submitting the correlation test plan for review and approval.
63.1206(b)(8)(v)	You may request approval to have the particulate matter and opacity standards and associated operating limits and conditions waived for more than 96 hours for a correlation test.

Reference	Notification, request, petition, or application 6
63.1206(b)(9)	Owners and operators of lightweight aggregate kilns may request approval of alternative emission standards for mercury, semivolatile metal, low volatile metal, and hydrogen chloride/chlorine gas under certain conditions.
63.1206(b)(10)	Owners and operators of cement kilns may request approval of alternative emission standards for mercury, semivolatile metal, low volatile metal, and hydrogen chloride/chlorine gas under certain conditions.
63.1206(b)(14)	Owners and operators of incinerators may elect to comply with an alternative to the particulate matter standard.
63.1206(b)(15)	Owners and operators of cement and lightweight aggregate kilns may request to comply with the alternative to the interim standards for mercury.
63.1206(c)(2)(ii)(C)	You may request to make changes to the startup, shutdown, and malfunction plan.
63.1206(c)(5)(i)(C)	You may request an alternative means of control to provide control of combustion system leaks.
63.1206(c)(5)(i)(D)	You may request other techniques to prevent fugitive emissions without use of instantaneous pressure limits.
63.1207(c)(2)	You may request to base initial compliance on data in lieu of a comprehensive performance test.
63.1207(d)(3)	You may request more than 60 days to complete a performance test if additional time is needed for reasons beyond your control.
63.1207(e)(3), 63.7(h)	You may request a time extension if the Administrator fails to approve or deny your test plan.
63.1207(h)(2)	You may request to waive current operating parameter limits during pretesting for more than 720 hours.
63.1207(f)(1)(ii)(D)	You may request a reduced hazardous waste feedstream analysis for organic hazardous air pollutants if the reduced analysis continues to be representative of organic hazardous air pollutants in your hazardous waste feedstreams.
63.1207(g)(2)(v)	You may request to operate under a wider operating range for a parameter during confirmatory performance testing.
63.1207(i)	You may request up to a one-year time extension for conducting a performance test (other than the initial comprehensive performance test) to consolidate testing with other state or federally-required testing.
63.1207(j)(4)	You may request more than 90 days to submit a Notification of Compliance after completing a performance test if additional time is needed for reasons beyond your control.
63.1207(l)(3)	After failure of a performance test, you may request to burn hazardous waste for more than 720 hours and for purposes other than testing or pretesting.
63.1209(a)(5), 63.8(f)	You may request: (1) Approval of alternative monitoring methods for compliance with standards that are monitored with a CEMS; and (2) approval to use a CEMS in lieu of operating parameter limits.
63.1209(g)(1)	You may request approval of: (1) Alternatives to operating parameter monitoring requirements, except for standards that you must monitor with a continuous emission monitoring system (CEMS) and except for requests to use a CEMS in lieu of operating parameter limits; or (2) a waiver of an operating parameter limit.
63.1209(l)(1)	You may request to extrapolate mercury feedrate limits.
63.1209(n)(2)	You may request to extrapolate semivolatile and low volatile metal feedrate limits.
63.1211(d)	You may request to use data compression techniques to record data on a less frequent basis than required by § 63.1209.

(b) *Notification of intent to comply (NIC).* These procedures apply to sources that have not previously complied with the requirements of paragraph (b) of this section, and to sources that previously complied with the NIC requirements of § 63.1210, which were in effect prior to October 11, 2000, that must make a technology change requiring a Class 1 permit modification to meet the standards of §§ 63.1219, 63.1220, and 63.1221.

(1) You must prepare a Notification of Intent to Comply that includes all of the following information:

(i) General information:

(A) The name and address of the owner/operator and the source;

(B) Whether the source is a major or an area source;

(C) Waste minimization and emission control technique(s) being considered;

(D) Emission monitoring technique(s) you are considering;

(E) Waste minimization and emission control technique(s) effectiveness;

(F) A description of the evaluation criteria used or to be used to select waste minimization and/or emission control technique(s); and

(G) A general description of how you intend to comply with the emission standards of this subpart.

(ii) As applicable to each source, information on key activities and estimated dates for these activities that will bring the source into compliance with emission control requirements of this subpart. You must include all of the following key activities and dates in your NIC:

(A) The dates by which you anticipate you will develop engineering designs for emission control systems or process changes for emissions;

(B) The date by which you anticipate you will commit internal or external resources for installing emission control systems or making process changes for emission control, or the date by which you will issue orders for the purchase of component parts to accomplish emission control or process changes.

(C) The date by which you anticipate you will submit construction applications;

(D) The date by which you anticipate you will initiate on-site construction, installation of emission control equipment, or process change;

(E) The date by which you anticipate you will complete on-site construction, installation of emission control equipment, or process change; and

(F) The date by which you anticipate you will achieve final compliance. The individual dates and milestones listed in paragraphs (b)(1)(ii)(A) through (F) of this section as part of the NIC are not requirements and therefore are not

enforceable deadlines; the requirements of paragraphs (b)(1)(ii)(A) through (F) of this section must be included as part of the NIC only to inform the public of how you intend to comply with the emission standards of this subpart.

(iii) A summary of the public meeting required under paragraph (c) of this section;

(iv) If you intend to cease burning hazardous waste prior to or on the compliance date, the requirements of paragraphs (b)(1)(ii) and (b)(1)(iii) of this section do not apply. You must include in your NIC a schedule of key dates for the steps to be taken to stop hazardous waste activity at your combustion unit. Key dates include the date for submittal of RCRA closure documents required under subpart G, part 264 or subpart G, part 265 of this chapter.

(2) You must make a draft of the NIC available for public review no later than 30 days prior to the public meeting required under paragraph (c)(1) of this section or no later than 9 months after the effective date of the rule if you intend to cease burning hazardous waste prior to or on the compliance date.

(3) You must submit the final NIC to the Administrator no later than one year following the effective date of the emission standards of this subpart.

(c) *NIC public meeting and notice.* (1) Prior to the submission of the NIC to the permitting agency, and no later than 10 months after the effective date of the emission standards of this subpart, you must hold at least one informal meeting with the public to discuss anticipated activities described in the draft NIC for achieving compliance with the emission standards of this subpart. You must post a sign-in sheet or otherwise provide a voluntary opportunity for attendees to provide their names and addresses;

(2) You must submit a summary of the meeting, along with the list of attendees and their addresses developed under paragraph (b)(1) of this section, and copies of any written comments or materials submitted at the meeting, to the Administrator as part of the final NIC, in accordance with paragraph (b)(1)(iii) of this section;

(3) You must provide public notice of the NIC meeting at least 30 days prior to the meeting and you must maintain, and provide to the Administrator upon request, documentation of the notice. You must provide public notice in all of the following forms:

(i) *Newspaper advertisement.* You must publish a notice in a newspaper of general circulation in the county or equivalent jurisdiction of your facility. In addition, you must publish the notice in newspapers of general circulation in adjacent counties or equivalent jurisdiction where such publication would be necessary to inform the affected public. You must publish the notice as a display advertisement.

(ii) *Visible and accessible sign.* You must post a notice on a clearly marked sign at or near the source. If you place the sign on the site of the hazardous waste combustor, the sign must be large enough to be readable from the nearest spot where the public would pass by the site.

(iii) *Broadcast media announcement.* You must broadcast a notice at least once on at least one local radio station or television station.

(iv) *Notice to the facility mailing list.* You must provide a copy of the notice to the facility mailing list in accordance with § 124.10(c)(1)(ix) of this chapter.

(4) You must include all of the following in the notices required under paragraph (c)(3) of this section:

(i) The date, time, and location of the meeting;

(ii) A brief description of the purpose of the meeting;

(iii) A brief description of the source and proposed operations, including the address or a map (e.g., a sketched or copied street map) of the source location;

(iv) A statement encouraging people to contact the source at least 72 hours before the meeting if they need special access to participate in the meeting;

(v) A statement describing how the draft NIC (and final NIC, if requested) can be obtained; and

(vi) The name, address, and telephone number of a contact person for the NIC.

(5) The requirements of this paragraph do not apply to sources that intend to cease burning hazardous waste prior to or on the compliance date.

■ 13. Section 63.1211 is amended by:

■ a. Revising the table in paragraph (b).

■ b. Revising paragraph (c)(1).

The revisions read as follows:

§ 63.1211 What are the recordkeeping and reporting requirements?

* * * * *

(b) * * *

Reference	Document, Data, or Information
63.1200, 63.10(b) and (c)	General. Information required to document and maintain compliance with the regulations of Subpart EEE, including data recorded by continuous monitoring systems (CMS), and copies of all notifications, reports, plans, and other documents submitted to the Administrator.
63.1204(d)(1)(ii), 63.1220(d)(1)(ii)	Documentation of mode of operation changes for cement kilns with in-line raw mills.
63.1204(d)(2)(ii), 63.1220(d)(2)(ii)	Documentation of compliance with the emission averaging requirements for cement kilns with in-line raw mills.
63.1204(e)(2)(ii), 63.1220(e)(2)(ii)	Documentation of compliance with the emission averaging requirements for preheater or preheater/precalciner kilns with dual stacks.
63.1206(b)(1)(ii)	If you elect to comply with all applicable requirements and standards promulgated under authority of the Clean Air Act, including Sections 112 and 129, in lieu of the requirements of Subpart EEE when not burning hazardous waste, you must document in the operating record that you are in compliance with those requirements.
63.1206(b)(5)(ii)	Documentation that a change will not adversely affect compliance with the emission standards or operating requirements.
63.1206(b)(11)	Calculation of hazardous waste residence time.
63.1206(c)(2)	Startup, shutdown, and malfunction plan.
63.1206(c)(2)(v)(A)	Documentation of your investigation and evaluation of excessive exceedances during malfunctions.
63.1206(c)(3)(v)	Corrective measures for any automatic waste feed cutoff that results in an exceedance of an emission standard or operating parameter limit.
63.1206(c)(3)(vii)	Documentation and results of the automatic waste feed cutoff operability testing.
63.1206(c)(4)(ii)	Emergency safety vent operating plan.
63.1206(c)(4)(iii)	Corrective measures for any emergency safety vent opening.
63.1206(c)(5)(ii)	Method used for control of combustion system leaks.
63.1206(c)(6)	Operator training and certification program.
63.1206(c)(7)(i)(D)	Operation and maintenance plan.
63.1209(c)(2)	Feedstream analysis plan.

Reference	Document, Data, or Information
63.1209(k)(6)(iii), 63.1209(k)(7)(ii), 63.1209(k)(9)(ii), 63.1209(o)(4)(iii).	Documentation that a substitute activated carbon, dioxin/furan formation reaction inhibitor, or dry scrubber sorbent will provide the same level of control as the original material.
63.1209(k)(7)(i)(C)	Results of carbon bed performance monitoring.
63.1209(q)	Documentation of changes in modes of operation.
63.1211(c)	Documentation of compliance.

(c) * * *

(1) By the compliance date, you must develop and include in the operating record a Documentation of Compliance. You are not subject to this requirement, however, if you submit a Notification of Compliance under § 63.1207(j) prior to the compliance date. Upon inclusion of the Documentation of Compliance in the operating record, hazardous waste burning incinerators, cement kilns, and lightweight aggregate kilns regulated under the interim standards of §§ 63.1203, 63.1204, and 63.1205 are no longer subject to compliance with the previously applicable Notification of Compliance.

* * * * *

■ 14. Section 63.1212 is added to subpart EEE to read as follows:

§ 63.1212 What are the other requirements pertaining to the NIC?

(a) *Certification of intent to comply.* The Notice of Intent to Comply (NIC) must contain the following certification signed and dated by a responsible official as defined under § 63.2 of this chapter: I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

(b) *New units.* Any source that files a RCRA permit application or permit modification request for construction of a hazardous waste combustion unit after October 12, 2005 must:

(1) Prepare a draft NIC according to § 63.1210(b) and make it available to the public upon issuance of the notice of NIC public meeting per § 63.1210(c)(3);

(2) Prepare a draft comprehensive performance test plan pursuant to the requirements of § 63.1207 and make it available for public review upon issuance of the notice of NIC public meeting;

(3) Provide notice to the public of a pre-application meeting pursuant to § 124.30 or notice to the public of a permit modification request pursuant to § 270.42 and;

(4) Hold an informal public meeting 30 days following notice of NIC public meeting and notice of the pre-application meeting or notice of the permit modification request.

(c) *Information Repository specific to new combustion units.* (1) Any source that files a RCRA permit application or modification request for construction of a new hazardous waste combustion unit after October 12, 2005 may be required to establish an information repository if deemed appropriate.

(2) The Administrator may assess the need, on a case-by-case basis for an information repository. When assessing the need for a repository, the Administrator shall consider the level of public interest, the presence of an existing repository, and any information available via the New Source Review and Title V permit processes. If the Administrator determines a need for a repository, then the Administrator shall notify the facility that it must establish and maintain an information repository.

(3) The information repository shall contain all documents, reports, data, and information deemed necessary by the Administrator. The Administrator shall have the discretion to limit the contents of the repository.

(4) The information repository shall be located and maintained at a site chosen by the source. If the Administrator finds the site unsuitable for the purposes and persons for which it was established, due to problems with location, hours of availability, access, or other relevant considerations, then the Administrator shall specify a more appropriate site.

(5) The Administrator shall require the source to provide a written notice about the information repository to all individuals on the source mailing list.

(6) The source shall be responsible for maintaining and updating the repository with appropriate information throughout a period specified by the Administrator. The Administrator may close the repository at his or her discretion based on the considerations in paragraph (c)(2) of this section.

■ 15. Section 63.1214 is amended by revising paragraphs (c)(1), (c)(2), (c)(3), and (c)(4) to read as follows:

§ 63.1214 Implementation and enforcement.

* * * * *

(c) * * *

(1) Approval of alternatives to requirements in §§ 63.1200, 63.1203, 63.1204, 63.1205, 63.1206(a), 63.1215, 63.1216, 63.1217, 63.1218, 63.1219, 63.1220, and 63.1221.

(2) Approval of major alternatives to test methods under §§ 63.7(e)(2)(ii) and (f), 63.1208(b), and 63.1209(a)(1), as defined under § 63.90, and as required in this subpart.

(3) Approval of major alternatives to monitoring under §§ 63.8(f) and 63.1209(a)(5), as defined under § 63.90, and as required in this subpart.

(4) Approval of major alternatives to recordkeeping and reporting under §§ 63.10(f) and 63.1211(a) through (c), as defined under § 63.90, and as required in this subpart.

■ 16. Section § 63.1215 is added to subpart EEE to read as follows:

§ 63.1215 What are the health-based compliance alternatives for total chlorine?

(a) *General.* (1) *Overview.* You may establish and comply with health-based compliance alternatives for total chlorine under the procedures prescribed in this section for your hazardous waste combustors other than hydrochloric acid production furnaces. You may comply with these health-based compliance alternatives in lieu of the emission standards for total chlorine provided under §§ 63.1216, 63.1217, 63.1219, 63.1220, and 63.1221. To identify and comply with the limits, you must:

(i) Identify a total chlorine emission concentration (ppmv) expressed as chloride ($Cl^{(-)}$) equivalent for each on-site hazardous waste combustor. You may select total chlorine emission concentrations as you choose to demonstrate eligibility for the risk-based limits under this section, except as provided by paragraph (b)(4) of this section;

(ii) Apportion the total chlorine emission concentration between HCl and Cl_2 according to paragraph (b)(6)(i) of this section, and calculate HCl and Cl_2 emission rates (lb/hr) using the gas flowrate and other parameters from the most recent regulatory compliance test.

(iii) Calculate the annual average HCl-equivalent emission rate as prescribed in paragraph (b)(2) of this section.

(iv) Perform an eligibility demonstration to determine if your HCl-equivalent emission rate meets the national exposure standard and thus is below the annual average HCl-equivalent emission rate limit, as prescribed by paragraph (c) of this section;

(v) Submit your eligibility demonstration for review and approval, as prescribed by paragraph (e) of this section, which must include information to ensure that the 1-hour average HCl-equivalent emission rate limit is not exceeded, as prescribed by paragraph (d) of this section;

(vi) Demonstrate compliance with the annual average HCl-equivalent emission rate limit during the comprehensive performance test, as prescribed by the testing and monitoring requirements under paragraph (e) of this section;

(vii) Comply with compliance monitoring requirements, including establishing feedrate limits on total chlorine and chloride, and operating parameter limits on emission control equipment, as prescribed by paragraph (f) of this section; and

(viii) Comply with the requirements for changes, as prescribed by paragraph (h) of this section.

(2) *Definitions.* In addition to the definitions under § 63.1201, the following definitions apply to this section:

1-Hour Average HCl-Equivalent Emission Rate means the HCl-equivalent emission rate (lb/hr) determined by equating the toxicity of chlorine to HCl using 1-hour RELs as the health risk metric for acute exposure.

1-Hour Average HCl-Equivalent Emission Rate Limit means the HCl-equivalent emission rate (lb/hr) determined by equating the toxicity of chlorine to HCl using 1-hour RELs as the health risk metric for acute exposure and which ensures that maximum 1-hour average ambient concentrations of HCl-equivalents do not exceed a Hazard Index of 1.0, rounded to the nearest tenths decimal place (0.1), at an off-site receptor location.

Acute Reference Exposure Level (aREL) means health thresholds below which there would be no adverse health effects for greater than once in a lifetime exposures of one hour. ARELs are developed by the California Office of Health Hazard Assessment and are available at *http://www.oehha.ca.gov/air/acute_rels/acuterel.html.*

Annual Average HCl-Equivalent Emission Rate means the HCl-equivalent emission rate (lb/hr) determined by equating the toxicity of chlorine to HCl using RfCs as the health risk metric for long-term exposure.

Annual Average HCl-Equivalent Emission Rate Limit means the HCl-equivalent emission rate (lb/hr) determined by equating the toxicity of chlorine to HCl using RfCs as the health risk metric for long-term exposure and which ensures that maximum annual average ambient concentrations of HCl equivalents do not exceed a Hazard Index of 1.0, rounded to the nearest tenths decimal place (0.1), at an off-site receptor location.

Hazard Index (HI) means the sum of more than one Hazard Quotient for multiple substances and/or multiple exposure pathways. In this section, the Hazard Index is the sum of the Hazard Quotients for HCl and chlorine.

Hazard Quotient (HQ) means the ratio of the predicted media concentration of a pollutant to the media concentration at which no adverse effects are expected. For chronic inhalation exposures, the HQ is calculated under this section as the air concentration divided by the RfC. For acute inhalation exposures, the HQ is calculated under this section as the air concentration divided by the aREL.

Look-up table analysis means a risk screening analysis based on comparing the HCl-equivalent emission rate from the affected source to the appropriate HCl-equivalent emission rate limit specified in Tables 1 through 4 of this section.

Reference Concentration (RfC) means an estimate (with uncertainty spanning perhaps an order of magnitude) of a continuous inhalation exposure to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime. It can be derived from various types of human or animal data, with uncertainty factors generally applied to reflect limitations of the data used.

(b) *HCl-equivalent emission rates.* (1) You must express total chlorine emission rates for each hazardous waste combustor as HCl-equivalent emission rates.

(2) *Annual average rates.* You must calculate annual average toxicity-weighted HCl-equivalent emission rates for each combustor as follows:

$$ER_{tw} = ER_{HCl} + ER_{Cl2} \times (RfC_{HCl}/RfC_{Cl2})$$

Where:

ER_{LTtw} is the annual average HCl toxicity-weighted emission rate (HCl-equivalent emission rate) considering long-term exposures, lb/hr

ER_{HCl} is the emission rate of HCl in lbs/hr

ER_{Cl2} is the emission rate of chlorine in lbs/hr

RfC_{HCl} is the reference concentration of HCl

RfC_{Cl2} is the reference concentration of chlorine

(3) *1-hour average rates.* You must calculate 1-hour average toxicity-weighted HCl-equivalent emission rates for each combustor as follows:

$$ER_{STtw} = ER_{HCl} + ER_{Cl2} \times (aREL_{HCl}/aREL_{Cl2})$$

Where:

ER_{STtw} is the 1-hour average HCl toxicity-weighted emission rate (HCl-equivalent emission rate) considering 1-hour (short-term) exposures, lb/hr

ER_{HCl} is the emission rate of HCl in lbs/hr

ER_{Cl2} is the emission rate of chlorine in lbs/hr

$aREL_{HCl}$ is the 1-hour Reference Exposure Level of HCl

$aREL_{Cl2}$ is the 1-hour Reference Exposure Level of chlorine

(4) You must use the RfC values for hydrogen chloride and chlorine found at *http://epa.gov/ttn/atw/toxsource/summary.html.*

(5) You must use the aREL values for hydrogen chloride and chlorine found at *http://www.oehha.ca.gov/air/acute_rels/acuterel.html.*

(6) *Cl_2HCl ratios*—(i) *Ratio for calculating annual average HCl-equivalent emission rates.* (A) To calculate the annual average HCl-equivalent emission rate (lb/hr) for each combustor, you must apportion the total chlorine emission concentration (ppmv chloride ($Cl^{(-)}$) equivalent) between HCl and chlorine according to the historical average Cl_2/HCl volumetric ratio for all regulatory compliance tests.

(B) You must calculate HCl and Cl_2 emission rates (lb/hr) using the apportioned emission concentrations and the gas flowrate and other parameters from the most recent regulatory compliance test.

(C) You must calculate the annual average HCl-equivalent emission rate using these HCl and Cl_2 emission rates and the equation in paragraph (b)(2) of this section.

(ii) *Ratio for calculating 1-hour average HCl-equivalent emission rates.* (A) To calculate the 1-hour average HCl-equivalent emission rate for each combustor as a criterion for you to determine under paragraph (d) of this section if an hourly rolling average feedrate limit on total chlorine and chloride may be waived, you must apportion the total chlorine emission concentration (ppmv chloride ($Cl^{(-)}$) equivalent) between HCl and chlorine

according to the historical highest Cl_2/HCl volumetric ratio for all regulatory compliance tests.

(B) You must calculate HCl and Cl_2 emission rates (lb/hr) using the apportioned emission concentrations and the gas flowrate and other parameters from the most recent regulatory compliance test.

(C) You must calculate the 1-hour average HCl-equivalent emission rate using the se HCl and Cl_2 emission rates and the equation in paragraph (b)(3) of this section.

(iii) *Ratios for new sources.* (A) You must use engineering information to estimate the Cl_2/HCl volumetric ratio for a new source for the initial eligibility demonstration.

(B) You must use the Cl_2/HCl volumetric ratio demonstrated during the initial comprehensive performance test to demonstrate in the Notification of Compliance that your HCl-equivalent emission rate does not exceed your HCl-equivalent emission rate limit.

(C) When approving the test plan for the initial comprehensive performance test, the permitting authority will establish a periodic testing requirement, such as every 3 months for 1 year, to establish a record of representative Cl_2/HCl volumetric ratios.

(*1*) You must revise your HCl-equivalent emission rates and HCl-equivalent emission rate limits after each such test using the procedures prescribed in paragraphs (b)(6)(i) and (ii) of this section.

(*2*) If you no longer are eligible for the health-based compliance alternative, you must notify the permitting authority immediately and either:

(*i*) Submit a revised eligibility demonstration requesting lower HCl-equivalent emission rate limits, establishing lower HCl-equivalent emission rates, and establishing by downward extrapolation lower feedrate limits for total chlorine and chloride; or

(*ii*) Request a compliance schedule of up to three years to demonstrate compliance with the emission standards under §§ 63.1216, 63.1217, 63.1219, 63.1220, and 63.1221.

(iv) *Unrepresentative or inadequate historical Cl_2/HCl volumetric ratios.* (A) If you believe that the Cl_2/HCl volumetric ratio for one or more historical regulatory compliance tests is not representative of the current ratio, you may request that the permitting authority allow you to screen those ratios from the analysis of historical ratios.

(B) If the permitting authority believes that too few historical ratios are available to calculate a representative average ratio or establish a maximum ratio, the permitting authority may require you to conduct periodic testing to establish representative ratios.

(v) *Updating Cl_2/HCl ratios.* You must include the Cl_2/HCl volumetric ratio demonstrated during each performance test in your data base of historical Cl2/HCl ratios to update the ratios you establish under paragraphs (b)(6)(i) and (ii) of this section for subsequent calculations of the annual average and 1-hour average HCl-equivalent emission rates.

(7) *Emission rates are capped.* The hydrogen chloride and chlorine emission rates you use to calculate the HCl-equivalent emission rate limit for incinerators, cement kilns, and lightweight aggregate kilns must not result in total chlorine emission concentrations exceeding:

(i) For incinerators that were existing sources on April 19, 1996: 77 parts per million by volume, combined emissions, expressed as chloride ($Cl^{(-)}$) equivalent, dry basis and corrected to 7 percent oxygen;

(ii) For incinerators that are new or reconstructed sources after April 19, 1996: 21 parts per million by volume, combined emissions, expressed as chloride ($Cl^{(-)}$) equivalent, dry basis and corrected to 7 percent oxygen;

(iii) For cement kilns that were existing sources on April 19, 1996: 130 parts per million by volume, combined emissions, expressed as chloride ($Cl^{(-)}$) equivalent, dry basis and corrected to 7 percent oxygen;

(iv) For cement kilns that are new or reconstructed sources after April 19, 1996: 86 parts per million by volume, combined emissions, expressed as chloride ($Cl^{(-)}$) equivalent, dry basis and corrected to 7 percent oxygen;

(v) For lightweight aggregate kilns that were existing sources on April 19, 1996: 600 parts per million by volume, combined emissions, expressed as chloride ($Cl^{(-)}$) equivalent, dry basis and corrected to 7 percent oxygen;

(vi) For lightweight aggregate kilns that are new or reconstructed sources after April 19, 1996: 600 parts per million by volume, combined emissions, expressed as chloride ($Cl^{(-)}$) equivalent, dry basis and corrected to 7 percent oxygen.

(c) *Eligibility demonstration*—(1) *General.* (i) You must perform an eligibility demonstration to determine whether the total chlorine emission rates you select for each on-site hazardous waste combustor meet the national exposure standards using either a look-up table analysis prescribed by paragraph (c)(3) of this section, or a site-specific compliance demonstration prescribed by paragraph (c)(4) of this section.

(ii) You must also determine in your eligibility demonstration whether each combustor may exceed the 1-hour HCl-equivalent emission rate limit absent an hourly rolling average limit on the feedrate of total chlorine and chloride, as provided by paragraph (d) of this section.

(2) *Definition of eligibility.* (i) Eligibility for the risk-based total chlorine standard is determined by comparing the annual average HCl-equivalent emission rate for the total chlorine emission rate you select for each combustor to the annual average HCl-equivalent emission rate limit.

(ii) The annual average HCl-equivalent emission rate limit ensures that the Hazard Index for chronic exposure from HCl and chlorine emissions from all on-site hazardous waste combustors is less than or equal to 1.0, rounded to the nearest tenths decimal place (0.1), for the actual individual most exposed to the facility's emissions, considering off-site locations where people reside and where people congregate for work, school, or recreation.

(iii) Your facility is eligible for the health-based compliance alternative for total chlorine if either:

(A) The annual average HCl-equivalent emission rate for each on-site hazardous waste combustor is below the appropriate value in the look-up table determined under paragraph (c)(3) of this section; or

(B) The annual average HCl-equivalent emission rate for each on-site hazardous waste combustor is below the annual average HCl-equivalent emission rate limit you calculate based on a site-specific compliance demonstration under paragraph (c)(4) of this section.

(3) *Look-up table analysis.* Look-up tables for the eligibility demonstration are provided as Tables 1 and 2 to this section.

(i) Table 1 presents annual average HCl-equivalent emission rate limits for sources located in flat terrain. For purposes of this analysis, flat terrain is terrain that rises to a level not exceeding one half the stack height within a distance of 50 stack heights.

(ii) Table 2 presents annual average HCl-equivalent emission rate limits for sources located in simple elevated terrain. For purposes of this analysis, simple elevated terrain is terrain that rises to a level exceeding one half the stack height, but that does not exceed the stack height, within a distance of 50 stack heights.

(iii) To determine the annual average HCl-equivalent emission rate limit for a

source from the look-up table, you must use the stack height and stack diameter for your hazardous waste combustors and the distance between the stack and the property boundary.

(iv) If any of these values for stack height, stack diameter, and distance to nearest property boundary do not match the exact values in the look-up table, you must use the next lowest table value.

(v) *Adjusted HCl-equivalent emission rate limit for multiple on-site combustors.* (A) If you have more than one hazardous waste combustor on site, the sum across all hazardous waste combustors of the ratio of the adjusted HCl-equivalent emission rate limit to the HCl-equivalent emission rate limit provided by Tables 1 or 2 cannot exceed 1.0, according to the following equation:

$$\sum_{i=1}^{n} \frac{\text{HCl-Equivalent Emission Rate Limit Adjusted}_i}{\text{HCI-Equivalent Emission Rate Limit Table}_i} \leq 1.0$$

Where:

i = number of on-site hazardous waste combustors;

HCl-Equivalent Emission Rate Limit Adjusted$_i$ means the apportioned, allowable HCl-equivalent emission rate limit for combustor i, and

HCl-Equivalent Emission Rate Limit Table$_i$ means the HCl-equivalent emission rate limit from Table 1 or 2 to § 63.1215 for combustor *i.*

(B) The adjusted HCl-equivalent emission rate limit becomes the HCl-equivalent emission rate limit.

(4) *Site-specific compliance demonstration.* (i) You may use any scientifically-accepted peer-reviewed risk assessment methodology for your site-specific compliance demonstration to calculate an annual average HCl-equivalent emission rate limit for each on-site hazardous waste combustor. An example of one approach for performing the demonstration for air toxics can be found in the EPA's ''Air Toxics Risk Assessment Reference Library, Volume 2, Site-Specific Risk Assessment Technical Resource Document,'' which may be obtained through the EPA's Air Toxics Web site at *http://www.epa.gov/ttn/fera/risk_atra_main.html.*

(ii) The annual average HCl-equivalent emission rate limit is the HCl-equivalent emission rate that ensures that the Hazard Index associated with maximum annual average exposures is not greater than 1.0 rounded to the nearest tenths decimal place (0.1).

(iii) To determine the annual average HCl-equivalent emission rate limit, your site-specific compliance demonstration must, at a minimum:

(A) Estimate long-term inhalation exposures through the estimation of annual or multi-year average ambient concentrations;

(B) Estimate the inhalation exposure for the actual individual most exposed to the facility's emissions from hazardous waste combustors, considering off-site locations where people reside and where people congregate for work, school, or recreation;

(C) Use site-specific, quality-assured data wherever possible;

(D) Use health-protective default assumptions wherever site-specific data are not available, and:

(E) Contain adequate documentation of the data and methods used for the assessment so that it is transparent and can be reproduced by an experienced risk assessor and emissions measurement expert.

(iv) Your site-specific compliance demonstration need not:

(A) Assume any attenuation of exposure concentrations due to the penetration of outdoor pollutants into indoor exposure areas;

(B) Assume any reaction or deposition of the emitted pollutants during transport from the emission point to the point of exposure.

(d) *Assurance that the 1-hour HCl-equivalent emission rate limit will not be exceeded.* To ensure that the 1-hour HCl-equivalent emission rate limit will not be exceeded when complying with the annual average HCl-equivalent emission rate limit, you must establish a 1-hour average HCl-equivalent emission rate for each combustor, establish a 1-hour average HCl-equivalent emission rate limit for each combustor, and consider site-specific factors including prescribed criteria to determine if the 1-hour average HCl-equivalent emission rate limit may be exceeded absent an hourly rolling average limit on the feedrate of total chlorine and chloride. If the 1-hour average HCl-equivalent emission rate limit may be exceeded, you must establish an hourly rolling average feedrate limit on total chlorine as provided by paragraph (f)(3) of this section.

(1) *1-hour average HCl-equivalent emission rate.* You must calculate the 1-hour average HCl-equivalent emission rate from the total chlorine emission concentration you select for each source as prescribed in paragraph (b)(6)(ii)(C) of this section.

(2) *1-hour average HCl-equivalent emission rate limit.* You must establish the 1-hour average HCl-equivalent emission rate limit for each affected source using either a look-up table analysis or site-specific analysis:

(i) *Look-up table analysis.* Look-up tables are provided for 1-hour average HCl-equivalent emission rate limits as Table 3 and Table 4 to this section. Table 3 provides limits for facilities located in flat terrain. Table 4 provides limits for facilities located in simple elevated terrain. You must use the Tables to establish 1-hour average HCl-equivalent emission rate limits as prescribed in paragraphs (c)(3)(iii) through (c)(3)(v) of this section for annual average HCl-equivalent emission rate limits.

(ii) *Site-specific analysis.* The 1-hour average HCl-equivalent emission rate limit is the HCl-equivalent emission rate that ensures that the Hazard Index associated with maximum 1-hour average exposures is not greater than 1.0 rounded to the nearest tenths decimal place (0.1). You must follow the risk assessment procedures under paragraph (c)(4) of this section to estimate short-term inhalation exposures through the estimation of maximum 1-hour average ambient concentrations.

(3) *Criteria for determining whether the 1-hour HCl-equivalent emission rate may be exceeded absent an hourly rolling average limit on the feedrate of total chlorine and chloride.* An hourly rolling average feedrate limit on total chlorine and chloride is waived if you determine considering the criteria listed below that the long-term feedrate limit (and averaging period) established under paragraph (c)(4)(i) of this section will also ensure that the 1-hour average HCl-equivalent emission rate will not exceed the 1-hour average HCl-equivalent emission rate limit you calculate for each combustor.

(i) The ratio of the 1-hour average HCl-equivalent emission rate based on the total chlorine emission rate you select for each hazardous waste combustor to the 1-hour average HCl-equivalent emission rate limit for the combustor; and

(ii) The potential for the source to vary total chlorine and chloride

feedrates substantially over the averaging period for the feedrate limit established under paragraph (c)(4)(i) of this section.

(e) *Review and approval of eligibility demonstrations*—(1) *Content of the eligibility demonstration*—(i) *General.* The eligibility demonstration must include the following information, at a minimum:

(A) Identification of each hazardous waste combustor combustion gas emission point (e.g., generally, the flue gas stack);

(B) The maximum and average capacity at which each combustor will operate, and the maximum rated capacity for each combustor, using the metric of stack gas volume (under both actual and standard conditions) emitted per unit of time, as well as any other metric that is appropriate for the combustor (e.g., million Btu/hr heat input for boilers; tons of dry raw material feed/hour for cement kilns);

(C) Stack parameters for each combustor, including, but not limited to stack height, stack diameter, stack gas temperature, and stack gas exit velocity;

(D) Plot plan showing all stack emission points, nearby residences and property boundary line;

(E) Identification of any stack gas control devices used to reduce emissions from each combustor;

(F) Identification of the RfC values used to calculate annual average HCl-equivalent emission rates and the aREL values used to calculate 1-hour average HCl-equivalent emission rates;

(G) Calculations used to determine the annual average and 1-hour average HCl-equivalent emission rates and rate limits, including calculation of the Cl_2/HCl ratios as prescribed by paragraph (b)(6) of this section;

(ii) *Additional content to implement the annual average HCl-equivalent emission rate limit.* You must include the following in your eligibility demonstration to implement the annual average HCl-equivalent emission rate limit:

(A) For incinerators, cement kilns, and lightweight aggregate kilns, calculations to confirm that the annual average HCl-equivalent emission rate that you calculate from the total chlorine emission rate you select for each combustor does not exceed the limits provided by paragraph (b)(7) of this section;

(B) Comparison of the annual average HCl-equivalent emission rate limit for each combustor to the annual average HCl-equivalent emission rate for the total chlorine emission rate you select for each combustor;

(C) The annual average HCl-equivalent emission rate limit for each hazardous waste combustor, and the limits on operating parameters required under paragraph (g)(1) of this section;

(D) Determination of the long-term chlorine feedrate limit, including the total chlorine system removal efficiency for sources that establish an (up to) annual rolling average feedrate limit under paragraph (g)(2)(ii) of this section;

(iii) *Additional content to implement the 1-hour average HCl-equivalent emission rate limit.* You must include the following in your eligibility demonstration to implement the 1-hour average HCl-equivalent emission rate limit:

(A) Determination of whether the combustor may exceed the 1-hour HCl-equivalent emission rate limit absent an hourly rolling average chlorine feedrate limit, including:

(*1*) Determination of the 1-hour average HCl-equivalent emission rate from the total chlorine emission rate you select for the combustor;

(*2*) Determination of the 1-hour average HCl-equivalent emission rate limit using either look-up Tables 3 and 4 to this section or site-specific risk analysis;

(*3*) Determination of the ratio of the 1-hour average HCl-equivalent emission rate to the 1-hour average HCl-equivalent emission rate limit for the combustor; and

(*4*) The potential for the source to vary total chlorine and chloride feedrates substantially over the averaging period for the long-term feedrate limit established under paragraphs (g)(2)(i) and (g)(2)(ii) of this section; and

(B) Determination of the hourly rolling average chlorine feedrate limit, including the total chlorine system removal efficiency.

(iv) *Additional content of a look-up table demonstration.* If you use the look-up table analysis to establish HCl-equivalent emission rate limits, your eligibility demonstration must also contain, at a minimum, the following:

(A) Documentation that the facility is located in either flat or simple elevated terrain; and

(B) For facilities with more than one on-site hazardous waste combustor, documentation that the sum of the ratios for all such combustors of the HCl-equivalent emission rate to the HCl-equivalent emission rate limit does not exceed 1.0.

(v) *Additional content of a site-specific compliance demonstration.* If you use a site-specific compliance demonstration, your eligibility demonstration must also contain, at a minimum, the following information to support your determination of the annual average HCl-equivalent emission rate limit for each combustor:

(A) Identification of the risk assessment methodology used;

(B) Documentation of the fate and transport model used;

(C) Documentation of the fate and transport model inputs, including the stack parameters listed in paragraph (d)(1)(i)(C) of this section converted to the dimensions required for the model;

(D) As applicable:

(*1*) Meteorological data;

(*2*) Building, land use, and terrain data;

(*3*) Receptor locations and population data, including areas where people congregate for work, school, or recreation; and

(*4*) Other facility-specific parameters input into the model;

(E) Documentation of the fate and transport model outputs; and

(F) Documentation of any exposure assessment and risk characterization calculations.

(2) *Review and approval*—(i) *Existing sources.* (A) If you operate an existing source, you must submit the eligibility demonstration to your permitting authority for review and approval not later than 12 months prior to the compliance date. You must also submit a separate copy of the eligibility demonstration to: U.S. EPA, Risk and Exposure Assessment Group, Emission Standards Division (C404–01), Attn: Group Leader, Research Triangle Park, North Carolina 27711, electronic mail address *REAG@epa.gov.*

(B) Your permitting authority should notify you of approval or intent to disapprove your eligibility demonstration within 6 months after receipt of the original demonstration, and within 3 months after receipt of any supplemental information that you submit. A notice of intent to disapprove your eligibility demonstration, whether before or after the compliance date, will identify incomplete or inaccurate information or noncompliance with prescribed procedures and specify how much time you will have to submit additional information or to achieve the MACT standards for total chlorine under §§ 63.1216, 63.1217, 63.1219, 63.1220, and 63.1221. If your eligibility demonstration is disapproved, the permitting authority may extend the compliance date of the total chlorine standards to allow you to make changes to the design or operation of the combustor or related systems as quickly as practicable to enable you to achieve compliance with the MACT total chlorine standards.

(C) If your permitting authority has not approved your eligibility demonstration by the compliance date, and has not issued a notice of intent to disapprove your demonstration, you may nonetheless begin complying, on the compliance date, with the HCl-equivalent emission rate limits you present in your eligibility demonstration.

(D) If your permitting authority issues a notice of intent to disapprove your eligibility demonstration after the compliance date, the authority will identify the basis for that notice and specify how much time you will have to submit additional information or to comply with the MACT standards for total chlorine under §§ 63.1216, 63.1217, 63.1219, 63.1220, and 63.1221. The permitting authority may extend the compliance date of the total chlorine standards to allow you to make changes to the design or operation of the combustor or related systems as quickly as practicable to enable you to achieve compliance with the MACT standards for total chlorine.

(ii) *New or reconstructed sources.* (A) *General.* The procedures for review and approval of eligibility demonstrations applicable to existing sources under paragraph (e)(2)(i) of this section also apply to new or reconstructed sources, except that the date you must submit the eligibility demonstration is as prescribed in this paragraph (e)(2)(ii).

(B) If you operate a new or reconstructed source that starts up before April 12, 2007, or a solid fuel boiler or liquid fuel boiler that is an area source that increases its emissions or its potential to emit such that it becomes a major source of HAP before April 12, 2007, you must either:

(*1*) Comply with the final total chlorine emission standards under §§ 63.1216, 63.1217, 63.1219, 63.1220, and 63.1221, by October 12, 2005, or upon startup, whichever is later, except for a standard that is more stringent than the standard proposed on April 20, 2004 for your source. If a final standard is more stringent than the proposed standard, you may comply with the proposed standard until October 14, 2008, after which you must comply with the final standard; or

(*2*) Submit an eligibility demonstration for review and approval under this section by April 12, 2006, and comply with the HCl-equivalent emission rate limits and operating requirements you establish in the eligibility demonstration.

(C) If you operate a new or reconstructed source that starts up on or after April 12, 2007, or a solid fuel boiler or liquid fuel boiler that is an area source that increases its emissions or its potential to emit such that it becomes a major source of HAP on or after April 12, 2007, you must either:

(*1*) Comply with the final total chlorine emission standards under §§ 63.1216, 63.1217, 63.1219, 63.1220, and 63.1221 upon startup. If the final standard is more stringent than the standard proposed for your source on April 20, 2004, however, and if you start operations before October 14, 2008, you may comply with the proposed standard until October 14, 2008, after which you must comply with the final standard; or

(*2*) Submit an eligibility demonstration for review and approval under this section 12 months prior to startup.

(f) *Testing requirements*—(1) *General.* You must comply with the requirements for comprehensive performance testing under § 63.1207.

(2) *System removal efficiency.* (i) You must calculate the total chlorine removal efficiency of the combustor during each run of the comprehensive performance test.

(ii) You must calculate the average system removal efficiency as the average of the test run averages.

(iii) If your source does not control emissions of total chlorine, you must assume zero system removal efficiency.

(3) *Annual average HCl-equivalent emission rate limit.* If emissions during the comprehensive performance test exceed the annual average HCl-equivalent emission rate limit, eligibility for emission limits under this section is not affected. This emission rate limit is an annual average limit even though compliance is based on a 12-hour or (up to) an annual rolling average feedrate limit on total chlorine and chloride because the feedrate limit is also used for compliance assurance for the semivolatile metal emission standard

(4) *1-hour average HCl-equivalent emission rate limit.* Total chlorine emissions during each run of the comprehensive performance test cannot exceed the 1-hour average HCl-equivalent emission rate limit.

(5) *Test methods.* (i) If you operate a cement kiln or a combustor equipped with a dry acid gas scrubber, you must use EPA Method 320/321 or ASTM D 6735–01, or an equivalent method, to measure hydrogen chloride, and the back-half (caustic impingers) of Method 26/26A, or an equivalent method, to measure chlorine gas.

(ii) *Bromine and sulfur considerations.* If you operate an incinerator, boiler, or lightweight aggregate kiln and your feedstreams contain bromine or sulfur during the comprehensive performance test at levels specified under paragraph (e)(2)(ii)(B) of this section, you must use EPA Method 320/321 or ASTM D 6735–01, or an equivalent method, to measure hydrogen chloride, and Method 26/26A, or an equivalent method, to measure chlorine and hydrogen chloride, and determine your chlorine emissions as follows:

(A) You must determine you chlorine emissions to be the higher of the value measured by Method 26/26A, or an equivalent method, or the value calculated by difference between the combined hydrogen chloride and chlorine levels measured by Method 26/26a, or an equivalent method, and the hydrogen chloride measurement from EPA Method 320/321 or ASTM D 6735–01, or an equivalent method.

(B) The procedures under paragraph (f)(2)(ii) of this section for determining hydrogen chloride and chlorine emissions apply if you feed bromine or sulfur during the performance test at the levels specified in this paragraph (f)(5)(ii)(B):

(*1*) If the bromine/chlorine ratio in feedstreams is greater than 5 percent by mass; or

(*2*) If the sulfur/chlorine ratio in feedstreams is greater than 50 percent by mass.

(g) *Monitoring requirements.* (1) *General.* You must establish and comply with limits on the same operating parameters that apply to sources complying with the MACT standard for total chlorine under § 63.1209(o), except that feedrate limits on total chlorine and chloride must be established according to paragraphs (g)(2) and (g)(3) of this section:

(2) *Feedrate limit to ensure compliance with the annual average HCl-equivalent emission rate limit.* (i) For sources subject to the feedrate limit for total chlorine and chloride under § 63.1209(n)(4) to ensure compliance with the semivolatile metals standard:

(A) The feedrate limit (and averaging period) for total chlorine and chloride to ensure compliance with the annual average HCl-equivalent emission rate limit is the same as required by § 63.1209(n)(4), except as provided by paragraph (g)(2)(i)(B) of this section.

(B) The numerical value of the total chlorine and chloride feedrate limit (*i.e.*, not considering the averaging period) you establish under § 63.1209(n)(4) must not exceed the value you calculate as the annual average HCl-equivalent emission rate limit (lb/hr) divided by [1 − system removal efficiency], where the system removal efficiency is calculated as prescribed by paragraph (f)(2) of this section.

(ii) For sources exempt from the feedrate limit for total chlorine and chloride under § 63.1209(n)(4) because they comply with § 63.1207(m)(2), the feedrate limit for total chlorine and chloride to ensure compliance with the annual average HCl-equivalent emission rate must be established as follows:

(A) You must establish an average period for the feedrate limit that does not exceed an annual rolling average;

(B) The numerical value of the total chlorine and chloride feedrate limit (*i.e.*, not considering the averaging period) must not exceed the value you calculate as the annual average HCl-equivalent emission rate limit (lb/hr) divided by [1 − system removal efficiency], where the system removal efficiency is calculated as prescribed by paragraph (f)(2) of this section.

(C) You must calculate the initial rolling average as though you had selected a 12-hour rolling average, as provided by paragraph (b)(5)(i) of this section. You must calculate rolling averages thereafter as the average of the available one-minute values until enough one-minute values are available to calculate the rolling average period you select. At that time and thereafter, you update the rolling average feedrate each hour with a 60-minute average feedrate.

(3) *Feedrate limit to ensure compliance with the 1-hour average HCl-equivalent emission rate limit.* (i) You must establish an hourly rolling average feedrate limit on total chlorine and chloride to ensure compliance with the 1-hour average HCl-equivalent emission rate limit unless you determine that the hourly rolling average feedrate limit is waived under paragraph (d) of this section.

(ii) You must calculate the hourly rolling average feedrate limit for total chlorine and chloride as the 1-hour average HCl-equivalent emission rate limit (lb/hr) divided by [1 − system removal efficiency], where the system removal efficiency is calculated as prescribed by paragraph (f)(2)(ii) of this section.

(h) *Changes*—(1) *Changes over which you have control.* (i) *Changes that would affect the HCl-equivalent emission rate limit.* (A) If you plan to change the design, operation, or maintenance of the facility in a manner than would decrease the annual average or 1-hour average HCl-equivalent emission rate limit, you must submit to the permitting authority prior to the change a revised eligibility demonstration documenting the lower emission rate limits and calculations of reduced total chlorine and chloride feedrate limits.

(B) If you plan to change the design, operation, or maintenance of the facility in a manner than would increase the annual average or 1-hour average HCl-equivalent emission rate limit, and you elect to increase your total chlorine and chloride feedrate limits. You must also submit to the permitting authority prior to the change a revised eligibility demonstration documenting the increased emission rate limits and calculations of the increased feedrate limits prior to the change.

(ii) *Changes that could affect system removal efficiency.* (A) If you plan to change the design, operation, or maintenance of the combustor in a manner than could decrease the system removal efficiency, you are subject to the requirements of § 63.1206(b)(5) for conducting a performance test to reestablish the combustor's system removal efficiency and you must submit a revised eligibility demonstration documenting the lower system removal efficiency and the reduced feedrate limits on total chlorine and chloride.

(B) If you plan to change the design, operation, or maintenance of the combustor in a manner than could increase the system removal efficiency, and you elect to document the increased system removal efficiency to establish higher feedrate limits on total chlorine and chloride, you are subject to the requirements of § 63.1206(b)(5) for conducting a performance test to reestablish the combustor's system removal efficiency. You must also submit to the permitting authority a revised eligibility demonstration documenting the higher system removal efficiency and the increased feedrate limits on total chlorine and chloride.

(2) *Changes over which you do not have control that may decrease the HCl-equivalent emission rate limits.* These requirements apply if you use a site-specific risk assessment under paragraph (c)(4) of this section to demonstrate eligibility for the health-based limits.

(i) *Proactive review.* You must review the documentation you use in your eligibility demonstration every five years from the date of the comprehensive performance test and submit for review and approval with the comprehensive performance test plan either a certification that the information used in your eligibility demonstration has not changed in a manner that would decrease the annual average or 1-hour average HCl-equivalent emission rate limit, or a revised eligibility demonstration.

(ii) *Reactive review.* If in the interim between your comprehensive performance tests you have reason to know of changes that would decrease the annual average or 1-hour average HCl-equivalent emission rate limit, you must submit a revised eligibility demonstration as soon as practicable but not more frequently than annually.

(iii) *Compliance schedule.* If you determine that you cannot demonstrate compliance with a lower annual average HCl-equivalent emission rate limit during the comprehensive performance test because you need additional time to complete changes to the design or operation of the source, you may request that the permitting authority grant you additional time to make those changes as quickly as practicable.

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Table 1 of §63.1215: Annual Average HCl-Equivalent Emssion Rate Limits (lb/hr)--Flat Terrain

	Distance to property boundary (m)											
Stack Diameter = 0.3 m												
Stack Height (m)	**30**	**50**	**70**	**100**	**200**	**300**	**500**	**700**	**1000**	**2000**	**3000**	**5000**
5	3.7E-01	4.9E-01	7.3E-01	9.1E-01	1.6E+00	2.3E+00	4.1E+00	5.7E+00	6.1E+00	1.0E+01	1.6E+01	2.9E+01
10	1.0E+00	1.0E+00	1.1E+00	1.5E+00	2.1E+00	2.7E+00	4.8E+00	5.7E+00	6.5E+00	1.1E+01	1.8E+01	3.2E+01
20	2.3E+00	2.3E+00	2.3E+00	2.3E+00	2.7E+00	3.7E+00	5.6E+00	7.4E+00	1.0E+01	1.9E+01	2.9E+01	5.2E+01
30	4.1E+00	4.1E+00	4.1E+00	4.2E+00	4.7E+00	6.0E+00	9.5E+00	1.3E+01	1.8E+01	3.3E+01	4.8E+01	7.9E+01
50	1.2E+01	1.2E+01	1.2E+01	1.2E+01	1.3E+01	1.5E+01	2.0E+01	2.8E+01	3.8E+01	7.1E+01	1.0E+02	1.6E+02
Stack Diameter = 0.5 m												
Stack Height (m)	**30**	**50**	**70**	**100**	**200**	**300**	**500**	**700**	**1000**	**2000**	**3000**	**5000**
5	6.5E-01	9.3E-01	1.4E+00	1.8E+00	3.0E+00	4.4E+00	7.2E+00	9.2E+00	1.3E+01	1.5E+01	2.0E+01	3.4E+01
10	1.4E+00	1.4E+00	1.6E+00	2.1E+00	3.9E+00	5.4E+00	8.3E+00	1.0E+01	1.3E+01	1.7E+01	2.3E+01	3.8E+01
20	3.7E+00	3.7E+00	3.7E+00	3.9E+00	4.9E+00	6.5E+00	8.5E+00	1.0E+01	1.3E+01	2.2E+01	3.2E+01	5.5E+01
30	5.5E+00	5.5E+00	5.5E+00	5.5E+00	5.6E+00	6.7E+00	1.0E+01	1.4E+01	1.9E+01	3.4E+01	4.9E+01	8.1E+01
50	1.4E+01	1.4E+01	1.4E+01	1.4E+01	1.4E+01	1.5E+01	2.1E+01	2.8E+01	3.9E+01	7.2E+01	1.0E+02	1.6E+02
Stack Diameter = 1.0 m												
Stack Height (m)	**30**	**50**	**70**	**100**	**200**	**300**	**500**	**700**	**1000**	**2000**	**3000**	**5000**
10	3.2E+00	3.6E+00	4.0E+00	5.4E+00	9.6E+00	1.3E+01	1.8E+01	2.3E+01	2.8E+01	4.5E+01	5.3E+01	6.5E+01
20	5.9E+00	5.9E+00	5.9E+00	6.1E+00	9.6E+00	1.3E+01	1.8E+01	2.3E+01	2.8E+01	4.5E+01	5.3E+01	7.5E+01
30	1.0E+01	1.0E+01	1.0E+01	1.0E+01	1.2E+01	1.3E+01	1.8E+01	2.3E+01	2.8E+01	4.5E+01	6.1E+01	9.3E+01
50	1.8E+01	1.8E+01	1.8E+01	1.8E+01	1.8E+01	1.8E+01	2.3E+01	3.1E+01	4.2E+01	7.7E+01	1.1E+02	1.7E+02
70	7.4E+01	7.4E+01	7.4E+01	7.4E+01	7.4E+01	7.4E+01	8.0E+01	1.0E+02	1.4E+02	2.1E+02	2.7E+02	4.0E+02
Stack Diameter = 1.5 m												
Stack Height (m)	**30**	**50**	**70**	**100**	**200**	**300**	**500**	**700**	**1000**	**2000**	**3000**	**5000**
10	4.1E+00	5.3E+00	6.4E+00	7.9E+00	1.3E+01	2.1E+01	2.7E+01	3.6E+01	4.8E+01	7.6E+01	9.1E+01	1.1E+02
20	7.6E+00	7.6E+00	7.6E+00	7.9E+00	1.3E+01	2.1E+01	2.7E+01	3.6E+01	4.8E+01	7.6E+01	9.1E+01	1.2E+02
30	1.3E+01	1.3E+01	1.3E+01	1.3E+01	1.6E+01	2.1E+01	2.7E+01	3.6E+01	4.8E+01	7.6E+01	9.1E+01	1.2E+02
50	2.3E+01	2.3E+01	2.3E+01	2.3E+01	2.3E+01	2.3E+01	2.7E+01	3.6E+01	4.8E+01	8.6E+01	1.2E+02	1.8E+02
70	1.0E+02	1.0E+02	1.0E+02	1.0E+02	1.0E+02	1.0E+02	1.1E+02	1.4E+02	1.8E+02	3.0E+02	4.0E+02	5.8E+02
Stack Diameter = 2.0 m												
Stack Height (m)	**30**	**50**	**70**	**100**	**200**	**300**	**500**	**700**	**1000**	**2000**	**3000**	**5000**
10	5.0E+00	6.3E+00	7.7E+00	9.8E+00	1.7E+01	2.8E+01	3.3E+01	4.4E+01	5.9E+01	1.0E+02	1.4E+02	1.6E+02
20	9.3E+00	9.3E+00	9.4E+00	1.0E+01	1.7E+01	2.8E+01	3.3E+01	4.4E+01	5.9E+01	1.0E+02	1.4E+02	1.8E+02
30	1.6E+01	1.6E+01	1.6E+01	1.6E+01	1.9E+01	2.8E+01	3.3E+01	4.4E+01	5.9E+01	1.0E+02	1.4E+02	1.8E+02
50	2.9E+01	2.9E+01	2.9E+01	2.9E+01	2.9E+01	2.9E+01	3.3E+01	4.4E+01	5.9E+01	1.0E+02	1.4E+02	2.0E+02
70	1.4E+02	1.4E+02	1.4E+02	1.4E+02	1.4E+02	1.4E+02	1.4E+02	1.8E+02	2.3E+02	3.4E+02	4.3E+02	6.4E+02
100	3.0E+02	3.0E+02	3.0E+02	3.0E+02	3.0E+02	3.0E+02	3.0E+02	3.0E+02	3.5E+02	5.2E+02	6.8E+02	8.2E+02
Stack Diameter = 3.0 m												
Stack Height (m)	**30**	**50**	**70**	**100**	**200**	**300**	**500**	**700**	**1000**	**2000**	**3000**	**5000**
10	6.5E+00	6.9E+00	7.7E+00	9.8E+00	2.2E+01	3.4E+01	5.4E+01	7.4E+01	9.8E+01	1.3E+02	1.6E+02	1.6E+02
20	1.6E+01	1.6E+01	1.7E+01	2.0E+01	2.5E+01	3.7E+01	5.6E+01	7.4E+01	9.8E+01	1.5E+02	2.1E+02	3.0E+02
30	2.0E+01	2.0E+01	2.0E+01	2.0E+01	2.5E+01	3.7E+01	5.6E+01	7.4E+01	9.8E+01	1.7E+02	2.2E+02	3.0E+02
50	4.2E+01	4.2E+01	4.2E+01	4.2E+01	4.4E+01	5.1E+01	5.6E+01	7.4E+01	9.8E+01	1.7E+02	2.2E+02	3.0E+02
70	2.3E+02	2.3E+02	2.3E+02	2.3E+02	2.3E+02	2.4E+02	2.4E+02	2.9E+02	3.6E+02	4.1E+02	5.0E+02	7.0E+02
100	3.5E+02	3.5E+02	3.5E+02	3.5E+02	3.5E+02	3.5E+02	3.5E+02	3.5E+02	3.9E+02	6.3E+02	7.5E+02	8.7E+02
Stack Diameter = 4.0 m												
Stack Height (m)	**30**	**50**	**70**	**100**	**200**	**300**	**500**	**700**	**1000**	**2000**	**3000**	**5000**
30	2.5E+01	2.5E+01	2.5E+01	2.5E+01	3.4E+01	5.6E+01	8.1E+01	1.1E+02	1.4E+02	2.2E+02	2.8E+02	4.3E+02
50	5.1E+01	5.1E+01	5.1E+01	5.1E+01	5.3E+01	6.2E+01	8.1E+01	1.1E+02	1.4E+02	2.4E+02	3.1E+02	4.4E+02
70	2.6E+02	2.6E+02	2.6E+02	2.6E+02	2.7E+02	2.8E+02	3.3E+02	4.6E+02	4.8E+02	5.0E+02	5.7E+02	7.7E+02
100	5.7E+02	5.7E+02	5.7E+02	5.7E+02	5.7E+02	5.7E+02	5.7E+02	5.7E+02	5.8E+02	8.6E+02	9.3E+02	1.1E+03

Table 2 of §63.1215: Annual Average HCl-Equivalent Emission Rate Limits (lbs/hr)--Simple Elevated Terrain

	Distance to property boundary (m)											
Stack Diameter = 0.3 m												
Stack height (m)	**30**	**50**	**70**	**100**	**200**	**300**	**500**	**700**	**1000**	**2000**	**3000**	**5000**
5	1.3E-01	1.8E-01	2.5E-01	3.7E-01	6.4E-01	8.9E-01	1.4E+00	2.0E+00	3.1E+00	7.7E+00	1.3E+01	2.6E+01
10	3.8E-01	3.8E-01	4.4E-01	6.1E-01	6.4E-01	8.9E-01	1.4E+00	2.0E+00	3.1E+00	7.7E+00	1.3E+01	2.6E+01
20	1.1E+00	1.1E+00	1.1E+00	1.2E+00	1.2E+00	1.5E+00	2.3E+00	3.4E+00	5.2E+00	1.2E+01	2.0E+01	3.9E+01
30	2.4E+00	2.4E+00	2.4E+00	2.4E+00	2.7E+00	3.5E+00	4.2E+00	5.2E+00	7.0E+00	1.5E+01	2.6E+01	4.9E+01
50	7.7E+00	7.7E+00	7.7E+00	7.7E+00	7.7E+00	8.6E+00	8.6E+00	8.6E+00	8.6E+00	2.0E+01	3.4E+01	6.5E+01
Stack Diameter = 0.5 m												
Stack height (m)	**30**	**50**	**70**	**100**	**200**	**300**	**500**	**700**	**1000**	**2000**	**3000**	**5000**
5	1.8E-01	2.6E-01	3.5E-01	5.6E-01	1.4E+00	1.6E+00	2.3E+00	3.4E+00	5.2E+00	9.6E+00	1.5E+01	2.8E+01
10	5.3E-01	5.3E-01	6.1E-01	8.5E-01	1.4E+00	1.6E+00	2.3E+00	3.4E+00	5.2E+00	9.6E+00	1.5E+01	2.8E+01
20	1.5E+00	1.5E+00	1.5E+00	1.5E+00	1.5E+00	1.6E+00	2.3E+00	3.4E+00	5.2E+00	1.2E+01	2.0E+01	3.9E+01
30	2.9E+00	2.9E+00	2.9E+00	2.9E+00	2.9E+00	3.5E+00	4.2E+00	5.5E+00	8.1E+00	1.7E+01	2.8E+01	5.2E+01
50	8.0E+00	8.0E+00	8.0E+00	8.0E+00	8.0E+00	8.8E+00	1.2E+01	1.2E+01	1.2E+01	2.3E+01	3.7E+01	6.9E+01
Stack Diameter = 1.0 m												
Stack height (m)	**30**	**50**	**70**	**100**	**200**	**300**	**500**	**700**	**1000**	**2000**	**3000**	**5000**
10	9.7E-01	9.7E-01	1.1E+00	1.7E+00	3.7E+00	3.7E+00	4.2E+00	5.5E+00	7.5E+00	1.5E+01	2.3E+01	4.1E+01
20	2.7E+00	2.7E+00	2.7E+00	3.0E+00	3.7E+00	3.7E+00	4.2E+00	5.5E+00	7.5E+00	1.5E+01	2.3E+01	4.3E+01
30	4.3E+00	4.3E+00	4.3E+00	4.3E+00	4.3E+00	4.3E+00	4.3E+00	5.5E+00	8.1E+00	1.7E+01	2.8E+01	5.2E+01
50	9.5E+00	9.5E+00	9.5E+00	9.5E+00	9.5E+00	9.5E+00	1.2E+01	1.4E+01	1.6E+01	3.1E+01	4.8E+01	8.3E+01
70	4.0E+01	4.0E+01	4.0E+01	4.0E+01	4.0E+01	4.0E+01	4.0E+01	4.1E+01	4.1E+01	4.1E+01	5.8E+01	9.8E+01
Stack Diameter = 1.5 m												
Stack height (m)	**30**	**50**	**70**	**100**	**200**	**300**	**500**	**700**	**1000**	**2000**	**3000**	**5000**
10	2.0E+00	2.0E+00	2.3E+00	3.4E+00	5.1E+00	6.0E+00	6.0E+00	6.6E+00	9.3E+00	1.9E+01	3.0E+01	5.4E+01
20	3.5E+00	3.5E+00	3.5E+00	3.9E+00	5.1E+00	6.0E+00	6.0E+00	6.6E+00	9.3E+00	1.9E+01	3.0E+01	5.4E+01
30	6.0E+00	6.0E+00	6.0E+00	6.0E+00	6.0E+00	6.0E+00	6.0E+00	6.6E+00	9.3E+00	1.9E+01	3.0E+01	5.5E+01
50	1.1E+01	1.1E+01	1.1E+01	1.1E+01	1.1E+01	1.1E+01	1.2E+01	1.4E+01	1.6E+01	3.1E+01	4.8E+01	8.3E+01
70	5.1E+01	5.1E+01	5.1E+01	5.1E+01	5.1E+01	5.1E+01	5.1E+01	5.1E+01	5.1E+01	6.2E+01	7.8E+01	1.2E+02
Stack Diameter = 2.0 m												
Stack height (m)	**30**	**50**	**70**	**100**	**200**	**300**	**500**	**700**	**1000**	**2000**	**3000**	**5000**
10	2.6E+00	2.6E+00	3.0E+00	4.2E+00	6.3E+00	9.2E+00	9.2E+00	1.0E+01	1.4E+01	2.5E+01	3.7E+01	6.3E+01
20	4.2E+00	4.2E+00	4.2E+00	4.7E+00	6.3E+00	9.2E+00	9.2E+00	1.0E+01	1.4E+01	2.5E+01	3.7E+01	6.3E+01
30	8.4E+00	8.4E+00	8.4E+00	8.4E+00	9.2E+00	9.2E+00	9.2E+00	1.0E+01	1.4E+01	2.5E+01	3.7E+01	6.3E+01
50	1.4E+01	1.4E+01	1.4E+01	1.4E+01	1.4E+01	1.4E+01	1.4E+01	1.5E+01	1.6E+01	3.1E+01	4.8E+01	8.3E+01
70	5.9E+01	5.9E+01	5.9E+01	5.9E+01	5.9E+01	5.9E+01	5.9E+01	5.9E+01	5.9E+01	7.0E+01	1.0E+02	1.5E+02
100	8.2E+01	8.2E+01	8.2E+01	8.2E+01	8.2E+01	8.2E+01	8.2E+01	8.2E+01	8.2E+01	8.2E+01	1.1E+02	1.7E+02
Stack Diameter = 3.0 m												
Stack height (m)	**30**	**50**	**70**	**100**	**200**	**300**	**500**	**700**	**1000**	**2000**	**3000**	**5000**
10	3.3E+00	3.4E+00	3.9E+00	5.5E+00	1.1E+01	1.7E+01	1.7E+01	1.7E+01	1.7E+01	3.3E+01	5.0E+01	8.6E+01
20	6.5E+00	6.5E+00	6.5E+00	7.6E+00	1.1E+01	1.7E+01	1.7E+01	1.7E+01	1.7E+01	3.3E+01	5.0E+01	8.6E+01
30	1.1E+01	1.1E+01	1.1E+01	1.1E+01	1.2E+01	1.7E+01	1.7E+01	1.7E+01	1.7E+01	3.3E+01	5.0E+01	8.6E+01
50	1.7E+01	1.7E+01	1.7E+01	1.7E+01	1.7E+01	1.7E+01	1.7E+01	1.7E+01	1.7E+01	3.3E+01	5.0E+01	8.6E+01
70	8.0E+01	8.0E+01	8.0E+01	8.0E+01	8.0E+01	8.0E+01	8.0E+01	8.0E+01	8.0E+01	8.5E+01	1.2E+02	1.9E+02
100	1.3E+02	1.3E+02	1.3E+02	1.3E+02	1.3E+02	1.3E+02	1.3E+02	1.3E+02	1.3E+02	1.3E+02	1.9E+02	2.4E+02
Stack Diameter = 4.0 m												
Stack height (m)	**30**	**50**	**70**	**100**	**200**	**300**	**500**	**700**	**1000**	**2000**	**3000**	**5000**
30	1.3E+01	1.3E+01	1.3E+01	1.3E+01	1.5E+01	2.1E+01	2.1E+01	2.1E+01	2.1E+01	4.0E+01	6.0E+01	9.8E+01
50	2.1E+01	2.1E+01	2.1E+01	2.1E+01	2.1E+01	2.1E+01	2.1E+01	2.1E+01	2.1E+01	4.0E+01	6.0E+01	9.8E+01
70	1.1E+02	1.1E+02	1.1E+02	1.1E+02	1.1E+02	1.1E+02	1.1E+02	1.1E+02	1.1E+02	1.1E+02	1.5E+02	2.3E+02
100	1.5E+02	1.5E+02	1.5E+02	1.5E+02	1.5E+02	1.5E+02	1.5E+02	1.5E+02	1.5E+02	1.5E+02	2.2E+02	3.4E+02

Table 3 of §63.1215: 1-Hour Average HCl-Equivalent Emission Rates (lb/hr)--Flat Terrain

	Distance to property boundary (m)											
Stack Diameter = 0.3 m												
Stack Height (m)	**30**	**50**	**70**	**100**	**200**	**300**	**500**	**700**	**1000**	**2000**	**3000**	**5000**
5	3.9E+00	5.1E+00	7.6E+00	9.6E+00	1.6E+01	2.4E+01	4.3E+01	5.3E+01	6.2E+01	1.1E+02	1.7E+02	3.1E+02
10	9.7E+00	9.8E+00	1.1E+01	1.4E+01	2.0E+01	2.6E+01	4.6E+01	5.3E+01	6.2E+01	1.1E+02	1.7E+02	3.1E+02
20	2.2E+01	2.2E+01	2.2E+01	2.2E+01	2.5E+01	3.5E+01	5.3E+01	7.0E+01	9.5E+01	1.8E+02	2.8E+02	4.9E+02
30	3.9E+01	3.9E+01	3.9E+01	4.0E+01	4.4E+01	5.7E+01	9.0E+01	1.2E+02	1.7E+02	3.1E+02	4.5E+02	7.5E+02
50	1.2E+02	1.2E+02	1.2E+02	1.2E+02	1.2E+02	1.4E+02	1.9E+02	2.6E+02	3.6E+02	6.7E+02	9.7E+02	1.5E+03
Stack Diameter = 0.5 m												
Stack Height (m)	**30**	**50**	**70**	**100**	**200**	**300**	**500**	**700**	**1000**	**2000**	**3000**	**5000**
5	6.9E+00	9.8E+00	1.5E+01	1.8E+01	3.2E+01	4.6E+01	7.5E+01	9.7E+01	1.2E+02	1.6E+02	2.1E+02	3.6E+02
10	1.3E+01	1.4E+01	1.5E+01	2.0E+01	3.7E+01	5.1E+01	7.9E+01	9.7E+01	1.2E+02	1.6E+02	2.2E+02	3.6E+02
20	3.5E+01	3.5E+01	3.5E+01	3.6E+01	4.6E+01	6.2E+01	8.1E+01	9.7E+01	1.2E+02	2.1E+02	3.0E+02	5.2E+02
30	5.2E+01	5.2E+01	5.2E+01	5.2E+01	5.3E+01	6.4E+01	9.8E+01	1.3E+02	1.8E+02	3.2E+02	4.7E+02	7.7E+02
50	1.3E+02	1.3E+02	1.3E+02	1.3E+02	1.3E+02	1.4E+02	2.0E+02	2.7E+02	3.7E+02	6.8E+02	9.7E+02	1.5E+03
Stack Diameter = 1.0 m												
Stack Height (m)	**30**	**50**	**70**	**100**	**200**	**300**	**500**	**700**	**1000**	**2000**	**3000**	**5000**
10	3.0E+01	3.4E+01	3.8E+01	5.1E+01	9.0E+01	1.2E+02	1.7E+02	2.2E+02	2.7E+02	4.3E+02	5.0E+02	6.1E+02
20	5.5E+01	5.5E+01	5.5E+01	5.8E+01	9.0E+01	1.2E+02	1.7E+02	2.2E+02	2.7E+02	4.3E+02	5.0E+02	7.1E+02
30	9.6E+01	9.6E+01	9.6E+01	9.6E+01	1.1E+02	1.2E+02	1.7E+02	2.2E+02	2.7E+02	4.3E+02	5.8E+02	8.8E+02
50	1.7E+02	1.7E+02	1.7E+02	1.7E+02	1.7E+02	1.7E+02	2.2E+02	2.9E+02	4.0E+02	7.3E+02	1.0E+03	1.6E+03
70	7.0E+02	7.0E+02	7.0E+02	7.0E+02	7.0E+02	7.0E+02	7.6E+02	9.9E+02	1.3E+03	2.0E+03	2.6E+03	3.8E+03
Stack Diameter = 1.5 m												
Stack Height (m)	**30**	**50**	**70**	**100**	**200**	**300**	**500**	**700**	**1000**	**2000**	**3000**	**5000**
10	3.9E+01	5.0E+01	6.1E+01	7.5E+01	1.2E+02	2.0E+02	2.5E+02	3.4E+02	4.6E+02	7.2E+02	8.6E+02	1.0E+03
20	7.1E+01	7.1E+01	7.2E+01	7.5E+01	1.2E+02	2.0E+02	2.5E+02	3.4E+02	4.6E+02	7.2E+02	8.6E+02	1.1E+03
30	1.2E+02	1.2E+02	1.2E+02	1.2E+02	1.5E+02	2.0E+02	2.5E+02	3.4E+02	4.6E+02	7.2E+02	8.6E+02	1.1E+03
50	2.2E+02	2.2E+02	2.2E+02	2.2E+02	2.2E+02	2.2E+02	2.5E+02	3.4E+02	4.6E+02	8.1E+02	1.1E+03	1.7E+03
70	9.6E+02	9.6E+02	9.6E+02	9.6E+02	9.6E+02	9.6E+02	1.0E+03	1.3E+03	1.7E+03	2.9E+03	3.8E+03	5.5E+03
Stack Diameter = 2.0 m												
Stack Height (m)	**30**	**50**	**70**	**100**	**200**	**300**	**500**	**700**	**1000**	**2000**	**3000**	**5000**
10	4.7E+01	6.0E+01	7.3E+01	9.2E+01	1.7E+02	2.6E+02	3.2E+02	4.2E+02	5.6E+02	9.7E+02	1.3E+03	1.5E+03
20	8.8E+01	8.8E+01	8.8E+01	9.4E+01	1.7E+02	2.6E+02	3.2E+02	4.2E+02	5.6E+02	9.7E+02	1.3E+03	1.7E+03
30	1.5E+02	1.5E+02	1.5E+02	1.5E+02	1.8E+02	2.6E+02	3.2E+02	4.2E+02	5.6E+02	9.7E+02	1.3E+03	1.7E+03
50	2.7E+02	2.7E+02	2.7E+02	2.7E+02	2.7E+02	2.7E+02	3.2E+02	4.2E+02	5.6E+02	9.7E+02	1.3E+03	1.9E+03
70	1.3E+03	1.3E+03	1.3E+03	1.3E+03	1.3E+03	1.3E+03	1.4E+03	1.7E+03	2.2E+03	3.2E+03	4.1E+03	5.9E+03
100	2.8E+03	2.8E+03	2.8E+03	2.8E+03	2.8E+03	2.8E+03	2.8E+03	2.8E+03	3.3E+03	5.0E+03	6.5E+03	7.7E+03
Stack Diameter = 3.0 m												
Stack Height (m)	**30**	**50**	**70**	**100**	**200**	**300**	**500**	**700**	**1000**	**2000**	**3000**	**5000**
10	6.2E+01	6.5E+01	7.3E+01	9.2E+01	2.1E+02	3.3E+02	5.1E+02	7.0E+02	9.3E+02	1.2E+03	1.5E+03	1.5E+03
20	1.5E+02	1.5E+02	1.6E+02	1.9E+02	2.4E+02	3.5E+02	5.3E+02	7.0E+02	9.3E+02	1.4E+03	2.0E+03	2.8E+03
30	1.9E+02	1.9E+02	1.9E+02	1.9E+02	2.4E+02	3.5E+02	5.3E+02	7.0E+02	9.3E+02	1.6E+03	2.1E+03	2.8E+03
50	4.0E+02	4.0E+02	4.0E+02	4.0E+02	4.2E+02	4.8E+02	5.3E+02	7.0E+02	9.3E+02	1.6E+03	2.1E+03	2.8E+03
70	2.2E+03	2.2E+03	2.2E+03	2.2E+03	2.2E+03	2.3E+03	2.3E+03	2.8E+03	3.4E+03	3.9E+03	4.7E+03	6.6E+03
100	3.3E+03	3.3E+03	3.3E+03	3.3E+03	3.3E+03	3.3E+03	3.3E+03	3.3E+03	3.7E+03	6.0E+03	7.1E+03	8.2E+03
Stack Diameter = 4.0 m												
Stack Height (m)	**30**	**50**	**70**	**100**	**200**	**300**	**500**	**700**	**1000**	**2000**	**3000**	**5000**
30	2.3E+02	2.3E+02	2.3E+02	2.4E+02	3.2E+02	5.3E+02	7.7E+02	1.0E+03	1.3E+03	2.1E+03	2.6E+03	4.1E+03
50	4.8E+02	4.8E+02	4.8E+02	4.8E+02	5.0E+02	5.8E+02	7.7E+02	1.0E+03	1.3E+03	2.3E+03	3.0E+03	4.2E+03
70	2.4E+03	2.4E+03	2.4E+03	2.4E+03	2.5E+03	2.6E+03	3.2E+03	4.3E+03	4.5E+03	4.7E+03	5.4E+03	7.2E+03
100	5.4E+03	5.4E+03	5.4E+03	5.4E+03	5.4E+03	5.4E+03	5.4E+03	5.4E+03	5.5E+03	8.1E+03	8.8E+03	1.0E+04

Table 4 of §63.1215: 1-Hour Average HCl-Equivalent Emission Rate Limits (lb/hr)--Simple Elevated Terrain

	Distance to property boundary (m)											
Stack Diameter = 0.3 m												
Stack Height (m)	30	50	70	100	200	300	500	700	1000	2000	3000	5000
5	1.4E+00	1.9E+00	2.6E+00	3.8E+00	6.8E+00	9.4E+00	1.5E+01	2.1E+01	3.3E+01	8.1E+01	1.4E+02	2.7E+02
10	4.0E+00	4.0E+00	4.6E+00	6.4E+00	6.8E+00	9.4E+00	1.5E+01	2.1E+01	3.3E+01	8.1E+01	1.4E+02	2.7E+02
20	1.1E+01	1.1E+01	1.1E+01	1.1E+01	1.2E+01	1.5E+01	2.4E+01	3.5E+01	5.4E+01	1.3E+02	2.1E+02	4.0E+02
30	2.3E+01	2.3E+01	2.3E+01	2.3E+01	2.5E+01	3.3E+01	4.4E+01	5.5E+01	7.3E+01	1.6E+02	2.7E+02	5.2E+02
50	7.3E+01	7.3E+01	7.3E+01	7.3E+01	7.3E+01	8.3E+01	9.0E+01	9.0E+01	9.0E+01	2.1E+02	3.5E+02	6.8E+02
Stack Diameter = 0.5 m												
Stack Height (m)	30	50	70	100	200	300	500	700	1000	2000	3000	5000
5	1.9E+00	2.7E+00	3.7E+00	5.9E+00	1.4E+01	1.7E+01	2.4E+01	3.5E+01	5.4E+01	1.0E+02	1.6E+02	3.0E+02
10	5.6E+00	5.6E+00	6.4E+00	8.9E+00	1.4E+01	1.7E+01	2.4E+01	3.5E+01	5.4E+01	1.0E+02	1.6E+02	3.0E+02
20	1.6E+01	1.6E+01	1.6E+01	1.6E+01	1.6E+01	1.7E+01	2.4E+01	3.5E+01	5.4E+01	1.3E+02	2.1E+02	4.0E+02
30	2.7E+01	2.7E+01	2.7E+01	2.7E+01	2.7E+01	3.3E+01	4.4E+01	5.8E+01	8.5E+01	1.8E+02	2.9E+02	5.5E+02
50	7.6E+01	7.6E+01	7.6E+01	7.6E+01	7.6E+01	8.3E+01	1.1E+02	1.3E+02	1.3E+02	2.4E+02	3.9E+02	7.2E+02
Stack Diameter = 1.0 m												
Stack Height (m)	30	50	70	100	200	300	500	700	1000	2000	3000	5000
10	1.0E+01	1.0E+01	1.2E+01	1.7E+01	3.9E+01	3.9E+01	4.5E+01	5.8E+01	7.9E+01	1.6E+02	2.4E+02	4.4E+02
20	2.6E+01	2.6E+01	2.6E+01	2.8E+01	3.9E+01	3.9E+01	4.5E+01	5.8E+01	7.9E+01	1.6E+02	2.4E+02	4.5E+02
30	4.2E+01	4.2E+01	4.2E+01	4.2E+01	4.2E+01	4.2E+01	4.5E+01	5.8E+01	8.5E+01	1.8E+02	2.9E+02	5.5E+02
50	8.9E+01	8.9E+01	8.9E+01	8.9E+01	8.9E+01	8.9E+01	1.1E+02	1.4E+02	1.7E+02	3.3E+02	5.0E+02	8.7E+02
70	3.8E+02	3.8E+02	3.8E+02	3.8E+02	3.8E+02	3.8E+02	3.8E+02	4.0E+02	4.1E+02	4.3E+02	6.1E+02	1.0E+03
Stack Diameter = 1.5 m												
Stack Height (m)	30	50	70	100	200	300	500	700	1000	2000	3000	5000
10	2.1E+01	2.1E+01	2.5E+01	3.6E+01	5.4E+01	6.3E+01	6.3E+01	6.9E+01	9.8E+01	2.0E+02	3.2E+02	5.7E+02
20	3.3E+01	3.3E+01	3.3E+01	3.7E+01	5.4E+01	6.3E+01	6.3E+01	6.9E+01	9.8E+01	2.0E+02	3.2E+02	5.7E+02
30	6.3E+01	6.3E+01	6.3E+01	6.3E+01	6.3E+01	6.3E+01	6.3E+01	6.9E+01	9.8E+01	2.0E+02	3.2E+02	5.8E+02
50	1.0E+02	1.0E+02	1.0E+02	1.0E+02	1.0E+02	1.0E+02	1.2E+02	1.4E+02	1.7E+02	3.3E+02	5.0E+02	8.7E+02
70	4.8E+02	4.8E+02	4.8E+02	4.8E+02	4.8E+02	4.8E+02	4.8E+02	4.8E+02	4.8E+02	6.5E+02	8.2E+02	1.3E+03
Stack Diameter = 2.0 m												
Stack Height (m)	30	50	70	100	200	300	500	700	1000	2000	3000	5000
10	2.7E+01	2.7E+01	3.2E+01	4.4E+01	6.6E+01	9.7E+01	9.7E+01	1.1E+02	1.5E+02	2.6E+02	3.9E+02	6.6E+02
20	4.0E+01	4.0E+01	4.0E+01	4.4E+01	6.6E+01	9.7E+01	9.7E+01	1.1E+02	1.5E+02	2.6E+02	3.9E+02	6.6E+02
30	7.9E+01	7.9E+01	7.9E+01	7.9E+01	9.1E+01	9.7E+01	9.7E+01	1.1E+02	1.5E+02	2.6E+02	3.9E+02	6.6E+02
50	1.3E+02	1.3E+02	1.3E+02	1.3E+02	1.3E+02	1.3E+02	1.3E+02	1.4E+02	1.7E+02	3.3E+02	5.0E+02	8.7E+02
70	5.6E+02	5.6E+02	5.6E+02	5.6E+02	5.6E+02	5.6E+02	5.6E+02	5.6E+02	5.6E+02	7.3E+02	1.1E+03	1.5E+03
100	8.6E+02	8.6E+02	8.6E+02	8.6E+02	8.6E+02	8.6E+02	8.6E+02	8.6E+02	8.6E+02	8.6E+02	1.2E+03	1.7E+03
Stack Diameter = 3.0 m												
Stack Height (m)	30	50	70	100	200	300	500	700	1000	2000	3000	5000
10	3.5E+01	3.5E+01	4.1E+01	5.8E+01	1.2E+02	1.6E+02	1.8E+02	1.8E+02	1.8E+02	3.5E+02	5.2E+02	9.0E+02
20	6.2E+01	6.2E+01	6.2E+01	7.2E+01	1.2E+02	1.6E+02	1.8E+02	1.8E+02	1.8E+02	3.5E+02	5.2E+02	9.0E+02
30	1.0E+02	1.0E+02	1.0E+02	1.0E+02	1.2E+02	1.6E+02	1.8E+02	1.8E+02	1.8E+02	3.5E+02	5.2E+02	9.0E+02
50	1.8E+02	1.8E+02	1.8E+02	1.8E+02	1.8E+02	1.8E+02	1.8E+02	1.8E+02	1.8E+02	3.5E+02	5.2E+02	9.0E+02
70	7.5E+02	7.5E+02	7.5E+02	7.5E+02	7.5E+02	7.5E+02	7.5E+02	7.5E+02	7.5E+02	8.9E+02	1.3E+03	2.0E+03
100	1.4E+03	1.4E+03	1.4E+03	1.4E+03	1.4E+03	1.4E+03	1.4E+03	1.4E+03	1.4E+03	1.4E+03	2.0E+03	2.6E+03
Stack Diameter = 4.0 m												
Stack Height (m)	30	50	70	100	200	300	500	700	1000	2000	3000	5000
30	1.2E+02	1.2E+02	1.2E+02	1.2E+02	1.4E+02	2.0E+02	2.2E+02	2.2E+02	2.2E+02	4.2E+02	6.3E+02	1.0E+03
50	2.2E+02	2.2E+02	2.2E+02	2.2E+02	2.2E+02	2.2E+02	2.2E+02	2.2E+02	2.2E+02	4.2E+02	6.3E+02	1.0E+03
70	1.0E+03	1.0E+03	1.0E+03	1.0E+03	1.0E+03	1.0E+03	1.0E+03	1.0E+03	1.0E+03	1.1E+03	1.6E+03	2.4E+03
100	1.6E+03	1.6E+03	1.6E+03	1.6E+03	1.6E+03	1.6E+03	1.6E+03	1.6E+03	1.6E+03	1.6E+03	2.3E+03	3.6E+03

■ 17. Section 63.1216 and an undesignated center heading are added to subpart EEE to read as follows:

Emissions Standards and Operating Limits for Solid Fuel Boilers, Liquid Fuel Boilers, and Hydrochloric Acid Production Furnaces

§63.1216 What are the standards for solid fuel boilers that burn hazardous waste?

(a) *Emission limits for existing sources.* You must not discharge or cause combustion gases to be emitted into the atmosphere that contain:

(1) For dioxins and furans, either carbon monoxide or hydrocarbon emissions in excess of the limits provided by paragraph (a)(5) of this section;

(2) Mercury in excess of 11 μg/dscm corrected to 7 percent oxygen;

(3) For cadmium and lead combined, except for an area source as defined under § 63.2, emissions in excess of 180 μg/dscm, corrected to 7 percent oxygen;

(4) For arsenic, beryllium, and chromium combined, except for an area source as defined under § 63.2, emissions in excess of 380 μg/dscm, corrected to 7 percent oxygen;

(5) For carbon monoxide and hydrocarbons, either:

(i) Carbon monoxide in excess of 100 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis and corrected to 7 percent oxygen. If

you elect to comply with this carbon monoxide standard rather than the hydrocarbon standard under paragraph (a)(5)(ii) of this section, you must also document that, during the destruction and removal efficiency (DRE) test runs or their equivalent as provided by § 63.1206(b)(7), hydrocarbons do not exceed 10 parts per million by volume during those runs, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane; or

(ii) Hydrocarbons in excess of 10 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane;

(6) For hydrogen chloride and chlorine combined, except for an area source as defined under § 63.2, emissions in excess of 440 parts per million by volume, expressed as a chloride ($Cl^{(-)}$) equivalent, dry basis and corrected to 7 percent oxygen; and

(7) For particulate matter, except for an area source as defined under § 63.2 or as provided by paragraph (e) of this section, emissions in excess of 68 mg/dscm corrected to 7 percent oxygen.

(b) *Emission limits for new sources.* You must not discharge or cause combustion gases to be emitted into the atmosphere that contain:

(1) For dioxins and furans, either carbon monoxide or hydrocarbon emissions in excess of the limits provided by paragraph (b)(5) of this section;

(2) Mercury in excess of 11 μg/dscm corrected to 7 percent oxygen;

(3) For cadmium and lead combined, except for an area source as defined under § 63.2, emissions in excess of 180 μg/dscm, corrected to 7 percent oxygen;

(4) For arsenic, beryllium, and chromium combined, except for an area source as defined under § 63.2, emissions in excess of 190 μg/dscm, corrected to 7 percent oxygen;

(5) For carbon monoxide and hydrocarbons, either:

(i) Carbon monoxide in excess of 100 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis and corrected to 7 percent oxygen. If you elect to comply with this carbon monoxide standard rather than the hydrocarbon standard under paragraph (b)(5)(ii) of this section, you must also document that, during the destruction and removal efficiency (DRE) test runs or their equivalent as provided by § 63.1206(b)(7), hydrocarbons do not exceed 10 parts per million by volume during those runs, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane; or

(ii) Hydrocarbons in excess of 10 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane;

(6) For hydrogen chloride and chlorine combined, except for an area source as defined under § 63.2, emissions in excess of 73 parts per million by volume, expressed as a chloride ($Cl^{(-)}$) equivalent, dry basis and corrected to 7 percent oxygen; and

(7) For particulate matter, except for an area source as defined under § 63.2 or as provided by paragraph (e) of this section, emissions in excess of 34 mg/dscm corrected to 7 percent oxygen.

(c) *Destruction and removal efficiency (DRE) standard.* (1) *99.99% DRE.* Except as provided in paragraph (c)(2) of this section, you must achieve a DRE of 99.99% for each principle organic hazardous constituent (POHC) designated under paragraph (c)(3) of this section. You must calculate DRE for each POHC from the following equation:

$$DRE = [1 - (W_{out} \div W_{in})] \times 100\%$$

Where:

W_{in} = mass feedrate of one POHC in a waste feedstream; and

W_{out} = mass emission rate of the same POHC present in exhaust emissions prior to release to the atmosphere.

(2) *99.9999% DRE.* If you burn the dioxin-listed hazardous wastes F020, F021, F022, F023, F026, or F027 (see § 261.31 of this chapter), you must achieve a DRE of 99.9999% for each POHC that you designate under paragraph (c)(3) of this section. You must demonstrate this DRE performance on POHCs that are more difficult to incinerate than tetra-, penta-, and hexachlorodibenzo-*p*-dioxins and dibenzofurans. You must use the equation in paragraph (c)(1) of this section to calculate DRE for each POHC. In addition, you must notify the Administrator of your intent to incinerate hazardous wastes F020, F021, F022, F023, F026, or F027.

(3) *Principal organic hazardous constituents (POHCs).* (i) You must treat the POHCs in the waste feed that you specify under paragraph (c)(3)(ii) of this section to the extent required by paragraphs (c)(1) and (c)(2) of this section.

(ii) You must specify one or more POHCs that are representative of the most difficult to destroy organic compounds in your hazardous waste feedstream. You must base this specification on the degree of difficulty of incineration of the organic constituents in the hazardous waste and on their concentration or mass in the hazardous waste feed, considering the results of hazardous waste analyses or other data and information.

(d) *Significant figures.* The emission limits provided by paragraphs (a) and (b) of this section are presented with two significant figures. Although you must perform intermediate calculations using at least three significant figures, you may round the resultant emission levels to two significant figures to document compliance.

(e) *Alternative to the particulate matter standard.* (1) *General.* In lieu of complying with the particulate matter standards of this section, you may elect to comply with the following alternative metal emission control requirement:

(2) *Alternative metal emission control requirements for existing solid fuel boilers.* (i) You must not discharge or cause combustion gases to be emitted into the atmosphere that contain cadmium, lead, and selenium in excess of 180 μg/dscm, combined emissions, corrected to 7 percent oxygen; and,

(ii) You must not discharge or cause combustion gases to be emitted into the atmosphere that contain antimony, arsenic, beryllium, chromium, cobalt, manganese, and nickel in excess of 380 μg/dscm, combined emissions, corrected to 7 percent oxygen.

(3) Alternative metal emission control requirements for new solid fuel boilers. (i) You must not discharge or cause combustion gases to be emitted into the atmosphere that contain cadmium, lead, and selenium in excess of 180 μg/dscm, combined emissions, corrected to 7 percent oxygen; and,

(ii) You must not discharge or cause combustion gases to be emitted into the atmosphere that contain antimony, arsenic, beryllium, chromium, cobalt, manganese, and nickel in excess of 190 μg/dscm, combined emissions, corrected to 7 percent oxygen.

(4) *Operating limits.* Semivolatile and low volatile metal operating parameter limits must be established to ensure compliance with the alternative emission limitations described in paragraphs (e)(2) and (e)(3) of this section pursuant to § 63.1209(n), except that semivolatile metal feedrate limits apply to lead, cadmium, and selenium, combined, and low volatile metal feedrate limits apply to arsenic,

beryllium, chromium, antimony, cobalt, manganese, and nickel, combined.

(f) *Elective standards for area sources.* Area sources as defined under § 63.2 are subject to the standards for cadmium and lead, the standards for arsenic, beryllium, and chromium, the standards for hydrogen chloride and chlorine, and the standards for particulate matter under this section if they elect under § 266.100(b)(3) of this chapter to comply with those standards in lieu of the standards under 40 CFR 266.105, 266.106, and 266.107 to control those pollutants.

■ 18. Section 63.1217 is added to read as follows:

§ 63.1217 What are the standards for liquid fuel boilers that burn hazardous waste?

(a) *Emission limits for existing sources.* You must not discharge or cause combustion gases to be emitted into the atmosphere that contain:

(1)(i) Dioxins and furans in excess of 0.40 ng TEQ/dscm, corrected to 7 percent oxygen, for liquid fuel boilers equipped with a dry air pollution control system; or

(ii) Either carbon monoxide or hydrocarbon emissions in excess of the limits provided by paragraph (a)(5) of this section for sources not equipped with a dry air pollution control system;

(iii) A source equipped with a wet air pollution control system followed by a dry air pollution control system is not considered to be a dry air pollution control system, and a source equipped with a dry air pollution control system followed by a wet air pollution control system is considered to be a dry air pollution control system for purposes of this emission limit;

(2) For mercury, except as provided for in paragraph (a)(2)(iii) of this section:

(i) When you burn hazardous waste with an as-fired heating value less than 10,000 Btu/lb, emissions in excess of 19 μg/dscm, corrected to 7 percent oxygen, on an (not-to-exceed) annual averaging period;

(ii) When you burn hazardous waste with an as-fired heating value 10,000 Btu/lb or greater, emissions in excess of 4.2×10^{-5} lbs mercury attributable to the hazardous waste per million Btu heat input from the hazardous waste on an (not-to-exceed) annual averaging period;

(iii) The boiler operated by Diversified Scientific Services, Inc. with EPA identification number TND982109142, and which burns radioactive waste mixed with hazardous waste, must comply with the mercury emission standard under § 63.1219(a)(2);

(3) For cadmium and lead combined, except for an area source as defined under § 63.2,

(i) When you burn hazardous waste with an as-fired heating value less than 10,000 Btu/lb, emissions in excess of 150 μg/dscm, corrected to 7 percent oxygen, on an (not-to-exceed) annual averaging period;

(ii) When you burn hazardous waste with an as-fired heating value of 10,000 Btu/lb or greater, emissions in excess of 8.2×10^{-5} lbs combined cadmium and lead emissions attributable to the hazardous waste per million Btu heat input from the hazardous waste on an (not-to-exceed) annual averaging period;

(4) For chromium, except for an area source as defined under § 63.2:

(i) When you burn hazardous waste with an as-fired heating value less than 10,000 Btu/lb, emissions in excess of 370 μg/dscm, corrected to 7 percent oxygen;

(ii) When you burn hazardous waste with an as-fired heating value of 10,000 Btu/lb or greater, emissions in excess of 1.3×10^{-4} lbs chromium emissions attributable to the hazardous waste per million Btu heat input from the hazardous waste;

(5) For carbon monoxide and hydrocarbons, either:

(i) Carbon monoxide in excess of 100 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis and corrected to 7 percent oxygen. If you elect to comply with this carbon monoxide standard rather than the hydrocarbon standard under paragraph (a)(5)(ii) of this section, you must also document that, during the destruction and removal efficiency (DRE) test runs or their equivalent as provided by § 63.1206(b)(7), hydrocarbons do not exceed 10 parts per million by volume during those runs, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane; or

(ii) Hydrocarbons in excess of 10 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane;

(6) For hydrogen chloride and chlorine, except for an area source as defined under § 63.2:

(i) When you burn hazardous waste with an as-fired heating value less than 10,000 Btu/lb, emissions in excess of 31 parts per million by volume, combined emissions, expressed as a chloride ($Cl^{(-)}$) equivalent, dry basis and corrected to 7 percent oxygen;

(ii) When you burn hazardous waste with an as-fired heating value of 10,000 Btu/lb or greater, emissions in excess of 5.08×10^{-2} lbs combined emissions of hydrogen chloride and chlorine gas attributable to the hazardous waste per million Btu heat input from the hazardous waste;

(7) For particulate matter, except for an area source as defined under § 63.2 or as provided by paragraph (e) of this section, emissions in excess of 80 mg/dscm corrected to 7 percent oxygen.

(b) *Emission limits for new sources.* You must not discharge or cause combustion gases to be emitted into the atmosphere that contain:

(1)(i) Dioxins and furans in excess of 0.40 ng TEQ/dscm, corrected to 7 percent oxygen, for liquid fuel boilers equipped with a dry air pollution control system; or

(ii) Either carbon monoxide or hydrocarbon emissions in excess of the limits provided by paragraph (b)(5) of this section for sources not equipped with a dry air pollution control system;

(iii) A source equipped with a wet air pollution control system followed by a dry air pollution control system is not considered to be a dry air pollution control system, and a source equipped with a dry air pollution control system followed by a wet air pollution control system is considered to be a dry air pollution control system for purposes of this emission limit;

(2) For mercury:

(i) When you burn hazardous waste with an as-fired heating value less than 10,000 Btu/lb, emissions in excess of 6.8 μg/dscm, corrected to 7 percent oxygen, on an (not-to-exceed) annual averaging period;

(ii) When you burn hazardous waste with an as-fired heating value of 10,000 Btu/lb or greater, emissions in excess of 1.2×10^{-6} lbs mercury emissions attributable to the hazardous waste per million Btu heat input from the hazardous waste on an (not-to-exceed) annual averaging period;

(3) For cadmium and lead combined, except for an area source as defined under § 63.2:

(i) When you burn hazardous waste with an as-fired heating value less than 10,000 Btu/lb, emissions in excess of 78 μg/dscm, corrected to 7 percent oxygen, on an (not-to-exceed) annual averaging period;

(ii) When you burn hazardous waste with an as-fired heating value greater than or equal to 10,000 Btu/lb, emissions in excess of 6.2×10^{-6} lbs combined cadmium and lead emissions attributable to the hazardous waste per

million Btu heat input from the hazardous waste on an (not-to-exceed) annual averaging period;

(4) For chromium, except for an area source as defined under § 63.2:

(i) When you burn hazardous waste with an as-fired heating value less than 10,000 Btu/lb, emissions in excess of 12 μg/dscm, corrected to 7 percent oxygen;

(ii) When you burn hazardous waste with an as-fired heating value of 10,000 Btu/lb or greater, emissions in excess of 1.4×10^{-5} lbs chromium emissions attributable to the hazardous waste per million Btu heat input from the hazardous waste;

(5) For carbon monoxide and hydrocarbons, either:

(i) Carbon monoxide in excess of 100 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis and corrected to 7 percent oxygen. If you elect to comply with this carbon monoxide standard rather than the hydrocarbon standard under paragraph (b)(5)(ii) of this section, you must also document that, during the destruction and removal efficiency (DRE) test runs or their equivalent as provided by § 63.1206(b)(7), hydrocarbons do not exceed 10 parts per million by volume during those runs, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane; or

(ii) Hydrocarbons in excess of 10 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane;

(6) For hydrogen chloride and chlorine, except for an area source as defined under § 63.2:

(i) When you burn hazardous waste with an as-fired heating value less than 10,000 Btu/lb, emissions in excess of 31 parts per million by volume, combined emissions, expressed as a chloride ($Cl^{(-)}$) equivalent, dry basis and corrected to 7 percent oxygen;

(ii) When you burn hazardous waste with an as-fired heating value of 10,000 Btu/lb or greater, emissions in excess of 5.08×10^{-2} lbs combined emissions of hydrogen chloride and chlorine gas attributable to the hazardous waste per million Btu heat input from the hazardous waste;

(7) For particulate matter, except for an area source as defined under § 63.2 or as provided by paragraph (e) of this section, emissions in excess of 20 mg/dscm corrected to 7 percent oxygen.

(c) *Destruction and removal efficiency (DRE) standard.* (1) *99.99% DRE.* Except as provided in paragraph (c)(2) of this section, you must achieve a DRE of 99.99% for each principle organic hazardous constituent (POHC) designated under paragraph (c)(3) of this section. You must calculate DRE for each POHC from the following equation:

$$DRE = [1 - (W_{out} \div W_{in})] \times 100\%$$

Where:

W_{in} = mass feedrate of one POHC in a waste feedstream; and

W_{out} = mass emission rate of the same POHC present in exhaust emissions prior to release to the atmosphere.

(2) *99.9999% DRE.* If you burn the dioxin-listed hazardous wastes F020, F021, F022, F023, F026, or F027 (see § 261.31 of this chapter), you must achieve a DRE of 99.9999% for each POHC that you designate under paragraph (c)(3) of this section. You must demonstrate this DRE performance on POHCs that are more difficult to incinerate than tetra-, penta-, and hexachlorodibenzo-*p*-dioxins and dibenzofurans. You must use the equation in paragraph (c)(1) of this section to calculate DRE for each POHC. In addition, you must notify the Administrator of your intent to incinerate hazardous wastes F020, F021, F022, F023, F026, or F027.

(3) *Principal organic hazardous constituents (POHCs).* (i) You must treat the POHCs in the waste feed that you specify under paragraph (c)(3)(ii) of this section to the extent required by paragraphs (c)(1) and (c)(2) of this section.

(ii) You must specify one or more POHCs that are representative of the most difficult to destroy organic compounds in your hazardous waste feedstream. You must base this specification on the degree of difficulty of incineration of the organic constituents in the hazardous waste and on their concentration or mass in the hazardous waste feed, considering the results of hazardous waste analyses or other data and information.

(d) *Significant figures.* The emission limits provided by paragraphs (a) and (b) of this section are presented with two significant figures. Although you must perform intermediate calculations using at least three significant figures, you may round the resultant emission levels to two significant figures to document compliance.

(e) *Alternative to the particulate matter standard.* (1) *General.* In lieu of complying with the particulate matter standards of this section, you may elect to comply with the following alternative metal emission control requirement:

(2) *Alternative metal emission control requirements for existing liquid fuel boilers.* (i) When you burn hazardous waste with a heating value less than 10,000 Btu/lb:

(A) You must not discharge or cause combustion gases to be emitted into the atmosphere that contain cadmium, lead, and selenium, combined, in excess of 150 μg/dscm, corrected to 7 percent oxygen; and

(B) You must not discharge or cause combustion gases to be emitted into the atmosphere that contain antimony, arsenic, beryllium, chromium, cobalt, manganese, and nickel, combined, in excess of 370 μg/dscm, corrected to 7 percent oxygen;

(ii) When you burn hazardous waste with a heating value of 10,000 Btu/lb or greater:

(A) You must not discharge or cause combustion gases to be emitted into the atmosphere that contain in excess of 8.2×10^{-5} lbs combined emissions of cadmium, lead, and selenium attributable to the hazardous waste per million Btu heat input from the hazardous waste; and

(B) You must not discharge or cause combustion gases to be emitted into the atmosphere that contain either in excess of 1.3×10^{-4} lbs combined emissions of antimony, arsenic, beryllium, chromium, cobalt, manganese, and nickel attributable to the hazardous waste per million Btu heat input from the hazardous waste;

(3) *Alternative metal emission control requirements for new liquid fuel boilers.* (i) When you burn hazardous waste with a heating value less than 10,000 Btu/lb:

(A) You must not discharge or cause combustion gases to be emitted into the atmosphere that contain cadmium, lead, and selenium, combined, in excess of 78 μg/dscm, corrected to 7 percent oxygen; and

(B) You must not discharge or cause combustion gases to be emitted into the atmosphere that contain antimony, arsenic, beryllium, chromium, cobalt, manganese, and nickel, combined, in excess of 12 μg/dscm, corrected to 7 percent oxygen;

(ii) When you burn hazardous waste with a heating value greater than or equal to 10,000 Btu/lb:

(A) You must not discharge or cause combustion gases to be emitted into the atmosphere that contain in excess of 6.2×10^{-6} lbs combined emissions of cadmium, lead, and selenium attributable to the hazardous waste per million Btu heat input from the hazardous waste; and

(B) You must not discharge or cause combustion gases to be emitted into the

atmosphere that contain either in excess of 1.4×10^{-5} lbs combined emissions of antimony, arsenic, beryllium, chromium, cobalt, manganese, and nickel attributable to the hazardous waste per million Btu heat input from the hazardous waste;

(4) *Operating limits.* Semivolatile and low volatile metal operating parameter limits must be established to ensure compliance with the alternative emission limitations described in paragraphs (e)(2) and (e)(3) of this section pursuant to § 63.1209(n), except that semivolatile metal feedrate limits apply to lead, cadmium, and selenium, combined, and low volatile metal feedrate limits apply to arsenic, beryllium, chromium, antimony, cobalt, manganese, and nickel, combined.

(f) *Elective standards for area sources.* Area sources as defined under § 63.2 are subject to the standards for cadmium and lead, the standards for chromium, the standards for hydrogen chloride and chlorine, and the standards for particulate matter under this section if they elect under § 266.100(b)(3) of this chapter to comply with those standards in lieu of the standards under 40 CFR 266.105, 266.106, and 266.107 to control those pollutants.

■ 19. Section 63.1218 is added to read as follows:

§ 63.1218 What are the standards for hydrochloric acid production furnaces that burn hazardous waste?

(a) *Emission limits for existing sources.* You must not discharge or cause combustion gases to be emitted into the atmosphere that contain:

(1) For dioxins and furans, either carbon monoxide or hydrocarbon emissions in excess of the limits provided by paragraph (a)(5) of this section;

(2) For mercury, hydrogen chloride and chlorine gas emissions in excess of the levels provided by paragraph (a)(6) of this section;

(3) For lead and cadmium, except for an area source as defined under § 63.2, hydrogen chloride and chlorine gas emissions in excess of the levels provided by paragraph (a)(6) of this section;

(4) For arsenic, beryllium, and chromium, except for an area source as defined under § 63.2, hydrogen chloride and chlorine gas emissions in excess of the levels provided by paragraph (a)(6) of this section;

(5) For carbon monoxide and hydrocarbons, either:

(i) Carbon monoxide in excess of 100 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis and corrected to 7 percent oxygen. If you elect to comply with this carbon monoxide standard rather than the hydrocarbon standard under paragraph (a)(5)(ii) of this section, you must also document that, during the destruction and removal efficiency (DRE) test runs or their equivalent as provided by § 63.1206(b)(7), hydrocarbons do not exceed 10 parts per million by volume during those runs, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane; or

(ii) Hydrocarbons in excess of 10 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane;

(6) For hydrogen chloride and chlorine gas, either:

(i) Emission in excess of 150 parts per million by volume, combined emissions, expressed as a chloride ($Cl^{(-)}$ equivalent, dry basis and corrected to 7 percent oxygen; or

(ii) Emissions greater than the levels that would be emitted if the source is achieving a system removal efficiency (SRE) of less than 99.923 percent for total chlorine and chloride fed to the combustor. You must calculate SRE from the following equation:

$$SRE = [1 - (Cl_{out} / Cl_{in})] \times 100\%$$

Where:

Cl in = mass feedrate of total chlorine or chloride in all feedstreams, reported as chloride; and

Cl out = mass emission rate of hydrogen chloride and chlorine gas, reported as chloride, in exhaust emissions prior to release to the atmosphere.

(7) For particulate matter, except for an area source as defined under § 63.2, hydrogen chloride and chlorine gas emissions in excess of the levels provided by paragraph (a)(6) of this section.

(b) *Emission limits for new sources.* You must not discharge or cause combustion gases to be emitted into the atmosphere that contain:

(1) For dioxins and furans, either carbon monoxide or hydrocarbon emissions in excess of the limits provided by paragraph (b)(5) of this section;

(2) For mercury, hydrogen chloride and chlorine gas emissions in excess of the levels provided by paragraph (b)(6) of this section;

(3) For lead and cadmium, except for an area source as defined under § 63.2, hydrogen chloride and chlorine gas emissions in excess of the levels provided by paragraph (b)(6) of this section;

(4) For arsenic, beryllium, and chromium, except for an area source as defined under § 63.2, hydrogen chloride and chlorine gas emissions in excess of the levels provided by paragraph (b)(6) of this section;

(5) For carbon monoxide and hydrocarbons, either:

(i) Carbon monoxide in excess of 100 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis and corrected to 7 percent oxygen. If you elect to comply with this carbon monoxide standard rather than the hydrocarbon standard under paragraph (b)(5)(ii) of this section, you must also document that, during the destruction and removal efficiency (DRE) test runs or their equivalent as provided by § 63.1206(b)(7), hydrocarbons do not exceed 10 parts per million by volume during those runs, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane; or

(ii) Hydrocarbons in excess of 10 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane;

(6) For hydrogen chloride and chlorine gas, either:

(i) Emission in excess of 25 parts per million by volume, combined emissions, expressed as a chloride ($Cl^{(-)}$ equivalent, dry basis and corrected to 7 percent oxygen; or

(ii) Emissions greater than the levels that would be emitted if the source is achieving a system removal efficiency (SRE) of less than 99.987 percent for total chlorine and chloride fed to the combustor. You must calculate SRE from the following equation:

$$SRE = [1 - (Cl_{out} / Cl_{in})] \times 100\%$$

Where:

Cl in = mass feedrate of total chlorine or chloride in all feedstreams, reported as chloride; and

Cl out = mass emission rate of hydrogen chloride and chlorine gas, reported as chloride, in exhaust emissions prior to release to the atmosphere.

(7) For particulate matter, except for an area source as defined under § 63.2, hydrogen chloride and chlorine gas

emissions in excess of the levels provided by paragraph (b)(6) of this section.

(c) *Destruction and removal efficiency (DRE) standard.* (1) *99.99% DRE.* Except as provided in paragraph (c)(2) of this section, you must achieve a DRE of 99.99% for each principle organic hazardous constituent (POHC) designated under paragraph (c)(3) of this section. You must calculate DRE for each POHC from the following equation:

$$DRE = [1 - (W_{out} / W_{in})] \times 100\%$$

Where:

Win = mass feedrate of one POHC in a waste feedstream; and

Wout = mass emission rate of the same POHC present in exhaust emissions prior to release to the atmosphere.

(2) *99.9999% DRE.* If you burn the dioxin-listed hazardous wastes F020, F021, F022, F023, F026, or F027 (see § 261.31 of this chapter), you must achieve a DRE of 99.9999% for each POHC that you designate under paragraph (c)(3) of this section. You must demonstrate this DRE performance on POHCs that are more difficult to incinerate than tetra-, penta-, and hexachlorodibenzo-*p*-dioxins and dibenzofurans. You must use the equation in paragraph (c)(1) of this section to calculate DRE for each POHC. In addition, you must notify the Administrator of your intent to incinerate hazardous wastes F020, F021, F022, F023, F026, or F027.

(3) *Principal organic hazardous constituents (POHCs).* (i) You must treat the POHCs in the waste feed that you specify under paragraph (c)(3)(ii) of this section to the extent required by paragraphs (c)(1) and (c)(2) of this section.

(ii) You must specify one or more POHCs that are representative of the most difficult to destroy organic compounds in your hazardous waste feedstream. You must base this specification on the degree of difficulty of incineration of the organic constituents in the hazardous waste and on their concentration or mass in the hazardous waste feed, considering the results of hazardous waste analyses or other data and information.

(d) *Significant figures.* The emission limits provided by paragraphs (a) and (b) of this section are presented with two significant figures. Although you must perform intermediate calculations using at least three significant figures, you may round the resultant emission levels to two significant figures to document compliance.

(e) *Elective standards for area sources.* Area sources as defined under § 63.2 are subject to the standards for cadmium and lead, the standards for arsenic, beryllium, and chromium, the standards for hydrogen chloride and chlorine, and the standards for particulate matter under this section if they elect under § 266.100(b)(3) of this chapter to comply with those standards in lieu of the standards under 40 CFR 266.105, 266.106, and 266.107 to control those pollutants.

■ 20. Section 63.1219 and a new undesignated center heading are added to subpart EEE to read as follows:

Replacement Emissions Standards and Operating Limits for Incinerators, Cement Kilns, and Lightweight Aggregate Kilns

§ 63.1219 What are the replacement standards for hazardous waste incinerators?

(a) *Emission limits for existing sources.* You must not discharge or cause combustion gases to be emitted into the atmosphere that contain:

(1) For dioxins and furans:

(i) For incinerators equipped with either a waste heat boiler or dry air pollution control system, either:

(A) Emissions in excess of 0.20 ng TEQ/dscm, corrected to 7 percent oxygen; or

(B) Emissions in excess of 0.40 ng TEQ/dscm, corrected to 7 percent oxygen, provided that the combustion gas temperature at the inlet to the initial particulate matter control device is 400°F or lower based on the average of the test run average temperatures. (For purposes of compliance, operation of a wet particulate matter control device is presumed to meet the 400°F or lower requirement);

(ii) Emissions in excess of 0.40 ng TEQ/dscm, corrected to 7 percent oxygen, for incinerators not equipped with either a waste heat boiler or dry air pollution control system;

(iii) A source equipped with a wet air pollution control system followed by a dry air pollution control system is not considered to be a dry air pollution control system, and a source equipped with a dry air pollution control system followed by a wet air pollution control system is considered to be a dry air pollution control system for purposes of this standard;

(2) Mercury in excess of 130 μg/dscm, corrected to 7 percent oxygen;

(3) Cadmium and lead in excess of 230 μg/dscm, combined emissions, corrected to 7 percent oxygen;

(4) Arsenic, beryllium, and chromium in excess of 92 μg/dscm, combined emissions, corrected to 7 percent oxygen;

(5) For carbon monoxide and hydrocarbons, either:

(i) Carbon monoxide in excess of 100 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis and corrected to 7 percent oxygen. If you elect to comply with this carbon monoxide standard rather than the hydrocarbon standard under paragraph (a)(5)(ii) of this section, you must also document that, during the destruction and removal efficiency (DRE) test runs or their equivalent as provided by § 63.1206(b)(7), hydrocarbons do not exceed 10 parts per million by volume during those runs, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane; or

(ii) Hydrocarbons in excess of 10 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane;

(6) Hydrogen chloride and chlorine gas (total chlorine) in excess of 32 parts per million by volume, combined emissions, expressed as a chloride ($Cl^{(-)}$) equivalent, dry basis and corrected to 7 percent oxygen; and

(7) Except as provided by paragraph (e) of this section, particulate matter in excess of 0.013 gr/dscf corrected to 7 percent oxygen.

(b) *Emission limits for new sources.* You must not discharge or cause combustion gases to be emitted into the atmosphere that contain:

(1)(i) Dioxins and furans in excess of 0.11 ng TEQ/dscm corrected to 7 percent oxygen for incinerators equipped with either a waste heat boiler or dry air pollution control system; or

(ii) Dioxins and furans in excess of 0.20 ng TEQ/dscm corrected to 7 percent oxygen for sources not equipped with either a waste heat boiler or dry air pollution control system;

(iii) A source equipped with a wet air pollution control system followed by a dry air pollution control system is not considered to be a dry air pollution control system, and a source equipped with a dry air pollution control system followed by a wet air pollution control system is considered to be a dry air pollution control system for purposes of this standard;

(2) Mercury in excess of 8.1 μg/dscm, corrected to 7 percent oxygen;

(3) Cadmium and lead in excess of 10 μg/dscm, combined emissions, corrected to 7 percent oxygen;

(4) Arsenic, beryllium, and chromium in excess of 23 μg/dscm, combined

emissions, corrected to 7 percent oxygen;

(5) For carbon monoxide and hydrocarbons, either:

(i) Carbon monoxide in excess of 100 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis and corrected to 7 percent oxygen. If you elect to comply with this carbon monoxide standard rather than the hydrocarbon standard under paragraph (b)(5)(ii) of this section, you must also document that, during the destruction and removal efficiency (DRE) test runs or their equivalent as provided by § 63.1206(b)(7), hydrocarbons do not exceed 10 parts per million by volume during those runs, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane; or

(ii) Hydrocarbons in excess of 10 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane;

(6) Hydrogen chloride and chlorine gas in excess of 21 parts per million by volume, combined emissions, expressed as a chloride ($Cl^{(-)}$) equivalent, dry basis and corrected to 7 percent oxygen; and

(7) Except as provided by paragraph (e) of this section, particulate matter in excess of 0.0015 gr/dscf, corrected to 7 percent oxygen.

(c) *Destruction and removal efficiency (DRE) standard.* (1) *99.99% DRE.* Except as provided in paragraph (c)(2) of this section, you must achieve a destruction and removal efficiency (DRE) of 99.99% for each principle organic hazardous constituent (POHC) designated under paragraph (c)(3) of this section. You must calculate DRE for each POHC from the following equation:

$$DRE = [1 - (W_{out} / W_{in})] \times 100\%$$

Where:

W_{in} = mass feedrate of one POHC in a waste feedstream; and

W_{out} = mass emission rate of the same POHC present in exhaust emissions prior to release to the atmosphere.

(2) *99.9999% DRE.* If you burn the dioxin-listed hazardous wastes F020, F021, F022, F023, F026, or F027 (see § 261.31 of this chapter), you must achieve a DRE of 99.9999% for each POHC that you designate under paragraph (c)(3) of this section. You must demonstrate this DRE performance on POHCs that are more difficult to incinerate than tetra-, penta-, and hexachlorodibenzo-*p*-dioxins and dibenzofurans. You must use the equation in paragraph (c)(1) of this section to calculate DRE for each POHC. In addition, you must notify the Administrator of your intent to incinerate hazardous wastes F020, F021, F022, F023, F026, or F027.

(3) *Principal organic hazardous constituent (POHC).* (i) You must treat each POHC in the waste feed that you specify under paragraph (c)(3)(ii) of this section to the extent required by paragraphs (c)(1) and (c)(2) of this section.

(ii) You must specify one or more POHCs that are representative of the most difficult to destroy organic compounds in your hazardous waste feedstream. You must base this specification on the degree of difficulty of incineration of the organic constituents in the hazardous waste and on their concentration or mass in the hazardous waste feed, considering the results of hazardous waste analyses or other data and information.

(d) *Significant figures.* The emission limits provided by paragraphs (a) and (b) of this section are presented with two significant figures. Although you must perform intermediate calculations using at least three significant figures, you may round the resultant emission levels to two significant figures to document compliance.

(e) *Alternative to the particulate matter standard.* (1). *General.* In lieu of complying with the particulate matter standards of this section, you may elect to comply with the following alternative metal emission control requirement:

(2) *Alternative metal emission control requirements for existing incinerators.* (i) You must not discharge or cause combustion gases to be emitted into the atmosphere that contain cadmium, lead, and selenium in excess of 230 μg/dscm, combined emissions, corrected to 7 percent oxygen; and,

(ii) You must not discharge or cause combustion gases to be emitted into the atmosphere that contain antimony, arsenic, beryllium, chromium, cobalt, manganese, and nickel in excess of 92 μg/dscm, combined emissions, corrected to 7 percent oxygen.

(3) *Alternative metal emission control requirements for new incinerators.* (i) You must not discharge or cause combustion gases to be emitted into the atmosphere that contain cadmium, lead, and selenium in excess of 10 μg/dscm, combined emissions, corrected to 7 percent oxygen; and,

(ii) You must not discharge or cause combustion gases to be emitted into the atmosphere that contain antimony, arsenic, beryllium, chromium, cobalt, manganese, and nickel in excess of 23 μg/dscm, combined emissions, corrected to 7 percent oxygen.

(4) *Operating limits.* Semivolatile and low volatile metal operating parameter limits must be established to ensure compliance with the alternative emission limitations described in paragraphs (e)(2) and (e)(3) of this section pursuant to § 63.1209(n), except that semivolatile metal feedrate limits apply to lead, cadmium, and selenium, combined, and low volatile metal feedrate limits apply to arsenic, beryllium, chromium, antimony, cobalt, manganese, and nickel, combined.

■ 21. Section 63.1220 is added to subpart EEE to read as follows:

§ 63.1220 What are the replacement standards for hazardous waste burning cement kilns?

(a) *Emission and hazardous waste feed limits for existing sources.* You must not discharge or cause combustion gases to be emitted into the atmosphere or feed hazardous waste that contain:

(1) For dioxins and furans, either:

(i) Emissions in excess of 0.20 ng TEQ/dscm corrected to 7 percent oxygen; or

(ii) Emissions in excess of 0.40 ng TEQ/dscm corrected to 7 percent oxygen provided that the combustion gas temperature at the inlet to the initial dry particulate matter control device is 400 °F or lower based on the average of the test run average temperatures;

(2) For mercury, both:

(i) An average as-fired concentration of mercury in all hazardous waste feedstreams in excess of 3.0 parts per million by weight; and

(ii) Emissions in excess of 120 μg/dscm, corrected to 7 percent oxygen; or

(iii) A hazardous waste feedrate corresponding to a maximum theoretical emission concentration (MTEC) in excess of 120 μg/dscm;

(3) For cadmium and lead, both:

(i) Emissions in excess of 7.6×10^{-4} lbs combined emissions of cadmium and lead attributable to the hazardous waste per million Btu heat input from the hazardous waste; and

(ii) Emissions in excess of 330 μg/dscm, combined emissions, corrected to 7 percent oxygen;

(4) For arsenic, beryllium, and chromium, both:

(i) Emissions in excess of 2.1×10^{-5} lbs combined emissions of arsenic, beryllium, and chromium attributable to the hazardous waste per million Btu heat input from the hazardous waste; and

(ii) Emissions in excess of 56 μg/dscm, combined emissions, corrected to 7 percent oxygen;

(5) *Carbon monoxide and hydrocarbons.* (i) For kilns equipped with a by-pass duct or midkiln gas sampling system, either:

(A) Carbon monoxide in the by-pass duct or mid-kiln gas sampling system in excess of 100 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis and corrected to 7 percent oxygen. If you elect to comply with this carbon monoxide standard rather than the hydrocarbon standard under paragraph (a)(5)(i)(B) of this section, you must also document that, during the destruction and removal efficiency (DRE) test runs or their equivalent as provided by § 63.1206(b)(7), hydrocarbons in the by-pass duct or mid-kiln gas sampling system do not exceed 10 parts per million by volume during those runs, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane; or

(B) Hydrocarbons in the by-pass duct or midkiln gas sampling system in excess of 10 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane;

(ii) For kilns not equipped with a by-pass duct or midkiln gas sampling system, either:

(A) Hydrocarbons in the main stack in excess of 20 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane; or

(B) Carbon monoxide in the main stack in excess of 100 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis and corrected to 7 percent oxygen. If you elect to comply with this carbon monoxide standard rather than the hydrocarbon standard under paragraph (a)(5)(ii)(A) of this section, you also must document that, during the destruction and removal efficiency (DRE) test runs or their equivalent as provided by § 63.1206(b)(7), hydrocarbons in the main stack do not exceed 20 parts per million by volume during those runs, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane.

(6) Hydrogen chloride and chlorine gas in excess of 120 parts per million by volume, combined emissions, expressed as a chloride ($Cl^{(-)}$) equivalent, dry basis, corrected to 7 percent oxygen; and

(7) For particulate matter, both:

(i) Emissions in excess of 0.028 gr/dscf corrected to 7 percent oxygen; and

(ii) Opacity greater than 20 percent, unless your source is equipped with a bag leak detection system under § 63.1206(c)(8) or a particulate matter detection system under § 63.1206(c)(9).

(b) *Emission and hazardous waste feed limits for new sources.* You must not discharge or cause combustion gases to be emitted into the atmosphere or feed hazardous waste that contain:

(1) For dioxins and furans, either:

(i) Emissions in excess of 0.20 ng TEQ/dscm corrected to 7 percent oxygen; or

(ii) Emissions in excess of 0.40 ng TEQ/dscm corrected to 7 percent oxygen provided that the combustion gas temperature at the inlet to the initial dry particulate matter control device is 400 °F or lower based on the average of the test run average temperatures;

(2) For mercury, both:

(i) An average as-fired concentration of mercury in all hazardous waste feedstreams in excess of 1.9 parts per million by weight; and

(ii) Emissions in excess of 120 μg/dscm, corrected to 7 percent oxygen; or

(iii) A hazardous waste feedrate corresponding to a maximum theoretical emission concentration (MTEC) in excess of 120 μg/dscm;

(3) For cadmium and lead, both:

(i) Emissions in excess of 6.2×10^{-5} lbs combined emissions of cadmium and lead attributable to the hazardous waste per million Btu heat input from the hazardous waste; and

(ii) Emissions in excess of 180 μg/dscm, combined emissions, corrected to 7 percent oxygen;

(4) For arsenic, beryllium, and chromium, both:

(i) Emissions in excess of 1.5×10^{-5} lbs combined emissions of arsenic, beryllium, and chromium attributable to the hazardous waste per million Btu heat input from the hazardous waste; and

(ii) Emissions in excess of 54 μg/dscm, combined emissions, corrected to 7 percent oxygen;

(5) *Carbon monoxide and hydrocarbons.* (i) For kilns equipped with a by-pass duct or midkiln gas sampling system, carbon monoxide and hydrocarbons emissions are limited in both the bypass duct or midkiln gas sampling system and the main stack as follows:

(A) Emissions in the by-pass or midkiln gas sampling system are limited to either:

(*1*) Carbon monoxide in excess of 100 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis and corrected to 7 percent oxygen. If you elect to comply with this carbon monoxide standard rather than the hydrocarbon standard under paragraph (b)(5)(i)(A)(*2*) of this section, you also must document that, during the destruction and removal efficiency (DRE) test runs or their equivalent as provided by § 63.1206(b)(7), hydrocarbons do not exceed 10 parts per million by volume during those runs, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane; or

(*2*) Hydrocarbons in the by-pass duct or midkiln gas sampling system in excess of 10 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane; and

(B) Hydrocarbons in the main stack are limited, if construction of the kiln commenced after April 19, 1996 at a plant site where a cement kiln (whether burning hazardous waste or not) did not previously exist, to 50 parts per million by volume, over a 30-day block average (monitored continuously with a continuous monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane.

(ii) For kilns not equipped with a by-pass duct or midkiln gas sampling system, hydrocarbons and carbon monoxide are limited in the main stack to either:

(A) Hydrocarbons not exceeding 20 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane; or

(B)(*1*) Carbon monoxide not exceeding 100 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen; and

(*2*) Hydrocarbons not exceeding 20 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous

monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane at any time during the destruction and removal efficiency (DRE) test runs or their equivalent as provided by § 63.1206(b)(7); and

(*3*) If construction of the kiln commenced after April 19, 1996 at a plant site where a cement kiln (whether burning hazardous waste or not) did not previously exist, hydrocarbons are limited to 50 parts per million by volume, over a 30-day block average (monitored continuously with a continuous monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane.

(6) Hydrogen chloride and chlorine gas in excess of 86 parts per million by volume, combined emissions, expressed as a chloride ($Cl^{(-)}$) equivalent, dry basis and corrected to 7 percent oxygen; and

(7) For particulate matter, both:

(i) Emissions in excess of 0.0023 gr/dscf corrected to 7 percent oxygen; and

(ii) Opacity greater than 20 percent, unless your source is equipped with a bag leak detection system under § 63.1206(c)(8) or a particulate matter detection system under § 63.1206(c)(9).

(c) *Destruction and removal efficiency (DRE) standard.* (1) *99.99% DRE.* Except as provided in paragraph (c)(2) of this section, you must achieve a destruction and removal efficiency (DRE) of 99.99% for each principle organic hazardous constituent (POHC) designated under paragraph (c)(3) of this section. You must calculate DRE for each POHC from the following equation:

$$DRE = [1 - (W_{out} / W_{in})] \times 100\%$$

Where:

W_{in} = mass feedrate of one POHC in a waste feedstream; and

W_{out} = mass emission rate of the same POHC present in exhaust emissions prior to release to the atmosphere.

(2) *99.9999% DRE.* If you burn the dioxin-listed hazardous wastes F020, F021, F022, F023, F026, or F027 (see § 261.31 of this chapter), you must achieve a DRE of 99.9999% for each POHC that you designate under paragraph (c)(3) of this section. You must demonstrate this DRE performance on POHCs that are more difficult to incinerate than tetra-, penta-, and hexachlorodibenzo-*p*-dioxins and dibenzofurans. You must use the equation in paragraph (c)(1) of this section to calculate DRE for each POHC. In addition, you must notify the Administrator of your intent to incinerate hazardous wastes F020, F021, F022, F023, F026, or F027.

(3) *Principal organic hazardous constituent (POHC).* (i) You must treat each POHC in the waste feed that you specify under paragraph (c)(3)(ii) of this section to the extent required by paragraphs (c)(1) and (c)(2) of this section.

(ii) You must specify one or more POHCs that are representative of the most difficult to destroy organic compounds in your hazardous waste feedstream. You must base this specification on the degree of difficulty of incineration of the organic constituents in the hazardous waste and on their concentration or mass in the hazardous waste feed, considering the results of hazardous waste analyses or other data and information.

(d) *Cement kilns with in-line kiln raw mills.* (1) *General.* (i) You must conduct performance testing when the raw mill is on-line and when the mill is off-line to demonstrate compliance with the emission standards, and you must establish separate operating parameter limits under § 63.1209 for each mode of operation, except as provided by paragraphs (d)(1)(iv) and (d)(1)(v) of this section.

(ii) You must document in the operating record each time you change from one mode of operation to the alternate mode and begin complying with the operating parameter limits for that alternate mode of operation.

(iii) You must calculate rolling averages for operating parameter limits as provided by § 63.1209(q)(2).

(iv) If your in-line kiln raw mill has dual stacks, you may assume that the dioxin/furan emission levels in the by-pass stack and the operating parameter limits determined during performance testing of the by-pass stack when the raw mill is off-line are the same as when the mill is on-line.

(v) In lieu of conducting a performance test to demonstrate compliance with the dioxin/furan emission standards for the mode of operation when the raw mill is on-line, you may specify in the performance test workplan and Notification of Compliance the same operating parameter limits required under § 63.1209(k) for the mode of operation when the raw mill is on-line as you establish during performance testing for the mode of operation when the raw mill is off-line.

(2) *Emissions averaging.* You may comply with the mercury, semivolatile metal, low volatile metal, and hydrogen chloride/chlorine gas emission standards on a time-weighted average basis under the following procedures:

(i) *Averaging methodology.* You must calculate the time-weighted average emission concentration with the following equation:

$$C_{total} = \{C_{mill\text{-}off} \times (T_{mill\text{-}off} / (T_{mill\text{-}off} + T_{mill\text{-}on}))\} + \{C_{mill\text{-}on} \times (T_{mill\text{-}on} / (T_{mill\text{-}off} + T_{mill\text{-}on}))\}$$

Where:

C_{total} = time-weighted average concentration of a regulated constituent considering both raw mill on time and off time;

$C_{mill\text{-}off}$ = average performance test concentration of regulated constituent with the raw mill off-line;

$C_{mill\text{-}on}$ = average performance test concentration of regulated constituent with the raw mill on-line;

$T_{mill\text{-}off}$ = time when kiln gases are not routed through the raw mill; and

$T_{mill\text{-}on}$ = time when kiln gases are routed through the raw mill.

(ii) *Compliance.* (A) If you use this emission averaging provision, you must document in the operating record compliance with the emission standards on an annual basis by using the equation provided by paragraph (d)(2) of this section.

(B) Compliance is based on one-year block averages beginning on the day you submit the initial notification of compliance.

(iii) *Notification.* (A) If you elect to document compliance with one or more emission standards using this emission averaging provision, you must notify the Administrator in the initial comprehensive performance test plan submitted under § 63.1207(e).

(B) You must include historical raw mill operation data in the performance test plan to estimate future raw mill down-time and document in the performance test plan that estimated emissions and estimated raw mill down-time will not result in an exceedance of an emission standard on an annual basis.

(C) You must document in the notification of compliance submitted under § 63.1207(j) that an emission standard will not be exceeded based on the documented emissions from the performance test and predicted raw mill down-time.

(e) *Preheater or preheater/precalciner kilns with dual stacks.* (1) *General.* You must conduct performance testing on each stack to demonstrate compliance with the emission standards, and you must establish operating parameter limits under § 63.1209 for each stack, except as provided by paragraph (d)(1)(iv) of this section for dioxin/furan emissions testing and operating parameter limits for the by-pass stack of in-line raw mills.

(2) *Emissions averaging.* You may comply with the mercury, semivolatile metal, low volatile metal, and hydrogen

chloride/chlorine gas emission standards specified in this section on a gas flowrate-weighted average basis under the following procedures:

(i) *Averaging methodology.* You must calculate the gas flowrate-weighted average emission concentration using the following equation:

$$C_{tot} = \{C_{main} \times (Q_{main} / (Q_{main} + Q_{bypass}))\} + \{C_{bypass} \times (Q_{bypass} / (Q_{main} + Q_{bypass}))\}$$

Where:

C_{tot} = gas flowrate-weighted average concentration of the regulated constituent;

C_{main} = average performance test concentration demonstrated in the main stack;

C_{bypass} = average performance test concentration demonstrated in the bypass stack;

Q_{main} = volumetric flowrate of main stack effluent gas; and

Q_{bypass} = volumetric flowrate of bypass effluent gas.

(ii) *Compliance.* (A) You must demonstrate compliance with the emission standard(s) using the emission concentrations determined from the performance tests and the equation provided by paragraph (e)(1) of this section; and

(B) You must develop operating parameter limits for bypass stack and main stack flowrates that ensure the emission concentrations calculated with the equation in paragraph (e)(1) of this section do not exceed the emission standards on a 12-hour rolling average basis. You must include these flowrate limits in the Notification of Compliance.

(iii) *Notification.* If you elect to document compliance under this emissions averaging provision, you must:

(A) Notify the Administrator in the initial comprehensive performance test plan submitted under § 63.1207(e). The performance test plan must include, at a minimum, information describing the flowrate limits established under paragraph (e)(2)(ii)(B) of this section; and

(B) Document in the Notification of Compliance submitted under § 63.1207(j) the demonstrated gas flowrate-weighted average emissions that you calculate with the equation provided by paragraph (e)(2) of this section.

(f) *Significant figures.* The emission limits provided by paragraphs (a) and (b) of this section are presented with two significant figures. Although you must perform intermediate calculations using at least three significant figures, you may round the resultant emission levels to two significant figures to document compliance.

(g) [Reserved].

(h) When you comply with the particulate matter requirements of paragraphs (a)(7) or (b)(7) of this section, you are exempt from the New Source Performance Standard for particulate matter and opacity under § 60.60 of this chapter.

■ 22. Section 63.1221 is added to subpart EEE to read as follows:

§ 63.1221 What are the replacement standards for hazardous waste burning lightweight aggregate kilns?

(a) *Emission and hazardous waste feed limits for existing sources.* You must not discharge or cause combustion gases to be emitted into the atmosphere or feed hazardous waste that contain:

(1) For dioxins and furans, either:

(i) Emissions in excess of 0.20 ng TEQ/dscm corrected to 7 percent oxygen; or

(ii) Rapid quench of the combustion gas temperature at the exit of the (last) combustion chamber (or exit of any waste heat recovery system that immediately follows the last combustion chamber) to 400°F or lower based on the average of the test run average temperatures. You must also notify in writing the RCRA authority that you are complying with this option;

(2) For mercury, either:

(i) Emissions in excess of 120 μg/dscm, corrected to 7 percent oxygen; or

(ii) A hazardous waste feedrate corresponding to a maximum theoretical emission concentration (MTEC) in excess of 120 μg/dscm;

(3) For cadmium and lead, both:

(i) Emissions in excess of 3.0×10^{-4} lbs combined emissions of cadmium and lead attributable to the hazardous waste per million Btu heat input from the hazardous waste; and

(ii) Emissions in excess of 250 μg/dscm, combined emissions, corrected to 7 percent oxygen;

(4) For arsenic, beryllium, and chromium, both:

(i) In excess of 9.5×10^{-5} lbs combined emissions of arsenic, beryllium, and chromium attributable to the hazardous waste per million Btu heat input from the hazardous waste;

(ii) Emissions in excess of 110 μg/dscm, combined emissions, corrected to 7 percent oxygen;

(5) *Carbon monoxide and hydrocarbons.* (i) Carbon monoxide in excess of 100 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis and corrected to 7 percent oxygen. If you elect to comply with this carbon monoxide standard rather than the hydrocarbon standard under paragraph (a)(5)(ii) of this section, you also must document that, during the destruction and removal efficiency (DRE) test runs or their equivalent as provided by § 63.1206(b)(7), hydrocarbons do not exceed 20 parts per million by volume during those runs, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane; or

(ii) Hydrocarbons in excess of 20 parts per million by volume, over an hourly rolling average, dry basis, corrected to 7 percent oxygen, and reported as propane;

(6) Hydrogen chloride and chlorine gas in excess of 600 parts per million by volume, combined emissions, expressed as a chloride ($Cl^{(-)}$) equivalent, dry basis and corrected to 7 percent oxygen; and

(7) Particulate matter emissions in excess of 0.025 gr/dscf, corrected to 7 percent oxygen.

(b) *Emission and hazardous waste feed limits for new sources.* You must not discharge or cause combustion gases to be emitted into the atmosphere or feed hazardous waste that contain:

(1) For dioxins and furans, either:

(i) Emissions in excess of 0.20 ng TEQ/dscm corrected to 7 percent oxygen; or

(ii) Rapid quench of the combustion gas temperature at the exit of the (last) combustion chamber (or exit of any waste heat recovery system that immediately follows the last combustion chamber) to 400°F or lower based on the average of the test run average temperatures. You must also notify in writing the RCRA authority that you are complying with this option;

(2) For mercury, either:

(i) Emissions in excess of 120 μg/dscm, corrected to 7 percent oxygen; or

(ii) A hazardous waste feedrate corresponding to a maximum theoretical emission concentration (MTEC) in excess of 120 μg/dscm;

(3) For cadmium and lead, both:

(i) Emissions in excess of 3.7×10^{-5} lbs combined emissions of cadmium and lead attributable to the hazardous waste per million Btu heat input from the hazardous waste; and

(ii) Emissions in excess of 43 μg/dscm, combined emissions, corrected to 7 percent oxygen;

(4) For arsenic, beryllium, and chromium, both:

(i) In excess of 3.3×10^{-5} lbs combined emissions of arsenic, beryllium, and chromium attributable to the hazardous waste per million Btu heat input from the hazardous waste;

(ii) Emissions in excess of 110 μg/dscm, combined emissions, corrected to 7 percent oxygen;

(5) *Carbon monoxide and hydrocarbons.* (i) Carbon monoxide in excess of 100 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis and corrected to 7 percent oxygen. If you elect to comply with this carbon monoxide standard rather than the hydrocarbon standard under paragraph (b)(5)(ii) of this section, you also must document that, during the destruction and removal efficiency (DRE) test runs or their equivalent as provided by § 63.1206(b)(7), hydrocarbons do not exceed 20 parts per million by volume during those runs, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane; or

(ii) Hydrocarbons in excess of 20 parts per million by volume, over an hourly rolling average, dry basis, corrected to 7 percent oxygen, and reported as propane;

(6) Hydrogen chloride and chlorine gas in excess of 600 parts per million by volume, combined emissions, expressed as a chloride ($Cl^{(-)}$) equivalent, dry basis and corrected to 7 percent oxygen; and

(7) Particulate matter emissions in excess of 0.0098 gr/dscf corrected to 7 percent oxygen.

(c) *Destruction and removal efficiency (DRE) standard.* (1) *99.99% DRE.* Except as provided in paragraph (c)(2) of this section, you must achieve a destruction and removal efficiency (DRE) of 99.99% for each principal organic hazardous constituent (POHC) designated under paragraph (c)(3) of this section. You must calculate DRE for each POHC from the following equation:

$$DRE = [1 - (W_{out} / Win)] \times 100\%$$

Where:

W_{in} = mass feedrate of one POHC in a waste feedstream; and

W_{out} = mass emission rate of the same POHC present in exhaust emissions prior to release to the atmosphere.

(2) *99.9999% DRE.* If you burn the dioxin-listed hazardous wastes F020, F021, F022, F023, F026, or F027 (see § 261.31 of this chapter), you must achieve a destruction and removal efficiency (DRE) of 99.9999% for each POHC that you designate under paragraph (c)(3) of this section. You must demonstrate this DRE performance on POHCs that are more difficult to incinerate than tetra-, penta-, and hexachlorodibenzo-dioxins and dibenzofurans. You must use the equation in paragraph (c)(1) of this section to calculate DRE for each POHC. In addition, you must notify the Administrator of your intent to burn hazardous wastes F020, F021, F022, F023, F026, or F027.

(3) *Principal organic hazardous constituents (POHCs).* (i) You must treat each POHC in the waste feed that you specify under paragraph (c)(3)(ii) of this section to the extent required by paragraphs (c)(1) and (c)(2) of this section.

(ii) You must specify one or more POHCs that are representative of the most difficult to destroy organic compounds in your hazardous waste feedstream. You must base this specification on the degree of difficulty of incineration of the organic constituents in the hazardous waste and on their concentration or mass in the hazardous waste feed, considering the results of hazardous waste analyses or other data and information.

(d) *Significant figures.* The emission limits provided by paragraphs (a) and (b) of this section are presented with two significant figures. Although you must perform intermediate calculations using at least three significant figures, you may round the resultant emission levels to two significant figures to document compliance.

PART 260—HAZARDOUS WASTE MANAGEMENT SYSTEM: GENERAL

■ 1. The authority citation for part 260 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921–6927, 6930, 6934, 6935, 6937, 6938, 6939, and 6974.

■ 2. Section 260.11 is amended by

■ a. Revising the first sentence in paragraph (a).

■ b. Revising paragraph (c)(1).

The revisions and additions read as follows:

§ 260.11 References.

(a) When used in parts 260 through 268 of this chapter, the following publications are incorporated by reference. * * *

* * * * *

(c) * * *

(1) ''APTI Course 415: Control of Gaseous Emissions,'' EPA Publication EPA–450/2–81–005, December 1981, IBR approved for §§ 264.1035 and 265.1035.

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PART 264—STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

■ 1. The authority citation for part 264 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6924, 6925, 6927, 6928(h), and 6974.

■ 2. Section 264.340 is amended by revising the first sentence of paragraph (b)(1) and adding paragraph (b)(5) to read as follows:

§ 264.340 Applicability.

* * * * *

(b) * * * (1) Except as provided by paragraphs (b)(2) through (b)(5) of this section, the standards of this part do not apply to a new hazardous waste incineration unit that becomes subject to RCRA permit requirements after October 12, 2005; or no longer apply when an owner or operator of an existing hazardous waste incineration unit demonstrates compliance with the maximum achievable control technology (MACT) requirements of part 63, subpart EEE, of this chapter by conducting a comprehensive performance test and submitting to the Administrator a Notification of Compliance under §§ 63.1207(j) and 63.1210(d) of this chapter documenting compliance with the requirements of part 63, subpart EEE, of this chapter. * * *

* * * * *

(5) The particulate matter standard of § 264.343(c) remains in effect for incinerators that elect to comply with the alternative to the particulate matter standard of §§ 63.1206(b)(14) and 63.1219(e) of this chapter.

* * * * *

PART 265—INTERIM STATUS STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

■ 1. The authority citation for part 265 continues to read as follows:

Authority: 42 U.S.C. 6905, 6906, 6912, 6922, 6923, 6924, 6925, 6935, 6936, and 6937.

■ 2. Section 265.340 is amended by revising paragraph (b)(1) to read as follows:

§ 265.340 Applicability.

* * * * *

(b) * * * (1) Except as provided by paragraphs (b)(2) and (b)(3) of this section, the standards of this part no longer apply when an owner or operator

demonstrates compliance with the maximum achievable control technology (MACT) requirements of part 63, subpart EEE, of this chapter by conducting a comprehensive performance test and submitting to the Administrator a Notification of Compliance under §§ 63.1207(j) and 63.1210(d) of this chapter documenting compliance with the requirements of part 63, subpart EEE, of this chapter.

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PART 266—STANDARDS FOR THE MANAGEMENT OF SPECIFIC HAZARDOUS WASTES AND SPECIFIC TYPES OF HAZARDOUS WASTE MANAGEMENT FACILITIES

■ 1. The authority citation for part 266 continues to read as follows:

Authority: 42 U.S.C. 1006, 2002(a), 3001–3009, 3014, 6905, 6906, 6912, 6921, 6922, 6924–6927, 6934, and 6937.

■ 2. Section 266.100 is amended by revising the first sentence of paragraph (b)(1) and adding paragraphs (b)(3) and (b)(4) to read as follows:

§ 266.100 Applicability.

* * * * *

(b) * * * (1) Except as provided by paragraphs (b)(2), (b)(3), and (b)(4) of this section, the standards of this part do not apply to a new hazardous waste boiler or industrial furnace unit that becomes subject to RCRA permit requirements after October 12, 2005; or no longer apply when an owner or operator of an existing hazardous waste boiler or industrial furnace unit demonstrates compliance with the maximum achievable control technology (MACT) requirements of part 63, subpart EEE, of this chapter by conducting a comprehensive performance test and submitting to the Administrator a Notification of Compliance under §§ 63.1207(j) and 63.1210(d) of this chapter documenting compliance with the requirements of part 63, subpart EEE, of this chapter.

* * *

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(3) If you own or operate a boiler or hydrochloric acid production furnace that is an area source under § 63.2 of this chapter and you elect not to comply with the emission standards under §§ 63.1216, 63.1217, and 63.1218 of this chapter for particulate matter, semivolatile and low volatile metals, and total chlorine, you also remain subject to:

(i) Section 266.105—Standards to control particulate matter;

(ii) Section 266.106—Standards to control metals emissions, except for mercury; and

(ii) Section 266.107—Standards to control hydrogen chloride and chlorine gas.

(4) The particulate matter standard of § 266.105 remains in effect for boilers that elect to comply with the alternative to the particulate matter standard under §§ 63.1216(e) and 63.1217(e) of this chapter.

* * * * *

PART 270—EPA ADMINISTERED PERMIT PROGRAMS: THE HAZARDOUS WASTE PERMIT PROGRAM

■ 1. The authority citation for part 270 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912, 6924, 6925, 6927, 6939, and 6974.

■ 2. Section 270.6 is revised to read as follows:

§ 270.6 References.

(a) When used in part 270 of this chapter, the following publications are incorporated by reference. These incorporations by reference were approved by the Director of the Federal Register pursuant to 5 U.S.C. 552(a) and 1 CFR part 51. These materials are incorporated as they exist on the date of approval and a notice of any change in these materials will be published in the **Federal Register**. Copies may be inspected at the Library, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., (3403T), Washington, DC 20460, *libraryhq@epa.gov*; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(b) The following materials are available for purchase from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161, (703) 605–6000 or (800) 553–6847; or for purchase from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 512–1800:

(1) ''APTI Course 415: Control of Gaseous Emissions,'' EPA Publication EPA–450/2–81–005, December 1981, IBR approved for §§ 270.24 and 270.25.

(2) [Reserved].

■ 3. Section 270.10 is amended by adding paragraph (l) to read as follows:

§ 270.10 General application requirements.

* * * * *

(l) If the Director concludes, based on one or more of the factors listed in paragraph (l)(1) of this section that compliance with the standards of 40 CFR part 63, subpart EEE alone may not be protective of human health or the environment, the Director shall require the additional information or assessment(s) necessary to determine whether additional controls are necessary to ensure protection of human health and the environment. This includes information necessary to evaluate the potential risk to human health and/or the environment resulting from both direct and indirect exposure pathways. The Director may also require a permittee or applicant to provide information necessary to determine whether such an assessment(s) should be required.

(1) The Director shall base the evaluation of whether compliance with the standards of 40 CFR part 63, subpart EEE alone is protective of human health or the environment on factors relevant to the potential risk from a hazardous waste combustion unit, including, as appropriate, any of the following factors:

(i) Particular site-specific considerations such as proximity to receptors (such as schools, hospitals, nursing homes, day care centers, parks, community activity centers, or other potentially sensitive receptors), unique dispersion patterns, etc.;

(ii) Identities and quantities of emissions of persistent, bioaccumulative or toxic pollutants considering enforceable controls in place to limit those pollutants;

(iii) Identities and quantities of nondioxin products of incomplete combustion most likely to be emitted and to pose significant risk based on known toxicities (confirmation of which should be made through emissions testing);

(iv) Identities and quantities of other off-site sources of pollutants in proximity of the facility that significantly influence interpretation of a facility-specific risk assessment;

(v) Presence of significant ecological considerations, such as the proximity of a particularly sensitive ecological area;

(vi) Volume and types of wastes, for example wastes containing highly toxic constituents;

(vii) Other on-site sources of hazardous air pollutants that significantly influence interpretation of the risk posed by the operation of the source in question;

(viii) Adequacy of any previously conducted risk assessment, given any subsequent changes in conditions likely to affect risk; and

(ix) Such other factors as may be appropriate.

(2) [Reserved]

■ 4. Section 270.19 is amended by revising paragraph (e) to reads as follows:

§ 270.19 Specific part B information requirements for incinerators.

* * * * *

(e) When an owner or operator of a hazardous waste incineration unit becomes subject to RCRA permit requirements after October 12, 2005, or when an owner or operator of an existing hazardous waste incineration unit demonstrates compliance with the air emission standards and limitations in part 63, subpart EEE, of this chapter (*i.e.*, by conducting a comprehensive performance test and submitting a Notification of Compliance under §§ 63.1207(j) and 63.1210(d) of this chapter documenting compliance with all applicable requirements of part 63, subpart EEE, of this chapter), the requirements of this section do not apply, except those provisions the Director determines are necessary to ensure compliance with §§ 264.345(a) and 264.345(c) of this chapter if you elect to comply with § 270.235(a)(1)(i) to minimize emissions of toxic compounds from startup, shutdown, and malfunction events. Nevertheless, the Director may apply the provisions of this section, on a case-by-case basis, for purposes of information collection in accordance with §§ 270.10(k), 270.10(l), 270.32(b)(2), and 270.32(b)(3).

■ 5. Section 270.22 is amended by revising the introductory text to read as follows:

§ 270.22 Specific part B information requirements for boilers and industrial furnaces burning hazardous waste.

When an owner or operator of a cement kiln, lightweight aggregate kiln, solid fuel boiler, liquid fuel boiler, or hydrochloric acid production furnace becomes subject to RCRA permit requirements after October 12, 2005, or when an owner or operator of an existing cement kiln, lightweight aggregate kiln, solid fuel boiler, liquid fuel boiler, or hydrochloric acid production furnace demonstrates compliance with the air emission standards and limitations in part 63, subpart EEE, of this chapter (*i.e.*, by conducting a comprehensive performance test and submitting a Notification of Compliance under §§ 63.1207(j) and 63.1210(d) of this chapter documenting compliance with all applicable requirements of part 63, subpart EEE, of this chapter), the requirements of this section do not apply. The requirements of this section do apply, however, if the Director determines certain provisions are necessary to ensure compliance with §§ 266.102(e)(1) and 266.102(e)(2)(iii) of this chapter if you elect to comply with § 270.235(a)(1)(i) to minimize emissions of toxic compounds from startup, shutdown, and malfunction events; or if you are an area source and elect to comply with the §§ 266.105, 266.106, and 266.107 standards and associated requirements for particulate matter, hydrogen chloride and chlorine gas, and non-mercury metals; or the Director determines certain provisions apply, on a case-by-case basis, for purposes of information collection in accordance with §§ 270.10(k), 270.10(l), 270.32(b)(2), and 270.32(b)(3).

* * * * *

■ 6. Section 270.24 is amended by revising paragraph (d)(3) to read as follows:

§ 270.24 Specific part B information requirements for process vents.

* * * * *

(d) * * *

(3) A design analysis, specifications, drawings, schematics, and piping and instrumentation diagrams based on the appropriate sections of ''APTI Course 415: Control of Gaseous Emissions'' (incorporated by reference as specified in § 270.6) or other engineering texts acceptable to the Regional Administrator that present basic control device information. The design analysis shall address the vent stream characteristics and control device operation parameters as specified in § 264.1035(b)(4)(iii).

* * * * *

■ 7. Section 270.25 is amended by revising paragraph (e)(3) to read as follows:

§ 270.25 Specific part B information requirements for equipment.

* * * * *

(e) * * *

(3) A design analysis, specifications, drawings, schematics, and piping and instrumentation diagrams based on the appropriate sections of ''APTI Course 415: Control of Gaseous Emissions'' (incorporated by reference as specified in § 270.6) or other engineering texts acceptable to the Regional Administrator that present basic control device information. The design analysis shall address the vent stream characteristics and control device operation parameters as specified in § 264.1035(b)(4)(iii).

* * * * *

■ 8. Section 270.32 is amended by adding paragraph (b)(3) to read as follows:

§ 270.32 Establishing permit conditions.

* * * * *

(b) * * *

(3) If, as the result of an assessment(s) or other information, the Administrator or Director determines that conditions are necessary in addition to those required under 40 CFR parts 63, subpart EEE, 264 or 266 to ensure protection of human health and the environment, he shall include those terms and conditions in a RCRA permit for a hazardous waste combustion unit.

* * * * *

■ 9. Section 270.42 is amended by:
■ a. Revising paragraph (j)(1).
■ b. Redesignating paragraph (j)(2) as (j)(3).
■ c. Adding new paragraph (j)(2).
■ d. Adding new paragraph (k); and
■ e. Adding a new entry 10 in numerical order in the table under section L of Appendix I.

The revisions and additions read as follows:

§ 270.42 Permit modification at the request of the permittee.

* * * * *

(j) * * *

(1) Facility owners or operators must have complied with the Notification of Intent to Comply (NIC) requirements of 40 CFR 63.1210 that were in effect prior to October 11, 2000, (See 40 CFR part 63 §§ 63.1200–63.1499 revised as of July 1, 2000) in order to request a permit modification under this section for the purpose of technology changes needed to meet the standards under 40 CFR 63.1203, 63.1204, and 63.1205.

(2) Facility owners or operators must comply with the Notification of Intent to Comply (NIC) requirements of 40 CFR 63.1210(b) and 63.1212(a) before a permit modification can be requested under this section for the purpose of technology changes needed to meet the 40 CFR 63.1215, 63.1216, 63.1217, 63.1218, 63.1219, 63.1220, and 63.1221 standards promulgated on October 12, 2005.

* * * * *

(k) *Waiver of RCRA permit conditions in support of transition to the part 63 MACT standards.* (1) You may request to have specific RCRA operating and emissions limits waived by submitting a Class 1 permit modification request under Appendix I of this section, section L(10). You must:

(i) Identify the specific RCRA permit operating and emissions limits which you are requesting to waive;

(ii) Provide an explanation of why the changes are necessary in order to minimize or eliminate conflicts between the RCRA permit and MACT compliance; and

(iii) Discuss how the revised provisions will be sufficiently protective.

(iv) The Director shall approve or deny the request within 30 days of receipt of the request. The Director may, as his or her discretion, extend this 30 day deadline one time for up to 30 days by notifying the facility owner or operator.

(2) To request this modification in conjunction with MACT performance testing where permit limits may only be waived during actual test events and pretesting, as defined under 40 CFR 63.1207(h)(2)(i) and (ii), for an aggregate time not to exceed 720 hours of operation (renewable at the discretion of the Administrator) you must:

(i) Submit your modification request to the Director at the same time you submit your test plans to the Administrator; and

(ii) The Director may elect to approve or deny the request continent upon approval of the test plans.

* * * * *

Appendix I to § 270.42—Classification of Permit Modification

Modifications	Class
* * * * * * *	
L. * * *	[1] 1
10. Changes to RCRA permit provisions needed to support transition to 40 CFR part 63 (Subpart EEE—National Emission Standards for Hazardous Air Pollutants From Hazardous Waste Combustors), provided the procedures of § 270.42(k) are followed..	
* * * * * * *	

[1] Class 1 modifications requiring prior Agency approval.

* * * * *

■ 10. Section 270.62 is amended by revising the introductory text to read as follows:

§ 270.62 Hazardous waste incinerator permits.

When an owner or operator of a hazardous waste incineration unit becomes subject to RCRA permit requirements after October 12, 2005, or when an owner or operator of an existing hazardous waste incineration unit demonstrates compliance with the air emission standards and limitations in part 63, subpart EEE, of this chapter (*i.e.*, by conducting a comprehensive performance test and submitting a Notification of Compliance under §§ 63.1207(j) and 63.1210(d) of this chapter documenting compliance with all applicable requirements of part 63, subpart EEE, of this chapter), the requirements of this section do not apply, except those provisions the Director determines are necessary to ensure compliance with §§ 264.345(a) and 264.345(c) of this chapter if you elect to comply with § 270.235(a)(1)(i) to minimize emissions of toxic compounds from startup, shutdown, and malfunction events. Nevertheless, the Director may apply the provisions of this section, on a case-by-case basis, for purposes of information collection in accordance with §§ 270.10(k), 270.10(l), 270.32(b)(2), and 270.32(b)(3).

* * * * *

■ 11. Section 270.66 is amended by revising the introductory text to read as follows:

§ 270.66 Permits for boilers and industrial furnaces burning hazardous waste.

When an owner or operator of a cement kiln, lightweight aggregate kiln, solid fuel boiler, liquid fuel boiler, or hydrochloric acid production furnace becomes subject to RCRA permit requirements after October 12, 2005 or when an owner or operator of an existing cement kiln, lightweight aggregate kiln, solid fuel boiler, liquid fuel boiler, or hydrochloric acid production furnace demonstrates compliance with the air emission standards and limitations in part 63, subpart EEE, of this chapter (*i.e.*, by conducting a comprehensive performance test and submitting a Notification of Compliance under §§ 63.1207(j) and 63.1210(d) of this chapter documenting compliance with all applicable requirements of part 63, subpart EEE, of this chapter), the requirements of this section do not apply. The requirements of this section do apply, however, if the Director determines certain provisions are necessary to ensure compliance with §§ 266.102(e)(1) and 266.102(e)(2)(iii) of this chapter if you elect to comply with § 270.235(a)(1)(i) to minimize emissions of toxic compounds from startup, shutdown, and malfunction events; or if you are an area source and elect to comply with the §§ 266.105, 266.106, and 266.107 standards and associated requirements for particulate matter, hydrogen chloride and chlorine gas, and non-mercury metals; or the Director determines certain provisions apply, on a case-by-case basis, for purposes of information collection in accordance with §§ 270.10(k), 270.10(l), 270.32(b)(2), and 270.32(b)(3).

* * * * *

■ 12. Section 270.235 is amended by:

■ a. Revising the section heading and paragraphs (a)(1) introductory text and (a)(2) introductory text.

■ b. Revising paragraphs (b)(1) introductory text and (b)(2).

■ c. Adding new paragraph (c).

The revisions read as follows:

* * * * *

§ 270.235 Options for incinerators, cement kilns, lightweight aggregate kilns, solid fuel boilers, liquid fuel boilers and hydrochloric acid production furnaces to minimize emissions from startup, shutdown, and malfunction events.

(a) * * * (1) *Revisions to permit conditions after documenting compliance with MACT.* The owner or operator of a RCRA-permitted incinerator, cement kiln, lightweight aggregate kiln, solid fuel boiler, liquid fuel boiler, or hydrochloric acid production furnace may request that the Director address permit conditions that minimize emissions from startup, shutdown, and malfunction events under any of the following options when requesting removal of permit conditions that are no longer applicable according to §§ 264.340(b) and 266.100(b) of this chapter:

* * * * *

(2) *Addressing permit conditions upon permit reissuance.* The owner or operator of an incinerator, cement kiln, lightweight aggregate kiln, solid fuel boiler, liquid fuel boiler, or hydrochloric acid production furnace that has conducted a comprehensive performance test and submitted to the Administrator a Notification of Compliance documenting compliance with the standards of part 63, subpart EEE, of this chapter may request in the application to reissue the permit for the combustion unit that the Director control emissions from startup,

shutdown, and malfunction events under any of the following options:

* * * * *

(b) * * * (1) *Interim status operations.* In compliance with §§ 265.340 and 266.100(b), the owner or operator of an incinerator, cement kiln, lightweight aggregate kiln, solid fuel boiler, liquid fuel boiler, or hydrochloric acid production furnace that is operating under the interim status standards of part 265 or 266 of this chapter may control emissions of toxic compounds during startup, shutdown, and malfunction events under either of the following options after conducting a comprehensive performance test and submitting to the Administrator a Notification of Compliance documenting compliance with the standards of part 63, subpart EEE, of this chapter.

* * * * *

(2) *Operations under a subsequent RCRA permit.* When an owner or operator of an incinerator, cement kiln, lightweight aggregate kiln, solid fuel boiler, liquid fuel boiler, or hydrochloric acid production furnace that is operating under the interim status standards of parts 265 or 266 of this chapter submits a RCRA permit application, the owner or operator may request that the Director control emissions from startup, shutdown, and malfunction events under any of the options provided by paragraphs (a)(2)(i), (a)(2)(ii), or (a)(2)(iii) of this section.

(c) *New units.* Hazardous waste incinerator, cement kiln, lightweight aggregate kiln, solid fuel boiler, liquid fuel boiler, or hydrochloric acid production furnace units that become subject to RCRA permit requirements after October 12, 2005 must control emissions of toxic compounds during startup, shutdown, and malfunction events under either of the following options:

(1) Comply with the requirements specified in § 63.1206(c)(2) of this chapter; or

(2) Request to include in the RCRA permit, conditions that ensure emissions of toxic compounds are minimized from startup, shutdown, and malfunction events, including releases from emergency safety vents, based on review of information including the source's startup, shutdown, and malfunction plan and design. The director will specify that these permit conditions apply only when the facility is operating under its startup, shutdown, and malfunction plan.

PART 271—REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE PROGRAMS

■ 1. The authority citation for part 271 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), and 6926.

■ 2. Section 271.1(j) is amended by adding the following entries to Table 1 in chronological order by date of publication in the **Federal Register**, to read as follows:

§ 271.1 Purpose and scope.

* * * * *

(j) * * *

TABLE 1.—REGULATIONS IMPLEMENTING THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984

Promulgation date	Title of Reglation	**Federal Register** reference	Effective date
*	*	*	*
Oct. 12, 2005	Standards for Hazardous Air Pollutants for Hazardous Waste Combustors.	[Insert FR page numbers]	Oct. 12, 2005.

[FR Doc. 05–18824 Filed 10–11–05; 8:45 am]

BILLING CODE 6560–50–P

Federal Register

Wednesday,
October 12, 2005

Part III

Environmental Protection Agency

40 CFR Part 51

Prevention of Significant Deterioration for Nitrogen Oxides; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 51

[AD–FRL–7981–1; E–Docket ID No. OAR–2004–0013 (Legacy Docket No. A–87–16)]

RIN–2060–AM33

Prevention of Significant Deterioration for Nitrogen Oxides

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In today's final action, EPA is retaining the existing nitrogen dioxide (NO_2) increments as part of the Agency's regulations for the Prevention of Significant Deterioration (PSD) of air quality from emissions of nitrogen oxides (NO_X). These regulations are designed to preserve the air quality in national parks and other areas that are meeting the national ambient air quality standards (NAAQS) for NO_2 (hereafter called the NO_2 NAAQS). EPA reevaluated the original NO_2 increments in response to a 1990 court ruling that directed the Agency to consider and harmonize the statutory criteria for establishing PSD regulations for NO_X contained in sections 166(c) and 166(d) of the Clean Air Act (CAA or Act). EPA is also amending its PSD regulations to clarify that States otherwise meeting these requirements of the Act may obtain approval to employ alternative approaches to the existing increments for NO_2. Under a separate action, we will be publishing a Supplemental Notice of Proposed Rulemaking (SNPR) to show how implementation of the model cap and trade program under the 2005 Clean Air Interstate Rule (CAIR) can meet the requirements for a State to use this approach in lieu of the existing NO_2 increments in order to prevent significant deterioration of air quality from emissions of NO_X.

DATES: This final rule is effective on November 14, 2005.

ADDRESSES: EPA has established a docket for this action under Docket ID No. OAR–2004–0013. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket*. Although listed in the index, some information may not be publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Air Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Mr. Dan deRoeck, Information Transfer and Program Integration Division (C339–03), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, telephone (919) 541–5593, fax (919) 541–5509, or e-mail at *deroeck.dan@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

Entities affected by this rule include sources in all industry groups. The majority of sources potentially affected are expected to be in the following groups:

Industry group	SIC [a]	NAICS [b]
Electric Services	491	221111, 221112, 221113, 221119, 221121, 221122
Petroleum Refining	291	324110
Industrial Inorganic Chemicals	281	325181, 325120, 325131, 325182, 211112, 325998, 331311, 325188
Industrial Organic Chemicals	286	325110, 325132, 325192, 325188, 325193, 325120, 325199
Miscellaneous Chemical Products	289	325520, 325920, 325910, 325182, 325510
Natural Gas Liquids	132	211112
Natural Gas Transport	492	486210, 221210
Pulp and Paper Mills	261	322110, 322121, 322122, 322130
Paper Mills	262	322121, 322122
Automobile Manufacturing	371	336111, 336112, 336211, 336992, 336322, 336312, 336330, 336340, 336350, 336399, 336212, 336213
Pharmaceuticals	283	325411, 325412, 325413, 325414

[a] Standard Industrial Classification.
[b] North American Industry Classification System.

Entities affected by the rule also include States, local permitting authorities, and Indian tribes whose lands contain new and modified major stationary sources.

B. Where Can I Obtain Additional Information?

In addition to being available in the docket, an electronic copy of today's final rule is also available on the World Wide Web. Following signature by the EPA Administrator, a copy of today's final rule will be posted on the EPA's New Source Review (NSR) Web site, under Regulations & Standards, at *http://www.epa.gov/nsr/index.html*.

C. How is This Preamble Organized?

The information presented in this preamble is organized as follows:

I. General Information
A. Does This Action Apply to Me?

B. Where Can I Obtain Additional Information?
C. How Is This Preamble Organized?
II. Background
A. PSD Program
B. Existing PSD Increment System for NO_X
C. SIP Requirements for Implementing PSD Program
D. Court Challenge to Increments for NO_X
III. Overview of Today's Final Action
A. What We Proposed
B. Final Action and Differences From Proposal
IV. Legal Basis for Final Action
A. Clean Air Act Provisions and Court Opinion
1. Applicable Statutory Provisions
2. Opinion of the Court in *EDF* v. *EPA*
B. EPA's Interpretation of Section 166 of the Act
1. Regulations As a Whole Should Fulfill Statutory Requirements
2. Contingent Safe Harbor Approach
3. The Statutory Factors Applicable Under Section 166(c)
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5. Authority for States To Adopt Alternatives To Increment
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B. Scope of Our Analysis
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1. Health Effects
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VI. Final Actions
A. Retain Existing Increment System for NO_X
1. Existing Characteristics of the Regulatory Scheme Fulfill Statutory Criteria
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1. States May Adopt ''Other Measures'' That Fulfill Section 166 of the Act
2. EPA Is Not Adopting Elements of Option 3
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VII. Measures Not Proposed as Options
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A. Executive Order 12866—Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act (RFA)
D. Unfunded Mandates Reform Act
E. Executive Order 13132—Federalism
F. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045—Protection of Children From Environmental Health and Safety Risks
H. Executive Order 13211—Actions That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898—Federal Actions To Address Environmental Justice in Minority Populations and Low-income Populations
K. Congressional Review Act

II. Background

A. PSD Program

Part C of title I of the Act contains the requirements for a component of the major new source review (NSR) program known as the Prevention of Significant Deterioration (PSD) program. This program sets forth procedures for the preconstruction review and permitting of new and modified major stationary sources of air pollution locating in areas meeting the NAAQS, *i.e.*, ''attainment'' areas, or in areas for which there is insufficient information to classify an area as either attainment or nonattainment, *i.e.*, ''unclassifiable'' areas.

The applicability of the PSD program to a particular source must be determined in advance of construction and is pollutant-specific. Once a source is determined to be subject to PSD, it must undertake a series of analyses to demonstrate that it will use the best available control technology (BACT) and will not cause or contribute to a violation of any NAAQS or incremental ambient pollutant concentration increase. In cases where the source's emissions may adversely affect an area classified as a Class I area, additional review is conducted to protect the increments and special attributes of such an area defined as ''air quality related values'' (AQRV).

When the permitting authority reaches a preliminary decision to authorize construction of each proposed major new source or major modification, it must provide notice of the preliminary decision and an opportunity for comment by the general public, industry, and other persons that may be affected by the major source or major modification. After considering and responding to the comments, the permitting authority may issue a final determination on the construction permit in accordance with the PSD regulations.

B. Existing PSD Increment System for NO_X

On October 17, 1988, EPA promulgated pollutant-specific PSD regulations for NO_X under section 166 of the CAA. 53 FR 40656. As part of these regulations, the EPA decided to establish NO_2 increments following the pattern enacted by Congress for the particulate matter (PM) and sulfur dioxide (SO_2) increments. These increments establish maximum increases in ambient air concentrations of NO_2 (expressed in micrograms per cubic meter ($\mu g/m^3$)) allowed in a PSD area over a baseline concentration. Emissions increases from both stationary and mobile sources are considered in the consumption of the NO_2 increments which are implemented through the PSD permitting provisions in 40 CFR parts 51 and 52.

The NO_2 increment system includes the three-tiered area classification system originally established by Congress in section 163 for the statutory increments for SO_2 and PM. Congress designated Class I areas (including certain national parks and wilderness areas) as areas of special national concern, where the need to prevent air quality deterioration is the greatest. Consequently, the allowable level of incremental change in air quality is smallest, *i.e.*, most stringent, in Class I areas. Congress initially established as Class II all areas not specifically designated in the Act as Class I areas. The increments of Class II areas are less stringent than those of the Class I areas and allow for a moderate degree of emissions growth. For future redesignation purposes, Congress defined as Class III any existing Class II area for which a State may desire to promote higher levels of industrial development (and emissions growth). Thus, Class III areas are allowed to have the greatest amount of pollutant increase while still achieving the NAAQS. There have been no Class III redesignations to date.

EPA based the levels of the original NO_2 increments for the three area classifications on the percentage-of-NAAQS approach that Congress used to define the increments in the Act for SO_2 and PM. Congress used different percentages of the NAAQS to calculate the Class I increments for PM and SO_2. For the NO_2 increments, we chose the percentage that Congress used for SO_2. This decision yielded a lower numerical value for the Class I NO_2 increment than would have resulted by using the PM percentages.

The existing Class I NO_2 increment is 2.5 $\mu g/m^3$ (annual average), a level of 2.5 percent of the NO_2 NAAQS. It is based on the Class I SO_2 increment, which is set at the same percentage (2.5 percent) of the SO_2 annual NAAQS. The Class II NO_2 increment is 25 $\mu g/m^3$ − 25 percent of the NO_2 NAAQS. The Class III NO_2 increment is 50 $\mu g/m^3$ − 50 percent of the NO_2 NAAQS.

C. SIP Requirements for Implementing PSD Program

Air quality planning requirements for new and modified stationary sources of air pollution are an integral part of the PSD program. States must develop, adopt, and submit to EPA for approval a State Implementation Plan (SIP) that contains emission limitations and other

control measures to attain and maintain the NAAQS and to meet other requirements of section 110(a) of the Act. Each SIP must contain a preconstruction review program for the construction and modification of any stationary source of air pollution to assure that the NAAQS are achieved and maintained. Further, each SIP must: protect areas of clean air; not interfere with any other State's NAAQS maintenance; protect AQRVs, including visibility, in national parks and other natural areas of special concern; assure that appropriate emissions controls are applied; maximize opportunities for economic development consistent with the preservation of clean air resources; and ensure that any decision to increase air pollution is made only after full public consideration of all the consequences of such a decision.

D. Court Challenge to Increments for NO_X

EPA's original NO_2 increments were challenged in 1988 by the Environmental Defense Fund (now Environmental Defense, or ''ED'') when ED filed suit in the U.S. Court of Appeals for the District of Columbia Circuit against the Administrator (*Environmental Defense Fund, Inc.* v. *Reilly*, No. 88–1882). ED successfully argued that EPA failed to sufficiently consider certain provisions in section 166 of the CAA. The court remanded the case to EPA ''to develop an interpretation of section 166 that considers both subsections (c) and (d), and if necessary to take new evidence and modify the regulations.'' *Environmental Defense Fund* v. *EPA*, 898 F.2d 183, 190 (D.C. Cir. 1990) (''*EDF* v. *EPA*''). EPA initiated this action in response to the court decision. We discuss the opinion of the court further below.

III. Overview of Today's Final Action

To ensure protection of the air quality in national parks and other areas that meet the NAAQS for NO_2, EPA is taking final action today on its reevaluation of the Agency's pollutant-specific PSD regulations for NO_X, which include the existing NO_2 increments. We have decided to retain the existing NO_2 increments while also granting States the option to seek approval of alternative approaches that protect parks and prevent significant deterioration of air quality from emissions of NO_X.

A. What We Proposed

In accordance with the directions of a 1990 court ruling, EPA conducted a review of the existing NO_2 increments that are part of the Agency's pollutant-specific PSD regulations for NO_X. We considered and harmonized the statutory criteria, contained in sections 166(c) and 166(d) of the Act, that govern the content of these PSD regulations for NO_X. EPA proposed to apply the statutory criteria using the ''contingent safe harbor'' approach that was suggested by the court as an appropriate way to ensure that EPA's PSD regulations for NO_X will prevent significant deterioration of air quality in parks and other areas that are designated to be in attainment with the NAAQS or are unclassifiable. Applying this legal interpretation, we proposed three options to satisfy the statutory requirements. See 70 FR 8880 (Feb. 23, 2005).

In the first option (option 1) of our February 2005 proposal, EPA proposed to retain the existing regulatory framework and the original, existing increments for NO_2 that the Agency first promulgated in 1988 to protect the air quality in national parks and other areas that meet the NAAQS for NO_2. These increments were established as a percentage of the NAAQS, and were based on the same ambient measure (NO_2) and averaging period (annual) as the NAAQS. We proposed to find that an increment with these characteristics satisfied the minimum requirements of section 166(d) of the Act for preserving the air quality in parks and other attainment and unclassifiable areas. In addition, to address the requirements of section 166(c), we reviewed the existing regulatory framework of the Agency's PSD regulations for NO_X and the scientific and technical information pertaining to the health, welfare, and ecological effects of NO_X. In light of this review, EPA proposed to find that the statutory requirements were met by retaining annual NO_2 increments that are based on the percentages of the NAAQS that Congress employed to set the increments for SO_2. The available research on health and welfare effects indicated that the existing NO_2 increments, in conjunction with the case-by-case permit reviews for additional impacts and impairment of AQRVs, fulfilled the criteria in section 166(c).

In the second option (option 2), we proposed to allow States to prevent significant deterioration of air quality due to emissions of NO_X by adopting an EPA-administered market-based interstate cap and trade program, such as the model cap and trade program for EGUs contained in our CAIR. Under this option, a State that implemented this program to address NO_X emissions would no longer be required to conduct certain source-specific analyses, including the current NO_2 increment analysis. This option would require States to submit revised SIPs that include a cap and trade program to reduce NO_X emissions in accordance with statewide emissions budgets prescribed by EPA. Neither the statewide budget nor the regional cap would be a legally enforceable limit on total NO_X emissions but would be used as an accounting technique to determine the amount of emissions reductions that would be needed from specific source categories to satisfy the budget or cap. The requirements of the cap and trade program would be enforceable, and this would ensure that as long as emissions from sources outside of the cap did not grow more than projected, the overall regionwide budget would be met.

As a third option (option 3), we proposed to allow States to adopt their own planning strategies to meet the requirements of section 166 of the CAA. We proposed to allow a State to forego implementation of the NO_2 increments if the State could demonstrate that measures in its SIP, in conjunction with Federal requirements, would prevent significant deterioration of air quality from emissions of NO_X. Under this option, in lieu of implementing the increment system for NO_X, a State would have to demonstrate that specific planning goals and requirements contained in its SIP would satisfy the requirements in section 166 of the Act and the goals and purposes of the PSD program set forth in section 160. We proposed to require that States establish a clear planning goal that satisfied the requirements of sections 166(c) and 166(d) of the Act. Under this option, EPA did not propose to require a State to demonstrate that its SIP included a specific type of program. However, we indicated that we believed a goal to keep statewide emissions of NO_X from all sources below 1990 levels would prevent significant deterioration of air quality and satisfy the requirements of section 166 of the Act.

B. Final Action and Differences From Proposal

In this final action, we are adopting option 1 of the February 2005 proposal and retaining the existing NO_2 increments along with other parts of the existing framework of pollutant-specific PSD regulations for NO_X. However, we are also amending the text of one of our PSD regulations in order to make clear that States may seek EPA approval of SIPs that utilize an alternative approach to the NO_2 increments if the State can demonstrate that an alternative program satisfies the requirements of sections

166(c) and 166(d) of the CAA and prevents significant deterioration from emissions of NO_X. States have always had the option to submit alternative approaches in their SIPs that can be shown to be more effective than the minimum program elements established by EPA, but this regulatory change is intended to clarify that a system other than increments may be utilized by a State to prevent significant deterioration from emissions of NO_X where the requirements of the CAA are otherwise met.

In options 2 and 3, we proposed to address the requirements of section 166 of the CAA for NO_X through the review and approval of State programs that employed alternative approaches to fulfill the requirements of sections 166(c) and 166(d) of the Act. We are codifying this basic principle in our regulations today without defining any specific type of alternative program that we believe would meet these requirements. We are simply making clear in our regulations that States have the option to continue implementing the NO_2 increment program or to design an alternative approach as part of the SIPs and submit this program to EPA for approval. Rather than promulgating a specific alternative program of the type we proposed in option 2 and option 3, we are allowing States the flexibility to submit any type of alternative for consideration on a case-by-case basis to determine if the alternative meets the requirements of sections 166(c) and 166(d) of the CAA as we interpret these provisions in this final action. We are not establishing any additional regulatory criteria (such as planning goals or emissions inventory requirements) that would govern the review of such a program other than what is already contained within the CAA. Thus, we make no final finding at this time that any particular type of program other than the existing increment framework meets the requirements of sections 166(c) and 166(d) of the CAA. Instead, we plan to make such determinations on a case-by-case basis whenever a State submits an alternative approach for EPA to approve as part of a SIP.

Although we are not adopting a specific cap and trade (option 2) or emissions inventory-based planning program (option 3) at this time, we continue to see promise in using a cap and trade approach modeled on the CAIR to meet the goals of the PSD program for NO_X. As a result, we intend to publish a supplemental notice of proposed rulemaking that builds on option 2 and provides more details on how a State that achieves the NO_X emissions reductions required under CAIR can fulfill the objectives of the PSD program, satisfy the statutory requirements of section 166 of the Act, and obviate the need to implement the NO_2 increments program.

IV. Legal Basis for Final Action

A. Clean Air Act Provisions and Court Opinion

1. Applicable Statutory Provisions

EPA is taking this action in accordance with the requirements of section 166 of the CAA for NO_X. In section 166(a) of the Act, Congress directed EPA to conduct a study and promulgate regulations to prevent significant deterioration of air quality which would result from emission of hydrocarbons, carbon monoxide, photochemical oxidants, and NO_X.

Congress further specified that such regulations meet the following requirements set forth in sections 166(c) and 166(d):

> (c) Such regulations shall provide specific numerical measures against which permit applications may be evaluated, a framework for stimulating improved control technology, protection of air quality values, and fulfill the goals and purposes set forth in section 101 and section 160.
>
> (d) The regulations * * * shall provide specific measures at least as effective as the increments established in section 163 [for SO_2 and PM] to fulfill such goals and purposes, and may contain air quality increments, emission density requirements, or other measures.

The goals and purposes of the PSD program set forth in section 160 are as follows:

> (1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate[d] to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air, notwithstanding attainment and maintenance of all national ambient air quality standards;
>
> (2) to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value;
>
> (3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;
>
> (4) to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and
>
> (5) to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

In addition, the goals and purposes of the CAA described in section 101 of the Act are the following:

> (b) * * * (1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;
>
> (2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;
>
> (3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and
>
> (4) to encourage and assist the development and operation of regional air pollution prevention and control programs [; and]
>
> (c) * * * to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this Act, for pollution prevention.

2. Opinion of the Court in *EDF* v. *EPA*

In its 1990 opinion on the challenge to EPA's 1988 regulations for NO_X, the court held that EPA had satisfied its obligation under section 166(d) but had not sufficiently considered whether different increments should be established under the criteria in section 166(c).

Environmental Defense Fund v. *EPA*, 898 F.2d 183 (D.C. Cir. 1990) (*''EDF* v. *EPA''*). More specifically, the court held that EPA's percentage-of-NAAQS approach for determining the increments satisfied the duty under section 166(d) to promulgate regulations for NO_X that were ''at least as effective'' as the increments in section 163. *Id.* at 188. As to subsection (c), however, the court held that EPA's approach of using the percentage ambient concentrations as a ''proxy'' for meeting the subsection (c) criteria overlooked the language of subsection (c) and turned subsection (c) into an option despite its mandatory wording. Thus, the court remanded the case to EPA ''to develop an interpretation of section 166 that considers both subsections (c) and (d), and if necessary to take new evidence and modify the regulations.'' *Id.* at 190.

The court identified three steps that EPA took to develop PSD regulations for NO_X under section 166. The first two steps reflected EPA's decisions to implement the PSD program for NO_X by adopting regulations for NO_X that employed increments with an area classification system. These first two steps were not controverted in *EDF* v. *EPA*. See 898 F.2d at 184–85. The dispute in the EDF case involved only

the third step, which was EPA's action to establish several characteristics of the increments by reference to the NAAQS. The characteristics that EPA derived from the NAAQS were (1) the level of the increments using the percent-of-NAAQS approach; (2) the time period (annual average) for the increments; and (3) the pollutant (NO_2) for which the increments were established. Since these three characteristics of the increments were the only issues controverted in the *EDF* v. *EPA* case, EPA interprets the court's remand to direct the Agency only to reconsider these three questions. However, in the proposal, we also believed it would be beneficial to consider alternative approaches to an increment system and voluntarily reconsidered the first two steps in the process of developing pollutant-specific PSD regulations for NO_X.

In *EDF* v. *EPA*, the court held that, in light of the criteria in section 166(c), EPA could not use the NAAQS as the sole basis for deriving increments. However, the court held that using the NAAQS as the basis for deriving increments was permissible in determining whether the ''at least as effective'' standard under subsection (d) was met. But, with respect to subsection (c), the court stated: ''We find nothing in the language or legislative history suggesting that this duty [consideration of the goals and purposes of the statute] could be satisfied simply by referencing the NAAQS.'' *Id.* at 190. The court noted the differences between the health and welfare criteria on which the NAAQS are based (sections 108 and 109) and the ''goals and purposes'' of the PSD program set forth in section 160, highlighting the special value the PSD program places on protection of national parks. At the same time, the court recognized that ''[n]evertheless, the ambient standards are the basic measure of air quality under the [Clean Air Act], and the controlling standards by no means exclude any value that is the subject of focus under the PSD provisions.'' *Id.* at 176 (internal citations and quotations omitted). In other words, the court observed that NAAQS remain relevant to the inquiry under section 166 because they are a basic measure of air quality and may indirectly reflect some consideration, among others, of the same values that are the focus of the PSD program. However, the court indicated that we could not rely solely upon the NAAQS to comply with section 166 because this provision directs us to focus on the specific goals and purposes of PSD which are not necessarily the factors that determine the NAAQS under section 109.

Thus, the court directed EPA to reconsider the characteristics of the existing increments in light of the criteria in both sections 166(c) and 166(d). The court indicated that one permissible interpretation for harmonizing subsections (c) and (d) would be to construe subsection (d) as a ''contingent safe harbor'' or presumptive baseline. Thus, increments derived from the NAAQS could be authorized if the Agency were to undertake additional analysis and make a reasoned determination that the criteria under subsection (c) do not call for different increments than the ''safe harbor'' that meets the criteria in subsection (d) of the statute.

B. EPA's Interpretation of Section 166 of the Act

In the February 2005 notice of proposed rulemaking (February 2005 proposal), we responded to the court's opinion by describing in detail how the EPA proposed to interpret and apply the relevant provisions of the CAA in the course of reevaluating the existing PSD regulations for NO_X on remand. 70 FR at 8885–88. Our interpretation is grounded on five central elements. First, we read section 166 of the Act to direct EPA to conduct a holistic analysis that considers how a complete system of regulations will collectively satisfy the applicable criteria, rather than evaluating one individual part of a regulatory scheme in isolation. Second, we adopted the ''contingent safe harbor'' approach suggested by the court which calls for EPA to first establish the minimum level of effectiveness necessary to satisfy section 166(d) and then to conduct further analysis to determine if additional measures are necessary to fulfill the requirements of section 166(c). Third, we interpreted section 166(c) of the Act to identify eight statutory factors that EPA must apply when promulgating pollutant-specific regulations to prevent significant deterioration of air quality. Fourth, we interpreted the requirements to simultaneously satisfy each of these factors to establish a balancing test in cases where certain objectives may be at odds with each other. Fifth, we recognized that the requirements of section 166 may be satisfied by adopting other measures besides an increment and that EPA may allow States to demonstrate that alternatives to increment contained in a SIP meet the requirements of sections 166(c) and 166(d).

We maintain this interpretation in this final action and summarize the main points below. Further discussion of many of these points can be found in the February 2005 proposal. 70 FR at 8885. In addition to reiterating the main points below, the following discussion also clarifies our interpretation in light of several comments that we received.

1. Regulations As a Whole Should Fulfill Statutory Requirements

Commenters did not question our holistic approach, which is grounded on the structure of section 166 of the Act. Section 166(a) directs EPA to develop pollutant-specific regulations to prevent the significant deterioration of air quality. Sections 166(c) and 166(d) provide detail on the contents of those regulations. In order to develop pollutant-specific regulations under subsection (a), EPA must establish an overall regulatory framework for those regulations and fill in specific details around that framework. Thus, EPA interprets section 166 to require that the entire system of PSD regulations for a particular pollutant must, as a whole, satisfy the criteria in sections 166(c) and 166(d).

As a result, when we reevaluated the existing PSD regulations for NO_X, we did not look at increments in isolation, but also considered how these increments work in conjunction with other measures to satisfy the statutory criteria. The other measures that we considered with the increments are the area classification system, AQRV review in Class I areas, additional impacts analysis, and BACT requirements. This approach is consistent with section 166(d), which says that pollutant-specific PSD regulations ''may contain'' increments or ''other measures.''

In option 1 of the proposal, we proposed to retain the increment system and focused our reevaluation on the specific characteristics of the increments (level, time period, and pollutant) in our existing PSD regulations for NO_X. This was because the dispute in *EDF* v. *EPA* involved only EPA's decisions to define the characteristics of the increments for NO_X in relation to the NAAQS. Since the increment and area classification system in EPA's PSD regulations for NO_X was not controverted, we interpreted the court's opinion not to require that the Agency reconsider this basic framework for its PSD regulations for NO_X. Thus, in this action to finalize option 1 of the proposal, we continue to focus on the level, time period, and pollutant employed to establish increments for NO_X. However, under our holistic approach, we considered these characteristics of the increment in conjunction with the other measures

contained in our PSD regulations for NO_X that were not challenged in *EDF* v. *EPA.*

2. Contingent Safe Harbor Approach

Our proposal to harmonize the criteria set forth in sections 166(c) and 166(d) by employing the ''contingent safe harbor'' approach was also not opposed by any commenters. Several commenters took issue with our ultimate decision not to establish increments more stringent than the safe harbor, but no one questioned the analytical approach that we used to harmonize sections 166(c) and 166(d) of the Act.

We continue to believe this is an appropriate reading of the statute. Subsection (c) of section 166 describes the kinds of measures to be contained in the regulations to prevent significant deterioration of air quality called for in section 166(a) and specifies that these regulations are to ''fulfill the goals and purposes'' set forth in sections 160 and 101 of the Act. Then, under subsection (d), to ''fulfill such goals and purposes,'' EPA must promulgate ''specific measures at least as effective as the increments established in section 7473 of this title [section 163 of the Act].'' 42 U.S.C. 7476. Thus, subsection (d) can be construed to require that EPA identify a minimum level of effectiveness, or safe harbor, for the body of pollutant-specific PSD regulations adopted under section 166. Then, subsection (c) may be read to require that EPA conduct further review to determine whether, based on the criteria in subsection (c), EPA's pollutant-specific PSD regulations under section 166 should contain measures that deviate from the minimum ''safe harbor'' identified under subsection (d). As in 1988, we construe subsection (d) to require that the measures be ''at least as stringent'' as the statutory increments set forth in section 163.

When we employ an increment and area classification system in our section 166 PSD regulations, we interpret this language to require that EPA, at minimum, establish increments that are consistent with the statutory increments established by Congress in section 163 of the Act. Thus, we identified the ''safe harbor'' increments for NO_X for each area classification (Class I, II, or III) to be increments established in relation to the NO_2 NAAQS that were set (1) at an equivalent percentage of the NAAQS as the statutory increments; (2) for the same pollutants as the NAAQS; and (3) for the same time period as the NAAQS. We then conducted further review to determine whether these ''safe harbor'' increments, in conjunction with other measures adopted under the PSD program and section 166, sufficiently fulfilled the criteria in subsection (c).

After weighing and balancing the criteria set forth in subsection (c) (and the incorporated goals and purposes of the CAA in section 101 and the PSD program in section 160), we have determined that the ''safe harbor'' increments and associated measures satisfy the criteria in subsection (c) for NO_X. Thus, we are not adopting different increments, additional increments, or additional measures to satisfy the section 166(c) criteria. However, under the contingent safe harbor approach, if we had determined that the ''safe harbor'' increments and other measures did not satisfy the criteria applicable under section 166(c), we would have promulgated additional increments or other measures as part of our pollutant-specific PSD regulations for NO_X under section 166.

3. The Statutory Factors Applicable Under Section 166(c)

We proposed to interpret section 166(c) of the Act to establish eight factors to be considered in the development of PSD regulations for the pollutants covered by this provision. These factors are three of the four criteria listed in section 166(c) and the five goals and purposes identified in section 160 of the Act. The three stand-alone criteria in section 166(c) indicate that PSD regulations for specific pollutants should provide (1) specific numerical measures for evaluating permit applications; (2) a framework for stimulating improved control technology; and (3) protection of air quality values. 42 U.S.C. 7476(c). The five goals and purposes in section 160 are incorporated into the analysis by virtue of the fourth criterion in section 166(c), which directs that EPA's pollutant-specific PSD regulations ''fulfill the goals and purposes'' set forth in sections 160 and 101 of the Act. This fourth criterion in section 166(c) cannot be understood without reference to other parts of the Act. Thus, we construed the term ''fulfill the goals and purposes,'' as used in section 166(c), to mean that EPA should apply the goals and purposes listed in section 160 as factors applicable to pollutant-specific PSD regulations established under section 166.

A few commenters disagreed with our choice of words in an introductory paragraph when we collectively described these eight parts of the Act as ''factors to be considered.'' However, no one disagreed that these eight objectives should be the focus of our analysis. For instance, commenters did not question our decision to emphasize the five goals and purposes in section 160, while looking to the more general goals in section 101 of the Act to provide guidance on the meaning of the more specific goals and purposes of the PSD program in section 160.[1]

In this rulemaking action, we use the term ''factors'' as shorthand to describe the group of eight statutory objectives (three criteria and five goals and purposes) that we believe Congress directed us to achieve in promulgating pollutant-specific PSD regulations under section 166 of the Act. We do not intend for our use of ''factors'' to suggest that EPA does not believe it must satisfy all four criteria in section 166(c), one of which requires that EPA fulfill the five goals and purposes in section 160. The Agency has used the term ''factors'' in this action to avoid confusion when referring to the combination of criteria in section 166(c) and goals and purposes in section 160 that the court directed us to consider further on remand. Regardless of the semantics, our objective is to establish regulations that satisfy each of these factors.

4. Balancing the Factors Applicable Under Section 166(c)

A few commenters questioned our interpretation of the Act to establish a balancing test among many of the eight factors applicable under section 166(c) of the Act. In the proposal, we described how we believed the Act directed us to balance the goal to promote economic growth with the factors that direct us to protect: (1) AQRVs; (2) the public health and welfare from adverse effects, and (3) the air quality in parks and special areas. We are not persuaded that this is an impermissible reading of the Act. Section 166 of the CAA directs EPA to promulgate pollutant-specific PSD regulations that simultaneously satisfy each of the eight factors described above. While these objectives are

[1] The Agency's view is that PSD measures that satisfy the specific goals and purposes of section 160 also satisfy the more general purposes and goals identified in section 101 of the Act. The overall goals and purposes of the CAA listed in sections 101(b) and 101(c) are general goals regarding protecting and enhancing the nation's air resources and controlling and preventing pollution. Because these broad goals are given more specific meaning in section 160, EPA does not believe it is necessary to consider them in detail when evaluating whether PSD regulations satisfy the criteria in section 166(c). In addition, the court's inquiry in *EDF* v. *EPA* focused exclusively on the specific goals and purpose of the PSD program set forth in section 160. However, because the broad purpose of the CAA set forth in section 101(b)(1) provides some additional guidance as to the meaning of the more specific PSD goal set forth in section 160(3), we considered section 101(b)(1) further in the limited context of interpreting one of the factors applicable under section 166.

generally complementary, there are circumstances where some of the objectives may be in conflict. In these situations, some degree of balance or accommodation is inherent in the requirement to establish regulations that satisfy all of these factors at the same time. If not, it might be impossible for EPA to establish one set of regulations that fulfills all the factors applicable under section 166(c).

As discussed in the proposal, we believe this balancing test derives primarily from the third goal and purpose set forth in section 160. Section 160(3) directs us to ''insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources.''

To some extent, this goal of the PSD program in section 160(3) more specifically articulates the broader purpose of the CAA, described in section 101(b)(1) of the Act, to ''protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population.'' 42 U.S.C. 7401(b)(1). Sections 160(3) and 101(b)(1) are similar in that both sections reflect the goal to simultaneously protect air quality and maximize opportunities for economic growth. Thus, in interpreting the meaning of section 160(3) when used as a factor applicable under section 166(c), we also consider the broader purpose of the Act set forth in section 101(b)(1).

The first part of the goal of the PSD program set forth in section 160(3) (''to insure that economic growth will occur'') makes clear that the PSD program is not intended to stifle economic growth. However, the second part of this goal indicates that economic growth should ''occur in a manner that is consistent with the preservation of existing clean air resources.'' 42 U.S.C. 7470(3). Section 101(b)(1) indicates that these goals are not necessarily inconsistent because Congress sought to ''protect and enhance the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population.'' When considered in light of the purpose of the Act set forth in section 101(b)(1), it is clear that section 160(3) establishes the goal of the PSD program to maximize opportunities for economic growth and to protect clean air resources. Therefore, when applied as a guiding factor for the content of pollutant-specific PSD regulations under section 166(c), we construe section 160(3) to require that we balance economic growth and environmental protection.

A few commenters objected to our characterization of the goal in section 160(3) as establishing an objective to ''foster economic growth.'' According to common usage, the term ''foster'' means to ''promote the growth or development of.'' Merriam-Webster's Collegiate Dictionary, Tenth Edition, Page 459 (2001). We used ''foster'' in the context of describing the goals in sections 160(3) and 101(b)(1) of the Act, and considered the term to be consistent with the goal to ''insure'' economic growth under certain conditions and to ''promote'' the productive capacity of the population while protecting air quality. However, to be more consistent with our terminology in recent NSR rulemaking actions (67 FR at 80187), we will use the phrase ''maximize opportunities for economic growth'' in this final action rather than ''foster economic growth.''

One commenter also argued that EPA was impermissibly departing from an earlier interpretation that the goal in section 160(3) required EPA ''to ensure that economic growth in clean areas occurs only after careful deliberation by State and local communities.'' 53 FR 3698, 3699 (Feb. 8, 1988). However, we believe our current view is consistent with what we said in that earlier notice of proposed rulemaking. In 1988, we also recognized that Congress had directed us to balance several of the goals and purposes listed in section 160 of the Act. 53 FR at 3699. We stated that the PSD program is required to balance the first goal to protect public health and welfare, the second goal to protect air quality in national parks and other special areas, and a third goal as expressed above. 53 FR at 3699. From the language we used, however, it is apparent that this ''third goal'' was actually a combination of the goal in section 160(3) with the goal in section 160(5) of the Act. Section 160(5) establishes the goal to ''assure that any decision to permit increased air pollution in any area is made only after careful evaluation of all the consequences of such decision and after adequate opportunities for informed public participation in the decisionmaking process.'' 42 U.S.C. 7470(5). We continue to believe that Congress directed us to fulfill both the goals in sections 160(3) and 160(5) at the same time. However, because, as we describe in more detail below, we believe that other aspects of our existing PSD regulations for NO_X fulfill the goal in section 160(5), we have not emphasized the language of section 160(5) in the balancing test we utilized to analyze the characteristics of the increment.

In the present action, we are carrying this balancing approach an additional step by seeking to harmonize the goals in section 160 with other criteria applicable under section 166(c) of the Act. Thus, we have not disavowed what we said in 1988, but rather have added to it. Consistent with the direction of the court, we have analyzed the terms of sections 166(c) and 160 more carefully after the court held that we had not adequately considered these provisions of the Act. Having considered these parts of the statute in more depth at this stage, we believe our current interpretation is well-grounded in the terms of the Act and in fact consistent with what we said in 1988.

The need to balance the applicable factors to achieve these objectives simultaneously is also supported by our interpretation of the second goal in section 160(2) of the Act to ''protect public health and welfare.'' The precise meaning of this goal in the context of the PSD program is somewhat ambiguous because it appears to mirror the legal standards applicable to the promulgation of the primary and secondary NAAQS. Under section 109(b) of the Act, the primary NAAQS must ''protect the public health'' with an adequate margin of safety (section 109(b)(1)) and the secondary NAAQS must ''protect the public welfare from any known or anticipated adverse effects'' associated with ambient concentrations of the pollutant (section 109(b)(2)). The term ''welfare'' is defined in the Act to include ''effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate.'' Section 302(h) of the Act.

In the specific context of the PSD program, we construe this charge to ''protect public health and welfare'' to require EPA to evaluate whether adverse effects may occur as a result of increases in ambient pollutant concentrations to levels below the NAAQS. If such effects may occur in some areas of the country, then EPA must consider how to establish PSD regulations that protect public health and welfare against those effects where they may occur. However, we do not interpret the PSD program to require regulations that eliminate all negative effects that may result from increases in pollution in attainment areas.

The PSD program is, as its title indicates, designed to prevent ''significant deterioration'' from a baseline concentration. See S. Rep. 95–127 at 11 (3 LH at 1385) (''This legislation defines 'significant deterioration' in all clean air areas as a specified amount of *additional* pollution * * *. This definition is intended to prevent any *major decline* in air quality currently existing in clean

air areas.'' (emphasis added)). Thus, some decline in air quality (relative to the baseline air quality concentration) is permissible for any particular area of the country that is currently achieving the NAAQS, as long as it is not ''significant.''

When EPA employs an area classification system in its section 166 regulations, these factors must be weighed in each type of area (Class I, Class II, and Class III). However, the weight given to each factor may be more or less, depending on the area involved and the amount of deterioration deemed ''significant'' for that type of area. For example, economic growth may be the most important factor in a Class III area, but our PSD regulations for such areas should offer some level of protection for existing clean air resources. In a Class I area, our PSD regulations should allow some level of economic growth, even though preservation of existing clean air resources may be the dominant factor for these areas.

5. Authority for States To Adopt Alternatives To Increment

We do not interpret section 166 to require that EPA (or that States that implement our regulations) employ an increment system for every pollutant listed in this section. Section 166(d) states that our pollutant-specific PSD regulations ''may contain'' increments or ''other measures.'' Thus, EPA or the States may employ approaches other than an increment system, so long as such an approach otherwise meets the requirements of sections 166(c) and 166(d).

If a State adopts regulations in its SIP that meet the criteria of sections 166(c) and 166(d), we believe section 166 would give EPA the authority to allow the State to implement that program in lieu of the NO_2 increment program that we are reaffirming today. Thus, one approach we proposed for fulfilling our obligation to promulgate pollutant-specific regulations for NO_X under section 166 was to adopt regulations that allow States to demonstrate that alternative programs satisfy section 166.

Under section 110(a)(1) of the Act, each State is required to submit a SIP that provides for implementation, maintenance, and enforcement of the primary and secondary NAAQS established by EPA. All areas are required to submit SIPs within certain timeframes, and those SIPs must include specified provisions identified under section 110(a)(2) of the Act. SIPs for nonattainment areas are required to include additional specified control requirements, as well as controls providing for attainment of any revised NAAQS and periodic reductions providing ''reasonable further progress'' in the interim (see section 172(c) of the Act). For attainment areas subject to the PSD program, section 161 of the Act requires that ''each applicable implementation plan shall contain emissions limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region * * * designated * * * as attainment or unclassifiable.'' We have interpreted sections 166 and 161 to collectively require that EPA promulgate a specific PSD regulatory program for each pollutant identified in section 166 (such as the existing NO_2 increments and associated regulations), and then to require the States to adopt that program as part of their SIPs. Nothing in the CAA precludes EPA from promulgating a minimum program, such as the NO_2 increments we reaffirm today, and giving States the option to either adopt the minimum program or to design an alternative program and demonstrate to EPA that such a program meets the requirements of sections 166(c) and 166(d), as interpreted in this action.

One commenter argued that EPA is authorized under sections 160, 161, and 166 of the Act to direct States to adopt SIPs that reduce emissions of NO_X from existing sources. However, we do not completely agree with this interpretation. The PSD program was designed to be a growth management program that limits the deterioration of air quality beyond baseline levels that may be caused by the construction of major new and modified sources. The commenter disputed this view by pointing to language in section 160(2) which establishes the goal to ''preserve, protect, and enhance'' air quality in national parks. However, considering the growth management goals of the PSD program, we believe the use of the term ''enhance'' in section 160(2) was intended to refer to the visibility provisions in sections 169A and 169B and those situations where a PSD increment is violated. Section 160 lists the goals and purposes of part C of the CAA, and this part includes sections 169A and 169B which establish the Regional Haze program. An explicit goal of this program is to ''remedy any existing impairment of visibility in mandatory Class I Federal areas.'' 42 U.S.C. 7491(a)(1). Thus, we believe the goal to ''enhance'' air quality in national parks is implemented through the Regional Haze program while the PSD program focuses on preserving and protecting air quality in these areas. However, when a PSD increment is violated, we agree that EPA may require a State to revise its SIP to correct a violation. See 40 CFR 51.166(a)(3). Otherwise, we do not interpret these PSD provisions to authorize us to direct States in their SIPs to achieve reductions in emissions from existing sources for PSD purposes.

However, we recognize that the growth management goals of PSD may also be fulfilled when the States adopt controls on existing sources that would reduce emissions and allow growth from new sources and major modifications to existing sources without causing significant deterioration. Under the increment approach, we have previously recognized that States may choose to require reductions from existing sources in order to expand the increments and allow for more growth under the PSD program.[2] However, we have never required States to do so because, in the absence of an increment violation, we do not believe section 166 and other provisions in part C give us the legal authority to mandate such reductions for PSD purposes.

V. Health and Welfare Effects of NO_X

As explained in the preceding section, the goals and purposes of the PSD program that are especially relevant to the development of our pollutant-specific PSD regulations for NO_X address protection of public health and welfare, with a particular emphasis on the air quality in national parks and other natural areas. Thus, we evaluated the available scientific and technical information on the health and welfare effects of NO_X to determine whether any modification of those increments is warranted.

In this section, we summarize the scientific and technical information that we considered, as well as the relevant health and welfare findings that we believe support retaining the existing NO_2 increments. Additional discussion on the potential effects of NO_X is contained in the February 2005 proposal. See 70 FR 8880 (February 23, 2005) at 8888–8894.

A. Overview of the Potential Effects of Nitrogen Oxides

''Nitrogen oxides'' is the generic term for a group of highly reactive gases that contain nitrogen and oxygen in varying amounts. The high-temperature combustion of fossil fuels, primarily

[2] 43 FR 26380, 26381 (June 19, 1978) (''States can expand the available PSD increments by requiring emissions reductions from existing sources.'')

from electric utilities and mobile sources, is a major contributor to the formation of nitric oxide (NO) and NO_2.[3] Most NO_X from combustion sources is emitted as NO (about 95 percent); the remainder are primarily NO_2. Emissions of NO are rapidly oxidized in the atmosphere to produce even more NO_2.[4] In a relatively short time, however, NO_2 in the atmosphere can be transformed into other nitrogen compounds, including nitric acid and nitrates. We also know that nitrogen oxides[5] play a major role in the formation of other criteria pollutants—ozone and PM (nitrogen-bearing particles and acid aerosols)—each with their own set of adverse health and welfare effects.[6] For example, nitrate particles contribute to visibility impairment and regional haze and nitrates are a major component of acidic deposition.

In addition, reduced nitrogen compounds, such as ammonia (NH_3) (derived largely from emissions from livestock waste as well as the application of fertilizer to the ground) and ammonium (NH_4^+), are also important to many of the public health and environmental impacts associated with atmospheric nitrogen compounds. However, because these nitrogen compounds are not associated with emissions of NO_X from the stationary sources subject to review under the PSD program, we did not consider it appropriate to factor them into the review of the adequacy of the existing NO_2 increments.

These varied origins of nitrogen in the atmosphere add to the difficulty of determining the specific source contributing to the total nitrogen concentration. This, in turn, increases the difficulty of designing an emissions control strategy for reducing the nitrogen contribution in a particular area.

B. Scope of Our Analysis

In the proposal, we explained that we did not believe our pollutant-specific PSD regulations for NO_X were the appropriate place to address the effects of the secondary pollutants ozone and PM. Some commenters disagreed with our proposed approach and argued that EPA should address the adverse effects of ozone and PM as part of our assessment of the existing NO_2 increments. Photochemical oxidants (ozone)[7] and PM[8] are formed in part by reactions of NO_X emissions with other pollutants in the atmosphere. However, we do not agree that this fact alone dictates that our pollutant-specific PSD regulations for NO_X must address ozone and PM impacts. Because nitrogen oxides are not the only compounds that contribute to the formation of ozone and PM, we believe we can more effectively address the effects of PM and ozone through separate regulations for these pollutants under section 166 of the Act.

It would be unreasonable to establish pollutant-specific PSD regulations to protect against the effects of ozone without also considering the other major precursor for ozone—volatile organic compounds. Any PSD regulation attempting to mitigate the ozone impacts from NO_X, notwithstanding the ozone NAAQS, would be unfounded without also addressing this significant component. Thus, we conclude that, for PSD purposes, the contribution of NO_X to the formation of ozone should be considered primarily in the context of the establishment of pollutant-specific PSD regulations for ozone.[9]

Like ozone, PM has several precursors, of which NO_X is only one. NO_2 may be transformed to nitrate particulates by means of chemical reactions in the atmosphere.[10] However, any PSD strategy for PM should consider both direct PM emissions and all of the regulated precursors instead of placing disproportionate emphasis on only one component of the pollutant. Regulations for NO_X that address PM effects in a narrow manner (*i.e.*, nitrates only) could potentially affect the stringency of the PM increments and considerations regarding the baseline concentration and baseline date. Thus, we believe it would be inappropriate to promulgate pollutant-specific regulations for NO_X based on its transformation into PM. In a separate notice, EPA intends to consider options for regulating precursors to $PM_{2.5}$.

Some commenters believe that the statutory PSD requirements obligate EPA to promulgate NO_X regulations to prevent significant deterioration of air quality from ozone and PM. These commenters cited language from section 166(a) of the Act which directs EPA to ''promulgate regulations to prevent significant deterioration of air quality which would result from the emissions of such pollutants.'' CAA § 166(a).

However, we do not interpret this language to compel the action commenters recommend. The phrase ''result from emissions of such pollutants'' refers back to the first clause of the sentence which lists several pollutants (''hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides'') that are subject to section 166. We do not read this language to compel EPA to promulgate a single regulation to address all such pollutants at once. Reading the sentence as a whole, we interpret the language in section 166(a) to provide EPA with the discretion to separately promulgate pollutant-specific PSD regulations for each of these four groups of pollutants (which include ozone because it is formed by photochemical oxidants). Thus we believe our obligation in this action to promulgate pollutant-specific PSD regulations for ''nitrogen oxides'' does not necessarily have to include consideration of the effects of ozone.

For similar reasons, we do not read the provisions of section 166 of the Act to require that EPA consider effects attributable to PM when promulgating pollutant-specific PSD regulations for ''nitrogen oxides.'' Congress established separate increments for PM, originally measured as total suspended particulate (or TSP), under the authority of section 163 of the Act. Congress later authorized EPA to replace the TSP increments with increments for PM_{10}. See CAA § 166(f). Section 166(a) of the Act also directs EPA to promulgate pollutant-specific PSD regulations for any pollutants for which a NAAQS is established after the

[3] Some forms of NO_X are produced naturally (via lightning, soils, wildfires, stratospheric intrusion, and the oceans).

[4] Because NO is readily converted to NO_2 in the atmosphere, the emissions of NO_X reported by EPA assume NO_X in the form of NO_2. In predicting ambient impacts that may result from emissions of NO_X, initially is assumed to be emitted from sources as NO_X. (40 CFR part 50 app W sec. 6.2.4.)

[5] Seven oxides of nitrogen are known to occur in the atmosphere: nitric oxide (NO), nitrogen dioxide (NO_X), nitrate (NO_3^-), nitrous oxide N_2O), dinitrogen trioxide (N_2O_3), dinitrogen tetroxide (N_2O_4) and dinitrogen pentoxide (N_2O_5).

[6] The term ''welfare'' is defined in the Act to include, *inter alia,* ''effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate.'' Section 302(h).

[7] Ozone is the oxidant found in the largest quantities in the atmosphere. The EPA promulgated NAAQS for photochemical oxidants in 1971. The chemical designation of the standard was changed in 1979 from ''photochemical oxidants'' to ozone. See 44 FR 8202 (February 8, 1979).

[8] Particulate matter (PM) is composed of directly emitted particles and secondarily formed particles. Secondary particulates are produced from gaseous pollutants, mainly NO_X, SO_2, ammonia, and some VOCs. Emissions of NO_X can result in the formation of particulate nitrates whose contribution to fine particles varies depending on geographic location and other criteria.

[9] In the 1988 final preamble adopting the NO_2 increments, we gave limited consideration to whether limiting increases of NO_X emissions would worsen ozone ambient concentrations, in response to comments raising this issue. 53 FR at 40668. We did not, however, attempt to set the NO_2 increments to address ozone public health and welfare impacts, nor do we believe that is required here, for the reasons stated above. Increments for ozone have not been established because of the technical difficulty associated with predicting ambient concentration changes resulting from a single stationary source. 61 FR 65764, 65776 (Dec. 13, 1996).

[10] Nitrate is a major constituent of atmospheric PM. Due to limited scientific literature addressing the health impacts of nitrates, exposure currently is analyzed as exposure to fine PM. (NAPAP, 1998.)

enactment of section 166. We interpret this language to apply to pollutants such as $PM_{2.5}$ for which we promulgated a NAAQS after 1977. Thus, it does not follow that section 166 must be read to require that EPA consider PM effects when promulgating regulations for NO_X.

Another commenter asserted that the court's opinion in *EDF* v. *EPA* made it abundantly clear that EPA cannot use any single NAAQS or NAAQS indicator as the sole basis for the regulations required by section 166 to address NO_X. Rather, the commenter stated, EPA must evaluate the impact of NO_X with reference to the goals and purposes in sections 101 and 160, which goals and purposes encompass protection of public health and welfare from ''air pollution'' without exception for any specific pollutants or class of pollutants. We recognize that emissions of NO_X contribute to a range of direct and indirect effects on health, welfare, and AQRVs, but we believe this rulemaking action should focus on those effects that were considered by EPA in the development of the NAAQS for NO_2.

This approach is appropriate because the need to develop PSD rules is tied to the existence of the NAAQS. As the court in *EDF* v. *EPA* acknowledged ''the ambient standards are the basic measure of air quality under the [Clean Air Act] and the controlling standards by no means *exclude* any value that is the subject of focus under the PSD provisions.'' 898 F.2d at 190 (emphasis in original). Thus, the health and welfare effects that were evaluated by EPA when it established the NAAQS should also be considered when EPA establishes regulations under section 166 to protect against significant deterioration of air quality from NO_X emissions.

The provisions of section 166 make clear that EPA is to establish PSD regulations (including an increment, if appropriate) under this provision after the establishment of a NAAQS for the applicable pollutants. In 1971, EPA first established a single standard for NO_2 as both the primary and secondary NAAQS addressing NO_X. 36 FR 8186 (April 30, 1971). Congress then passed section 166 of the Act in 1977 and gave EPA 2 years to complete its study and promulgate PSD regulations for ''nitrogen oxides.'' 42 U.S.C. 7476(a). In addition, for pollutants for which a NAAQS had not been promulgated by August 7, 1977, Congress gave EPA 2 years from the promulgation of such standards to establish PSD regulation under section 166 of the Act. *Id.* The establishment of PSD regulations (which may include increments) must necessarily follow the NAAQS because the NAAQS provides the benchmark against which we are to judge ''significant deterioration'' of air quality.

We do not believe that our decision to define the bounds of our analysis as the range of effects considered in setting the NAAQS is contrary to the court's holding in *EDF* v. *EPA.* The court held that EPA cannot use the NAAQS as the ''sole basis'' for deriving the increment. 898 F.2d at 190. However, in this action, we did not simply focus on the level of the NAAQS as a legal standard, as we did in 1988. In this rulemaking action on remand, we considered the health and welfare effects that EPA evaluated to establish the NAAQS. But rather than considering those effects in relation to the standards set forth in section 109, we evaluated those effects in relation to the factors in sections 166(c) and 160 of the Act. The court held that we could not rely solely on the NAAQS itself to establish increments because of the emphasis in sections 166(c) and 160 on special considerations, such as protection of national wilderness areas, whose special values may be reflected in the NAAQS but are not necessarily the only factors that determine the level of the NAAQS. See 898 F.2d at 190. Thus, within the field of effects that EPA found relevant when establishing the NAAQS, we narrowed our inquiry to focus on the special considerations of PSD and those effects that may occur in some areas notwithstanding attainment of the NAAQS. This approach follows directly from the court's opinion in *EDF* v. *EPA.*

C. Data Considered in Our Analysis

In our February 2005 notice, we proposed to focus primarily on the health and welfare information that we had compiled for the last periodic review of the NO_2 NAAQS. EPA is required to conduct a periodic, comprehensive analysis of available scientific and technical data as part of its process for promulgating NAAQS in accordance with sections 108 and 109 of the Act. The last reevaluation of the NAAQS for NO_X was completed in 1996. 61 FR 52852, November 8, 1996. The most recently reviewed data for NO_X is contained in the 1993 Criteria Document for NO_X (''1993 Criteria Document'') and the associated 1995 OAQPS Staff Paper (''1995 Staff Paper for NO_X''), as further explained below.[11]

Although we also considered the information contained in studies published since the last NAAQS review, several commenters believed that we should have given greater attention to such later studies. These commenters believe these later studies show the growing seriousness of NO_X effects in the form of ozone, PM and atmospheric nitrogen deposition (N deposition).[12] One commenter felt that we ignored a lot of scientific information on NO_X effects on ecosystems. Another commenter argued that our focus on the review of the 1993 Criteria Document and 1995 Staff Paper for NO_X was a ''self-imposed limitation'' that relied on incomplete scientific information considering the fact that new information has been developed since then.

Although we did focus on the Criteria Document and 1995 Staff Paper for NO_X, we did not wholly ignore new information as the commenters appear to suggest. We considered information contained in more recent studies, particularly those concerning the types of effects on ecosystems associated with atmospheric nitrogen deposition. We evaluated information published since completion of the last NAAQS review to determine whether there have been significant advances in scientific and technical information. The more recent data we reviewed has clearly broadened our understanding of the ecological changes resulting from deposition in general and N deposition in particular. Recent information also provides us with greater information about N deposition trends and the speciation of various N components. The collection of these types of information is an essential step in the process of quantitatively defining the dose-response relationship between emissions of NO_X and the various adverse effects being observed. However, even these later studies, including ones supplied by some of the commenters, do not enable us to establish those relationships at this time.

We focused on the effects described in the Criteria Document and 1995 Staff Paper for NO_X because these documents are the product of a rigorous process that is followed to validate and interpret the information. In accordance with the Act, the NAAQS process begins with the development of ''air quality criteria'' under section 108 for air pollutants that ''may reasonably be anticipated to

[11] The official titles of these documents are, respectively, ''Air Quality Criteria for Oxides of Nitrogen,'' EPA, August 1993; and ''Review of the National Ambient Air Quality Standards for Nitrogen Oxides: Assessment of Scientific and Technical Information,'' EPA, September 1995.

[12] The term ''atmospheric nitrogen deposition'' refers to the process by which nitrogen compounds in the atmosphere are transferred to various surfaces, including water, soil, etc. Additional discussion on this is provided in sections V and VI of this preamble as related to indirect effects of NO_2.

endanger public health or welfare'' and that come from ''numerous or diverse'' sources. Section 108(a)(1). For each NAAQS review, the Administrator must appoint ''an independent scientific review committee composed of seven members of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies,'' known as the Clean Air Scientific Advisory Committee (CASAC). Section 109(d)(2)(A). CASAC is charged with recommending revisions to the criteria document and NAAQS, and advising the Administrator on several issues, including areas in which additional knowledge is required to appraise the adequacy and basis of existing, new or revised NAAQS. Section 109(d)(2)(B), (C).

''Air quality criteria'' must reflect the latest scientific knowledge on ''all identifiable effects on public health or welfare'' that may result from a pollutant's presence in the ambient air. 42 U.S.C. 7408(a)(2). The scientific assessments constituting air quality criteria generally take the form of a ''criteria document,'' a rigorous review of all pertinent scientific studies and related information. The EPA also develops a ''staff paper'' to ''bridge the gap'' between the scientific review and the judgments the Administrator must make to set standards. See *Natural Resources Defense Council* v. *EPA (''NRDC'')*, 902 F.2d 962, 967 (D.C. Cir. 1990). Both documents undergo extensive scientific peer-review as well as public notice and comment. See *e.g.*, 62 FR 38654/1–2.

Our focus on the 1993 Criteria Document and the 1995 Staff Paper for NO_X is supported by the provisions of section 166 which make clear that EPA is to establish pollutant-specific PSD regulations after the establishment of a NAAQS for the applicable pollutants. 42 U.S.C. 7476(a). Under normal circumstances, the Act provides that EPA promulgate new PSD regulations under section 166, including new increments if appropriate, within 2 years from the promulgation of any NAAQS after 1977. 42 U.S.C. 7476(a). In such instances, the health and welfare information used for the setting of the NAAQS would also be ''current'' for purposes of establishing pollutant-specific PSD regulations. We believe this timing was intended to enable EPA to rely upon the same body of information concerning a pollutant's health and welfare effects when it establishes the NAAQS and the subsequent PSD increments (or other measure) defining significant air quality deterioration for the same pollutant.

Thus, while we believe it would be consistent with congressional intent to rely in the ordinary case on only the information used in the most recent NAAQS review when establishing pollutant-specific PSD regulations under section 166, the situation we faced with NO_X was unique. Because considerable time had passed since the 1996 review of the NO_2 NAAQS, we considered the more recent studies discussed above.

Because EPA is taking this action to fulfill a court remand of an increment originally established in 1988, the Act could be read to suggest that we revert back to the information compiled in the NAAQS review that predated our initial action in 1988. When the NO_2 increments were originally developed and promulgated, the most recent Criteria Document for oxides of nitrogen was EPA's 1982 Criteria Document, used for completing the periodic review of the NO_2 NAAQS promulgated on June 19, 1985 (50 FR 25532). However, because of the amount of time that has passed since then, we do not believe it is reasonable to read the Act so narrowly in this case. Thus, we relied on the most recent Criteria Document, because it represented the most recent compilation of scientific and technical evidence for purposes of NAAQS review, even though this was not the Criteria Document we used to develop the 1988 NO_2 increments.

In the last periodic review of the NO_2 NAAQS, in 1996, EPA compiled information that was not part of the scope of the previous NAAQS review. Specifically, the 1993 Criteria Document and 1995 Staff Paper for NO_X considered as part of the secondary standard review ''short- and long-term effects of nitrogen deposition on biological, physical and chemical components of ecosystems and the resulting effect of changes to these components on ecosystem structure and function as well as the traditional issue of visibility impairment, and materials damage.'' The expanded scope is particularly relevant to the types of effects that should be used to consider the effectiveness of the PSD increments.

We do not interpret the court decision in *EDF* v. *EPA* [13] to mean that we should not consider the same data when establishing both the NAAQS and the PSD increments for a particular pollutant, but rather that we would be expected to weigh the same data differently using the different legal criteria as our guide. Consequently, we might arrive at different conclusions for developing the NAAQS and increments because of the differences in the legal criteria for the two types of standards. As the court itself said, ''a pollutant that has only mild public health effects but severe effects on wilderness areas might demand a lower increment (measured as a percentage of its ambient standards) than one with severe health effects but only mild effects on wilderness areas.'' *EDF* v. *EPA*, 898 F.2d at 190. Thus, while the Act seems to require that EPA establish NAAQS and increments for the same pollutant using different legal standards, we believe it is important nevertheless that the body of evidence used for both reviews should initially be subjected to the same level of Agency validation and review.

D. Analysis of Potential Effects

This section contains a summary of our review of the health and welfare effects associated with NO_X reviewed by EPA as part of the reconsideration of the pollutant-specific PSD regulations for NO_X. Although EPA concluded from the available evidence that there was no basis in 1996 for revising the NO_2 NAAQS, the objective of our latest review of the same body of scientific and technical evidence was to determine whether there is any basis for proposing to modify the NO_2 increments, based on specific percentages of those NAAQS, which are part of the PSD regulations for NO_X that we promulgated in 1988. Our analysis of the health and welfare effects associated with NO_X included adverse health effects that were found to occur at levels at or near the NAAQS, as well as a variety of direct NO_2 welfare effects and indirect welfare effects resulting from the transformation of NO_2 to other nitrogen compounds in the atmosphere which are then transferred to other surfaces via N deposition.

We noted earlier that the 1993 Criteria Document and 1995 Staff Paper for NO_X added a level of review not contained in the previous periodic review of the NAAQS for NO_X. That is, the most recent documents include evidence concerning ''short- and long-term effects of N deposition on biological, physical and chemical components of ecosystems and the resulting effect of changes to these components on ecosystem structure and function as well as the traditional issues of visibility impairment and materials damage.'' The consideration of such effects was our primary focus for determining whether the existing increments need to be modified to satisfy section 166(c) of the Act.

[13] The court pointed out that ''the 'goals and purposes' of the PSD program, set forth in § 160, are not identical to the criteria on which the ambient standards are based * * *''

1. Health Effects

In 1996, EPA concluded that there was no need to change the existing primary NAAQS for NO_2 on the basis of the health effects evidence available at that time. Nevertheless, for purposes of evaluating the safe harbor NO_2 increments, we examined those effects which were found to occur at levels at or near NAAQS. Of particular concern were possible health effects resulting from short-term exposure (*e.g.*, less than 3 hours), which might justify consideration of a short-term increment.

The short-term health effects of most concern at ambient or near-ambient concentrations of NO_2 involved mild changes in airway responsiveness (airway constriction and narrowing) and decrease in pulmonary function. In neither case were the observed effects considered serious: Observations of airway constriction did not reveal airway inflammation and were fully reversible, and changes in pulmonary function were considered small. Moreover, most of the observed effects occurred at ambient concentrations of NO_2 that were above levels typically monitored in areas meeting the NAAQS, *i.e.*, PSD areas.

We also considered effects based on longer-term (2-week periods), low-level exposure to NO_2 involving increased respiratory illnesses among children. These studies involved situations of indoor exposure to NO_2 emitted from gas stoves. Various limitations associated with these clinical studies made it difficult to extrapolate the results in a manner that would yield estimates of health impacts associated with outdoor NO_2 exposure. See February 2005 proposal at 70 FR 8890–8891.

2. Welfare Effects

In our February 2005 proposal, we indicated that the 1996 periodic review of the NO_2 NAAQS concluded that the available body of scientific and technical evidence did not provide an adequate basis for setting a separate secondary standard to address welfare effects of NO_X. See 70 FR at 8891. However, as discussed earlier, the goals and purposes of the PSD program give special weight to the protection of welfare, air quality values and areas of special national and regional interest (national parks, national wilderness areas, etc.) Accordingly, EPA reviewed the information on welfare effects to determine whether it supported a need on our part to modify the existing NO_2 increments to provide additional environmental protection, especially for such areas as national parks, wilderness areas and their natural, recreational, scenic, or historic value(s), notwithstanding attainment of the NAAQS in PSD areas.

As mentioned earlier, the evidence we reviewed covered both direct (NO_2) and indirect (other NO_X), short- and long-term effects on biological, physical and chemical components of ecosystems and the resulting effect of changes to these components on ecosystem structure and function. Information from selected later studies was also reviewed to determine the extent to which our knowledge of the adverse effects of NO_X had advanced since the 1996 review. A summary of our review of both direct and indirect effects of NO_2 is presented below.

a. Direct Welfare Effects

The 1993 Criteria Document and 1995 Staff Paper for NO_X provided evidence that exposure to NO_2 can cause potentially adverse effects on plants and materials, and visibility impairment (primarily in the form of local-scale plume discoloration). These effects are summarized below. See also 70 FR 8892–8893.

Experimental studies involving exposure of plants to NO_2 for periods less than 24 hours produced effects on the growth development and reproduction of plants. However, the pollutant concentrations used in these experiments were well above concentrations observed in the ambient air and at a frequency of occurrence not typically found in the U.S. The experimental effects were not considered significant at concentrations at or below the level of the NAAQS.

The effects of NO_2 on materials were not well determined according to the evidence contained in the 1993 Criteria Document. The limited information showed that it was difficult to distinguish NO_2 or any other agent as the single causative agent for observed damage; many agents, together with a number of environmental stresses, act on the surface of materials over time.

Finally, NO_2 can cause visibility impairment in the form of a discoloration effect most noticeable as local-scale (within 50 kilometers of the source) or ''reasonably attributed impairment.'' This effect can be observed as a contrast or color difference between a plume and a viewed background, such as the sky or a distant object. However, some studies have shown that brownish discoloration can result from the presence of particles alone, thus making it difficult to determine a reliable relationship between ground-level concentrations of NO_2 at any given point and discoloration caused by particles that may also be in a source's plume. The 1995 Staff Paper for NO_X noted that despite the known light-absorbing qualities of NO_2, ''there are relatively little data available for judging the actual importance of NO_2 to visual air quality.''

b. Indirect Welfare Effects

The predominant welfare effects of NO_2 are indirect effects caused by nitrogen compounds that have been transformed from NO_2 in the atmosphere, such as nitric acid and nitrates. Studies have shown that nitrogen compounds can contribute to various negative ecological effects when they are transferred from the atmosphere to a variety of surfaces, *e.g.*, water, soil, vegetation, and other materials, by the process of N deposition.'' [14]

Nitrogen deposition occurs in several forms, including wet (rain or snow), dry (transfer of gases or particles), or occult (fog, mist or cloud) deposition. Nitrogen deposition occurs primarily as nitrates, which are formed in the atmosphere by the oxidation of NO and NO_2, or as ammonia, which is released by agricultural or soil microbial activity. When the nitrogen transfer process involves acids (*e.g.*, nitric acid) or acidifying compounds, the deposition process is referred to as ''acidic deposition.''

For the February 2005 proposal, we reviewed various indirect effects resulting from N deposition and which can be categorized according to the specific ecosystem being affected. These include terrestrial, wetland, and aquatic ecosystems. These different effects are summarized below. See also 70 FR 8888–8894.

As with the other effects we considered, we focused primarily on the evidence contained in the 1993 Criteria Document and 1995 Staff Paper for the NO_2 NAAQS. Other more recent studies were also summarized, although we did not consider ourselves to be under an obligation to consider such evidence since it has not yet undergone the extensive level of validation and review that will be necessary if it is to be incorporated into the section 108 Criteria Document for NO_X.

The following subsections summarize the various indirect effects of NO_2 on

[14] Under certain conditions, in terrestrial or agricultural systems, some amount of nitrogen deposition can enhance growth of some forest species and crops. However, in areas where deposition occurs in excess of plant and microbial demand (also known as nitrogen saturation) the added nitrogen can disturb the nitrogen cycle, contributing to such negative effects as increased plant susceptibility to some natural stresses and modification of interplant competition.

ecosystems, including terrestrial systems (*i.e.*, plant communities), wetlands, and aquatic systems. We believe that the effects summarized are potentially relevant to an evaluation of the pollutant-specific PSD regulations for NO_X because these effects have been observed in areas of the country that are attaining the NAAQS.

(1) Terrestrial ecosystems. Soils are the largest pool of nitrogen in forest ecosystems, although such nitrogen is generally not available for plants until it has been mineralized by bacteria (Fenn, 1998). Another important source of nitrogen is atmospheric deposition, which may cause or contribute to significant adverse changes in terrestrial ecosystems, including soil acidification, increase in soil susceptibility to natural stresses, and alterations in plant species mix.

When excess nitrogen input causes soil acidification, it can alter the availability of plant nutrients (*i.e.*, calcium and magnesium) and expose tree roots to toxic levels of aluminum and manganese, thereby having an adverse effect on tree growth. It can also lead to the mobilization of aluminum from the soil as nitrates are leached from the soil and transported to waterways, where the aluminum can exhibit toxic effects to aquatic organisms.[15]

It is worth noting that air pollution is not the sole cause of soil change; high rates of acidification are occurring in less polluted regions of the western U.S. because of natural internal soil processes, such as tree uptake of nitrate and nitrification associated with excessive nitrogen fixation. Although N deposition can accelerate the acidification of soils, the levels of nitrogen necessary to produce measurable soil acidification are quite high. The 1993 Criteria Document indicated that, at that time, N deposition had not been directly associated with the acidification of soils in the U.S. More recent information suggests that in parts of the Northeast, for example, acid deposition has resulted in the accumulation of sulfur and nitrogen in the soil beyond the levels that forests can use and retain, and has accelerated the leaching of base cations, such as calcium and magnesium, that help neutralize acid deposition. (Driscoll, 2001.) Some western forest areas may also be experiencing nitrogen saturation conditions, although the role of N deposition may vary from one location to another (Fenn, 1998, 2003).

Aside from the effects of soil acidification, some studies have shown that increased N deposition can alter tree susceptibility to frost damage, insect and disease attack, and plant community structure. However, other studies have not shown that similar results occur. In all, the studies evaluated in the 1993 Criteria Document which focused on the impact of excessive inputs of nitrogen in forest ecosystems showed mixed results. The long response time of trees to environmental stresses has made it difficult to fully understand how acid rain may affect trees. It is also difficult to isolate the possible effects of acid rain from stresses resulting from other natural and anthropogenic origins. However, more recent studies appear to provide some evidence that acid deposition has caused the death of red spruce trees, particularly at higher elevations in the Northeast by decreasing cold tolerance, and may be in part responsible for the extensive loss of sugar maple in Pennsylvania. (Driscoll, 2001.)

Finally, in terrestrial systems in which the pre-existing balance is marked by a competition among species for the available nitrogen, additional nitrogen inputs, such as N deposition, may bring about an alteration of the species mix. That is, a displacement of one kind of vegetation (*e.g.*, plants, grasses) with another may occur. While the 1995 Staff Paper for NO_X noted that there were no documented accounts of terrestrial ecosystems undergoing species shifts due to N deposition in the U.S., later research provides some evidence suggesting that elevated N deposition can contribute to shifts of species compositions (*e.g.*, Allen, 1998; Bowman, 2000).

(2) Wetlands. Wetlands include swamps, marshes, and bogs. In such lands, water saturation is the dominant factor determining the nature of soil development and the types of plants and animal communities living in the soil and on its surface. These areas function as habitats for plant and wildlife (among other useful environmental purposes), including many rare and threatened plant species. Some of these plants adapt to systems low in nitrogen or with low nutrient levels. Long-term studies (greater than 3 years) of increased nitrogen loadings to wetland systems in European countries have reported that increased primary production of biomass can result in changes of interplant competition. The 1995 Staff Paper for NO_X reported that, based on the evidence reviewed in the 1993 Criteria Document, ''the staff believes we can anticipate similar effects from atmospheric N deposition in the United States* * *.'' However, in the 1995 Staff Paper for NO_X, EPA found no documentation providing sufficient evidence that such species changes have occurred or were occurring at the time in the U.S.

(3) Aquatic ecosystems. Nitrogen deposition may adversely affect aquatic ecosystems as a result of either acidification or eutrophication. Both processes can cause a reduction in water quality that makes the body of water unsuitable for many aquatic organisms.

The 1995 Staff Paper for NO_X indicated that growing evidence supported the concern that the impact of N deposition on sensitive aquatic systems ''may be significant.'' Later studies have shown much more clearly the harm that can result. Atmospheric nitrogen can enter lakes and streams either as direct deposition to the water surfaces or as N deposition to the watershed of which they are a part. In some cases, nitrate may be temporarily stored in snow packs from which it is subsequently released in more concentrated form in snowmelt. In other cases, nitrogen deposited to the watershed may subsequently be routed through plants and soil microorganisms and transformed into other inorganic or organic nitrogen species which, when they reach the water system, are only indirectly related to the original deposition. To complicate matters, recent studies suggest that, in addition to the contribution of nitrogen from anthropogenic sources, nitrogen released from the weathering of nitrogen-bearing bedrock, not commonly considered in the biogeochemical cycling of nitrogen, may contribute a ''surprisingly large amount'' of nitrate to natural waters. (Dahlgreen, 2002.)

Acidification may occur in two ways: Chronic (long-term) acidification and episodic (short-term or seasonal) acidification. Episodic acidification is more likely to be the primary problem in most situations, with chronic acidification occurring mainly where excessive nitrogen saturation exists. (NAPAP, 1998.) The main concern with acidification of aquatic ecosystems is associated with freshwater systems. Acidification impairs the water quality of lakes and streams by lowering the pH levels, decreasing acid-neutralizing capacity, and increasing aluminum concentrations (through the process of aluminum mobilization from the soil, as

[15] Aluminum from soil seldom appears in aquatic systems because natural aluminum minerals are insoluble in the normal pH range of natural waters. However, the term ''aluminum mobilization'' refers to the conversion of aluminum in acidic soils into dissolved forms and its transport, as runoff or subsurface flow, to water systems. Mobilized aluminum can then alter the acid/base property of natural water systems (Wang, 2004).

explained earlier). High levels of aluminum, considered toxic to fish and other organisms, have been recorded in watersheds in the Northeast associated with low levels of acid deposition. (Driscoll, 2001.)

Acid deposition may also increase the conversion of mercury to organic (methyl) mercury in lakes where it is absorbed by aquatic organisms and leads to increasing concentrations in the food chain. Human consumption of fish containing high levels of methylmercury can lead to problems with the central nervous system.

Regions of North America differ in their sensitivity to acidic deposition and in the amount of acidic deposition they receive. Some parts of the eastern U.S. are highly sensitive and chronically or episodically receive damaging concentrations of acidic deposition. For example, a 2001 report indicates that 41 percent of lakes in the Adirondack Mountain region of New York and 15 percent of lakes in New England show evidence of either chronic or episodic acidification, or both. (Driscoll, 2001.) Other sensitive regions, such as the western U.S., are unlikely to suffer adverse chronic effects but may experience acidic conditions more on an episodic basis. Certain high-elevation western lakes, in particular, are subject to episodes of acidic deposition.

Eutrophication generally is a natural process by which aquatic systems are enriched with the nutrients, including nitrogen, that are presently limiting for primary production in that system. However, this process can be accelerated by increased nutrient input resulting from anthropogenic sources, *e.g.*, agricultural runoff, urban runoff, leaking septic systems, sewage discharge. Studies have also shown that N deposition may directly and indirectly play a role in accelerated eutrophication. When nitrogen is a limiting nutrient, input from various origins can make a water system prone to eutrophication, with impacts ranging from the increased turbidity and floating mats of macro algae shading out beneficial submersed aquatic vegetation habitat, to the exacerbation of noxious algae blooms, to the creation of low or no-oxygen conditions which negatively affect fish populations. The National Park Service (NPS) has reported that loadings of total N deposition (wet and dry) have caused changes in aquatic chemistry and biota in the Rocky Mountain National Park's high elevation ecosystems. (U.S. Department of the Interior, 2002.) In the same report, the NPS noted that increasing trends in N deposition at many parks in the western U.S. result from both nitrate and ammonium.

The key to creating a linkage between levels of N deposition and the eutrophication of aquatic systems is to demonstrate that the productivity of the system is limited by nitrogen availability, and to show that N deposition is a major source of nitrogen to the system. Thus, while it appears that nitrogen inputs to aquatic systems may be of general concern for eutrophic conditions, the significance of nitrogen input will vary from site to site. (1995 Staff Paper for NO_X at 77.)

A 1993 National Research Council report identifying eutrophication as the most serious pollution problem facing the estuarine waters of the U.S. was reported in an EPA document issued in 1997, entitled ''Nitrogen Oxides: Impacts on Public Health and the Environment'' (p. 79). Nitrogen input is a major concern because nitrogen is the limiting nutrient for algae growth in many estuaries and coastal water systems. In contrast to the eutrophication concern, acidification typically is not a concern, because estuaries and coastal waters receive substantial amount of weathered material from terrestrial ecosystems and from exchange with sea water.

Estimation of the contribution of atmospheric N deposition to the eutrophication problem can be difficult because of the various direct anthropogenic sources of nitrogen, including agricultural runoff and sewage. Some studies have shown that nitrogen deposited from the atmosphere can be a significant portion of the total nitrogen loadings in specific locations, such as the Chesapeake Bay—the largest of the 130 estuaries in the U.S. It has been estimated that the proportion of the total nitrate load to the Bay attributable to N deposition ranges from 10 to 45 percent (NAPAP, 1998).

In most freshwater systems, including lakes and streams, phosphorus, not nitrogen, is the limiting nutrient. Thus, eutrophication by nitrogen inputs will only be a concern in lakes that are chronically nitrogen limited and have a substantial total phosphorus concentration. This condition is common only in lakes that have received excessive inputs of anthropogenic phosphorus or, in rare cases, have high concentrations of natural phosphorus. In the former case, the primary dysfunction of the lakes is an excess supply of phosphorus, and controlling N deposition would be an ineffective method of gaining water quality improvement. In the latter case, N deposition can measurably increase biomass and thus contribute to eutrophication in lakes with high concentrations of natural phosphorus. Other lakes, including some high-elevation lakes in the Rocky Mountains and Sierra Nevada, are very low in both phosphorus and nitrogen; addition of nitrogen can increase biomass and contribute to eutrophication in these lakes also.

(4) Visibility impairment (Regional Haze). Nitrate particulates are formed as a result of chemical reactions involving NO and NO_2 with other substances in the atmosphere, such as ammonia. These particulates, as both fine and coarse particles, are considered to be more responsible for visibility impairment than NO_2 directly. The fine particles can remain airborne for considerable periods of time, may be transported long distances from the NO_X source, and impair visibility by either scattering light or absorbing it.

The major cause of visibility impairment in the East is sulfates, not nitrates which account for only 7 to 16 percent of the light extinction in the East. However, nitrates in the West are responsible for up to 45 percent of the light extinction.

Recent studies tend to provide more comprehensive documentation of certain adverse effects than were reported earlier in the 1993 Criteria Document. However, even in such later studies the inability to establish quantifiable dose-response relationships NO_X and the various types of ecosystems remains to be a key problem. More study is needed to resolve this problem.

VI. Final Actions

In the February 2005 proposal, we presented for public review and comment the results of our review of the scientific and technical evidence. We described the various health and welfare effects associated with NO_2 and other forms of NO_X and proposed our decision about the adequacy of the existing NO_2 increments. On the basis of the available information, we proposed not to change the existing PSD regulations for NO_X. We also proposed to find that the existing regulations, including the increments for NO_X expressed as annual average ambient concentrations of NO_2 satisfied the requirements under sections 166(c) and 166(d) of the Act.

In today's action, we are retaining the existing NO_2 increments without change. In addition, we are amending the text of our PSD regulations at 40

CFR 51.166 [16] to clarify that any State may employ an alternative approach to the NO_2 increments if the State's approach meets certain requirements. Separately, we will soon publish a supplemental notice of proposed rulemaking that provides more details on how a State that achieves the NO_X emission reductions under CAIR can utilize its CAIR-related reductions as part of its alternative approach to the NO_2 increments. In this section of the preamble, we describe our rationale for the final action we are taking today on the NO_2 increments and respond to significant comments we received on the relevant portions of the proposal.

A. Retain Existing Increment System for NO_X

1. Existing Characteristics of the Regulatory Scheme Fulfill Statutory Criteria

In the February 2005 proposal, we addressed how several aspects of our PSD regulations for NO_X that were not controverted in the *EDF* v. *EPA* court challenge served to satisfy many of the factors applicable under section 166(c). This analysis helps show how our PSD regulations for NO_X, as a whole, satisfy the criteria in section 166.

We continue to believe that many of the factors applicable under section 166(c) are fulfilled by the elements of our regulations that were not challenged in the *EDF* v. *EPA* case. Since we do not interpret the court's decision to require us to reevaluate the entire regulatory framework of the PSD regulations for NO_X we established in 1988, with respect to option 1 of the proposal, we focused our review on the level, time period, and pollutant form (NO_2) reflected in the increments we included in the 1988 PSD regulations for NO_X. Thus, when a factor applicable under section 166(c) was fully satisfied by an aspect of the existing regulations that was not questioned by the court, we did not consider that factor any further in our evaluation of the characteristics of the increment.

In many cases, an aspect of our regulations that was not controverted in the court challenge partially contributes to the fulfillment of an applicable factor but does not fully satisfy that factor. In these instances, to determine if changes to the increments are necessary to satisfy the factors applicable under section 166(c), we also considered the effectiveness of the unchallenged parts of our regulations in conjunction with the three primary characteristics of the increments that were challenged. We believe our obligations under section 166(c) of the Act are satisfied when all of our pollutant-specific PSD regulations for NO_X (including the level and other characteristics of any increment) collectively satisfy the factors applicable under 166(c) of the Act.

a. Increment System

Two of the factors applicable under section 166(c) are fulfilled by employing an increment system in our pollutant-specific PSD regulations for NO_X. In this action, we are retaining this basic framework for our pollutant-specific PSD regulations for NO_X.

An increment-based program fulfills our obligation under section 166(c) to provide ''specific numerical measures against which permit applications may be evaluated.'' Under section 165(a)(3) of the Act, a permit applicant must demonstrate that emissions from the proposed construction and operation of a facility ''will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant.'' 42 U.S.C. 7475(a)(3).

An increment is the maximum allowable increase of an air pollutant that is allowed to occur above the applicable baseline concentration. The baseline concentration in a particular area is generally the ambient pollutant concentration at the time the first complete PSD permit application is submitted (*i.e.*, the baseline date) [17] by a new major stationary source or a major modification locating in or otherwise affecting that area.[18] By establishing the maximum allowable level of ambient pollutant concentration increase in a particular area, an increment defines ''significant deterioration.'' Once the baseline date associated with the first proposed new major stationary source or major modification in an area is established, the new emissions from that source consume a portion of the increment in that area, as do any subsequent emissions increases that occur from any source in the area. When the maximum pollutant concentration increase defined by the increment has been reached, additional PSD permits cannot be issued until sufficient amounts of the increment are ''freed up'' via emissions reductions that may be required by the permitting authority. Moreover, the air quality in a region cannot deteriorate to a level in excess of the applicable NAAQS, even if all the increment has not been consumed. Thus, areas where the air pollutant concentration is near the level allowed by the NAAQS may not be able to use the full amount of pollutant concentration increase allowed by the increment.

Thus, an increment is a quantitative value that establishes the ''maximum allowable increase'' for a particular pollutant. It functions, therefore, as a specific numerical measure that can be used to evaluate whether an applicant's proposed project will cause or contribute to air pollution in excess of allowable levels.

Increments also satisfy the second factor in section 166(c) by providing ''a framework for stimulating improved control technology.'' Increments establish an incentive to apply more stringent control technologies in order to avoid violating the increment. Given that the PSD increment level may be consumed by cumulative emissions increases over time, it may become necessary to impose increasingly more stringent levels of control on new sources in order to avoid violating the increment or ensuring that there will be increment remaining for additional economic growth. The more stringent control technologies utilized in these areas may become the basis of BACT determinations elsewhere, as the technologies become more commonplace and the costs tend to decline. See also S. Rep. 95–127 at 18, 30 (3 LH at 1392, 1404) (''the incremental ceiling should serve as an incentive to technology, as a potential source may wish to push the frontiers of technology in a particular case to obtain greater productive capacity within the limits of the increments'').

Because the existing increment-based regulatory framework, which was not controverted in *EPA* v. *EDF*, satisfies these criteria we are retaining the increment approach in this action.

However, we recognize that an increment system is not the only way to fulfill the requirements of section 166 of the Act. Congress did not require EPA to utilize increments in its PSD regulations for NO_X but gave EPA the discretion to employ increments if appropriate to meet the criteria and

[16] Section 51.166 of the CFR contains minimum requirements for the submittal and adoption of regulations that are part of a SIP. We are not making similar changes to the Federal PSD regulations at 40 CFR 52.21.

[17] This date is actually identified as the 'minor source baseline'' date in EPA regulations. 40 CFR 51.166(b)(14); 40 CFR 52.21(b)(14). Because the baseline concentration does not include emissions from certain major sources that consume increment, EPA has distinguished between the 'minor source baseline'' date and the 'major source baseline date.'' See 40 CFR 51.166(b)(13)–(14); 40 CFR 52.21(b)(13)–(14).

[18] For PSD baseline purposes, a source generally ''affects'' an area when its new emissions increase is projected to result in an ambient pollutant increase of 1 $\mu g/m^3$ (annual average) or more of the pollutant.

goals and purposes set forth in sections 166 and 160 of the Act. 42 U.S.C. 7474(d); *EDF* v. *EPA*, 898 F.2d at 185 (''Congress contemplated that EPA might use increments''). Thus, in this action, we are also allowing States to develop alternatives to an increment system at their discretion, and to submit any such alternative program to EPA so that we can determine whether it satisfies the requirements of section 166. In addition, in a separate rulemaking action, we are continuing to develop an alternative regulatory framework that would enable a State to demonstrate that the requirements of section 166 are satisfied by reducing NO_X emissions from existing sources under the CAIR and other similar programs.

b. Area Classifications

Having increments set at different levels for each class of PSD area helps to fulfill two of the factors applicable under section 166(c) of the Act. Under the three-tiered area classification scheme established by Congress, Class I areas are areas where especially clean air is most desirable. The original Class I areas established by Congress included national parks, wilderness areas, and other special areas that require an extra level of protection. It stands to reason that the most stringent increment is imposed in Class I areas. In contrast, Class III areas, which are those areas in which a State wishes to permit the highest relative level of industrial development, have the least stringent increment level. Areas that are not especially sensitive or that do not wish to allow for a higher level of industrial growth are classified as Class II. When Congress established this three-tiered scheme for SO_2 and PM, it intended that Class II areas be subject to an increment that allows ''moderately large increases over existing pollution.'' H.R. Rep. 95–294, 4 LH at 2609. The Petitioners in *EDF* v. *EPA* did not contest EPA's decision in 1988 to employ this same classification scheme in our pollutant-specific PSD regulations for NO_X.

Establishing the most stringent increments in Class I areas helps fulfill EPA's obligation to establish regulations for NO_X that ''preserve, protect, and enhance the air quality'' in parks and special areas. Class I areas are primarily the kinds of parks and special areas covered by section 160(2) of the Act.

With the air quality in Class I areas subject to the greatest protection, this scheme then provides two additional area classifications with higher increment levels to help satisfy the goal in section 160(3) of the Act that EPA ''insure that economic growth will occur in a manner consistent with preservation of clean air resources.'' In those areas where clean air resources may not require as much protection, more growth is allowed. By employing an intermediate level (Class II areas) and higher level (Class III areas), this classification scheme helps ensure that growth can occur where it is needed (Class III areas) without putting as much pressure on existing clean air resources in other areas where some growth is still desired (Class II areas).

By redesignating an existing Class II area to Class III, States may accommodate economic growth and air quality in areas where the Class II increment is too stringent to allow the siting of new or modified sources. The procedures specified by the Act for such a redesignation require a commitment of the State government to the creation of such an area, extensive public review, participation in the SIP area redesignation process, and a finding that the redesignation will not result in the applicable increment being exceeded in a nearby Class I or Class II area. See 42 U.S.C. 7474(a)–(b) (Section 164(a)–(b)). Our 1988 analysis, 53 FR at 3702–05, and the subsequent issuance of PSD permits for major new and modified sources of NO_X since that time [19] tend to confirm that, with the existing increment levels, the three-tiered classification system has allowed for economic growth, consistent with the preservation of clean air resources.

However, we do not believe that this framework alone completely satisfies the factors applicable under section 166(c) of the Act. The increment that is employed for each class of area is also relevant to an evaluation of whether the area classification scheme achieves the goals of the PSD program. We discuss the increments further below.

c. Permitting Procedures

Two of the factors applicable under section 166(c) are fulfilled by the case-by-case permit review procedures that are built into our existing regulations. The framework of our existing PSD regulations employs the preconstruction permitting system and procedures required under section 165 of the Act. 42 U.S.C. 7475. These requirements are generally reflected in sections 51.166 and 52.21 of EPA's PSD regulations in Title 40 of the Code of Federal Regulations. These permitting and review procedures, which we interpret to apply to construction of new major sources and to major modifications at existing sources, fulfill the goals set forth in sections 160(4) and 160(5) of the Act. These goals require that PSD programs in one State not interfere with the PSD programs in other States and that PSD programs assure that any decision to permit increased air pollution is made after careful evaluation and public participation in the decisionmaking process. For the same reasons set forth in our proposal, 70 FR at 8896, we continue to believe these factors are fulfilled by employing the permit review procedures.

d. Air Quality Related Values Review by Federal Land Manager and Permitting Authority

Under an increment approach, we consider the review of AQRVs in Class I areas by the Federal Land Manager (FLM) and State permitting authority to be an additional measure that helps to satisfy the factors in sections 166(c) and 160(2) which require that EPA's PSD regulations for NO_X protect air quality values, and parks and other special areas, respectively. In the 1988 rulemaking addressing PSD for NO_X, EPA extended the AQRV review procedures set forth in sections 51.166(p) and 52.21(p) to cover NO_2. 53 FR at 3704. These AQRV review procedures were established based on section 165(d) of the Act, and they were originally applied only in the context of the statutory increments for PM and SO_2. However, because they also address many of the factors applicable under section 166(c) of the Act, EPA also applied them to NO_X through regulation.

Section 165(d) creates a scheme in which the FLM and permitting authority must review the impacts of a proposed new or modified source's emissions on AQRVs. The Act assigns to the FLM an ''affirmative responsibility'' to protect the AQRVs in Class I areas. The FLM may object to or concur in the issuance of a PSD permit based on the impact, or lack thereof, that new emissions may have on any affected AQRV that the FLM has identified. If the proposed source's emissions do not cause or contribute to a violation of a Class I increment, the FLM may still prevent issuance of the permit by demonstrating to the satisfaction of the permitting authority that the source or modification will have an adverse impact on AQRVs. Section 165(d)(2)(C). On the other hand, if the proposed source will cause or contribute to a violation of a Class I increment, the permitting authority (State or EPA) shall not issue the permit unless the owner or operator demonstrates to the satisfaction of the FLM that there will be no adverse

[19] EPA does not formally track the issuance of PSD permits across the country, but EPA's Regional Offices have confirmed that various PSD permits for sources of NO_X have been issued by many of the States in their respective jurisdictions.

impact on AQRVs.[20] Thus, the compliance with the increment determines whether the FLM or the permit applicant has the burden of satisfactorily demonstrating whether or not the proposed source's emissions would have an adverse impact on AQRVs.[21]

In our February 2005 proposal, we referred to this process as the ''FLM review.'' However, we recognize this term is somewhat of an oversimplification because it fails to account for the role of the State permitting authority. In this final action, we more precisely describe this process as the review of AQRVs by the FLM and permitting authority.

Incorporating these AQRV review procedures into the PSD regulations for NO_X helps to provide protection for parks and special areas (which are generally the Class I areas subject to this review) and air quality values (which are factors considered in the review). As we stated in the proposed rule, we believe the term ''air quality values'' should be given the same meaning as ''air quality related values.'' Legislative history indicates that the term ''air quality value'' was used interchangeably with the term ''air quality *related* value'' (AQRV) regarding Class I lands.[22]

Section 166(d) of the CAA provides that EPA may promulgate measures other than increments to satisfy the requirements of section 166. Legislative history indicates that the AQRV review provisions of section 165(d) were intended to provide another layer of protection, beyond that provided by increments. The Senate committee report stated the following: ''A second test of protection is provided in specified Federal land areas (Class I areas), such as national parks and wilderness areas; these areas are also subjected to a review process based on the effect of pollution on the area's air quality related values.'' S. Rep. 95–127, at 4 LH at 1401.

One commenter asserted that the AQRV review process is not effective in protecting air quality in national parks and wilderness areas because the FLM does not have unilateral authority to prevent the issuance of a permit when it alleges that a proposed new source or modification will have an adverse impact on an AQRV. We recognize that the FLM has the burden to convince the permitting authority that there will be an adverse impact on AQRVs in situations where the proposed project will not cause an increment to be violated. Nevertheless, we do not agree that the effectiveness of this process for reviewing impacts on AQRVs is diminished simply because the ultimate decision to issue or deny a permit does not rest with the FLM in all cases.

While the permitting authority has the discretion to disagree with the FLM's analysis, that discretion is not unfettered. See *In the matter of Hadson Power 14—Buena Vista,* 4 EAD 258, 276 (Oct. 5, 1992) (opinion of EPA's Environmental Appeals Board in PSD Appeal No. 92–3, 92–4, 92–5). The permitting authority must carefully consider the FLM's analysis. If a permitting authority is not convinced that there will be an adverse impact on AQRVs from the proposed facility, the permitting authority must provide a ''rational basis'' for such a conclusion. 50 FR 28549 (July 12, 1985); *Hadson Power* at 276. In addition, our visibility regulations require that States provide an explanation when they disagree with an FLM's conclusion that visibility will be adversely impacted. 40 CFR 51.307(a)(3). The District of Columbia Circuit Court has recently observed that a State must justify its decision in writing when it disagrees with an FLM report finding an adverse impact on visibility. See *National Parks Conservation Ass'n* v. *Manson,* No. 04–5327, slip op. at 8 (D.C. Cir. July 1, 2005).

The value of the FLM review procedure is that it requires a review of impacts on AQRVs by the FLM and permitting authority for each project that may have an adverse impact on AQRVs in a specific, localized area. In those cases where the increment is not violated and the permitting authority agrees that a proposed project will adversely affect AQRVs, the parks and other special areas will be protected by denial of the permit or by requiring the applicant to modify the project to alleviate the adverse impact. Although it is not the final decisionmaker on this question in such a situation, the FLM plays an important and material role by raising these issues for consideration by the permitting authority, which in the majority of cases will be the State.

Furthermore, we have not asserted that the AQRV review process alone is sufficient to satisfy the requirements of section 166(c) for NO_X. As discussed below, we believe the statutory factors are fulfilled when the review of AQRVs is applied in conjunction with increments and other aspects of our PSD regulations.

Several commenters recommended that we improve the FLM review process by providing specific guidance on how to evaluate and manage adverse impacts on AQRVs from NO_X emissions. These commenters called for a more specific framework or systematic approach for conducting the review of impacts on AQRVs and determining whether impacts are adverse. Some requested that EPA provide more definition of the concept of AQRVs and circumstances when an AQRV is adversely impacted.

We recognize that the process of reviewing impacts on AQRVs is somewhat ambiguous because it is loosely defined. The CAA does not define AQRV, except to note that it includes visibility. Section 165(d)(1)(B). Some additional insight can be gained from the following description in legislative history:

> The term ''air quality related values'' of Federal lands designated as class I includes the fundamental purposes for which such lands have been established and preserved by the Congress and the responsible Federal agency. For example, under the 1916 Organic Act to establish the National Park Service (16 U.S.C. 1), the purpose of such national park lands ''is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.''

S. Rep. 95–127 at 36, reprinted at 3 LH at 1410.

However, we are not prepared at this time to provide further definition for these concepts in this rulemaking action for pollutant-specific PSD regulations for NO_X. We believe the existing AQRV review process provides the avenue to satisfy the factors applicable under section 166(c) of the Act in conjunction

[20] Even if such a waiver of the Class I increment is allowed upon a finding of no adverse impact, the source must comply with such emissions limitations as may be necessary to ensure that the Class II increment for SO_2 or PM is not exceeded. Section 165(d)(2)(C)(iv). In 1988, EPA made this provision applicable to the PSD provisions for NO_X, with a cap of 25 $\mu g/m^3$ – the NO_2 Class II increment. 53 FR at 3704; 40 CFR 51.166(p)(4) and 52.21(p)(5).

[21] In response to concerns that Class I increment would hinder growth in areas surrounding the Class I area, Congress established Class I increments as a means of determining where the burden of proof should lie for a demonstration of adverse effects on AQRVs. *See* Senate Debate, June 8, 1977 (3 LH at 725).

[22] *See* S. Rep. 95–127, at 12, reprinted at 3 LH at 1386, 1410 (describing the goal of protecting ''air quality values'' in ''Federal lands—such as national parks and wilderness areas and international parks,'' and in the next paragraph and subsequent text using the term ''air quality related values'' to describe the same goal); *id.* at 35, 36 (''The bill charges the Federal land manager and the supervisor with a positive role to protect *air quality values* associated with the land areas under the jurisdiction of the [FLM]'' and then describing the statutory term as ''air quality related values''). H.R. Report 95–564 at 532 (describing duty of Administrator to consider ''air quality values'' of the tribal and State lands in resolving an appeal of a tribal or State redesignation, which is described in the final bill as ''air quality related values'').

with other aspects of our PSD regulations.

The AQRV review process applies to SO_2 and PM as well, and thus is broader than the scope of this rulemaking for NO_X. We have been engaged in a separate action to consider refinements to the AQRV review process. In 1996, the Agency, among other refinements, proposed the following definition of AQRV:

> * * * visibility or a scenic, cultural, physical, biological, ecological, or recreational resource that may be affected by a change in air quality, as defined by the Federal Land Manager for Federal lands, or by the applicable State or Indian Governing Body for nonfederal lands.

61 FR 38250, 38322 (July 23, 1996). However, we have not reached the closure on the evaluation of these issues. We will continue to work with Federal land management agencies and consult with States and other stakeholder groups on potential reforms to the AQRV review process, including evaluating the potential of a critical loads approach, as discussed in section VII of this preamble.

e. Additional Impacts Analysis

The additional impacts analysis set forth in our regulations also helps fulfill the criteria and goals and purposes in sections 166(c) and 160. The additional impacts analysis involves a case-by-case review of potential harm to visibility, soils, and vegetation that could occur from the construction or modification of a source.

Sections 51.166(o)(1) and 52.21(o)(1) of the PSD regulations require that a permit provide the following analysis:

> an analysis of the impairment to visibility, soils and vegetation that would occur as a result of the source or modification, and general commercial, residential, industrial and other growth associated with the source or modification. The owner or operator need not provide an analysis of the impact on vegetation having no significant commercial or recreational value.

This requirement was based on section 165(e)(3)(B) of the CAA, which provides that EPA establish regulations that require ''an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by emissions from such facility * * *'' 42 U.S.C. 7475(e)(3)(B).

This portion of the additional impacts analysis is especially helpful for satisfying the requirements of section 166(c) in Class II and Class III areas. These areas are not subject to the additional AQRV review that applies only in Class I areas. We agree with the commenter who pointed out that our regulations under section 166 must also provide protection for Class II and Class III areas. While not as intensive a review as the AQRV analysis required in Class I areas, the consideration of impairments to visibility, soils, and vegetation through the additional impacts analysis contributes to the satisfaction of the factors applicable under section 166(c) of the CAA in all areas, including Class II and Class III areas.

f. Installation of Best Available Control Technology

The requirement that new sources and modified sources subject to PSD apply BACT is an additional measure that helps to satisfy the factors in sections 166(c), 160(1), and 160(2) of the Act. This requirement, based on section 165(a)(4) of the CAA, is included in EPA's PSD regulations and thus is also part of the regulatory framework for the Agency's pollutant-specific regulations for NO_X. 40 CFR 52.21(j); 40 CFR 51.166(j). Our existing regulations define ''best available control technology'' as ''an emission limitation * * * based on the maximum degree of reduction for each pollutant subject to regulation under the Act * * * which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source through application of production processes or available methods, systems, and techniques * * *.'' 40 CFR 52.21(b)(12); 40 CFR 52.166(b)(12). This pollutant control technology requirement is rigorous and in practice has required significant reductions in the pollutant emissions from new and modified sources. The control of NO_X emissions through the application of BACT helps to protect air quality values, public health and welfare, and parks and other special areas.

2. Characteristics of Increments for NO_X

Because *EDF* v. *EPA* concerned certain characteristics of the increments for NO_X that we had established in 1988, we sought comments in our proposal on the possible need to (1) create additional increments for forms of NO_X other than NO_2 alone; (2) promulgate additional increments for an averaging period other than the existing annual period, *i.e.*, ''short-term'' increments; and (3) increase the stringency of the existing NO_2 increments by lowering the allowable levels. Several commenters opposed our proposal to retain the annual NO_2 increments at existing levels for all area classifications. However, many commenters supported the existing increments, believing that they provide adequate environmental protection and meet the requirements of section 166(c) of the Act.

The majority of commenters that opposed retaining the existing increments recommended we adopt various alternatives to the existing NO_2 increments, including new short-term increments, increments measured by a different form of NO_X, and the use of critical loads in lieu of the present increment system. A few commenters felt that the existing levels of the increments are not adequate to protect the environment but did not recommend specific ways to change them. One commenter supported the existing increments but recommended that EPA enact additional mechanisms for protecting AQRVs in Class I areas. Two commenters supported revising and retaining the increment system on an interim basis but then emphasized the need for additional studies to ultimately improve the PSD program for NO_X by switching to a critical loads approach.

After considering these comments, we have decided to retain the existing increments for NO_X without any of the changes recommended by commenters. We have not been persuaded by comments (including the information contained in studies provided by the commenters) that there is sufficient basis for EPA to modify the ''safe harbor'' increments. Thus, we are retaining annual NO_2 increments for each area classification with a level based on the same percentages of the NAAQS Congress employed to establish the SO_2 increments. As a result, the Class I increment for NO_2 remains at 2.5 $\mu g/m^3$ (annual average). The Class II increment for NO_2 is 25 $\mu g/m^3$ (annual average) and the Class III increment for NO_2 is 50 $\mu g/m^3$ (annual average).

In evaluating the level, averaging period, and form of increments for NO_X, we applied the following four factors applicable under section 166(c): (1) Protect air quality values; (2) protect public health and welfare from adverse effects from air pollution that occur even when the air quality meets the NAAQS; (3) protect air quality in parks and special areas; and (4) ensure economic growth consistent with preservation of clean air resources.[23]

[23] We have paraphrased these factors here and in other sections to facilitate the explanation of our reasoning. However, we recognize that the statutory language is broader than the shorthand we use here for convenience.

We continue to believe that the other four factors identified in sections 166(c) and 160 of the Act do not relate to the level, time period, and form of the increments and thus are more appropriately considered when determining the overall framework for PSD regulations. Since we believe that those other factors are satisfied by the increment and area classification framework and other measures contained within our PSD regulations, we do not believe that it is necessary to further consider those other four factors when evaluating the characteristics of increments of NO_X.

a. Fundamental Elements of Increments

In the proposal, we described three elements which we believed were fundamental to the PSD increments under the regulatory framework established by Congress. We considered these elements in determining whether to modify the existing increments. First, an increment represents an allowable marginal increase in ambient air pollution concentrations resulting from increases in the emissions of a particular pollutant after the ''baseline'' date in the affected PSD area. Second, increments are not intended to remedy the effects of pre-existing sources of pollution in attainment areas, but rather prevent excessive growth in emissions in these areas that already have ambient air pollution levels below the NAAQS. The third fundamental element of increments is that they are intended to allow the same level of growth in each area with a particular classification and thus should be uniform across the nation for each area classification. Most commenters did not question these fundamental elements of increments, but some concerns were raised.

(1) Marginal level of increase. Increments represent the maximum allowable level of pollutant concentration increase in an area where the air quality is in attainment with the NAAQS or has been designated ''unclassifiable.'' Thus, an increment is essentially a marginal level of increase in air pollution that is allowable for particular areas. The statutory increments are expressed as ambient concentrations rather than mass values. An increment differs from the NAAQS in that an increment is not an absolute air quality ceiling. The pollutant increase allowed by an increment is added to the ''baseline'' air pollution levels existing in an affected PSD area at the time a new or modified major source submits an application for a PSD construction permit. Thus, in applying the factors applicable under section 166(c), we interpreted section 166 of the Act to require an analysis of the impacts on air quality values, health and welfare, and parks and special areas that could occur as a result of some marginal increase in the concentration of air pollution in an area.

As noted earlier, EPA does not interpret the PSD program to require it to set increments at a level where there will be no negative effects from a marginal increase in air pollution in the amount of the increment. Congress did not anticipate that an increment would be a level of increase below which there would be no negative effects. An increment is the level that defines ''significant'' deterioration; it allows some deterioration of air quality. The PSD program allows for some increase in effects when necessary to ensure that economic growth may continue to occur consistent with the preservation of clean air resources.

(2) Increments need not remedy existing air pollution. Because an increment is an allowable level of increase, it does not function to reduce air pollution in existence before the baseline dates. As its name indicates, the PSD program is intended to protect against significant deterioration of the air quality in attainment and unclassifiable areas from the construction and operation of new and modified sources of a particular size. Thus, the PSD program limits increases in emissions of a pollutant (as measured by the increase in ambient concentrations of the pollutant) but does not seek to reduce existing emissions or ambient air pollutant concentrations to a particular level.

Several commenters seemed to suggest that the increment system should somehow be designed to improve the air quality to remedy existing effects. However, we believe it is clear that the increments established by Congress were only intended to define the allowable levels of marginal increase in air pollution above a baseline concentration that are established in each area when the first major source applies for a PSD permit in that area. 42 U.S.C. 7479(4). As a result, we do not believe we are required to set increments at a level intended to alleviate existing negative effects.

When we evaluated the characteristics of increments necessary to prevent significant deterioration of air quality, we also recognized that EPA has adopted several other programs under the CAA that reduce the adverse effects from existing air pollution sources. These programs are designed to reduce emissions from existing sources, while the increments serve the complementary function of limiting increases in emissions from the construction of new major sources and the modification of existing ones. Since our proposal, EPA has taken a series of actions that require States to achieve substantial reductions in NO_X emissions.

On March 10, 2005, EPA finalized the CAIR (70 FR 25162, May 12, 2005), which requires substantial emissions reductions of SO_2 and NO_X from sources in 28 eastern States and the District of Columbia to help downwind $PM_{2.5}$ and 8-hour ozone nonattainment areas achieve the NAAQS. Under this program, emissions of NO_X are regulated as a precursor of either ozone or fine PM, or both. EPA is requiring the affected States to submit revised SIPs that include control measures to reduce emissions of NO_X to assist in achieving the NAAQS.[24] This program is based on State obligations to address interstate transport of pollution under section 110(a)(2)(D) of the Act. The required NO_X reductions must be implemented by the States in two phases, with the first phase beginning in 2009 (covering 2009–2014) and the second phase beginning in 2015. The EPA estimates that the two-phase CAIR program will reduce NO_X emissions by a total of 2 million tons from 2003 emissions levels.

Reduction of NO_X emissions from existing sources is also required under EPA's 1998 NO_X SIP Call, which also addresses State obligations to address interstate transport of pollution. The NO_X SIP Call requires 22 eastern States and the District of Columbia to submit SIP revisions that prescribe NO_X emissions reductions by a specified deadline. The EPA has projected that approximately 900,000 tons of NO_X per ozone season will be reduced as a result of this particular program. While these reductions are intended primarily to improve air quality in the East with respect to ozone, it is clear that the required decreases in NO_X emissions will also decrease acid deposition, nitrogen loadings to aquatic and terrestrial ecosystems, and ambient concentrations of NO_2.

In addition, EPA has taken further action to reduce NO_X emissions from existing sources that contribute to visibility problems, through implementation of the Regional Haze program under sections 169A and 169B of part C.[25] On July 6, 2005, EPA issued

[24] The required reductions in NO_X emissions will also result in substantial visibility improvements and reductions in nitrogen deposition in many parts of the eastern United States.

[25] When the visibility provisions were enacted, the House committee report specifically recognized that the ''visibility problem is caused primarily by emission into the atmosphere of sulfur dioxide,

revised regulations for regional haze, including guidelines for Best Available Retrofit Technology (BART) determinations. The regulations require States to submit SIPs to address regional haze visibility impairment in 156 mandatory Class I Federal areas located throughout the U.S. 70 FR 39104. As required by the Act, the regulations require certain major stationary sources, placed in service between August 7, 1962 and August 7, 1977, and which emit 250 tons or more per year of a visibility-impairing pollutant, including NO_X, to undergo a BART analysis.

The BART requirements are in addition to other elements of the Regional Haze program in regulations that EPA originally promulgated in 1999. 64 FR 35714 (July 1, 1999) (''Regional Haze rule''). The main components of this rule require States to: (1) Submit SIPs that provide for ''reasonable progress'' toward achieving ''natural visibility conditions'' in Class I areas; (2) provide for an improvement in visibility in the 20 percent most impaired days; (3) ensure no degradation in visibility occurs on the 20 percent clearest days; and (4) determine the annual rate of visibility improvement that would lead to ''natural visibility'' conditions in 60 years.

At the time that Congress established the Regional Haze Program, a Congressional committee recognized that the PSD program was not necessarily created to alleviate adverse effects resulting from contributions by existing sources. When it was writing section 169A of the Act at the same time that it established the PSD program, the House recorded the following observations in a committee report:

> [T]he committee recognizes that one mechanism which has been suggested for protecting these areas, the mandatory Class I increments of new section 160 ('Prevention of Significant Deterioration') do not protect adequately visibility in Class I areas. First, inadequately controlled, existing gross emitters such as the Four Corners plant would not be affected by the significant deterioration provisions of the bill. Their emissions are part of the baseline, and would not be required to be reduced by new section 160 of the act.

H. Rep. 95–294, at 205, 4 LH at 2672 (emphasis added). This statement indicates that protection of air quality values under section 166(c) is provided when an increment limits significant deterioration of air quality resulting from increases in emissions after the baseline date, but does not require an increment that addresses adverse impacts on air quality values, such as visibility, that are caused by pre-existing emissions.

In addition, in the 1990 Amendments, Congress enacted title IV to address the problem of acid deposition. We believe this supports an interpretation that the PSD measures called for in section 166 need not address acid deposition impacts that are attributed to emissions that existed prior to the baseline date. When we use an increment approach, our view is that the PSD program is intended to focus on establishing a marginal level of increase in emissions that will prevent significant air quality deterioration and, in conjunction with AQRVs identified by the FLM, provide protection against increases in adverse effects, such as acidification, that may result from emissions increases after the baseline date.

Thus, in areas where the PSD baseline has not yet been established, the emissions reductions achieved by these programs will result in lower PSD baseline concentrations. Then the increments will operate as an allowable level of marginal increase that prevents the significant deterioration of air quality beyond the baseline concentration in these attainment areas. This approach is consistent with Congressional intent that the baseline concentration, representing the air quality in an attainment area subject to PSD, be established on the date of the first application for a permit by a PSD source affecting that area. 42 U.S.C. 7479(4). See also *Alabama Power* v. *Costle*, 606 F.2d 1068, 1088–89 (D.C. Cir. 1979).

(3) Increments should be uniform for each area classification. Several commenters disagreed with our view that the increments should be uniform throughout the U.S. in each area with the same classification. These commenters argued that uniform national standards are not required by the Act. We continue to believe that the PSD program is intended to allow the air quality in each area of the country attaining the NAAQS, and with the same area classification, to ''deteriorate'' by the same amount for each subject pollutant, regardless of the existing air quality when the increment is initially triggered in a particular area, as long as such growth allowed within the constraints of the increment does not cause adverse impacts on site-specific AQRVs or other important values.[26] In this way, the PSD increments avoid having a disproportionate impact on growth that might disadvantage some communities, recognizing that the increments in themselves would not address existing negative impacts but cannot allow significant new adverse impacts. Congress established the foundation for uniform national increments when it created increments for SO_2 and PM under section 165 of the Act.

Thus, when we use the framework of an increment and area classification system in the national PSD regulations for a particular pollutant, we believe that we should establish a single increment for each class of area such that this allowable level of increase applies uniformly to all areas in the nation with that particular classification. This is necessary for EPA to ensure equitable treatment by allowing similar levels of emissions growth for all regions of the country that a State elects to classify in a particular manner. The following statement from the legislative history of the PSD program supports this interpretation of what Congress intended:

> Some suggestions were made that the pollution increments should be calculated as a function of existing levels of pollution in each area. But the inequities inherent in such an approach are readily evident * * *. The committee's approach—increments calculated as a percentage of the national standard—eliminates those inequities. All areas of the same classification would be allowed the same absolute increase in pollution, regardless of existing levels of pollution.

H. Rep. 95–294, at 153, 4 LH at 2620. See also S. Rep. 95–127, at 30, 3 LH at 1404 (''These increments are the same for all nondeterioration areas, thus providing equity for all areas''). This indicates that Congress did not intend to impose more stringent restrictions under the PSD program on particular areas of the country based on their current levels of air pollution, unless, of course, the current levels of pollution concentrations are so near the NAAQS that the full amount of incremental change cannot be allowed.

Instead, Congress provided States with the authority to determine situations when it might be desirable to allow a greater or lesser level of air quality protection in a particular area. Except for certain Federal lands designated as mandatory Class I areas

oxides of nitrogen, and particulate matter * * *'' H.R. Rep. 95–294, at 204, reprinted in 4 LH at 2671. NO_X may result in visibility impairment either locally (a coherent plume effect) or by contributing to regional haze, which has been recognized as primarily a fine particle phenomenon. 1995 Staff Paper for NO_X at 89. For the reasons discussed earlier, we do not believe we need to consider PM effects in this court-ordered reevaluation of the NO_2 increments.

[26] Congress also recognized that some areas may have air pollution levels already near the levels allowed by the applicable NAAQS, whereby the NAAQS would govern and the full amount of increment might not be usable.

that could not be reclassified, Congress classified all other areas as Class II areas and gave the States the power to reclassify these areas to Class I or Class III to provide for greater protection of air quality or allow more growth, depending on the values of the State and the community in that area. The ability to reclassify most areas allows the States to make their own choices about which areas require more protection of air quality and which areas should be allowed more growth consistent with the protection of air quality. See H.R. Rep. 95–294, at 153–154, 4 LH at 2620–2621.

The same equitable considerations are applicable when we establish PSD regulations containing increments and area classifications under section 166 of the Act. Since Congress did not intend for the increments it established to impose a disproportionate impact on particular areas, we do not believe it intended for EPA to do so under section 166 of the Act. Thus, to treat all areas of the country in an equitable manner, it is necessary for us to establish uniform national increments for NO_2 that define a maximum allowable increase for each of the three area classifications. Then, States and tribes in exercising their unique authority to manage their own air quality, in accordance with their own unique and individual goals and objectives, may decide how to best manage their air quality resources by reassigning area classifications within any particular area (other than mandatory Federal Class I areas).

Some of the commenters opposing uniform national increments disagreed with our view that the increments should be uniform because they felt we improperly focused on ''providing equal opportunity for new emission sources without fulfilling [our] statutory duty to protect ecological resources across the country.'' What is required, according to these commenters, is ''the protection of air quality related values and fulfillment of the Act's goals and purposes—which unquestionably include protection of individual parks, wilderness areas, and other areas of important value.'' Moreover, these commenters argued that because of our insistence on the use of uniform increments no amount of information would ever provide a ''nationally applicable'' basis for EPA to revise the NO_2 increments, because, as EPA recognizes, ''the sensitivity of individual ecosystems varies greatly'' across locations.

We do not believe that our position supporting uniform national increments under the national PSD program necessarily conflicts with our responsibility to protect sensitive ecological resources located throughout the U.S. The use of uniform national increments—only one component of the PSD regulations for NO_X—does not mean that the PSD program is not responsive to different levels of adverse effects in particularly sensitive areas, such as Class I areas.

We weighed Congress' goal to treat all areas with a particular classification the same against the unique variability in ecosystem effects that may result from NO_X emissions (described elsewhere in this preamble). We ultimately concluded that multiple goals could be achieved by retaining uniform national increments for NO_2 for each area classification and augmenting them with an additional case-by-case procedural review which can identify and protect against variable effects that could occur in especially sensitive areas, even when the increment is not fully consumed. Indeed, this is what Congress did under its original PSD program requirements for SO_2 and PM.

This approach is embodied in the framework for the PSD regulations for NO_X that we adopted in 1988. As described in section VI.A.1. above, each permit application is subject to an ''additional impacts'' analysis that allows the permitting authority to consider the sensitivity of a particular area. In Class I areas, the AQRV review procedures provide further protection, notwithstanding the allowable amount of pollutant concentration increase allowed by the Class I increment, for the air quality values and the national parks and wilderness areas included in Class I areas. These two sets of special procedures are an important part of the overall regulations for preventing significant air quality deterioration, while retaining the uniform national increments. This approach allows EPA to achieve the equity of setting a uniform increment level for all areas with a particular classification, while directing that permitting authorities conduct a more intensive, site-specific review to identify effects that might occur in a more sensitive area but not necessarily in all areas of the country with that classification.

As noted earlier, we read section 166 of the Act to direct EPA to establish a system of regulations containing provisions that collectively satisfy the content requirements in sections 166(c) and 166(d) of the Act. Thus, we think Congress contemplated that we would consider all the provisions in our regulations as a group when establishing particular aspects of those regulations. As a result, we believe it is appropriate and consistent with our statutory obligations to consider the protection provided by the additional impacts analysis and the review of AQRVs in Class I areas when establishing increments.

We also believe that the factors applicable under section 166(c) of the Act are met when we establish a uniform national increment for NO_2 for each class of area and augment the increment system with an additional case-by-case procedural review to identify and protect against variable adverse effects that could occur in especially sensitive areas before the amount of pollutant increase defined by the increment is reached.

We, nevertheless, understand the commenters' concern over our position that the increments should be uniform, when they conclude that no amount of evidence concerning ecological effects will be useful for revising the increments, because of the highly variable sensitivity of ecosystems throughout the U.S. While we have indicated that it would be very difficult to use such variable data to modify the increments as uniform increments, we believe it may be possible to develop uniform increments that provide for a reasonable level of protection in most areas if sufficient national critical loads data are available to determine the range of adverse effects that must be considered. Clearly, such extensive data are not available at this time.

Some commenters argued that we should establish local standards under section 166 to address the known variable effects from NO_X. For the most part, however, the comments related to the use of a critical loads approach rather than a set increment or variable increments for NO_X. In either case, however, because of the equitable considerations and State prerogatives to classify areas described above, we do not believe that Congress intended for EPA to create a federally imposed system of regional or locally based increments or to authorize EPA to do so to address any variability in potential effects. Likewise, we do not believe it is permissible or appropriate for us to establish uniform increments at levels so stringent that they prevent any adverse impact on the most sensitive receptors in any part of the U.S. Although such an approach might achieve uniformity across all areas, it would unduly restrict growth in those areas of the country where adverse effects may not occur at the levels where the adverse effects occur in more sensitive areas.

Furthermore, our regulations also provide protection against localized impacts by requiring each new or

modified source subject to PSD to apply BACT. The BACT requirement provides for a case-by-case State determination, taking into account energy, environmental, and economic impacts and other costs to determine the best method for minimizing a source's emissions. See section 169(3) of the Act.

b. Analytical approaches for establishing increments. Mindful of the above considerations about the characteristics of the increments, we reviewed the scientific and technical evidence available for the 1996 review of the NO_2 NAAQS in order to determine whether, and to what extent, the ''safe harbor'' increments should be modified to satisfy sections 166(c) and 160 of the Act. As summarized in section V of this preamble, EPA's conclusions about whether nitrogen at levels at or below the NAAQS caused negative environmental impacts were mixed, but included findings that negative effects associated with nitrogen deposition (1) did not likely exist (*e.g.*, eutrophication of freshwater systems); (2) were insignificant (*e.g.*, impacts on terrestrial vegetation); or (3) not clearly understood (*e.g.*, chronic and episodic acidification). There was some evidence that at levels below the NAAQS, nitrogen was at least in part contributing to known negative environmental effects. Ultimately, we tried two different analytical approaches—a quantitative and a qualitative evaluation—to reach our decision about whether we had a basis for modifying the safe harbor NO_2 increments so that the increments themselves could provide greater protection against such adverse effects. These approaches and the relevant findings are described below.

(1) Quantitative Evaluation. An increment is not like the NAAQS in that it does not set a uniform pollutant concentration ''ceiling'' against which potential negative ecosystem responses could be evaluated. Instead, an increment allows a uniform allowable pollutant concentration increase above a baseline concentration in an area. Therefore, we evaluated how protective the existing NO_2 increments are by trying to compare the maximum pollutant concentration increases allowed by the NO_2 increments against the pollutant concentrations at which various environmental responses occur. See 70 FR 8900.

Unfortunately, this quantitative approach was hindered because the available evidence we reviewed typically was inconclusive regarding the pollutant concentrations at which negative environmental responses associated with NO_X could be expected to occur. As described in section V, in many instances, there was uncertainty about the specific relationship between the pollutant, NO_2, and its precise role in causing a particular negative response to an environmental receptor.

The Agency encountered the same problem in the past during the last periodic review of the NO_2 NAAQS. Because of our inability to derive from the available evidence a way to quantify how much of a contribution atmospheric deposition of nitrogen is making to negative environmental effects and what levels of reduction are necessary to remedy the situation, we were precluded from recommending secondary (welfare-based) NAAQS for NO_X. See 1995 Staff Paper for NO_X, vol. 1, pp. 91–95. For similar reasons, we could not quantitatively identify the level of increase in NO_X emissions at which significant negative environmental effects occur. Thus, we do not have a quantitative way to determine whether or how to modify the existing NO_2 increments in order to prevent significant deterioration.

Recognizing the inconclusive nature of the scientific and technical evidence contained in the 1993 Criteria Document, we looked beyond that information to later studies that might provide the information we needed to determine the quantitative dose-response relationships associated with NO_X in the atmosphere. We found that later studies enable us to better understand N deposition trends, the mechanisms by which NO_X contributes to N deposition, and the ways in which sensitive ecosystem resources respond to excess nitrogen. However, even in the later studies, there continues to be significant uncertainty about the quantitative dose-response relationships that we need to evaluate the effectiveness of the existing NO_2 increments.

Some commenters saw the later studies, which provide evidence of increased levels of N deposition in some areas of the U.S., and scientific findings more closely linking nitrogen deposition to observed negative ecosystem responses as ''proof'' that the existing NO_2 increments are ineffective. We disagree with the commenters' claims that evidence of localized impacts in specific sensitive areas, as reflected in later studies, necessarily proves that the existing NO_2 increments across the U.S. are ineffective. It is not clear at this time whether a lower, more stringent increment level that we might select for the national uniform increments would prevent the adverse effects that are currently being observed in a particular park or sensitive area of the U.S. We have already acknowledged that increments are not intended to prevent all negative impacts in all areas, and that the PSD regulations for NO_X contain other mechanisms for protecting sensitive resources where the increment alone does not do so.

We cannot deny the commenters' claims that some areas of the U.S. (primarily in the West) have continued to experience increased rates of N deposition, as studies have shown. However, such information does not change the fact that we are currently unable to find sufficient evidence upon which to establish a dose-response relationship associated with NO_X so that we can scientifically support more stringent numerical levels for the NO_2 increments should we otherwise conclude that a modification is appropriate. Instead, as mentioned above, most published studies have still largely focused on documenting the adverse effects and making links to N deposition as a primary cause. These studies typically fall short of defining a quantitative relationship between emissions of NO_X, N deposition rates, and the negative responses being observed.

There are many recent studies that examine the various sources of the nitrogen input (industry, transportation, agriculture), N deposition budget, geographical location of different nitrogen loadings, and trends in deposition rates, as well as the specific effects of nitrogen deposition on specific ecosystems. These studies in general emphasize the importance of reducing current emissions of NO_X as part of a strategy for reducing observed impacts and promoting ecosystem recovery. However, such studies are not yet able to provide the information needed to identify the dose-response relationships associated with NO_X.

There are several key difficulties associated with the ability to establish a quantitative relationship between NO_X and the negative environmental responses to which nitrogen compounds are known to contribute. Below, we summarize some of the key areas of difficulty for which a better understanding is needed.

(1) Relationship between NO_X emissions and N deposition. It is generally recognized that reducing NO_X emissions will result in reductions in N deposition as well. However, the quantitative relationship between the two is complex and still uncertain. Some recent studies attempt to address the various parameters that together could help to establish this relationship. For example, some recent study results provide evidence of a quantitative

relationship between NO_X emissions and precipitation (wet deposition) NO_3 in the eastern U.S. However, the results of efforts to establish a quantitative relationship between NO_X emissions and total (wet and dry) nitrogen deposition have thus far been inconclusive (Butler, 2000, 2003). These studies point to the reactive nature of components of NO_X as being part of the problem. Besides producing nitric acid or nitrate aerosols, both components of N deposition, NO_X can also result in the formation of peroxyacetyl nitrates (PAN), ozone and other oxidant species. Also, it has been observed that high year-to-year variability in N deposition does not match the relatively small total NO_X emissions changes in the eastern U.S.

(2) Nitrogen deposition budget. Another complication is that total N deposition typically includes the combined contributions of emissions from NO_X (which form nitrates and nitric acid in the atmosphere) and ammonia (ammonium). Emissions of ammonia can be converted to any other nitrogen species and can contribute to all nitrogen-related inputs. (Ammonia Workshop, 2003.) Ammonia and ammonium found in the atmosphere, and in the soil, are generally the result of agricultural activities that are neither regulated directly by the PSD program nor counted towards the consumption of the NO_2 increment (and would not be counted against the increment for NO_X measured as any other form of NO_X). In order to better understand the relationship between the different sources of nitrogen and the ecosystems affected, it is important to also recognize contributions from ammonia and ammonium.

One challenge with understanding the contributions from different nitrogen species is that the mix of pollutant inputs that affect sensitive ecosystems is dynamic. A 2005 report using data from the National Atmospheric Deposition Program National Trends Network has shown that from 1985 to 2002 marked changes in concentrations of sulfate, nitrate and ammonium in wet deposition have occurred. The reported trends indicate ''changes in the mix of gases and particles scavenged by precipitation, possibly reflecting changes in emissions, atmospheric chemical transformations, and weather patterns.'' (Lehmann, 2005.)

In some areas of the country, for example, it is reported that emissions of ammonia are increasing at a greater rate than emissions of NO_X. At the same time, atmospheric ammonium concentrations in wet deposition are increasing at a greater rate than are nitrate concentrations (Fenn, 2003a). The same study indicated that NO_X emissions in the western U.S. are projected to decrease 28 percent by 2018, while ammonia emissions are projected to increase by 16 percent. Another study reports the occurrence of significant increases of ammonia and dissolved inorganic nitrogen in much of the U.S., while reporting regionally significant increases and decreases in nitrate. (Lehmann, 2005.)

Another challenge is that in many areas, particularly in the West, the accuracy of the inventory for ammonia is very uncertain, and historic deposition monitoring (collected mainly in the form of wet deposition) typically has not included the ammonia component. (Fenn, 2003a.) This leads to problems in estimating total N deposition.

We believe that a better understanding of ammonia emissions and the ammonia levels in the atmosphere, and their contribution to total N deposition, is also needed in order to obtain a more complete picture of the atmospheric partitioning of N emissions and total mass of N deposition. This will help us better understand the dose-response relationships between the different sources of nitrogen and the ecosystems affected by them.

Finally, the N deposition budget and associated deposition rates are determined by a complex interaction of multiple processes. Modeling efforts to simulate the formation and deposition of nitrogen species in the West involve a number of data inputs including emissions of nitrogen from various sources of NO_X and ammonia, meteorological parameters, chemical transformation and partitioning of nitrogen species, aerosol dynamics, and rates of wet and dry deposition. (Fenn, 2003a.)

(3) Ecosystem variety and sensitivity. Even if a particular threshold value could be identified to quantifiably relate ambient NO_X concentrations to an adverse effect in a given ecosystem and location, the same threshold is not likely to apply to similar ecosystems throughout the U.S. In our most recent review of the NO_2 NAAQS, we observed that ''a great degree of diversity exists among ecosystem types, as well as in the mechanism by which these systems assimilate nitrogen inputs.'' 60 FR 52831, October 11, 1995 at 52881. As a result, we concluded, ''the relationship between nitrogen deposition rates and their potential environmental impact is to a large degree site- or region-specific and may vary considerably over broader geographical areas or from one system to another because of the amount, form, and timing of nitrogen deposition, forest type and status, soil types and status, the character of the receiving waterbodies, the history of land management and disturbances across the watersheds and regions, and exposure to other pollutants.'' *Id.*

A 2005 paper describes the progress being made by FLMs in identifying the resources that are at risk or sensitive to air pollution in the parks and wilderness areas under their jurisdiction. (Porter, 2005.) Reportedly, the FLMs have also completed qualitative descriptions of the various resources. It is noted that such information is ''specific to each wilderness area or park, because of the tremendous diversity in ecosystem characteristics, sensitivities, and stressors on federal lands.''

Thus, for example, ecosystems in the Northeast have been more strongly affected by acid deposition than have ecosystems in the western U.S. On the other hand, the problem of greater concern in the West results from nitrogen enrichment, which includes nitrogen saturation, eutrophication and alterations in biological communities. In addition, some areas in the West are noted for their sensitivity to relatively low doses of N deposition, particularly at higher elevations.

In addition to the difficulties described above, there are other considerations that add to the complexity of determining dose-response relationships for NO_X. These include: (1) In addition to multiple nitrogen compounds that must be identified, the observed ecosystem responses to pollutant deposition can also be the result of combined pollutant impacts, such as the acidification of lakes from both sulfur and nitrogen deposition; (2) short-term increases of nitrates in streams have occurred in the absence of concurrent increases of N deposition but have been positively correlated with mean annual air temperatures (Murdoch, 1998), and high levels of nitrogen have occurred in the absence of anthropogenic sources; and (3) it may take years before certain ecosystems come into balance with the cumulative amounts of nitrogen inputs (making it difficult to determine the level at which recovery begins).

The difficulty of establishing the dose-response relationships associated with NO_X is further illustrated by EPA's experience in evaluating the feasibility of setting an acid deposition standard. Under section 404 of the 1990 Amendments, Pub. L. 101–549, Congress directed EPA to conduct a study of the feasibility and effectiveness

of an acid deposition standard(s), to report to Congress on the role that a deposition standard(s) might play in supplementing the acidic deposition program adopted in title IV, and to determine what measures would be needed to integrate an acid deposition standard with that program.

The EPA completed this study, ''Acid Deposition Feasibility Study, Report to Congress'' (1995), which concluded that current scientific uncertainties associated with determining the level of an acid deposition standard(s) are significant, and did not recommend setting an acid deposition standard. See *State of New York* v. *Browner*, 50 F. Supp. 2d 141, 149 (N.D.N.Y. 1999) (rejecting States' claim that section 404 required that the report include a deposition standard that would be sufficient to protect sensitive aquatic and terrestrial resources, and affirming EPA interpretation that duty was limited to ''consideration of a description'' of such standards).

While EPA has recognized that programs, such as the CAIR (70 FR 25162, May 12, 2005), that are intended to achieve NO_X emissions reductions pursuant to other statutory provisions will help mitigate acid deposition problems, none of those programs purport to set an acid deposition standard.

We note that one particular study, cited by two commenters, did include a ''conservative recommendation'' for a threshold level (*i.e.*, critical load) for nitrogen deposition based on ''wetfall for Class I areas in the central Rocky Mountains.'' (Williams, 2000.) In addition, it is reported that other efforts are underway by scientists using empirical studies and modeling to estimate critical loads for other areas of the U.S. Also, the NPS has spent considerable time evaluating the effects of both sulfur and nitrogen deposition in several national parks, and has estimated critical loadings associated with some of their important natural resources. (Porter, 2005.)

We have considered whether the concept of a ''critical load'' could be used to identify an alternative increment level. At this time, we do not believe that the current status of such research can be used as a basis for us to establish national increments, or other measures of NO_X, that could be applied throughout the U.S. We do, however, provide further discussion in section VII concerning the critical load concept and its potential for being an effective air quality management tool.

As discussed in the welfare effects section (V.D.2), although we are seeing effects at current nitrogen deposition rates, for the above reasons we believe that it is not technically or practicably feasible to identify a quantitative basis for concluding that the existing NO_2 increments are inadequate to provide protection against the types of adverse effects on ecosystems that may occur in some areas notwithstanding compliance with the NAAQS. In particular, it is not possible to determine a different level of increment protection that would define a significant deterioration level for ecosystem effects associated with emissions of NO_X. Thus, currently available information does not provide a nationally applicable, quantitative basis for revising the existing NO_2 increments.

(2) Qualitative Evaluation. As explained above, the available scientific and technical data do not yet enable us to adequately relate ambient concentrations of NO_X to ecosystem responses. Without such key information, it is difficult to quantitatively evaluate the effectiveness of the ''safe harbor'' increments for protecting air quality values, health and welfare, and parks while ensuring economic growth consistent with the preservation of clean air resources. Alternatively, we must make a qualitative judgment as to whether the existing NO_2 increments or some alternative increments meet the applicable factors.

In this situation, we believe that determining the increment levels that satisfy the factors applicable under section 166(c) is ultimately a policy choice that the Administrator must make, similar to the policy choice the Administrator must make in setting a primary NAAQS ''with an adequate margin of safety.'' See *Lead Industries Ass'n* v. *EPA*, 647 F.2d 1130, 1147 (D.C. Cir. 1980) (where information is insufficient to permit fully informed factual determinations, the Administrator's decisions rest largely on policy judgments). Using a similar approach is warranted because both section 109 and section 160(1) direct the Administrator to use his or her judgment in making choices regarding an adequate margin of safety or protecting against effects that may still occur notwithstanding compliance with the NAAQS—both areas of inquiry characterized by great uncertainty. Thus, in the process for setting NAAQS, the Administrator looks to factors such as the uncertainty of the science, the seriousness of the health effects, and the magnitude of the environmental problem (isolated or commonplace). *E.g.*, 62 FR 38652 (July 18, 1997) ($PM_{2.5}$ NAAQS).

Bearing on this policy decision for increments are various considerations, based on the available information and the factors applicable under section 166(c). The factors establishing particular environmental objectives (protecting air quality values, health and welfare, and parks) might suggest that, in some areas, we permit no or minimal increases in NO_X emissions or establish an increment for another form of NO_X because there are data indicating that an effect may be attributable to NO_X emissions. However, as explained earlier, we do not believe that Congress intended for the PSD program to eliminate all negative effects. Thus, rather than just seeking to eliminate all negative effects, we must attempt to identify a level of increase at which any additional effects beyond existing (or baseline) levels would be ''significant'' and protect against those ''adverse'' effects. Furthermore, we need to ensure that our increments provide room for some economic growth. Congress intended for EPA to weigh these considerations carefully and establish regulations that balance economic growth and environmental protection.

Since we are unable to establish a direct, widely applicable, quantitative relationship between particular levels of NO_X and specific negative effects, we give particular weight to the policy judgment that Congress made when it set the statutory increments as a percentage of the NAAQS and created increments for the same pollutant form and time period that was reflected in the NAAQS. In section 166 of the Act, Congress directed that EPA study the establishment of PSD regulations for other pollutants for which Congress did not wish to set increments at the time.

Congress' own reluctance to set increments to prevent significant deterioration of air quality due to emissions of NO_X, and the provisions ensuring time for Congressional review and action, suggest that Congress intended for EPA to avoid speculative judgments about the science where data are lacking. Thus, in the absence of specific data showing that a marginal increase of a particular level below the ''safe harbor'' would better protect health, welfare, parks, and air quality values, while simultaneously maximizing opportunities for economic growth, we give weight in our qualitative analysis of the factors applicable under section 166(c) to the method that Congress used to establish the statutory increments.

In making this qualitative judgment, we also consider the overall regulatory framework that we have established in the PSD regulations for NO_X. This

framework includes a case-by-case analysis of each permit application to identify additional impacts (*e.g.*, soils and vegetation), a special review by the FLM and State permitting authority of potential adverse effects on air quality values in parks and special areas, and a requirement that all new and modified sources install BACT. In addition, the area classification system ensures that there will be economic growth in particular areas that are consistent with the values of each State and individual communities within States.

c. Three characteristics of increments for NO_X.

(1) Form of increment. A significant issue in the *EDF* v. *EPA* case was EPA's action in 1988 to establish an increment for only one form of NO_X, *i.e.*, NO_2. We promulgated increments for NO_2 in 1988 because NO_2 was the only form of NO_X for which we had established a NAAQS at that time. However, the court held in *EDF* v. *EPA* that section 166(c) of the Act ''commands the Administrator to inquire into a pollutant's relation to the goals and purposes of the statute, and we find nothing in the language or legislative history suggesting that this duty could be satisfied simply by referencing the ambient standards.'' 898 F.2d at 190. As a result, in this rulemaking action on remand, we weighed the relevant evidence to determine whether the data supported the potential use of other forms of NO_X to serve as measures for the increments and, if so, what numerical levels would be appropriate.

We requested comment on whether we should adopt increments for other forms of NO_X and received several comments recommending that EPA do so. Some of these commenters claimed that the statute requires EPA to examine and regulate nitrogen compounds other than NO_2, to protect the air quality, especially in Class I areas. Therefore, these commenters called upon EPA to develop increments that accounted for other forms of NO_X, such as nitric acid, nitrate, ammonium nitrate, and for ozone. Some commenters recognized the complexity of the total nitrogen deposition problem and recommended that EPA revise and retain the existing increments on an interim basis, while undertaking the necessary steps to study the full scope of the problems associated with NO_X and revising the PSD regulations for NO_X accordingly. For the reasons discussed below, we have decided not to add any additional increments based on other forms of NO_X to the existing increments for NO_2.

Under the ''contingent safe harbor'' approach discussed above, we began our analysis with ''safe harbor'' increments that address increases in ambient NO_2 concentrations. Since 1988, EPA has not identified a basis upon which to establish a NAAQS for any form of NO_X other than NO_2. Thus, it remains the case today that the only NAAQS established for NO_X are the current NO_2 NAAQS which have not changed since 1971. We believe that increments based on the same pollutant for which we have a NAAQS are the ''safe harbor'' for the purposes of this rulemaking.

Establishing increments for this form of NO_X is ''at least as effective'' as the statutory increments in section 163 of the Act. Congress established statutory increments in section 163 for only those forms of PM and sulfur oxides for which we had promulgated a NAAQS.[27] As discussed above, the need for an increment necessarily derives from the establishment of a NAAQS, which is the basic measure of air quality under the CAA. Thus, an increment based on this basic measure of air quality is ''at least as effective'' as the statutory increments in section 163 of the Act. The court in *EDF* v. *EPA* rejected the argument that increments based on the same form of NO_X as the NAAQS were not ''as effective as'' the increments in section 163. 898 F.2d at 190.

We acknowledge that the available scientific and technical evidence indicates that the range of adverse effects being observed in the various ecosystems studied are the result of contributions from several forms of NO_X other than NO_2. We noted earlier in this preamble that seven species of oxides of nitrogen are known to occur in the atmosphere. However, anthropogenic emissions of NO_X predominantly originate as NO and quickly oxidize into NO_2. As described in section V of the preamble, under the discussion of environmental effects, many of the negative effects indirectly related to emissions of NO and NO_2 are caused (or contributed to) largely by nitrogen compounds (*e.g.*, nitrates, nitric acid) which result from chemical transformations of NO_2 in the atmosphere.

In particular, nitrates (NO_3^-), primarily in the form of nitric acid (HNO_3) and nitrate aerosols such as ammonium nitrate (NH_4NO_3), are primary constituents of nitrogen deposition and can play a significant role in producing welfare effects that are indirectly attributable to emissions of NO and NO_2. As a result, we examined the feasibility of establishing numerical increments that would include measurement of nitrates.

In the February 2005 proposal, we noted several reasons why we believed that it was not necessary to adopt individual increments for nitrate. First, the existing NO_2 increments, which limit the allowable increase of NO_2 in a given area, serve also to limit the amount of nitrate in the atmosphere.[28] That is, by limiting the allowable increase in ambient concentrations of NO_2 in the immediate area surrounding a proposed new or modified PSD source, some limit can effectively be placed on downwind formations of nitrate compounds as well.

We also noted that ambient nitrate often exists in the atmosphere in particulate form, *e.g.*, ammonium nitrate and nitrate salts formed from nitric acid. These forms are known to contribute to regional haze. Based on this, we indicated our belief that nitrates could be more effectively regulated under our national PM program.

Notwithstanding these reasons for not needing a nitrate-based increment, we further explained that the available scientific and technical evidence available for our consideration did not exist (1) to adequately establish a quantifiable relationship between NO_X emissions (NO/NO_2) and nitrogen deposition products, including nitrates, or (2) to set numerical levels for such increments.

Some of the commenters who supported the need for increments based on a broader measure of NO_X referenced more recent studies which point to the worsening trends of nitrogen deposition, and observations of adverse effects, in various areas of the country as evidence that the existing NO_2 increments are ineffective. On this basis, the commenters claimed that the existing NO_2 increments did not satisfy sections 166(c) and 160 of the Act. While we do not discount the findings contained in these studies, we do not believe that these more recent studies provide the necessary information either to establish broader nitrogen-based increments or to indicate that the NO_2 increments are ineffective.

As was the case with the more recent studies that we reviewed, the studies cited by commenters are based on observations of adverse ecological effects in specific localized areas where sensitive ecosystem receptors are known to exist. Such studies clearly have

[27] Since that time, we have refined the original NAAQS for PM (then measured as TSP) to focus on coarse (PM_{10}) and fine ($PM_{2.5}$) particulate matter. We subsequently established increments for PM_{10} in accordance with section 166(f) of the Act. 58 FR 31622 (June 3, 1993). We are considering establishing increments for $PM_{2.5}$.

[28] Another source of nitrates, not associated with emissions of NO_X, is the nitrification of ammonium by bacteria in stream beds.

enhanced our ability to understand the mechanics of the pollutant deposition process, identify deposition trends, and document the adverse effects to which nitrogen deposition contributes. Yet the same studies in most cases continue to fall short of enabling us to quantify the levels of deposition responsible for the recorded changes. In fact, many of these studies conclude by calling for additional research to collect the data necessary to quantify the dose-response relationships associated with nitrogen.

Even considering more recent evidence, we continue to believe that it is not feasible to develop broader-based increments for NO_X at this time, and the nitrate deposition effects in local areas where sensitive ecosystems exist will be more effectively addressed via the broader set of PSD regulations for NO_X and by various PM control programs that will apply in those local areas.

Finally, with regard to commenters' recommendations that we establish increments to address the effects of ozone, we indicated earlier that we do not believe Congress intended for us to consider the effects of other regulated pollutants, such as ozone, when establishing increments for NO_X. We continue to believe that the increments for NO_X need only consider effects resulting from ambient NO_2 and other forms of NO_X (resulting from the transformation of NO_2 in the atmosphere), rather than secondary pollutants for which Congress expected separate PSD regulations, including increments. See relevant comments concerning increments for secondary pollutants associated with NO_X and our responses to those comments in section V.D. of this preamble.

A key problem that we have already discussed, however, is that studies of nitrogen deposition indicate that the nitrogen input from total atmospheric nitrogen deposition is not simply the result of emissions of NO_X, but of other nitrogen compounds as well, including ammonia and ammonium. For example, when ambient concentrations of ammonia and nitric acid are sufficiently high, ammonium nitrate can be formed and both the ammonium and the nitrate become components of nitrogen deposition contributing nitrogen to an ecosystem. For these reasons, we do not believe it is feasible to adopt an additional increment for another form of NO_X to protect air quality values, health and welfare, and parks and special areas, from NO_X emissions increases associated with new and modified PSD sources. Thus we are adopting the ''safe harbor'' increments and retaining the existing increments for NO_2. Under these circumstances, the NAAQS provides a reasonable benchmark for identifying the pollutant to be used in an increment.

Section 160(1) of the Act is expressed by using the NAAQS as a benchmark and also uses standards that mirror the standards applicable to the NAAQS-setting process— ''protect public health and welfare.'' The court in *EDF* v. *EPA* rejected use of the NAAQS as the ''sole basis'' for deriving the increments for NO_X but did not preclude EPA from adopting only increments based on the same pollutant as the NAAQS when EPA has determined that additional increments are not needed after considering the factors applicable under section 166(c) of the Act. See 898 F.2d at 190. As we have explained earlier, several of the ''other forms of NO_X'' that commenters recommend be included in the increments for NO_X are more appropriately addressed under programs for other criteria pollutants, as well as some of the multi-pollutant emissions reductions programs that have been established across the U.S.

(2) Increment averaging periods. The existing NO_2 increments, promulgated in 1988, are based on an annual averaging period, consistent with the NO_2 NAAQS. In the 1988 rule, EPA did not set short-term NO_2 increments because a short-term NAAQS for NO_2 that would define short-term air quality for NO_2 did not exist. However, the court directed us to evaluate whether, considering the factors applicable under section 166(c), we should promulgate additional increments for short-term averaging times. 898 F.2d at 190. Thus, we have evaluated and requested comment on the need to promulgate additional NO_2 increments based on a short-term averaging time to satisfy section 166(c) of the Act. Several of the commenters that opposed EPA's proposed decision to retain the existing increments without modifying them argued that short-term increments were needed to meet our responsibility to provide health and welfare protection under the requirements of section 166(c) of the Act.

However, for the reasons discussed below, we are not persuaded that short-term NO_2 increments are necessary to satisfy the factors applicable under section 166(c).

Under the ''contingent safe harbor'' approach discussed above, we began our analysis with the ''safe harbor'' increments that are based on the same annual averaging time used in the NAAQS. Since 1988, EPA has not found cause to promulgate a NAAQS for any averaging period other than the annual average. Thus, since this is the only averaging time used in the current NAAQS, we consider an increment that employs this averaging time to be a ''safe harbor'' that is ''at least as effective'' as the statutory increments in section 163 of the Act. The increments listed in section 163 of the Act are based on the same averaging times that were contained in the NAAQS at the time Congress adopted this provision. The NAAQS are the basic measure of air quality under the CAA. Therefore, an increment that uses this standard as a benchmark is ''at least as effective'' as the statutory increments in section 163 of the Act. The court in *EDF* v. *EPA* rejected the argument that an increment based on the same averaging time as the NAAQS was not ''as effective as'' the increments in section 163. 898 F.2d at 190.

We reviewed the scientific and technical evidence available in the 1993 Criteria Document for NO_X in light of the section 166(c) criteria to determine whether it justified the need for a short-term increment, even though no short-term NO_2 NAAQS existed from which to derive a short-term safe harbor increment. As we indicated in the February 2005 proposal, the available evidence did not identify any adverse health effects from short-term exposure to ambient NO_2 concentrations in areas with air quality meeting the NO_2 NAAQS. Thus, we proposed to find that a short-term increment was not needed to provide any additional health protection beyond assuring that the existing increments would keep ambient NO_2 concentrations at levels below the NO_2 NAAQS.

Some commenters disagreed with us and expressed the need for a 1-hour NO_2 increment for health-related purposes. Some of these commenters urged us to consider recent health data and the fact that California has adopted a short-term health standard for NO_2 exposure. However, we continue to believe, based primarily on the evidence in the 1993 Criteria Document and 1995 Staff Paper for NO_X, that there is insufficient evidence to justify a national short-term NO_2 increment to provide additional health protection. As mentioned above, as part of the last review of the NO_2 NAAQS in 1996, EPA did not find adequate evidence that health effects from short-term exposure NO_2 occurred in areas where air quality levels met the NO_2 NAAQS.

The Administrator concluded from that review that the annual standard of 0.053 parts per million (ppm) NO_2 provides ''substantial protection'' against the identified health effects (mild changes in pulmonary function or airway responsiveness in sensitive individuals) associated with short-term

peaks occurring in the range of 0.2 to 0.5 ppm—almost one order of magnitude higher than the annual standard. 60 FR 52875, 52879–80 (October 11, 1995). The adequacy of the annual standard to protect against these potential short-term effects was further supported by the absence of documented effects in some studies at higher concentrations (3 ppm to 4 ppm).

We continue to believe that the existing primary annual NO_2 NAAQS provides sufficient protection against the likelihood of short-term NO_2 concentrations that would cause adverse human health responses in most areas of the U.S. We have no evidence at this time showing that there is a problem from a national perspective concerning short-term NO_2 concentrations that would represent a threat to human health, and the commenters have not provided information indicating a national problem for us to consider. We do know that high maximum 1-hour NO_2 concentrations have been measured in a few locations, including California—the only State that has adopted a short-term air quality standard for NO_2 (0.25 ppm, 1-hour).[29]

We have reviewed NO_2 air quality data collected from 592 monitoring site locations nationally from EPA's Air Quality System to determine how effective the current primary annual NO_2 NAAQS is in preventing high short-term NO_2 concentrations. These data show that, since 1999, only 14 sites (a few with multiple occurrences) across the U.S. have recorded peak 1-hour concentrations exceeding 0.25 ppm NO_2. Only one monitoring site recorded such peaks from 2003–2004. Thus, from a national perspective, we do not find support for a short-term NO_2 increment to provide health protection beyond that being provided by the existing annual primary NO_2 NAAQS.

We are aware of the fact that later studies have been published concerning human responses to short-term exposure to ambient NO_2 concentrations. These studies will be considered in the Agency's next periodic review of the NO_2 NAAQS. To the extent that any new relevant information is incorporated into the Criteria Document for oxides of nitrogen, we will carefully evaluate such evidence under the rigorous process described earlier in this preamble, involving CASAC and a public review process, to determine whether it is appropriate to adopt a short-term primary NO_2 NAAQS. In accordance with the requirements of section 166 of the Act, following promulgation of any revised NAAQS for NO_X, based on the same body of scientific and technical evidence, we will also review that evidence against the requirements of section 166(c) to determine the need to modify the existing NO_2 increments. However, at this time we do not believe there is a need to modify the existing NO_2 increments to provide a nationwide level of health protection beyond what is being provided by the primary annual NO_2 NAAQS.

In addition, the information that we reviewed concerning welfare effects associated with short-term exposure to NO_X did not convince us that there was a justification for a short-term increment to provide additional protection against adverse welfare effects. The available information indicated that known impacts were insignificant in some cases (*e.g.*, effects on terrestrial vegetation), while in other cases (*e.g.*, chronic acidification of surface waters) insufficient information existed to quantify how much of a contribution nitrogen deposition was making to the problem and what levels of reduction would be needed to remedy the negative impact. The effects that we reviewed are summarized in greater detail below and in section V of this preamble.

Two commenters recommended that we adopt a 1-hour NO_2 increment to prevent coherent plume (discoloration) visibility impairment. We do not believe that a short-term NO_2 increment for such purposes is supported by the available evidence. As we indicated in our description of welfare effects in section V of this preamble, NO_2 can cause a discoloration effect in a plume resulting in potential visibility impairment. However, the evidence also indicates that the presence of particulate in the plume can result in similar discoloration. Thus, the problem is not exclusively caused by NO_2. Moreover, the 1995 Staff Paper for NO_X noted that despite the known light-absorbing qualities of NO_2, ''there are relatively little data available for judging the actual importance of NO_2 to visual air quality.''

Visibility impairment associated with coherent plumes is currently addressed as part of the requirements for the AQRV review and the additional impacts analysis. This methodology measures visibility impairment resulting from multiple pollutants. The test for visibility impairment of this type is typically applied to sources locating less than 50 kilometers from a Class I area, and involves modeling the potential plume impacts to calculate 1-hour impacts within the elevated plume based on the concentrations of fine primary particulates and NO_2 emitted by the source. The effects of secondarily formed sulfates can also be considered, where applicable and appropriate, in the modeling procedure.

We do not believe it would be appropriate to establish a short-term NO_2 increment to address this visibility impairment problem when it is known that the problem is associated with multi-pollutant impacts. The problems associated with coherent plumes are currently addressed through protection of AQRVs and the ''additional impacts'' analysis. (Congress explicitly identified visibility as an example of an AQRV.) We believe that this is the most effective way to address this multi-pollutant problem.

Some commenters recommended short-term increments to protect against the increasing NO_X pollution impacts. In this regard, we do not find a justification to establish a short-term increment for either NO_2 or any other form of NO_X. In the latest review of the NO_2 NAAQS, the Administrator concluded that the impact on terrestrial vegetation from short-term exposures to NO_2 under existing ambient levels is insignificant and did not warrant a short-term standard (1995 Staff Paper for NO_X, p. 91). The Administrator also considered the welfare impacts from nitrate deposition during the last review of the NO_2 NAAQS. The evidence indicated, however, that none of the welfare impacts from nitrates were directly attributed to short-term ambient nitrate concentrations. In those cases where nitrogen deposition was shown to cause episodic or ''short-term'' effects, such as episodic acidification of streamwaters, the problem was typically the result of a long-term accumulation of nitrogen compounds that were released suddenly to the ecosystem (*e.g.*, snowmelt runoff to lakes and streams) rather than the direct result of short-term concentrations of nitrates being transferred from the atmosphere.

The ability to quantitatively relate N deposition to episodic acidification conditions is further hampered by evidence indicating that, because of conditions of nitrogen saturation, episodic acidification of surface waters and increased loadings to estuaries could worsen even without concurrent increases in N deposition. Later studies have verified this situation and have indicated that temperature change, among other things, rather than direct changes in the N deposition rate, can be

[29] It should be noted, however, that California's standard was not established on the basis of new information since our last periodic review of the NO_2 NAAQS. California established an ''Adverse Level'' for NO_2 (0.25 ppm, 1-hour) in 1962. In 1969, the California Air Resources Board set a short-term air quality standard for NO_2 using the original alert level.

more influential in the increased acidification conditions. One later study we reviewed subsequent to the proposal revealed a positive correlation between short-term increases in stream nitrate concentrations and mean annual air temperature (affecting nitrogen movement in a watershed), while finding no statistically significant correlation between deposition and stream nitrate concentrations. (Murdoch, 1988.)

One commenter recommended a short-term ammonium nitrate increment to address visibility problems associated with regional haze. However, we do not believe it is necessary to address this pollutant through our PSD regulations for NO_X. Ammonium nitrate is a form of PM (*i.e.*, nitrate particulate), and we already addressed the contribution of ammonium nitrates to total ambient PM levels and their effects on visibility (regional haze) under the PM program.[30] In revising the NAAQS for PM in 1997, EPA considered the welfare effects of PM, including nitrates, on visibility impairment in considering the need to revise the secondary PM standards. In doing this, we considered the pertinent scientific and technical information contained in the current Criteria Document for PM and Staff Paper for PM to determine what an appropriate level would be for a secondary standard to address adverse effects of PM on visibility. We concluded from that process that a 24-hour $PM_{2.5}$ primary standard in conjunction with a national regional haze program would be the more effective way to address regional variations in the adverse effects of fine particulate on visibility than by establishing national secondary standards for PM that would be lower than the $PM_{2.5}$ primary standards. See 62 FR 38652, July 18, 1997 at 38679–38683.

An important consideration in arriving at this decision was that there were significant differences in then-current visibility conditions in different areas of the country that could not effectively be addressed by a uniform national standard. Because our national control strategy for PM will include consideration of ammonium nitrate particles, we find no basis for establishing a short-term increment for ammonium nitrate to protect against visibility impairment as part of the PSD regulations for NO_X.

EPA has also recognized that NO_X results in the formation of ozone and nitrate particulates under certain conditions. Although ozone, PM_{10}, and $PM_{2.5}$ have short-term NAAQS to protect against public health effects associated with short-term exposure to these pollutants, EPA does not consider the impacts from these criteria pollutants, because it interprets section 166 to require consideration of these criteria pollutants separate and distinct from the duty to consider NO_X.

Based on these considerations, we believe that an annual average increment for NO_2, coupled with the requirements for the ''additional impacts'' and AQRV protection in Class I areas, is sufficient to protect air quality values, health and welfare, including the sensitive ecosystems in parks and other special areas. Thus, we revert to the ''safe harbor'' of the existing annual NO_2 increments and decline to adopt additional increments for shorter averaging periods under this final action.

(3) Level of NO_2 increment. Having concluded from the available scientific and technical evidence that additional increments based on other forms of NO_X or other averaging periods are either not necessary or not feasible, the remaining issue we evaluated in response to the court remand was whether there was a need for lower annual NO_2 increments. Our review of the applicable scientific and technical evidence provided no basis for us to propose modifying the levels of the existing NO_2 increments.

As part of our proposal, the analysis of the appropriate levels for NO_2 increments began by establishing a ''safe harbor'' increment level that was ''at least as effective as'' the increments established by Congress in section 163 of the Act. 42 U.S.C. 7476(d). Under our interpretation of the Act, we preliminarily concluded that these ''safe harbor'' levels established the minimum stringency levels (or highest marginal increase in concentration levels) that we may use as the increments for NO_2 for each class of area.

The court in *EDF* v. *EPA* recognized that the ''at least as effective'' standard in section 166(d) of the Act is satisfied when we establish increments using the percentage-of-NAAQS approach that Congress used to establish the statutory increments. See 898 F.2d at 188. This approach involves using the same percentages that Congress used to calculate the PM and SO_2 increments from the NAAQS in effect at that time for these pollutants. Because Congress used different percentages to calculate the Class I increments for PM and SO_2, we had to decide which of these percentages was appropriate for the Class I NO_2 increment. For the reasons described in the 1988 NO_2 increment rulemaking, we considered it appropriate for NO_2 increments to be derived using the same percentages that Congress used for SO_2 because NO_2 more closely resembles SO_2 than PM in its characteristics and sources. See 53 FR 3698, 3700 (February 8, 1988).

Because the NO_2 increments have not changed since 1988, the percentage-of-NAAQS approach yields the same levels that we derived in 1988. Thus, using this approach, the ''safe harbor'' level for the Class I NO_2 increment was calculated as 2.5 $\mu g/m^3$ (annual average), a level equal to 2.5 percent of the NO_2 NAAQS. For the Class II NO_2 increment, the ''safe harbor'' level is 25 $\mu g/m^3$—25 percent of the NO_2 NAAQS. For the Class III NO_2 increment, the ''safe harbor'' level is 50 $\mu g/m^3$—50 percent of the NO_2 NAAQS.

Our next step was to consider the factors applicable under section 166(c) and evaluate whether we needed to revise the ''safe harbor'' level to satisfy these factors. To the extent we were to find that the marginal increase in concentration allowed by the ''safe harbor'' level did not adequately protect against these effects and ensure economic growth consistent with preservation of clean air resources, we were obligated to attempt to identify an alternative level of marginal increase that would satisfy the factors applicable under section 166(c).

In order to identify the appropriate level of increase for ambient NO_2 concentrations, we attempted to establish a quantitative relationship between the emissions of NO_2 and potential adverse effects. Unfortunately, this approach was hindered for several reasons. First, the available evidence we reviewed was inconclusive regarding the pollutant concentrations at which the effects may occur. As previously described, in some instances, the available scientific and technical evidence revealed no significant effects, while in other cases the evidence revealed uncertainty about the direct relationship between the pollutant and its precise role in causing the effect. This requires an understanding of the intermediate transformation processes and the deposition patterns and total quantities of those nitrogen compounds which may contribute to the known or observed effects, as well as the nitrogen contribution to ecosystems from natural geobiochemical processes.

Second, since many of the negative effects were associated with total nitrogen deposition (indirectly associated with NO_2), *i.e.*, caused by NO_X compounds which have been transformed from NO_2 in the

[30] ''Impairment of visibility in multi-State regions, urban areas, and Class I areas is clearly an effect of particulate matter on public welfare.'' OAQPS Staff Paper for Particulate Matter, July 1996 at p. VIII–15.

atmosphere, it was also necessary to attempt to understand the quantitative relationship between emissions of NO_2 (the regulated form of the increment) and the observed negative environmental effects. Such relationships could not be sufficiently identified from the available evidence.

As a result of these findings, we proposed to find that the necessary scientific evidence was not yet available to determine that the existing safe harbor NO_2 increments are not adequately protective for purposes of defining ''significant deterioration.'' Therefore, we proposed to retain the existing NO_2 increments to limit allowable increases in ambient pollution associated with NO_X emissions and protect against health and welfare effects that might occur in areas where the air quality is better than the NO_2 NAAQS.

Some commenters objected to this proposed decision to retain the existing increments, although most of them generally did not suggest ways to revise the existing levels (other than to recommend short-term NO_2 increments) to make them more protective. For the most part, the studies and information provided by these commenters advance the knowledge about N deposition trends and how nitrogen inputs adversely affect sensitive resources at various locations, but they also support our original conclusions in the February 2005 proposal that there is not yet sufficient evidence to quantify a dose-response relationship between NO_X and the various negative effects being observed and reported.

We could establish more stringent increments simply by setting the allowable levels of pollutant increases at lower numerical values; however, we can find no basis for determining what particular lower values would provide the ''correct'' level of protection against the types of effects that have been identified. Consequently, we believe it would be inappropriate to arbitrarily select more stringent values for the NO_2 increments that are not supported by the available scientific and technical evidence.

Lacking a clear quantitative basis for establishing lower increment levels, we conducted a qualitative evaluation of the safe harbor increments in light of the considerations discussed above. To achieve equity and protect against effects that are variable across regions of the country, we believe each of the NO_2 increments should be set at a level that reasonably protects air quality values, health and welfare, and parks and special areas across the country, while also balancing the need to allow economic growth.

We continue to believe our ultimate obligation under section 166 of the Act is to establish a set of regulations for NO_X which contain provisions that collectively satisfy the content requirements in sections 166(c) and 166(d) of the Act. Thus, we think Congress contemplated that we would consider the entire set of regulations when we establish specific aspects of those regulations. As a result, we believe it is appropriate and consistent with our statutory obligations to consider the protection provided by the additional impacts analysis and the FLM review of AQRVs when evaluating the level of NO_2 increments that defines ''significant deterioration.''

Thus, based on the overall insufficiency of the available scientific and technical evidences to enable us to define a quantitative dose-response relationship, we believe the ''safe harbor'' approach for setting the increment levels is sufficient to satisfy the factors applicable under section 166(c), when coupled with the overall framework of PSD regulations applicable to NO_X. This approach generally maximizes opportunities for economic growth while ensuring that each area receives a sufficient level of protection against ''significant deterioration'' of air quality consistent with Congressional policy. To the extent necessary, the case-by-case additional impact analysis (in Class I and II areas) and AQRV review (in Class I areas) will provide additional protection in particular areas that may be more sensitive to nitrogen loadings resulting from NO_X emissions. Under these circumstances, we can find no basis for modifying the safe harbor increments, based on the approach established by Congress for the statutory increments. Thus, we retain the existing NO_2 increments that were established at the ''safe harbor'' level using the statutory ''percentage-of-NAAQS'' approach.

Several commenters seemed to suggest that we should no longer be relying on increments promulgated in 1988 to protect the environment and that it was time to update them. However, the Act does not provide a mechanism for periodically reviewing the increments for a particular pollutant. EPA's statutory responsibility for developing increments is linked to its responsibility for promulgating NAAQS. Section 166 requires EPA to promulgate increments for a pollutant following the promulgation of NAAQS for that pollutant. While the Act is silent in section 166 on how EPA is to respond to future revisions to existing NAAQS, we believe there may be certain circumstances when it is appropriate to review the increments for certain types of NAAQS revisions. For example, should EPA determine as part of a periodic review of the NO_2 NAAQS to promulgate a new, short-term NAAQS, then we believe it may be appropriate to consider the promulgation of a short-term increment as well. Nevertheless, this final action being taken today regarding the NO_2 increments is not a periodic review of the increments but a response to a court order requiring us to demonstrate the adequacy of the NO_2 increments, which we promulgated in 1988, in accordance with the relevant requirements that Congress provided for promulgating pollutant-specific PSD increments under section 166 of the Act.

d. Future considerations.

We agree with the commenters who have recognized the complexity of the total nitrogen deposition issue and suggested that it will take time to better understand the problems and solutions. The Act does not authorize EPA to reevaluate or upgrade the increments periodically, but generally requires new PSD regulations, which may include increments, following the promulgation of NAAQS.[31] Thus, as new information comes along to better document the dose-response relationships between NO_X and the various health- and welfare-related effects, we are not necessarily obligated to revise the existing increments for NO_X unless such information results in changes to the NAAQS. Hence, after any changes to the NAAQS, we would likely evaluate the PSD regulations for NO_X to determine what modifications, if any, are appropriate to meet the requirements of section 166 of the Act.

This is not to say, however, that the advance of relevant scientific and technical evidence could not be used to establish more effective mechanisms as part of the PSD regulations where we deem them to be appropriate. An example of this would be the use of the critical loads concept. In the February 2005 proposal, we proposed not to incorporate a critical loads approach as part of the national increment system (see 70 FR at 8914). We continue to believe that it would not be appropriate to do so at this time. Therefore, in today's final action, we are not adopting a critical loads approach in lieu of the existing NO_2 increments, nor are we at

[31] Section 166(a) of the Act requires in part that ''In the case of pollutants for which national ambient air quality standards are promulgated after the date of enactment of this part, he [the Administrator] shall promulgate such regulations not more than 2 years after the date of promulgation of such standards.''

this time incorporating a critical loads approach into the overall PSD regulations for NO_X. However, we remain interested in the concept and recognize its potential for addressing the adverse effects of nitrogen deposition. We discuss the critical loads approach more in section VII of this preamble.

Yet, we recognize that we may be obligated to consider modifications to the existing increments as new scientific and technical information becomes available, and when revisions to the existing NO_2 NAAQS are made. However, even as threshold levels of adverse impact are able to be defined for individual ecosystems, the diverse range of responses of nitrogen to different ecosystem as well as the number of factors (and interactions of those factors) which determine the response of ecosystems to anthropogenic nitrogen input will make it very difficult to establish uniform national increments which, by themselves, provide both an adequate level of protection in the most sensitive areas and a reasonable measure of ''significant'' deterioration in less sensitive areas.

B. State Option To Employ Alternatives to Increment

We are amending our regulations to explicitly give States the option to continue implementing the NO_2 increment program or to design an alternative approach as part of its SIP and submit this program to EPA for approval. If any States wish to pursue the latter option, EPA will review State requests on a case-by-case basis to determine if the State alternative program satisfies the requirements of sections 166(c) and 166(d) of the CAA and prevents significant deterioration of air quality from emissions of NO_X.

We are not establishing any specific regulatory criteria to govern the review and approval of such a program other than what is already contained within section 166 of the CAA. EPA is not prepared at this time to conclude that any particular type of program other than the existing increment framework meets the requirements of sections 166(c) and 166(d) of the CAA. However, as discussed in section IV above, we continue to believe EPA's obligation under section 166 to promulgate pollutant-specific regulations for NO_X can be satisfied by allowing States to demonstrate that ''other measures'' besides increments will prevent significant deterioration of air quality due to an increase in emissions of NO_X, as long as those measures are consistent with the requirements of sections 166(c) and 166(d) of the Act.

1. States May Adopt ''Other Measures'' That Fulfill Section 166 of the Act

In options 2 and 3 of the proposal, we proposed to address the requirements of section 166 of the CAA for NO_X through the review and approval of State programs that employed alternative approaches to fulfill the requirements of sections 166(c) and 166(d) of the Act. We are codifying only this core principle in our regulations today without identifying any specific type of alternative program that would meet these requirements. EPA is postponing decisions on adequacy of specific elements of a State's alternative approach until such time as the State submits its plan to EPA in a case-by-case SIP approval process. We believe this less prescriptive approach may allow some States to employ an alternate approach sooner and more efficiently, without waiting for EPA to develop a comprehensive one-size-fits-all program through additional rulemaking.

Accordingly, we are amending our PSD rule at § 51.166 to reflect that an alternative approach to maximum allowable pollutant concentrations or increments for NO_2 that meet the requirements of section 166 of the Act may be employed upon approval by the Administrator. We are requiring that a State's alternative approach meet three broad criteria, which will be explored in more detail on a case-by-case basis. The approach must: prevent significant deterioration of air quality due to emissions of NO_X; fulfill requirements of section 166 of the Act; and be demonstrated in the SIP. We are not establishing criteria, other than the requirements of the Act itself, by which to review a State's submittal, and we are not defining any particular type of alternative approach for States to use as a substitute for the NO_X increments. Rather, we are simply making clear in the regulations that States have the flexibility to employ an alternative approach to the NO_X increments.

2. EPA Is Not Adopting Elements of Option 3

Although this approach of allowing States to submit alternative programs has some similarities to our proposed option 3, we are not adopting several of the elements that we proposed as part of option 3 (the State planning approach). When we proposed option 3, we envisioned that the EPA could establish a specific planning goal for States, or require each State to establish one, and then provide a process by which States would demonstrate how the measures in their SIPs would achieve this goal. One specific planning goal we proposed was to keep statewide emissions of NO_X from all sources below 1990 levels.

Several commenters expressed concerns that option 3 of the proposal did not include sufficient detail. We agree with the commenters that there were numerous specific elements of the State planning approach that we had not fully addressed in our proposal. The unresolved issues related to option 3 included the following: (1) Timing of the SIP approval with discontinuation of NO_X increment tracking; (2) a State plan's failure to prevent significant deterioration due to NO_X emissions; (3) periodic assessment of PSD cumulative increment impacts; (4) additional measures (backstops); (5) potential for localized adverse impacts; and (6) effects of an alternative approach on air quality in neighboring States.

Because we have not yet resolved these issues, we have decided to codify only the core element of options 2 and 3—the principle that a State may employ alternatives to increment upon a proper demonstration. Thus, instead of seeking to resolve these issues for every State in advance through a rulemaking action, we will consider these types of issues on a case-by-case basis during review of individual State plans. At this time, we believe we can more effectively consider and address such issues in the context of specific plan approvals.

Although option 3 of our proposal lacked detail, several commenters tentatively supported the flexibility provided by option 3. Some commenters preferred a case-by-case approach to having ''one-size-fits-all'' criteria applicable to each State. Several commenters encouraged flexibility to acknowledge the differences in the air quality and types of sources among western and eastern States.

Other commenters opposed giving States flexibility on the grounds that this would result in a lack of uniformity nationwide. One commenter was concerned that State-to-State levels of NO_X protections would vary, resulting in an uneven playing field for regulated sources.

We recognize there are reasons to support flexibility and reasons to support uniform treatment. We addressed the juxtaposition of these issues in evaluating the increment system and related provisions, as discussed in more detail above. Our conclusion for those circumstances was that we could to some extent balance these concerns by combining a uniform increment system with a case-by-case review of additional impacts and

AQRVs. We believe we can also consider the need for a level playing field and the need to address regional variability when reviewing individual State alternatives. Thus, we do not believe we should foreclose permanently the option for States to demonstrate that they can design an alternative program. We favor giving States the option to experiment and consider approaches that are uniquely suitable to a particular area, provided that such approaches do not result in imbalances in NO_X regulation across the country.

Some commenters were against option 3 because they believed EPA might require States to develop an alternative to increments. Our final action today does not require a State to develop an alternative to the NO_2 increments. States have the flexibility to continue implementing the NO_2 increments or to pursue approval of other measures besides increments that achieve the same objectives.

Several commenters opposed option 3 on the grounds that it would not provide adequate protection for parks and AQRVs. These commenters were concerned that option 3 did not account for a source's distance and direction from a Class I area. The commenters indicated that these variables could have a major effect on whether a source's NO_X emissions adversely impact AQRVs. A State will be required to demonstrate that any alternative approach to increments protects parks and AQRVs. In addition, we recognized that an unresolved issue under our option 3 was the potential for localized adverse impacts. We will ensure that these issues are addressed before approving an individual program submission.

One commenter suggested that State planning approach be used as the foundation of a broader regional strategy to address air quality impacts of NO_X, and not only NO_2. The commenter believed that larger regional issues could not be addressed under option 3, as proposed, given the increased population growth projected for western States and attendant growth of urban areas. Our intent with this regulation is to provide for the review of alternatives on a State-by-State basis. However, to the extent that groups of States wish to develop regional strategies, EPA will consider them to determine if they meet the requirements of the Act. In addition, we will continue to evaluate EPA's options for promulgating regional strategies to address the commenter's concerns.

Tribal commenters were concerned that allowing States to implement alternatives to increment could threaten the tribes' abilities to regulate their own environmental quality and expose tribal environmental resources to greater risk of pollution. These commenters also expressed a concern that such alternatives would be inconsistent with the Federal government's trust responsibility to tribes. We do not believe this option will infringe the tribes' abilities to regulate their environments, harm tribal environmental resources, or overlook the Federal government's trust responsibility to federally-recognized tribes. At this point, it is difficult to determine whether a specific alternative program may affect adjacent areas, such as areas of Indian country. We want to emphasize, however, that any State's alternative program will be carefully evaluated to address potential concerns that affected entities may have, whether it be another State, a tribal governing body, or an FLM for a nearby Class I area. Each State alternative program will be evaluated on a case-by-case basis and subjected to public review and comment as part of the SIP review and approval process. We believe that it is reasonable to expect that States will communicate and cooperate with other potentially affected governing entities as part of the process of developing an alternative program. In addition, any such alternative program would need to be approved by EPA. In determining whether to approve such programs, EPA would act consistent with the Federal government's trust responsibility, including conducting appropriate consultation with tribes to help ensure that the interests of the tribes are considered in this process. Although no specific process has been established for tribes to consult with EPA on SIP approvals on a government-to-government basis, we will endeavor to provide additional opportunities for consultation and continue to carefully consider comments submitted by tribal officials. This process should help ensure that all concerns are considered and that environmental resources are protected prior to approval of an alternative program through the SIP submittal process.

3. Benefits of an Alternative Approach

States have always had the option to submit alternative approaches in their SIPs that can be shown to be more effective than the minimum program elements established by EPA, but States may not have recognized that a system other than increments may be utilized to prevent significant deterioration from emissions of NO_X. The alternative approach provides States with the flexibility to employ a program that may be more effective than increments in preventing significant deterioration of air quality from emissions of NO_X. For example, a State could adopt an emissions reduction plan for NO_X, under authority other than the PSD program, that limits NO_X emissions from particular sources to a greater extent than would occur under an increment approach that focuses on marginal increase in emissions.

In addition, although we believe the increment program is effective at limiting emissions increases, the process of tracking consumption of increment and modeling changes in emissions concentrations can be time-consuming and resource-intensive. A State that employs an EPA-approved alternative approach to the NO_2 increments program would not be required to maintain an NO_2 increment inventory. In addition, PSD permit applicants in the State would not be required to conduct an individual analysis to demonstrate that they do not cause or contribute to a violation of the increments. Other measures would be used to fulfill the requirements of the Act.

4. Future Actions Regarding Alternatives

Although we are not outlining a specific alternative program at this time, we continue to see promise in using a cap and trade approach modeled on the CAIR to reduce NO_X emissions in order to meet the goals of the PSD program for NO_X. As a result, we intend to publish a supplemental notice of proposed rulemaking that will explore this option further. This notice will build on proposed option 2 and provide more details on how a State that achieves the NO_X emissions reductions required under CAIR can fulfill the objectives of the PSD program, satisfy the statutory requirements of section 166 of the Act, and obviate the need to implement the NO_2 increments program.

VII. Measures Not Proposed as Options

In the February 2005 proposal, we proposed not to use a ''critical load'' as a means of identifying an alternative increment level or to incorporate the concept of critical loads into the PSD regulations for NO_X at the present time. Critical loads can be defined as ''quantitative estimates of an exposure to one or more pollutants below which significant harmful effects on specified sensitive elements of the environment do not occur according to present knowledge.'' See 1995 Staff Paper for NO_X at xi–xii.

Our proposal not to incorporate critical loads into our pollutant-specific PSD regulations for NO_X was based largely on our preliminary conclusion that the scientific basis for developing and applying critical loads was still emerging. We also raised an issue about critical loads that related to the possible use of critical loads to identify an alternative level for the existing NO_2 increments. Because of the vastly differing sensitivities and potential effects associated with ecosystem resources in different regions of the United States, we expressed our belief that critical loads do not represent an appropriate tool for setting a single, uniform, national standard, such as a PSD increment level.

We did acknowledge, however, that States could propose to use a critical loads concept. For example, where adequate information might be available, States could use critical loads as part of their own air quality management approaches, and EPA would consider it when determining whether the overall air quality management approach satisfied the PSD requirements. See 70 FR at 8914.

Five commenters agreed with our assessment that it would not be appropriate at this time to use critical loads as part of the PSD regulations for NO_X. These commenters generally agreed that the critical loads concept was not ready to be used for PSD purposes. In addition, some felt that it would be inappropriate for EPA to use critical loads as non-uniform national standards. One argued that the use of critical loads would improperly prohibit economic growth.

On the other hand, nine commenters responded to our proposal by opposing our decision not to use critical loads in some way under the PSD regulations for NO_X. These commenters recommended using critical loads as either complete replacements for the existing NO_2 increments or as a supplemental measure for the increment approach. The comments recommending the use of critical loads as a supplemental measure suggested that critical loads could augment the proposed uniform NO_X increment approach by providing a tool through which permitting authorities could consider ecosystem changes in more sensitive areas. In such areas, they believed a critical load could provide a science-based target for protection.

We agree that critical loads represent a promising mechanism for addressing environmental impacts associated with atmospheric nitrogen deposition. For example, once further developed, the critical load concept could potentially be used as a location-specific means to determine the goals of emissions control and management practices related to ecosystem protection. Clearly, the ''critical loads'' concept is one way to describe the level at which a specific natural area or system is negatively impacted by air pollution. With sufficient information, critical load determinations for nitrogen deposition can be related to location-specific indicators of ecological change, such as episodic and chronic acidification of streams and rivers, chemical changes in soils, or nutrient enrichment and eutrophication.

Over the past 20 years, the scientific community has gained increasing knowledge regarding the impacts of atmospheric emissions of certain criteria pollutants (NO_2, SO_2, and ozone) on natural systems. Studies that we reviewed as part of this rulemaking to determine the adequacy of the existing NO_2 increments illustrate that scientists now understand that both ambient exposure to and deposition of various nitrogen compounds have gradually changed the ecological balance of natural systems in many areas of the United States. Detailed descriptions of the ecological effects of nitrogen deposition can be found in many of the studies that we examined as part of the review of the existing NO_2 increments (see section V of this preamble), but in most every case it is not yet possible to quantify the levels of deposition responsible for such changes.

Commenters did not provide any information to show us that sufficient information is available at this time to use the critical load concept as part of the national PSD program for NO_X. Moreover, we believe that from the information that is available, because ecological systems are quite heterogeneous, critical loads would not serve as an appropriate replacement for the uniform national NO_2 increments. However, if the science is further developed, we do agree with those commenters who suggest that location-specific critical loads could be used effectively to augment the existing increment system for NO_X at those locations.

Two of the commenters supporting critical loads indicated that we should revise the existing NO_2 increments and continue using the increment system as an interim approach, while studying the critical load concept for future implementation as part of the PSD program. These commenters agreed that ultimately the critical loads approach was the most effective way to protect the environment from the adverse effects of nitrogen deposition. Several other commenters also urged EPA to further study the critical loads concept by initiating pilot projects or a demonstration critical loads program by working with States, FLMs, tribes, and others to select natural areas where existing information is adequate to do so.

We agree with the commenters recommending that the current increment system should continue to be applied under the PSD regulations for NO_X. However, as explained in section VI, we do not agree that there is sufficient basis for modifying the existing NO_2 increments. Therefore, under today's final action, we are not modifying the existing NO_2 increments, but retaining them at their existing levels and form.

We do agree with commenters that further research is necessary and appropriate to further evaluate the critical loads concept. As mentioned above, in recent years, ecosystems research has produced findings that are sufficient to identify changes to many sensitive elements of the environment at specific locations resulting from atmospheric nitrogen deposition in its various forms. Nitrogen impacts have been documented in areas ranging from East Coast estuaries to high-elevation systems in the Colorado Front Range to southern California chaparral communities. Nitrogen deposition in these areas impacts diverse ecological communities ranging from fisheries to alpine lakes to grasslands.

Even with advances in our understanding of nitrogen cycling in the environment, scientific challenges remain in relation to setting scientifically valid critical loads. These challenges include the following:

- *Data requirements and availability*: Critical loads for acidification and nutrient-related ecosystem changes for sensitive aquatic and terrestrial systems depend on many ecosystem characteristics, compounded by the fact that these characteristics are heterogeneous across space. Such characteristics include topography, elevation, slope, bedrock geology, soil characteristics, soil chemistry, land use history, water body and watershed surface area, surface water chemistry, meteorology, climate, plant species composition, biomass, and plant nutrient concentrations. Depending on the critical loads calculation method used, some or all of the data described above are necessary inputs for establishing critical loads. Clearly, establishing critical loads is a very data-intensive exercise. The challenge will be to determine the amount and types of data that are necessary and available for

calculating critical loads at local to regional scales.

• *Multiple methods and models*: In addition to data issues, the current multiplicity of methods for calculating critical loads poses a practical challenge that may complicate application of the critical loads approach for air quality management. At least three approaches are currently employed for calculating critical loads: empirical approaches in which critical loads are based on the relationship between an observed detrimental ecological effect and the deposition level at which the effect occurred; steady-state approaches using simple mass-balance models; and dynamic modeling approaches. While each approach has advantages and disadvantages, the National Research Council recently stated that reliance on steady-state models can introduce uncertainty into critical loads calculations and observed that ''the numerous methods for calculating both critical loads and exceedance levels allow for inconsistency in implementation'' (NRC, 2004). Model comparison efforts will help to resolve issues regarding critical load calculation approaches and enable evaluation of the data needs and relative applicability of steady-state and dynamic modeling approaches.

• *Critical load variations*: Critical load values vary depending upon factors such as the ecosystem response of interest or the spatial context. At a given location, for example, critical loads can vary depending upon the ecosystem response indicator of interest—critical loads for soils are often different than critical loads for freshwater systems. Similarly, critical loads for an ecosystem response indicator may vary across local to regional spatial scales. The challenge will be to integrate local-scale critical loads (*e.g.*, for a Class I area) and regional-scale critical loads when implementing air quality management programs for ecosystem protection at multiple scales.

We are aware that Federal land management agencies, other Federal and State agencies, and the scientific community have developed a substantial body of information related to nitrogen impacts for a limited number of site-specific ecosystems around the country. EPA will continue working to further develop the latest scientific research results and information to explore the critical loads approach to better manage air resources.

We agree with commenters that it is possible that a critical load program could be developed by working collaboratively with States, tribes, and FLMs to implement ''pilot projects'' in selected areas where there may be sufficient information on nitrogen deposition and ecosystem effects to establish critical loads. Under this final rule, the Agency encourages States, tribes and FLMs to join with EPA in exploring the voluntary use of critical loads as a basis to address effects of nitrogen deposition on ecosystems for such areas. With appropriate public input, cooperative critical load projects could lead to implementation plans that demonstrate protection against deterioration of AQRVs from nitrogen impacts, eliminate the need for NO_2 increment tracking, and reduce the extent of assessments needed for permitting new sources that may impact AQRVs in Class I areas. In addition, such an approach may fit within the structure of existing requirements.

EPA will work with interested States, tribes, Federal land management agencies and others to identify the components needed to develop and implement cooperative projects to explore the feasibility and usefulness of a critical loads approach. EPA believes such projects are a means through which to explore whether a critical loads approach could be an efficient approach to ensure protection of ecosystems and other AQRVs as part of the existing increment system, and also meet other purposes of the Act. Such an approach could reduce the administrative burden on States and new sources. Collaborative efforts to explore a critical loads approach for nitrogen would provide insight into the general role of critical loads in future air quality management programs.

The statutory PSD provisions authorize Federal land management agencies, including NPS and the U.S. Forest Service, to play a special role in protecting AQRVs in their Federal Class I lands.[32] In this context, the FLMs are also responsible for identifying AQRVs in Class I areas and assessing whether they might be adversely impacted. For many Class I area parks and wilderness areas, FLMs have already identified the resources at risk from or sensitive to air pollution. In conjunction with this effort, FLMs recently have explored the use and setting of critical loads as a management tool to characterize the risk from air pollution emissions and deposition to ecological systems on Class I areas and Federal lands. (Porter, 2005.) For example, they have used research on critical loads to assess ecosystem risk and to inform air quality management decisions related to new source permit reviews and comments on SIP pollution control strategies. These efforts could serve as the basis for continuing review and evaluation by a cooperative agreement with EPA, States and other interested parties.

One commenter believed that EPA should elaborate on the way we envision States' using critical loads within their State PSD programs. This commenter further believed that States should be encouraged to consider critical load data where such data indicate that the current NO_2 increments and current permitting procedures are not providing adequate environmental protection.

In our February 2005 proposal, we indicated that States, considering the state of the science, may propose use of critical load information as part of their air quality management approach. If such a proposal were made, EPA would consider it in determining whether the State's approach satisfied its PSD requirements. We envision the development of critical loads to be a phased, ongoing process. As critical loads are calculated for specific receptors in a particular area, such as forest soils, or surface waters, using a dose-response relationship, and such critical loads are adequately peer-reviewed, we encourage affected States to consider working closely with the applicable FLM to establish agreements and procedures for incorporating the critical load concept into their PSD permit process for protecting AQRVs.

VIII. Statutory and Executive Order Reviews

A. Executive Order 12866—Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is ''significant'' and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees,

[32] Section 165(d)(2)(B) places an affirmative responsibility on FLMs to protect the AQRVs in Federal Class I areas.

or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a ''significant regulatory action'' because the State planning option in the proposal raises novel legal and policy issues. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. Under this final action, we are retaining the existing increments and regulatory framework of the PSD regulations for NO_X. The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations (40 CFR parts 51 and 52) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*, and has assigned OMB control number 2060–0003, EPA ICR number 1230.17. A copy of the OMB-approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division, U.S. Environmental Protection Agency (2822T), 1200 Pennsylvania Ave., NW., Washington, DC 20460, or by calling (202) 566–1672.

As an alternative to the existing increments, the State has discretion in developing an alternative option that satisfies both the requirements of the statutory PSD program requirements for NO_X and the State's air quality management goals. It is not possible to determine at this time what additional burdens, if any, a State alternative program may entail.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act (RFA)

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule.

For purposes of assessing the impacts of today's final rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, EPA has concluded that this action will not have a significant economic impact on a substantial number of small entities. We are imposing no new requirements on small entities. We are retaining existing regulations without change and thus imposing no new requirements on small entities. Optionally, we allow States to adopt alternative programs to relieve the burden of conducting specific ambient air quality and increment analyses under the PSD program. However, States do not meet the definition of a small entity under the RFA.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year.

Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's final action contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector. The final rule imposes no enforceable duty on any State, local or tribal governments or the private sector.

We are retaining existing requirements and do not impose any new Federal mandates. New rule language authorizes States to adopt an alternative approach to meeting some of the rule's requirements, but States have had such authority under the CAA and are not required to adopt an alternative approach if they choose to continue implementing the existing program provisions. In any event, EPA has determined that this final rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or in the private sector in any one year. Thus, today's final rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Because we have not required any new Federal mandates, EPA has also determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132—Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have

federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This final rule does not have federalism implications. The rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. If the existing regulations for increments are retained, no new regulatory requirements will be imposed on States. Optionally, this final action permits States to obtain relief from certain regulatory requirements by adopting alternative programs but does not necessarily require adoption of a new program in that a State may rely on a program that is already in place or that is required by other EPA requirements. Direct compliance costs associated with today's rule could be incurred when States incorporate any changes into their SIPs, but these direct compliance costs would not be significant. Thus, Executive Order 13132 does not apply to this final rule.

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

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This final rule does not have tribal implications, as specified in Executive Order 13175. No tribes are currently implementing the PSD program. Furthermore, this final rule does not impose any new regulatory restrictions. In this final action, EPA is retaining the existing NO_2 increments and making explicit that States implementing the PSD program have the option to seek EPA approval of an alternative program that meets the objectives of the PSD program without using increments. At the time it reviews any alternative PSD program for NO_X submitted by a State, EPA will assess whether such program has tribal implications. However, the final action we are taking today does not have a substantial direct effect on tribes. Thus, Executive Order 13175 does not apply to this final rule. Although Executive Order 13175 does not apply to this rule, EPA has considered comments submitted by several tribal officials. A summary of the concerns raised in these comments and EPA's response to those concerns is provided in EPA's Comment-Response Document located in the docket for this rule.

G. Executive Order 13045—Protection of Children From Environmental Health and Safety Risks

Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is ''economically significant'' as defined under Executive Order 12866; and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks of NO_X addressed by this action present a disproportionate risk to children. The final rule retains existing regulations and does not impose any new regulatory requirements. States may obtain relief from certain regulatory requirements by choosing to adopt alternative programs.

H. Executive Order 13211—Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The final rule retains existing regulations and does not impose any new regulatory requirements. States may obtain relief from certain regulatory requirements by choosing to adopt alternative programs. This option does not impose any new requirements but rather allows States to obtain regulatory flexibility by implementing alternative requirements. Further, we have concluded that this rule is not likely to have any adverse energy effects.

I. National Technology Transfer and Advancement Act

As noted in the February 2005 proposal, section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Pub. L. 104–113, 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This final rule does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

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

Executive Order 12898 requires that each Federal agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionate high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations. The EPA concluded that this final rule should not raise any environmental justice issues.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). Therefore, this action will be effective November 14, 2005.

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List of Subjects in 40 CFR Part 51

Environmental protection, Administrative practices and procedures, Air pollution control,

Intergovernmental relations, Nitrogen oxides, Ozone, Particulate matter, Reporting and recordkeeping requirements.

Dated: September 29, 2005.

Stephen L. Johnson,

Administrator.

■ For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 51—[AMENDED]

■ 1. The authority citation for part 51 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C. 7401–7671 q.

Subpart I—[Amended]

■ 2. Section 51.166 is amended by revising paragraph (c) to read as follows:

§ 51.166 Prevention of significant deterioration of air quality.

* * * * *

(c) *Ambient air increments and other measures.* (1) The plan shall contain emission limitations and such other measures as may be necessary to assure that in areas designated as Class I, II, or III, increases in pollutant concentrations over the baseline concentration shall be limited to the following:

Pollutant	Maximum allowable increase (micrograms per cubic meter)
Class I	
Particulate matter:	
PM_{10}, annual arithmetic mean	4
PM_{10}, 24-hr maximum	8
Sulfur dioxide:	
Annual arithmetic mean	2
24-hr maximum	5
3-hr maximum	25
Nitrogen dioxide:	
Annual arithmetic mean	2.5
Class II	
Particulate matter:	
PM_{10}, annual arithmetic mean	17
PM_{10}, 24-hr maximum	30
Sulfur dioxide:	
Annual arithmetic mean	20
24-hr maximum	91
3-hr maximum	512
Nitrogen dioxide:	
Annual arithmetic mean	25
Class III	
Particulate matter:	
PM_{10}, annual arithmetic mean	34
PM_{10}, 24-hr maximum	60
Sulfur dioxide:	
Annual arithmetic mean	40
24-hr maximum	182
3-hr maximum	700
Nitrogen dioxide:	
Annual arithmetic mean	50

For any period other than an annual period, the applicable maximum allowable increase may be exceeded during one such period per year at any one location.

(2) Where the State can demonstrate that it has alternative measures in its plan other than maximum allowable increases that satisfy the requirements in sections 166(c) and 166(d) of the Clean Air Act for nitrogen oxides, the requirements for maximum allowable increases for nitrogen dioxide under paragraph (c)(1) of this section shall not apply upon approval of the plan by the Administrator.

* * * * *

[FR Doc. 05–20110 Filed 10–11–05; 8:45 am]

BILLING CODE 6560–50–P

Federal Register

Wednesday,
October 12, 2005

Part IV

Department of Labor

Employee Benefits Security Administration

29 CFR Parts 2560 and 2590

Department of the Treasury

Internal Revenue Service

26 CFR Part 54

Additional Extension of Time Frames for Employee Benefit Plans Affected by Hurricane Katrina; Final Rule

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Parts 2560 and 2590

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 54

Additional Extension of Time Frames for Employee Benefit Plans Affected by Hurricane Katrina

AGENCIES: Employee Benefits Security Administration, Department of Labor; Internal Revenue Service, Department of the Treasury.

ACTION: Extension of time frames.

SUMMARY: This document further extends certain time frames under the Employee Retirement Income Security Act and Internal Revenue Code for employee benefit plans, participants, and beneficiaries affected by Hurricane Katrina.

EFFECTIVE DATE: October 12, 2005.

FOR FURTHER INFORMATION CONTACT: Amy Turner, Employee Benefits Security Administration, Department of Labor, at 202–693–8335 for HIPAA issues; Fred Wong, Employee Benefits Security Administration, Department of Labor, at 202–693–8523 for COBRA notice and claims procedure issues; or Russ Weinheimer, Internal Revenue Service, Department of the Treasury, at 202–622–6080 for HIPAA, COBRA coverage, and COBRA premium issues.

SUPPLEMENTARY INFORMATION:

I. Background

On September 21, 2005, the Employee Benefits Security Administration and the Internal Revenue Service published a joint extension of time frames to help participants, beneficiaries, qualified beneficiaries, and claimants directly affected by Hurricane Katrina who might encounter problems in exercising their health coverage portability or continuation coverage rights, or in filing or perfecting a benefit claim. See 70 FR 55500. (''Original Hurricane Katrina Extension''). This relief was provided under authority in section 518 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1148, and section 7508A of the Internal Revenue Code of 1986 (Code), 26 U.S.C. 7508A.[1] Shortly after the notice was published, the Katrina Emergency Tax Relief Act of 2005 (KETRA) was enacted. Pub. L. 109–73. Section 403 of KETRA provides that any relief provided by the Secretary of the Treasury under section 7508A of the Code shall be for a period ending not earlier than February 28, 2006. Accordingly, this document extends the end of the tolling period of the ERISA and Code provisions under the Original Hurricane Katrina Extension through February 28, 2006.

The Agencies believe that such relief is immediately needed to preserve and protect the benefits of participants and beneficiaries in affected plans. Accordingly, the Agencies have determined, pursuant to section 553 of the Administrative Procedure Act, 5 U.S.C. 553 (b) and (d), that there is good cause for making the relief provided by this notice effective immediately upon publication and that notice and public participation may result in undue delay and, therefore, be contrary to public interest.

The relief provided by this document supplements other Hurricane Katrina disaster relief, which can be accessed on the Internet at *http://www.dol.gov* and *http://www.irs.gov*. Information on the scope of the geographic areas eligible for relief is available at *http://www.fema.gov/news/disasters.fema.*

II. Relief

The tolling periods described in paragraphs III.A and III.B. of the Original Hurricane Katrina Extension at 70 FR 55500 are changed for participants, beneficiaries, qualified beneficiaries, or claimants directly affected by Hurricane Katrina (as defined in paragraph III.C.(1) of the Original Hurricane Katrina Extension) and group health plans directly affected by Hurricane Katrina (as defined in paragraph III.C.(3) of the Original Hurricane Katrina Extension). The period group health plans, disability and other welfare plans, pension plans, and health insurance issuers subject to Part 7 of ERISA must disregard is from August 29, 2005 through February 28, 2006.

Signed at Washington, DC, this 4th day of October, 2005.

Ann Combs,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

Signed this 7th day of October, 2005.

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement, Internal Revenue Service, Department of the Treasury.

[FR Doc. 05–20547 Filed 10–7–05; 2:10 pm]

BILLING CODE 4510–29–P, 4830–01–P

[1] ERISA section 518 and Code section 7508A generally provide that, in the case of an employee benefit plan, sponsor, administrator, participant, beneficiary, or other person with respect to such a plan, affected by a Presidentially declared disaster, notwithstanding any other provision of law, the Secretaries of Labor and the Treasury may prescribe (by notice or otherwise) a period of up to one year that may be disregarded in determining the date by which any action is required or permitted to be completed. Section 518 of ERISA and section 7508A of the Code further provide that no plan shall be treated as failing to be operated in accordance with the terms of the plan solely as a result of complying with the postponement of a deadline under those sections.

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The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

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H.R. 3863/P.L. 109–86

Natural Disaster Student Aid Fairness Act (Oct. 7, 2005; 119 Stat. 2056)

S. 1786/P.L. 109–87

To authorize the Secretary of Transportation to make emergency airport improvement project grants-in-aid under title 49, United States Code, for repairs and costs related to damage from Hurricanes Katrina and Rita. (Oct. 7, 2005; 119 Stat. 2059)

S. 1858/P.L. 109–88

Community Disaster Loan Act of 2005 (Oct. 7, 2005; 119 Stat. 2061)

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