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

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

RIN 3150–AH77

List of Approved Fuel Storage Casks: Standardized NUHOMS® –32PT, –24PHB, and –24PTH Revision 8, Confirmation of Effective Date

AGENCY: Nuclear Regulatory Commission.

ACTION: Direct final rule: Confirmation of effective date.

SUMMARY: The Nuclear Regulatory Commission (NRC) is confirming the effective date of December 5, 2005, for the direct final rule that was published in the **Federal Register** on September 20, 2005 (70 FR 55023). This direct final rule amended the NRC's regulations to revise the Transnuclear, Inc., Standardized NUHOMS® System listing to include Amendment No. 8 to Certificate of Compliance (CoC) No. 1004.

DATES: The effective date of December 5, 2005, is confirmed for this direct final rule.

ADDRESSES: Documents related to this rulemaking, including comments received, may be examined at the NRC Public Document Room, located at One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. These same documents may also be viewed and downloaded electronically via the rulemaking Web site (*http://www.ruleforum.llnl.gov*). For information about the interactive rulemaking Web site, contact Ms. Carol Gallagher (301) 415–5905; e-mail *CAG@nrc.gov.*

FOR FURTHER INFORMATION CONTACT: Jayne M. McCausland, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 415–6219, e-mail *jmm2@nrc.gov.*

SUPPLEMENTARY INFORMATION: On September 20, 2005 (70 FR 55023), the NRC published a direct final rule amending its regulations in 10 CFR part 72 to revise the Standardized NUHOMS® System listing within the ''List of Approved Spent Fuel Storage Casks'' to include Amendment No. 8 to CoC No. 1004. This amendment adds a new spent fuel storage and transfer system, designated the NUHOMS® –24PTH System, and modifies the NUHOMS® –32PT and –24PHB dry shielded canister designs. In the direct final rule, NRC stated that if no significant adverse comments were received, the direct final rule would become final on December 5, 2005. The NRC did not receive any comments that warranted withdrawal of the direct final rule. Therefore, this rule will become effective as scheduled.

Dated at Rockville, Maryland, this 22nd day of November, 2005.

For the Nuclear Regulatory Commission.

Michael T. Lesar,

Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration.

[FR Doc. 05–23393 Filed 11–28–05; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–21935; Directorate Identifier 2005–CE–37–AD; Amendment 39–14387; AD 2005–24–07]

RIN 2120–AA64

Airworthiness Directives; Pacific Aerospace Corporation Ltd. Model 750XL Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA adopts a new airworthiness directive (AD) for certain Pacific Aerospace Corporation Ltd Model 750XL airplanes. This AD requires you to inspect the condition of the left and right outer panel attachment lugs for damage (scoring and gouging) and/or cracks (using a fluorescent penetrant inspection procedure for the crack inspection); to inspect the spacing of left and right outer panel attachment lugs; to replace the lugs if damage is found; and to make necessary corrections to the spacing. This AD results from mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for New Zealand. We are issuing this AD to prevent structural failure of the outer panel and spar due to a cracked, bent, or distorted condition of the left and right outer panel attachment lugs; and incorrect spacing of the left and right outer panel attachment lugs. This failure could lead to loss of control of the airplane.

DATES: This AD becomes effective on December 29, 2005.

As of December 29, 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 Pacific Aerospace Corporation Ltd., Hamilton Airport, Private Bag HN 3027, Hamilton, New Zealand; telephone: (64) 7–843–6144; facsimile: (64) 7–843–6134.

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://www.dms.dot.gov.* The docket number is FAA–2005–21935; Directorate Identifier 2005–CE–37–AD.

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

SUPPLEMENTARY INFORMATION:

Discussion

What events have caused this AD? The Civil Aviation Authority (CAA), which is the airworthiness authority for New Zealand, recently notified FAA that an unsafe condition may exist on certain Pacific Aerospace Corporation Ltd Model 750XL airplanes. The CAA reports the attachment lug spacers are incorrectly sized and cause the lugs to distort when the attachment bolt is tightened. Also, outer wing attachment lugs were used to secure the spar in the wing build jig without spacers. This

may have bent the clevis legs outward. These two problems may cause cracking and/or degradation of fatigue life.

What is the potential impact if FAA took no action? A cracked, bent, or distorted condition of the left and right outer panel attachment lugs and incorrect spacing of the left and right outer panel attachment lugs could result in structural failure. This failure could lead to loss of control of 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 Pacific Aerospace Corporation Ltd Model 750XL airplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on August 19, 2005 (70 FR 48657). The NPRM proposed to require you to inspect the condition and spacing of the left and right outer panel attachment lugs; replace the lugs if damage is found; and make any necessary corrections to the spacing.

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 4 airplanes in the U.S. registry.

What would be the cost impact of this AD on owners/operators of the affected airplanes? We estimate the following costs to do this proposed inspection:

Labor cost	Total cost per airplane	Total cost on U.S. operators
6 workhours × $65 = $390	$390	$1,560

We estimate the following costs to do any necessary replacements that would be required based on the results of this inspection. We have no way of determining the number of airplanes that may need this replacement:

Labor cost	Parts cost	Total cost per airplane
16 workhours × $65 = $1,040	Pacific Aerospace Corporation Ltd. will provide warranty credit for replacement costs.	$1,040

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–2005–21935; Directorate Identifier 2005–CE–37–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:

2005–24–07 Pacific Aerospace Corporation Ltd.: Amendment 39–14387; Docket No. FAA–2005–21935; Directorate Identifier 2005–CE–37–AD.

When Does This AD Become Effective?

(a) This AD becomes effective on December 29, 2005.

What Other ADs Are Affected by This Action?

(b) None.

What Airplanes Are Affected by This AD?

(c) This AD affects Model 750XL, serial numbers 101 through 115, that are certificated in any category.

What Is the Unsafe Condition Presented in This AD?

(d) This AD is the result of incorrect sizing of the attachment lug spacers causing the lugs to distort when the attachment bolt is tightened. Also, outer wing attachment lugs were used to secure the spar in the wing build jig without spacers. This may have bent the clevis legs outward. These two problems may cause cracking and/or degradation of fatigue life. The actions specified in this AD are intended to prevent structural failure of the outer panel and spar due to a cracked, bent, or distorted condition of the left and right outer panel attachment lugs; and incorrect spacing of the left and right outer panel attachment lugs. This failure could lead to loss of control of 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 left and right outer panel, paired center wing lugs, and the outer panel single lugs for damage (scoring or gouging).	Upon accumulating 300 hours time-in-service (TIS) or within 50 hours TIS after December 29, 2005 (the effective date of this AD), whichever occurs later.	Follow Pacific Aerospace Corporation Ltd. Mandatory Service Bulletin PACSB/XL/015, Issue 3, amended April 8, 2005.
(2) Inspect the left and right outer panel, paired center wing lugs, and the outer panel single lugs for cracks. You must use a fluorescent penetrant inspection procedure instead of the dye penetrant inspection procedure stated in the service information.	Upon accumulating 300 hours TIS or within 50 hours TIS after December 29, 2005 (the effective date of this AD), whichever occurs later.	Follow Pacific Aerospace Corporation Ltd. Mandatory Service Bulletin PACSB/XL/015, Issue 3, amended April 8, 2005.
(3) If any damage and/or cracks are found during the inspections required in paragraph (e)(1) and (e)(2) of this AD, you must replace the lugs.	Prior to further flight, after any inspection where damage and/or cracks are found.	Follow Pacific Aerospace Corporation Ltd. Mandatory Service Bulletin PACSB/XL/015, Issue 3, amended April 8, 2005.
(4) Inspect the left and right wing paired lugs for parallel spacing within 0.010 inches. If the paired lugs are not parallel within 0.010 inches, reshim outer wing attachment points and correct spacing.	Inspect upon accumulating 300 hours TIS or within 50 hours TIS after December 29, 2005 (the effective date of this AD), whichever occurs later. Correct spacing and reshim prior to further flight after the inspection.	Follow Pacific Aerospace Corporation Ltd. Mandatory Service Bulletin PACSB/XL/015, Issue 3, amended April 8, 2005.

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

Is There Other Information That Relates to This Subject?

(g) CAA Airworthiness Directive DCA/750XL/5, dated April 28, 2005; and Pacific Aerospace Corporation Ltd. Mandatory Service Bulletin PACSB/XL/015, Issue 3, amended April 8, 2005 also address 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 Pacific Aerospace Corporation Ltd. Mandatory Service Bulletin PACSB/XL/015, Issue 3, amended April 8, 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 Pacific Aerospace Corporation Ltd., Hamilton Airport, Private Bag HN 3027, Hamilton, New Zealand; telephone: (64) 7–843–6144; facsimile: (64) 7–843–6134. 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–2005–21935; Directorate Identifier 2005–CE–37–AD.

Issued in Kansas City, Missouri, on November 17, 2005.

David R. Showers,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–23260 Filed 11–28–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 902

[SATS No. AK–006–FOR]

Alaska Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: We are approving a proposed amendment to the Alaska regulatory program (the ''Alaska program'') under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Alaska proposed revisions to and additions of rules about the description of geology; probable hydrologic consequences; application requirements for underground mining; requirements for a subsidence control plan; bonding; replacement of water supplies; design requirements for other treatment facilities; design requirements for impoundments; discharges into underground mines; performance

standards for disposal of excess spoil or coal mine waste; inspections of excess spoil, underground development waste, or coal processing waste disposal areas; performance standards for mining operations that have thin or thick overburden; sealing requirements for auger holes; as-built plans of underground workings; damage to protected structures caused by subsidence from underground mining; inspections of abandoned sites; administrative procedures and provisions for civil penalties; definitions and provisions governing coal extraction incidental to the extraction of other minerals; exemption from provisions governing coal exploration and surface coal mining and reclamation operations for removal of coal incidental to the extraction of other minerals if the coal is 16⅔ percent or less of the total tonnage of minerals removed; definitions; prime farmlands; western alkaline mine initiative; designs, inspections, and certifications by registered professional engineers or other qualified professional specialist experienced or trained in the construction of impoundments and primary roads; coal exploration; reference to ''Standard Methods for the Examination of Water and Wastewater'; requirements concerning topsoil; requirements for surface and ground water monitoring; placement of coal mine waste disposal in excess spoil fills; policy statements; small operator assistance program; blasting; cumulative hydrologic impact assessment; fish and wildlife and the protection and enhancement plan; design and construction requirements for the temporary and permanent diversion of miscellaneous flows; design and construction requirements for both temporary and permanent stream channel diversions; the design and construction requirements for the spillways; drainage control for valley fills and coal waste dams and embankments; petitions for designating lands unsuitable for mining; and roads and low-water crossings.

Alaska revised its program to be consistent with the corresponding Federal regulations, clarify ambiguities and improve operational efficiency.

DATES: *Effective:* November 29, 2005.

FOR FURTHER INFORMATION CONTACT: James F. Fulton, Telephone: (303) 844–1400 ext. 1424, E-mail address: *JFULTON@OSMRE.GOV.*

SUPPLEMENTARY INFORMATION:

I. Background on the Alaska Program
II. Submission of the Proposed Amendment
III. Office of Surface Mining Reclamation and Enforcement's (OSM) Findings
IV. Summary and Disposition of Comments
V. OSM's Decision
VI. Procedural Determinations

I. Background on the Alaska Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, ''a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Alaska program on March 23, 1983. You can find background information on the Alaska program, including the Secretary's findings, the disposition of comments, and conditions of approval in the March 23, 1983, **Federal Register** (48 FR 12274). You can also find later actions concerning Alaska's program and program amendments at 30 CFR 902.10, 902.15 and 902.16.

II. Submission of the Proposed Amendment

By letter dated May 11, 2004, Alaska sent us a proposed amendment to its program (State Amendment Tracking System (SATS) No. AK–006, administrative record No. AK–9) under SMCRA (30 U.S.C. 1201 *et seq.*). Alaska sent the amendment in response to portions of letters dated May 7, 1986; December 16, 1988; November 1, 1989; February 7, 1990; June 4, 1996; and June 19, 1997 (administrative record Nos. AK–01, AK–03, AK–05, AK–06, AK–07 and AK–09); that we sent to Alaska in accordance with 30 CFR 732.17(c). Alaska also submitted the amendment in response to required program amendments codified at 30 CFR 902.16(a) and (b). Alaska submitted one provision at its own initiative.

We announced receipt of the proposed amendment in the July 19, 2004, **Federal Register** (69 FR 42920), provided an opportunity for a public hearing or meeting on its substantive adequacy, and invited public comment on its adequacy (administrative record No. AK–9–c). Because no one requested a public hearing or meeting, none was held. The public comment period ended on August 18, 2004. We received comments from one Federal agency.

During our review of the amendment, we identified concerns about revegetation of areas with a fish and wildlife habitat, recreation, shelter belts, or forest products post mining land use; subsidence and water replacement; bond release applications; topsoil removal; the removal of siltation structures; impoundment design; coal mine waste; and mining of coal incidental to the extraction of other minerals if coal is 16⅔ percent or less of the total tonnage of minerals removed. We notified Alaska of our concerns by letter dated October 4, 2004 (administrative record No. AK–9–3).

Alaska responded in a letter dated April 1, 2005, by submitting a revised amendment (administrative record No. AK–9–4).

Based upon Alaska's revisions to its amendment, we reopened the public comment period in the June 23, 2005, **Federal Register** (70 FR 36360; administrative record No. AK–9–4b). The public comment period ended on July 25, 2005. We received comments from one Federal agency and one local agency.

By letter dated July 20, 2005 (administrative record No. AK–9–5), Alaska submitted editorial clarification concerning proposed rules 11 AAC 90.461(g), 11 AAC 90.650 and 11 AAC 90.331(e). Alaska explained that because there were two proposed rules codified as 11 AAC 90.461(g), the proposed rule, concerning the consideration of all relevant and reasonably available information in any determination whether damage to protected structures was caused by subsidence, originally codified as 11 AAC 90.461(g), will be codified as 90.461(i). Alaska explained that the proposed rules at 11 AAC 90.650 through 11 AAC 658, concerning exemption for coal extraction incidental to the extraction of other minerals, were proposed as new Article 13 in the Alaska program and that the existing Article 13 and all following articles would be recodified beginning as Article 14. Alaska explained that an editorial revision of 11 AAC 90.331(e), concerning removal of siltation structures, was made to clarify that if there are areas approved by the Commissioner of the Alaska program and the U.S. Environmental Protection Agency for use of best management practices as alternative sediment control measures where siltation structures already exist, the existing siltation structures could be removed. Alaska proposed to revise the wording of ''before the Commisioner's approval under 11 AAC 90.323(b)'' to read ''until after alternative sediment control measures have been approved under 11 AAC 90.323(b)''.

Because Alaska's proposed editorial revisions and explanations did not

change the meaning of any proposed rules, OSM did not reopen the comment period.

III. OSM's Findings

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment.

A. Revisions to Alaska's Rules That Have the Same Meaning as the Corresponding Provisions of the Federal Regulations

Alaska proposed revisions to the following rules containing language that is the same as or similar to the corresponding sections of the Federal regulations. 11 AAC 90.045(b), (c), (d), and (e) (30 CFR 780.22(b) and (c) and 784.22(b)), concerning the requirements for (1) borings, or core samples from a proposed permit area; (2) test borings or core samplings collected and analyzed to greater depths within the proposed permit area or, for the area outside the proposed permit area, an evaluation of the impact of the proposed activities on the hydrologic balance; and (3) an application for an underground mine to include a separate description of the geology of the area proposed to be affected by surface operations and facilities, surface land overlying coal to be mined, and the coal to be mined;

11 AAC 90.085(a)(5) (30 CFR 784.14(e)(3)(iv)), concerning the requirement for a finding, in the discussion of probable hydrologic consequences, stating whether underground activities may result in contamination, diminution, or interruption of a well or spring in use for domestic, drinking, or residential purposes;

11 AAC 90.101(a) and (b) (30 CFR 784.20), concerning application requirements for underground mining and requirements for a subsidence control plan;

11 AAC 90.201(d) and (f) (30 CFR 800.11(b)(4) and 800.4(g)), concerning requirements for (1) incremental bonding and (2) adequate bond coverage to be in effect at all times;

11 AAC 90.211(a) (30 CFR 800.40(a)(3)), concerning addition of the requirement for a notarized statement in bond release applications affirming that all applicable reclamation requirements have been met;

11 AAC 90.321(e) (30 CFR 817.41(j)), concerning the requirement for prompt replacement of water supplies damaged by underground mining activities conducted after October 24, 1992;

11 AAC 90.331(h) (30 CFR 816.46(d)), concerning design requirements for other treatment facilities;

11 AAC 90.336(g) (30 CFR 816.49(a)(1)), concerning the requirement that impoundments meeting the Class B or C criteria in the U.S. Department of Agriculture, Natural Resources Conservation Service, Technical Release No. 60 (TR–60), ''Earth Dams and Reservoirs'', comply with the table titled ''Minimum Emergency Spillway Hydrologic Criteria'' in TR–60;

11 AAC 90.349(l) (30 CFR 816.41(i)(1)(i)), concerning discharges into underground mines;

11 AAC 90.391(b) and (l), 90.395(a) and 90.401(a), (d), and (e) (30 CFR 816.81(a) and (c)(1), 816.83, and 816.83(c)(3) and (4)), concerning performance standards for disposal of excess spoil or coal mine waste;

11 AAC 90.397(a) (30 CFR 816.83(d)), concerning inspections of excess spoil, underground development waste, or coal processing waste disposal areas;

11 AAC 90.407(f) (30 CFR 816.84(f)), concerning the requirement that at least 90 percent of the water stored during the design precipitation event shall be removed within the 10-day period following the design precipitation event from impounding structures constructed of or impounding coal mine waste;

11 AAC 90.443(a), (i), and (m) (30 CFR 816.104(b) and 816.105(b)), concerning performance standards for mining operations that have thin or thick overburden;

11 AAC 90.447(c)(1) (30 CFR 819.15(b)(1)), concerning the sealing requirements for auger holes;

11 AAC 90.461(b) (30 CFR 817.121(a)), concerning applications for underground mining, and requirements to either (1) prevent subsidence from causing material damage, or (2) plan for subsidence in a predictable and controlled manner that will minimize material damage;

11 AAC 90.461(g) (30 CFR 817.121(g)), concerning the requirement to, within an approved schedule, submit as-built plans of underground workings and requirements for the content of the plans;

11 AAC 90.461(h) (30 CFR 817.121(c)(5)), concerning requirements for an additional bond amount, when (1) subsidence-related material damage occurs to protected land, structures or facilities, or (2) contamination, diminution, or interruption occurs to a protected water supply;

11 AAC 90.461(i) (30 CFR 817.121(c)(4)(v)), concerning the requirement for the Commissioner of the Alaska program to consider all relevant and reasonably available information in any determination whether damage to protected structures was caused by subsidence from underground mining;

11 AAC 90.601(h) and (i) (30 CFR 840.11(g) and (h)), concerning inspections of abandoned sites;

11 AAC 90.629(a) and 90.631(a) (30 CFR 845.18(a) and 845.19(a)), concerning the administrative procedures for civil penalties;

11 AAC 90.635(a) and (b), 90.637(a) and (b), 90.639(a) through (c), and 90.641(a) through (d) (30 CFR Part 846), concerning provisions governing individual civil penalties;

11 AAC 90.650 through 90.658 (30 CFR Part 702), concerning definitions and provisions governing coal extraction incidental to the extraction of other minerals;

11 AAC 90.901(a)(2) (30 CFR 702.11(a)), concerning the exemption from provisions governing coal exploration and surface coal mining and reclamation operations, for coal incidental to the extraction of other minerals if the coal is 16⅔ percent or less of the total tonnage of minerals removed;

11 AAC 90.911 (30 CFR 701.5), concerning addition of definitions for ''coal mine waste,'' ''drinking, domestic, or residential water supply,'' ''impounding structure,'' ''material damage,'' ''noncommercial building,'' ''occupied residential dwelling and structures related thereto,'' ''previously mined area,'' ''refuse piles,'' and ''replacement water supply;''

11 AAC 90.911 (30 CFR 761.5), concerning addition of a definition for ''community or institutional building;''

11 AAC 90.911 (30 CFR 795.3), concerning addition of a definition for ''qualified laboratory;''

11 AAC 90.911 (30 CFR 800.5), concerning removal of reference to personal property from the definition for collateral bond; and

11 AAC 90.911 (30 CFR 816.104(a) and 816.105(a)), concerning addition of definitions for ''thick overburden'' and ''thin overburden.''

Because these proposed rules contain language that is the same as or similar to the corresponding Federal regulations, we find that they are no less effective than the corresponding Federal regulations.

B. Revisions to Alaska's Rules That Are Not the Same as the Corresponding Provisions of the Federal Regulations

1. Prime Farmlands

Alaska has no counterpart rules to the Federal regulations at 30 CFR 785.17 concerning provisions unique to prime

farmlands. The Director of OSM (Director) required in a letter dated June 19, 1997, sent in accordance with 30 CFR 732.17(c), that Alaska revise its program to include provisions no less effective than the Federal regulations at 30 CFR 785.17 protecting prime farmland soils.

Alaska's existing rule at 11 AAC 90.157 states that the Commissioner of the Alaska program may impose additional requirements for permit application contents, soil removal and handling, use of nutrients and amendments, erosion control, revegetation, and postmining land use to encourage development of agriculture and to assure that important farmlands are returned to premining or higher levels of productivity.

Alaska submitted correspondence, sent by e-mail to Alaska on July 10, 2002, from the U.S. Department of Agriculture, Natural Resources Conservation Service (NRCS), Alaska office. NRCS explained that one of the criteria for prime farmlands in the National Soils Handbook is that the soil temperature regime must be warmer than cryic. NRCS stated that all soils in Alaska have cryic soil temperature regimes which explains why there are no prime farmland soils in Alaska.

Based on the NRCS correspondence documenting that there are no prime farmland soils in Alaska, the Director finds that no further revision of the Alaska program is necessary to protect prime farmland soils.

2. 11 AAC 90.323(a), (b), and (c) and 90.331(e), Western Alkaline Mine Initiative

Alaska, at its own initiative, proposed to revise 11 AAC 90.323(a), concerning water quality standards, to refer to an exception at 11 AAC 90.323(b) from the requirement that any discharge of water from the disturbed area, including any disturbed area that has been graded, seeded, or planted, must pass through one or more siltation structures before leaving the permit area until removal is approved by the Commissioner of the Alaska program under 11 AAC 90.331(e).

Alaska proposed to revise 11 AAC 90.323(b) to state that the Commissioner may allow other sediment control measures for primary sediment control for disturbed areas that have been regraded, respread with topsoil, and stabilized against erosion, if the Commissioner and the U.S. Environmental Protection Agency (EPA) have approved the use of best management practices (BMP) as the effluent limitation.

Alaska proposed to revise 11 AAC 90.323(c) to require that the operator shall meet all applicable Federal and State water quality laws and regulations for the drainage from the permit area when there is mixing of drainage from disturbed, reclaimed, and undisturbed areas.

Alaska proposed to revise 11 AAC 90.331(e), to state that a siltation structure may not be removed until after the disturbed area has been stabilized and revegetated and no earlier than two years after the last augmented seeding or until after alternative sediment control measures have been approved under 11 AAC 90.323(b).

OSM suspended the Federal counterpart to Alaska's proposed 11 AAC 90.323(a) at 30 CFR 816.46(b)(2) on November 20, 1986 (see finding no. 16 at 51 FR 41957), in response to a remand by the court in *Permanent Surface Mining Regulation Litigation II.* The remaining Federal rules governing water quality for discharges from disturbed areas are those found at 30 CFR 816.42, 816.45, and 816.46(b)(1). In relevant part, those regulations require that sediment be controlled using the best technology currently available (BTCA). OSM no longer defines BTCA as being siltation structures as we previously did in the now-suspended 30 CFR 816.46(b)(2).

Alaska's proposed new language at 11 AAC 90.323(b) requires the approval of both the Commissioner of the Alaska program and EPA before Alaska could approve the use of BMP as an effluent limitation on reclamation areas.

EPA, on January 23, 2002, published a final rule that establishes effluent limitations and performance standards for the Western Alkaline Coal Mining Subcategory applicable to alkaline mine drainage from reclamation areas, brushing and grubbing areas, topsoil stockpiling areas, and regraded areas at western coal mining operations (see 67 FR 3370). In this final rule, EPA defined (1) ''Western coal mining operation'' as a surface or underground coal mining operation located in the interior western United States, west of the 100th meridian west longitude, in an arid or semiarid environment with an average annual precipitation of 26.0 inches or less, and (2) ''Alkaline mine drainage'' as ''mine drainage which, before any treatment, has a pH equal to or greater than 6.0 and total iron concentration of less than 10 mg/L'' (see 67 FR 3370 at 3375).

There are regions in Alaska where coal is mined that meet these climatic conditions.

In the final rule, EPA requires that a western coal mine operator develop and implement a site-specific sediment control plan for applicable areas (see January 23, 2002, 67 FR 3370 at 3380). The sediment control plan must identify sediment control BMPs and present their design, construction, maintenance specifications, and their expected effectiveness. EPA requires the operator to demonstrate, using watershed models accepted by the permitting authority, that implementation of the selected BMPs will not increase sediment loads over pre-mined, undisturbed condition sediment levels. The permit must then incorporate the site-specific sediment control plan and require the operator to implement the plan. EPA explains that sediment control BMPs for the coal mining industry are well known and established and include regrading, revegetation, mulching, check dams, vegetated channels, straw bales, dikes, silt fences, small sumps and berms, contour terracing, sedimentation ponds, and other construction practices (e.g., grass filters, serpentines, leaking berms, etc). In order to maintain pre-mined, undisturbed conditions on reclamation and associated areas, EPA promulgated non-numeric effluent limits based on the design, implementation, and maintenance of these BMPs.

As clearly stated in Alaska's proposed revision, EPA would have to approve any proposed BMPs before implementation of reclamation plans without sedimentation ponds or before removal of sedimentation ponds that treat reclamation areas. The Director finds that Alaska's proposed revision at 11 AAC 90.323(b) is consistent with EPA's new rule described above that allows for the installation of BMPs as the standard for treating runoff from reclaimed lands in the western United States that meet certain climatic conditions.

Although OSM has no direct counterpart to proposed 11 AAC 90.323(c), this requirement is implicit in OSM's regulations. Any mixing of runoff from undisturbed lands or reclaimed lands with runoff from disturbed lands would have to be treated in accordance with the Federal regulations at 30 CFR 816.42, 816.45, and 816.46. Both Alaska's proposed rule and OSM's existing regulations require, as do EPA's rules, that any waste stream that is commingled with a waste stream subject to a subpart of 40 CFR part 434 will be required to meet the most stringent limitations applicable to any component of the combined waste stream (see January 23, 2002, 67 FR 3370 at 3375).

Alaska's proposed rule at 11 AAC 90.331(e) contains requirements that are substantively the same as those in the

Federal regulations at 30 CFR 816.45(a)(2) and 816.46(a)(5) with the exception that Alaska's proposed rule allows for the removal of siltation structures after approval of alternative sediment control measures as BMPs by the Commissioner and EPA. OSM agrees that the allowance for the removal of existing siltation structures including sedimentation ponds after the required approvals of BMPs as alternative sediment control measures for the same area is inherent in the proposed language at 11 AAC 90.323(a) and (b); Alaska's proposed 11 AAC 90.331(e) makes this rationale explicit.

Based on the discussion above, the Director finds that Alaska's proposed revisions at 11 AAC 90.323(a), 90.323(b), 90.323(c), and 90.331(e) are no less effective than and consistent with the counterpart Federal regulations at 30 CFR 816.42, 816.45, and 816.46(b)(1) and approves them.

OSM notes that our approval of 11 AAC 90.323(b) should not be construed as approving the use of BMP as an effluent limitation because only the EPA has the authority to make that determination as the language of Alaska's proposed rule itself acknowledges.

3. 11 AAC 90.089(a)(1), 90.336(a), 90.337(a), 90.491(f)(1), Designs, Inspections, and Certifications by Registered Professional Engineers or Other Qualified Professional Specialist Experienced or Trained in the Construction of Impoundments and Primary Roads

Alaska proposed to revise 11 AAC 90.089(a)(1) and 90.336(a), concerning preparation and certification of design plans for siltation structures, impoundments, and coal mine waste dams, and 11 AAC 90.491(f)(1), concerning preparation and certification of design plans for primary roads to require that the plans must be prepared by, or under the direction of, and certified by a qualified registered professional engineer with experience or training in the design and construction of impoundments and roads.

Alaska also proposed to revise 11 AAC 90.337(a) to require that each permanent or temporary impoundment must be inspected by, or under the supervision of, a registered professional engineer or other qualified professional specialist under the direction of a professional engineer, and that the professional engineer or specialist shall be experienced or trained in the construction of impoundments.

These proposed rules are, with one exception, the same as the counterpart Federal regulations at 30 CFR 780.37(b), 816.49(a) and 816.49(a)(11) concerning preparation and certification of plans and drawings for primary roads, siltation structures, impoundments, and coal mine waste dams, and inspections of impoundments. The exception is that Alaska's proposed rules allow for preparation and certification or inspection by registered professional engineers with experience or training, while the Federal regulations only allow for preparation and certification of plans or inspection by registered professional engineers with experience. Alaska explained that the allowance for a registered professional engineer who is trained in the construction of impoundments and roads is necessary because of the limited pool in Alaska of such engineers who are experienced in the construction of impoundments or roads and inspections of impoundments.

As noted above, the Federal regulations specify that certain design and construction certifications and inspections must be made by a qualified, registered, professional engineer or qualified, registered, professional land surveyor who is experienced in the design and construction or inspection of these facilities. The term ''experienced'' was introduced in the Federal regulations that were promulgated during 1983 and 1987. The term is not defined and there is no explanation of it in the preambles to the proposed or final **Federal Register** notices for the promulgated Federal regulations. OSM agrees with Alaska that professional registered engineers who are trained, but who may not yet have worked in the field, can suffice for these certification and inspection responsibilities. OSM acknowledges that, in addition to the lack of experienced professional registered engineers in Alaska (in comparison to other States), mining in Alaska occurs in remote areas where it is not a simple matter to bring in a registered professional engineer as a consultant who may have such experience.

Therefore, based on the above discussion, the Director finds that Alaska's proposed rules at 11 AAC 90.089(a)(1), 90.336(a), 90.337(a), 90.491(f)(1) are no less effective than the counterpart Federal regulations at 30 CFR 780.37(b), 816.49(a) and 816.49(a)(11), and approves them.

C. Revisions to Alaska's Rules or Other Explanations Submitted in Response to Required Amendments Codified at 30 CFR 902.16(a) and (b) (See, Respectively, 57 FR 37410, August 19, 1992, Administrative Record No. AK–C–31; and 61 FR 48835, September 17, 1996, Administrative Record No. AK–E–22)

1. 30 CFR 902.16(a)(2), Description of Geology at 11 AAC 90.045(a)

OSM required at 30 CFR 902.16(a)(2) that Alaska revise 11 AAC 90.045(a) to require a description of the geology within the permit and adjacent areas to include the deeper of either the stratum immediately below the lowest coal seam to be mined or any aquifer below the lowest coal seam to be mined which may be adversely impacted by mining (finding no. 4, 57 FR 37410 at 37413, August 19, 1992).

Alaska proposed to revise 11 AAC 90.045(a) by adding a requirement that is substantively the same as the requirement in the Federal regulations at 30 CFR 780.22(b)(1) and 784.14(i)(2)(i).

Therefore, the Director finds that proposed 11 AAC 90.045(a) is no less effective than the Federal regulations at 30 CFR 780.22(b)(1) and 784.14(i)(2)(i), approves proposed 11 AAC 90.045(a) and removes the required amendment at 30 CFR 902.16(a)(2).

2. 30 CFR 902.16(a)(3), Coal Exploration at 11 AAC 90.163(b)(1)

OSM required at 30 CFR 902.16(a)(3) that Alaska revise 11 AAC 90.163(b)(1) to require that an operator affirm that a surface coal mining permit application will be submitted in the near future as required at 30 CFR 772.14(b); and to require that provisions in an exploration application provide evidence that sufficient coal reserves are available for future use or sale; and that an application for an exploration permit to remove more than 250 tons of coal contain a statement of why extraction of more than that amount is necessary per the requirements of Federal regulations at 30 CFR 772.14(b)(3) and (4) (finding no. 5, 57 FR 37410 at 37413, August 19, 1992).

In response to the required amendment, Alaska explained and OSM confirmed that existing rules at 11 AAC 90.163(b)(1), (c)(5) and (c)(6) contained the same requirements as those in the Federal regulations at 30 CFR 772.14(b), (b)(3) and (b)(4). On September 17, 1996, OSM approved, among other provisions concerning coal exploration, revisions to Alaska's program at 11 AAC 90.163(b)(1), (c)(4) and (c)(5) as substantively the same as the

counterpart Federal regulations at 30 CFR 772.14(b), (b)(3) and (b)(4) (see finding nos. 2 and 5, 61 FR 48835 at 48836 and 48837). OSM failed to remove the required amendment when these Alaska rules were approved. Other than the revision in codification from 11 AAC 90.163(c)(4) and (c)(5) to 11 AAC 90.163(c)(5) and (c)(6), these Alaska rules are the same as those approved by OSM on September 17, 1996.

Therefore, the Director is, based on our September 17, 1996, approval, removing the required program amendment at 30 CFR 902.16(a)(3).

3. 30 CFR 902.16(a)(4), Reference to Standard Methods for the Examination of Water and Wastewater at 11 AAC 90.043(b)

OSM required at 30 CFR 902.16(a)(4) that Alaska revise 11 AAC 90.181(a)(5), .043, .047 and .089 to include reference to the 17th edition of the Standard Methods for the Examination of Water and Wastewater (finding no. 6, 57 FR 37410 at 37413, August 19, 1992).

Alaska proposed to revise 11 AAC 90.043(b) to specify that any water quality analyses required by 11 AAC 90.043, 90.047 or 90.049 must be conducted according to the methodology in the most current edition of the Standard Methods for the Examination of Water and Wastewater, or the methodology in 40 CFR parts 136 and 434.

Alaska's existing rule at 11 AAC 90.181(a)(6), concerning qualified laboratories, requires, in part, that the laboratory have the capability of collecting field samples, and making hydrologic field measurements and analytical laboratory determinations in accordance with 11 AAC 90.043, which has been revised as described above to require analyses conducted according to the methodology in Standard Methods for the Examination of Water and Wastewater. Therefore, OSM is no longer requiring revision of 11 AAC 90.181(a)(5).

Alaska's rule language at proposed 11 AAC 90.043(b) differs from the Federal language only in that Alaska refers to the most recent edition rather than the 17th edition of the Standard Methods for the Examination of Water and Wastewater. The U.S. Environmental Protection Agency periodically revises the standard methods for water quality testing as technology changes; the revised methods reflect the industry standard for testing.

Therefore, the Director finds that proposed 11 AAC 90.043(b) is no less effective than the Federal regulations at 30 CFR 780.21(a), approves proposed 11 AAC 90.043(b) and removes the required amendment at 30 CFR 902.16(a)(4).

4. 30 CFR 902.16(a)(5), Exemption From Requirements Concerning Topsoil at 11 AAC 90.311(g)

OSM required at 30 CFR 902.16(a)(5) that Alaska delete 11 AAC 90.311(g). This rule provides the Commissioner of the Alaska program with the discretion to authorize an exemption from the requirements for the removal, stockpiling, and redistribution of topsoil and other materials. OSM explained that the Federal regulations as 30 CFR 816.22 do not provide the regulatory authority with the discretion for such an exemption (see finding no. 7, 57 FR 37410 at 37413, August 19, 1992).

In response to the required amendment, Alaska proposed to delete 11 AAC 90.311(g).

Therefore, the Director finds that Alaska's program is now no less effective than the Federal regulations at 30 CFR 816.22(a)(1)(ii) in protecting soil resources, approves the deletion of 11 AAC 90.311(g) and removes the required program amendment at 30 CFR 902.16(a)(5).

5. 30 CFR 902.16(a)(6), Definitions of ''Other Treatment Facilities'' and ''Siltation Structure'' at 11 AAC 90.911 and 11 AAC 90.331(d)(1)

OSM required at 30 CFR 902.16(a)(6) that Alaska revise (1) 11 AAC 90.331(a) by defining ''other treatment facilities'' and to clarify the relationship of ''treatment facility(ies)'', ''water treatment facilities'', and ''erosion control structures'' relative to the term ''siltation structure'' in a manner that is no less effective than the Federal program requirements; and (2) 11 AAC 90.331(d)(1) to provide for the 10-year, 24-hour precipitation event per the Federal regulation at 30 CFR 816.46(c)(1)(iii)(C) (see finding no. 8, 57 FR 37410 at 37414, August 19, 1992).

Alaska proposed to revise 11 AAC 90.911 by adding definitions of ''other treatment facility'' and ''siltation structure'' that are the same as the definitions of these terms in the Federal regulations at 30 CFR 701.5.

Alaska also proposed to revise 11 AAC 90.331(d)(1) so that the design construction and maintenance requirements for sedimentation ponds are substantively the same as the requirements of the Federal regulations at 30 CFR 816.46(c)(1)(iii)(C).

Therefore, the Director finds that (1) the proposed definitions of ''other treatment facility'' and ''siltation structure'' at 11 AAC 90.911 are no less effective than the same definitions in the Federal regulations at 30 CFR 701.5 and (2) proposed 11 AAC 90.331(d)(1) is no less effective than the Federal regulation at 30 CFR 816.46(c)(1)(iii)(C). The Director approves them and removes the required program amendment at 30 CFR 902.16(a)(6).

6. 30 CFR 902.16(a)(7), Inspections of Impoundments at 11 AAC 90.337(f)

OSM required at 30 CFR 902.16(a)(7) that Alaska revise 11 AAC 90.337(f) to require that all impoundments be examined on a basis that is no less effective than the Federal requirements at 30 CFR 816.49(a)(11) (see finding no. 9, 57 FR 37410 at 37414, August 19, 1992).

In response to the required amendment, Alaska explained and OSM confirmed that existing rules at 11 AAC 90.337(f) contain the same requirements concerning quarterly inspections as the Federal regulations at 30 CFR 816.49(a)(11). On September 17, 1996, OSM approved revisions to Alaska's program at 11 AAC 90.337(f) as substantively the same as the counterpart Federal regulations at 30 CFR 816.48(a)(11) (see finding no. 11, 61 FR 48835 at 48839, September 17, 1996). OSM failed to remove the required amendment when this Alaska rule was approved.

Therefore, the Director is, based on our September 17, 1996, approval, removing the required program amendment at 30 CFR 902.16(a)(7).

7. 30 CFR 902.16(a)(8), Water Monitoring at 11 AAC 90.345(e)

OSM required at 30 CFR 902.16(a)(8) that Alaska revise 11 AAC 90.345(e) to require that the surface-water monitoring plan include both upstream and downstream monitoring locations in all receiving bodies of water per the Federal regulation requirements at 30 CFR 780.21(j)(2)(i) and 784.14(i)(2)(i) (see finding no. 10, 57 FR 37410 at 37415, August 19, 1992).

Alaska revised 11 AAC 90.345(e), concerning the requirements for surface and ground water monitoring of water bodies that may be affected by the mining operation or that will receive a discharge, to be substantively the same as the requirements in the counterpart Federal regulations at 30 CFR 780.21(j)(2)(i) and 784.14(i)(2)(i).

Therefore, the Director finds that proposed 11 AAC 90.345(e) is no less effective than the Federal regulations at 30 CFR 780.21(j)(2)(i) and 784.14(i)(2)(i), approves proposed 11 AAC 90.345(e) and removes the required program amendment at 30 CFR 902.16(a)(8).

8. 30 CFR 902.16(a)(9), Approval of Coal Mine Waste Disposal in Excess Spoil Fills at 11 AAC 90.391(h)

OSM required at 30 CFR 902.16(a)(9) that Alaska revise 11 AAC 90.391(h) to require that the regulatory authority approve the placement of coal mine waste disposal in excess spoil fills per the Federal requirements at 30 CFR 816.71(i) (see finding no. 11, 57 FR 37410 at 37415, August 19, 1992).

Alaska proposed to revise 11 AAC 90.391(h)(2) to require that an operator demonstrate, prior to approval, that disposal of nontoxic and nonacid forming coal mine waste in an excess spoil fill is consistent with the design stability of the excess spoil fill. This requirement at proposed 11 AAC 90.391(h)(2) is substantively the same as the requirement in the Federal regulations at 30 CFR 816.71(i).

Therefore, the Director finds that proposed 11 AAC 90.391(h)(2) is no less effective than the Federal regulations at 30 CFR 816.71(i), approves proposed 11 AAC 90.391(h)(2) and removes the required program amendment at 30 CFR 902.16(a)(9).

9. 30 CFR 902.16(a)(10), Design of Impounding Structures Constructed of Coal Mine Waste or Intended To Impound Coal Mine Waste at 11 AAC 90.407(e)

OSM required at 30 CFR 902.16(a)(10) that Alaska revise 11 AAC 90.407(e) to provide for a precipitation event no less effective than the requirements of the Federal regulations at 30 CFR 816.84(b)(2) and the use of at least the 6-hour precipitation event for structures meeting the criteria of 30 CFR 77.216(a) (see finding no. 12, 57 FR 37410 at 37415, August 19, 1992).

In response to the required amendment, Alaska explained and OSM confirmed that the existing rule at 11 AAC 90.407(e) contains the same requirements concerning coal mine waste, dams and embankments as in the Federal regulations at 30 CFR 816.84(b)(2). On September 17, 1996, OSM approved revisions to Alaska's program at 11 AAC 90.407(e) as substantively the same as the counterpart Federal regulations at 30 CFR 816.84(b)(2) (see finding no. 2, 61 FR 48835 at 48836). OSM failed to remove the required amendment when this Alaska rule was approved.

Therefore, the Director is, based on our September 17, 1996, approval, removing the required program amendment at 30 CFR 902.16(a)(10).

10. 30 CFR 902.16(a)(11), Endangered and Threatened Species Protection at 11 AAC 90.423(b)

OSM required at 30 CFR 902.16(a)(11) that Alaska revise 11 AAC 90.423(b) to require consultation with Federal and State fish and wildlife agencies prior to making a determination as to whether and under what conditions an operator may continue with mining activities after reporting the presence of a listed endangered or threatened species per the Federal regulation requirements at 30 CFR 816.97(b) (see finding no. 13, 57 FR 37410 at 37415, August 19, 1992).

In response to the required amendment, Alaska explained and OSM confirmed that the existing rule at 11 AAC 90.423(b) contains the same requirements, concerning protection of listed endangered or threatened fish and wildlife, as in the Federal regulations at 30 CFR 816.97(b). On September 17, 1996, OSM approved revisions to Alaska's program at 11 AAC 90.423(b) as substantively the same as the counterpart Federal regulations at 30 CFR 816.97(b) (see finding no. 2, 61 FR 48835 at 48836). OSM failed to remove the required amendment when this Alaska rule was approved.

Therefore, the Director is, based on our September 17, 1996, approval, removing the required program amendment at 30 CFR 902.16(a)(11).

11. 30 CFR 902.16(a)(12), Allowance for Spoil To Be Placed Outside of Mined-Out Area in Nonsteep Slope Areas To Restore the Approximate Original Contour at 11 AAC 90.443(d)

OSM required at 30 CFR 902.16(a)(12) that Alaska revise 11 AAC 90.443(d) to allow blending the spoil into the surrounding terrain in nonsteep slope areas only, and to require the removal of all vegetative and organic material as a requirement for allowing spoil to be placed on the area outside the mined-out area per the Federal regulation requirements at 30 CFR 816.102(d)(2) (see finding no. 14, 57 FR 37410 at 37416, August 19, 1992).

Alaska explained and OSM confirmed that Alaska's existing rule at 11 AAC 90.443(k)(2) already contains requirements concerning blending the spoil into the surrounding terrain in non-steep slope areas that are substantively the same as those in the counterpart Federal regulations at 30 CFR 816.102(d)(2).

Therefore, the Director finds that 11 AAC 90.443(k)(2) is no less effective than the Federal regulations at 30 CFR 816.102(d)(2), approves proposed 11 AAC 90.443(k)(2) and removes the required program amendment at 30 CFR 902.16(a)(12).

12. 30 CFR 902.16(a)(13), Spoil in the Immediate Vicinity of a Remining Operation at 11 AAC 90.443(d)(1)

OSM required at 30 CFR 902.16(a)(13) that Alaska revise 11 AAC 90.443(e)(1) to require that spoil in the immediate vicinity of a remining operation be included in the permit area as required at 30 CFR 816.106(b)(1) (see finding no. 15, 57 FR 37410 at 37416, August 19, 1992).

In response to the required amendment, Alaska explained and OSM confirmed that the existing rule at 11 AAC 90.443(d)(1), concerning backfilling and grading of previously mined areas, contains the same requirements as those in the Federal regulation at 30 CFR 816.106(b)(1). On September 17, 1996, OSM approved revisions to Alaska's program at 11 AAC 90.443(d)(1) as substantively the same as the counterpart Federal regulations at 30 CFR 816.106(b)(1) (see finding no. 2, 61 FR 48835 at 48836). OSM failed to remove the required amendment when these Alaska rules were approved.

Therefore, the Director is, based on our September 17, 1996, approval, removing the required program amendment at 30 CFR 902.16(a)(13).

13. 30 CFR 902.16(a)(16), Submission of Policy Statements or Revision of Rules

OSM required at 30 CFR 902.16(a)(16) that Alaska resubmit policy statements and/or provide proposed regulations for those items addressed in proposed policy statements A through G in a manner no less effective than the Federal regulation requirements (see finding no. 19, 57 FR 37410 at 37417, August 19, 1992).

Policy Statement A, Maintenance of Records

In response to the required amendment, Alaska explained and OSM confirmed that the existing rule 11 AAC 90.907(j) addresses the requirements that copies of all records, reports and inspection materials maintained by the regulatory authority shall be made immediately available to the public until at least five years after expiration of the period during which the subject operation is active or is covered by any portion of a reclamation bond in a manner substantively similar to the counterpart Federal regulations at 30 CFR 840.14(b). On September 17, 1996, OSM approved revisions to Alaska's program at 11 AAC 90.907(j) as substantively the same as the counterpart Federal regulation at 30 CFR 840.14(b) (see finding no. 1, 61 FR 48836). OSM failed to remove the required amendment when these rules were approved.

Therefore, the Director, based on OSM's September 17, 1996, approval, finds that Alaska has satisfied that portion of the required amendment at 30 CFR 902.16(a)(16) pertaining to Policy Statement A.

Policy Statement B, Small Operator Assistance Program (SOAP)

Rather than resubmit Policy Statement B, Alaska proposed to revise its regulations at 11 AAC 90.911 by adding a definition of ''qualified laboratory'' that is identical to the Federal definition at 30 CFR 795.3.

Therefore, the Director finds that the proposed definition of ''qualified laboratory'' at 11 AAC 90.911 is no less effective than the same definition in the Federal regulation at 30 CFR 795.3 and approves it.

Alaska proposed to revise its regulations at 11 AAC 90.173(a)(2) by increasing the eligible annual coal production rate from 100,000 tons to 300,000 tons for SOAP assistance so that Alaska's rule is substantively the same as the Federal figures at 30 CFR 795.6(a)(2).

Therefore, the Director finds that proposed 11 AAC 90.173(a)(2) is no less effective than the Federal regulation at 30 CFR 795.6(a)(2) and approves proposed 11 AAC 90.173(a)(2).

Alaska proposed to revise its regulations at 11 AAC 90.173(b)(2) and (3) by increasing from 5% to 10%, the baseline percentage above which ownership will play a role in determining ''attributed coal production.'' This requirement in the Alaska proposed rules is substantively the same as the requirement in the Federal regulations at 30 CFR 795.6(a)(2)(i) and (ii).

Therefore, the Director finds that proposed 11 AAC 90.173(b)(2) and (3) are no less effective than the Federal regulations at 30 CFR 795.6(a)(2)(i) and (ii) and approves proposed 11 AAC 90.173(b)(2) and (3).

In response to the Energy Policy Act of 1992, OSM amended its regulations to require funding for additional technical services provided to SOAP applicants. Alaska revised the following regulations so as to provide those same services.

Alaska proposed to revise its regulations at 11 AAC 90.179(a)(3) by adding language that provides SOAP funding not only for the preparation of the statement of results of the test borings or core samplings but for the actual drilling as well in a manner substantively similar to the Federal regulations at 30 CFR 795.9(b)(2).

Therefore, the Director finds that proposed 11 AAC 90.179(a)(3) is no less effective than the Federal regulation at 30 CFR 795.9(b)(2) and approves proposed 11 AAC 90.179(a)(3).

Alaska proposed to revise its regulations at 11 AAC 90.179(b)(1) through (4) pertaining to data collection requirements for SOAP applicants so that the requirements would be substantively the same as the Federal requirements at 30 CFR 795.9(b)(3) through (6).

Therefore, the Director finds that proposed 11 AAC 90.179(b)(1) through (4) is no less effective than the Federal regulations at 30 CFR 795.9(b)(3) through (6) and approves proposed 11 AAC 90.179(b)(1) through (4).

Alaska proposed to revise its regulations at 11 AAC 90.179(c) by adding language requiring that the SOAP data collected under 11 AAC 90.179 be made available to interested persons as required by the Alaska Statute at AS 27.21.100 and in a substantively similar manner as the Federal regulations at 30 CFR 795.9(d).

The Director finds that proposed 11 AAC 90.179(c) is no less effective than the Federal regulation at 30 CFR 795.9(d) and approves 11 AAC 90.179(c).

Lastly, Alaska proposed to revise its regulations at 11 AAC 90.185(a)(4) and (5) by requiring reimbursement of SOAP funding for ''services rendered'' should the applicant's 12-month production of coal exceed 300,000 tons in a manner substantively similar to the Federal requirements at 30 CFR 795.12(a)(2) and (3).

Therefore, the Director finds that proposed 11 AAC 90.185(a)(4) and (5) are no less effective than the Federal regulations at 30 CFR 795.12(a)(4) and (5) and approves 11 AAC 90.185(a)(4) and (5). The Director further finds that Alaska has satisfied that portion of required amendment 30 CFR 902.16(a)(16) pertaining to Policy Statement B.

Policy Statement C, Blasting Notice

Rather than resubmit Policy Statement C, Alaska proposed to revise 11 AAC 90.375(f) and (g), concerning the requirement that an operator (1) publish a blasting schedule in local newspapers, at least 10 days, but not more than 30 days before beginning a blasting program and (2) distribute a revised blasting schedule, at least 10 days, but not more than 30 days before blasting in the area covered by the schedule change. The revisions to 11 AAC 90.375(f) and (g) are substantively the same as the Federal regulations at 30 CFR 816.64(b)(1) and (2).

Therefore, the Director finds that proposed 11 AAC 90.375(f) and (g) are no less effective than the Federal regulations at 30 CFR 816.64(b)(1) and (2), approves 11 AAC 90.375(f) and (g) and finds that Alaska has satisfied that portion of required amendment 30 CFR 902.16(a)(16) pertaining to Policy Statement C.

Policy Statement D, Surface Water Information

In response to the required amendment, Alaska explained and OSM confirmed that the existing rule 11 AAC 90.049(2)(c) and (g) concerning acidity and alkalinity information requirements in a permit application were substantively similar to the counterpart Federal regulation at 30 CFR 780.21(b)(2). On September 17, 1996, OSM approved revisions to Alaska's program at 11 AAC 90.049(2) (see finding No. 1, 61 FR 48836). OSM failed to remove the required amendment when these rules were approved.

Therefore, the Director, based on OSM's September 17, 1996 approval, finds that Alaska has satisfied that portion of the required amendment at 30 CFR 902.16(a)(16) pertaining to Policy Statement D.

Policy Statement E, Scope of Cumulative Hydrologic Impact Assessment

Rather than resubmit Policy Statement E, Alaska proposed to revise its regulations at 11 AAC 90.911 by including a definition of ''cumulative impact area'' that is identical to the Federal definition at 30 CFR 701.5. Since Alaska's current regulations did not contain the definition of cumulative impact area, the phrase was not present elsewhere in the Alaska regulations which made 11 AAC 90.085(c), pertaining to cumulative hydrologic impact assessment deficient as well. By adding the definition at 11 AAC 90.911, Alaska was then able to revise 11 AAC 90.085(c) by using the phrase in requiring the Commissioner to assess the cumulative hydrologic impacts for the cumulative impact area in a manner no less effective than the Federal regulations at 30 CFR 780.21(g).

Therefore, the Director finds that the proposed definition of ''cumulative impact area'' at 11 AAC 90.911 and proposed 11 AAC 90.085(c) are no less effective than 30 CFR 701.5 and 30 CFR 780.21(g), respectively, approves the proposed definition of ''cumulative impact area'' at 11 AAC 90.911 and proposed 11 AAC 90.085(c) and finds that Alaska has satisfied that portion of required amendment 30 CFR 902.16(a)(16) pertaining to Policy Statement E.

Policy Statement F, U.S. Fish and Wildlife Service Information Request

Rather than resubmit Policy Statement F, Alaska proposed to revise 11 AAC 90.057, concerning the requirement that the Commissioner provide resource information for fish and wildlife and the protection and enhancement plan to the U.S. Department of the Interior, Fish and Wildlife Service (Service) regional office or field office for their review, and that the information shall be provided within 10 days of receipt of the request from the Service. The proposed Alaska regulation at 11 AAC 90.057 is substantively similar to the Federal regulation at 30 CFR 780.16(c).

Therefore, the Director finds that proposed 11 AAC 90.057 is no less effective than the Federal regulation at 30 CFR 780.16(c), approves proposed 11 AAC 90.057 and finds that Alaska has satisfied that portion of required amendment 30 CFR 902.16(a)(16) pertaining to Policy Statement F.

Policy Statement G, Determining Peak Discharge for Hydrologic Designs

Rather than resubmit Policy Statement G, Alaska proposed to revise 11 AAC 90.325(b) and (c), concerning the design and construction requirements for the temporary and permanent diversion of miscellaneous flows in a manner that is substantively the same as the counterpart Federal regulation at 30 CFR 816.43(c)(3). Therefore, the Director finds that proposed 11 AAC 90.325(b) and (c) are no less effective than the Federal regulation at 30 CFR 816.43(c)(3) and approves 11 AAC 90.325(b) and (c).

Alaska proposed to revise 11 AAC 90.327(b)(2), concerning the design and construction requirements for both temporary and permanent stream channel diversions in a manner substantively similar to the counterpart Federal regulation at 30 CFR 816.43(b)(3).

Therefore, the Director finds that proposed 11 AAC 90.327(b)(2) is no less effective than the Federal regulation at 30 CFR 816.43(b)(3) and approves proposed 11 AAC 90.327(b)(3)

Alaska proposed to revise 11 AAC 90.336(b)(1) and (2), concerning the requirement that both temporary and permanent impoundments contain a combination of principal and emergency spillways and the design and construction requirements for the spillways. The revised Alaska regulations at 11 AAC 90.336(b)(1) and (2) are substantively the same as the counterpart Federal regulations at 30 CFR 816.49(a)(9)(ii)(B) and (C).

Therefore, the Director finds that proposed 11 AAC 90.336(b)(1) and (2) are no less effective than the Federal regulations at 30 CFR 816.49(a)(9)(ii)(B) and (C) and approves 11 AAC 90.336(b)(1) and (2).

Alaska proposed to revise 11 AAC 90.391(n) pertaining to the requirements for diverting surface water runoff from areas adjacent to and above valley fills as well as runoff from the surface of the fill itself. The proposed Alaska regulation at 11 AAC 90.391(n) is substantively the same as the counterpart Federal regulation at 30 CFR 816.72(a)(2).

Therefore, the Director finds that proposed 11 AAC 90.391(n) is no less effective than the Federal regulation at 30 CFR 816.72(a)(2) and approves 11 AAC 90.391(n).

Alaska proposed to revise 11 AAC 90.407(c), concerning the requirements for diverting surface water runoff from areas above coal waste dams and embankments that may cause instability and erosion. The proposed Alaska regulation at 11 AAC 90.407(c) is substantively the same as the counterpart Federal regulation at 30 CFR 816.84(d).

Therefore, the Director finds that proposed 11 AAC 90.407(c) is no less effective than the Federal regulation at 30 CFR 816.84(d) and approves 11 AAC 90.407(c). The Director further finds that Alaska has satisfied that portion of required amendment 30 CFR 902.16(a)(16) pertaining to Policy Statement G.

Conclusion

Based on the discussion above, the Director removes the required program amendment at 30 CFR 902.16(a)(16).

14. 30 CFR 902.16(a)(17), Petitions for Designating Lands Unsuitable for Mining at 11 AAC 90.701

OSM required at 30 CFR 902.16(a)(17) that Alaska resubmit the proposed petition form that requests termination of an unsuitability designation or provide proposed regulations that are no less effective than the Federal regulation requirements at 30 CFR 764.13(b) (see finding no. 20, 57 FR 37410 at 37418, August 19, 1992).

Alaska proposed to revise 11 AAC 90.701(a), (b), (c)(1) and (2), and (d)(1) and (2), concerning the requirements for petitions to designate areas unsuitable for mining, so that the proposed rules contain requirements that are substantively the same as the requirements in the Federal regulations at 30 CFR 764.13.

Therefore, the Director finds that proposed 11 AAC 90.701(a), (b), (c)(1) and (2), and (d)(1) and (2) are no less effective than the Federal regulations at 30 CFR 764.13, approves them and removes the required program amendment at 30 CFR 902.16(a)(17).

15. 30 CFR 902.16(b)(2), (3), (4), (5), and (6), Definition of ''Siltation Structure'' at 11 AAC 90.911

OSM required at 30 CFR 902.16(b)(2), (3), (4), (5) and (6) that Alaska add a definition of ''siltation structure'' that is no less effective than the Federal definition of this term at 30 CFR 701.5, or otherwise revise its program at 11 AAC 90.321(d), 90.323(a), 90.325(a), 90.327(b)(1) and (c) and 90.341(b)(2) (see finding no. 10, 61 FR 48835 at 48838, September 17, 1996).

Alaska proposed to revise 11 AAC 90.911 by adding a definition for ''siltation structure'' that is substantively the same as the Federal definition of this term at 30 CFR 701.5. As discussed in finding no. C.5 above, the Director is approving Alaska's proposed definition of ''siltation structure'' at 11 AAC 90.911.

Because the proposed definition of ''siltation structure'' at 11 AAC 90.911 is no less effective than the same definition in the Federal regulations at 30 CFR 701.5, the Director removes the required program amendments at 30 CFR 902.16(b)(2), (3), (4), (5) and (6).

16. 30 CFR 902.16(b)(7), Requirements for Topsoil on the Area Outside the Mined-Out Area in Nonsteep Slope Areas at 11 AAC 90.391(c) and 90.443(k)(2)

OSM required at 30 CFR 902.16(b)(7) that Alaska revise 11 AAC 90.443(k) to require that the topsoil on the area outside the mined-out area in nonsteep slope areas shall be removed, segregated, stored and redistributed in accordance with its topsoil removal provisions and that the spoil be backfilled and graded on the area in accordance with its provisions concerning performance standards for backfilling and grading, or add provisions to ensure that the disposal of spoil provisions are no less effective than the Federal regulations at 30 CFR 816.102(d)(2) and (3) (see finding no. 14, 61 FR 48835 at 48839, September 17, 1996). (OSM notes that the requirement concerning 11 AAC 90.443(k)(2) discussed here is the same as the requirement at 30 CFR 902.16(a)(12) discussed above in finding no. 11.)

Alaska explained, and OSM confirmed, that the existing Alaska rules at 11 AAC 90.391(c) and 11 AAC 90.443(k)(2) contain requirements that are substantively the same as the requirements in the counterpart Federal

regulation at 30 CFR 816.102(d)(2) and (3).

Therefore, the Director finds that existing 11 AAC 90.391(c) and 90.443(k)(2) are no less effective than the Federal regulations at 30 CFR 816.102(d)(2) and (3), approves them and removes the required program amendment at 30 CFR 902.16(b)(7).

17. 30 CFR 902.16(b)(8), Requirements for Roads That Alter or Relocate Natural Stream Channels and for (1) Structures for Perennial or Intermittent Stream Channel Crossings and (2) Design, Construction, and Maintenance of All Low-Water Crossings at 11 AAC 90.491(f)(3) and (4)

OSM required at 30 CFR 902.16(b)(8) that Alaska revise 11 AAC 90.491(f) to require the addition of provisions concerning the alteration or relocation of natural stream channels, and structures for perennial or intermittent stream channel crossings that are no less effective than 30 CFR 816.151(d)(5) and (6) and 817.151(d)(5) and (6) (see finding no. 15, 61 FR 48835 at 48840, September 17, 1996).

Alaska proposed to revise 11 AAC 90.491(f)(3) and (4), concerning the requirements for roads that alter or relocate natural stream channels and for (1) structures for perennial or intermittent stream channel crossings and (2) design, construction, and maintenance of all low-water crossings. Alaska's proposed rules contain requirements that are substantively the same as those in the Federal regulations at 30 CFR 816.151(d)(5) and (6) and 817.151(d)(5) and (6). Therefore the Director finds that proposed 11 AAC 90.491(f)(3) and (4) are no less effective than the Federal regulations at 30 CFR 816.151(d)(5) and (6) and 817.151(d)(5) and (6), approves them and removes the required program amendment at 30 CFR 902.16(b)(8).

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the amendment (administrative record No. AK–9–4b). In response, by letter dated July 14, 2005, (administrative record No. AK–9–4d), the City of Aleknagik (Aleknagik) commented that it opposed any amendment that would relax the regulations regarding reclamation of mining sites based upon the percentage of coal and felt that in order to protect Alaska's unique qualities, reclamation regulations should be strengthened not reduced regardless of the material that is mined.

Alaska's amendment included proposed rules at 11 AAC 90.901(a)(2), and 11 AAC 90.650 through 11 AAC 90.658, concerning the exemption from provisions governing coal exploration and surface coal mining and reclamation operations incidental to the extraction of other minerals if the coal is 16⅔ percent or less of the total tonnage of minerals removed. These rules are substantively the same as the Federal regulation at 30 CFR part 702 (see finding no. A above).

Alaska submitted the proposed rule revisions in response to a February 7, 1990, letter that OSM sent to Alaska in accordance with 30 CFR 732.17(c), requiring that Alaska adopt rules that are no less effective than the Federal regulations governing the mining of coal incidental to the extraction of other minerals if coal is 16⅔ percent or less of the total tonnage of minerals removed. Alaska's proposed rules set forth, as do the Federal regulations, stringent tests that an applicant must meet in order to demonstrate that the mining of coal is incidental to the mining of other minerals before an application to exempt an operation from the requirements for a permit under Alaska's coal regulatory program would be approved.

Although the Director appreciates the concerns raised by Aleknagik, the Director finds that these concerns have no merit, and does not require further revision of Alaska's rules.

Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Alaska program (administrative record No. AK–9–a). In response, by letter dated June 15, 2004 (administrative record No. AK–9–b), the Bureau of Land Management (BLM), Alaska State Office, submitted comments.

BLM (1) suggested that ''fill material'' as used at proposed 11 AAC 90.650(E), may actually be quite valuable and should not necessarily be excluded and (2) asked that Alaska define ''other minerals'' as used at proposed 11 AAC 90.652(M). These proposed rules govern the exemption from the requirement for a permit for coal extraction incidental to the extraction of other minerals. The term ''other minerals'' is already defined at proposed 11 AAC 90.650(E) to mean any commercially valuable substance mined for its mineral value, excluding coal, topsoil, waste and fill material; this definition is applicable anywhere this term is used in proposed rules 11 AAC 90.650 through 11 AAC 90.658. Alaska's use of the term ''fill material'' in the proposed definition of ''other minerals'' is identical to the use of the term in the counterpart Federal regulation at 30 CFR 702.5. In the context of this definition, the value of ''fill material'' is actually recognized but is not at issue; rather the issue concerns the exemption of coal from regulation under Alaska's rules governing surface coal mining and reclamation activities. If coal were to be mined incidental to the mining for commercial value of only topsoil, waste and/or fill material, the operator could not qualify, under proposed rules at 11 AAC 90.650–11 AAC 90.658, for an exemption from the regulation of surface coal mining and reclamation activities. Therefore, OSM required no revisions to the Alaska proposed rules in response to these comments.

BLM also identified a typographical error at proposed 11 AAC 90.395 and noted that there are no ''counties'' in Alaska with respect to the use of this word at proposed 11 AAC 652(i). OSM notified Alaska of BLM's comment and in Alaska's April 1, 2005, revisions to its proposed amendment, Alaska corrected the typographical error and revised proposed 11 AAC 652(i) to remove the word ''counties'' and require evidence of publication in a newspaper of statewide circulation and in a newspaper of general circulation in the vicinity of the mining area, of a public notice that an application for exemption (for coal extraction incidental to the extraction of other minerals) has been filed with the regulatory authority. Based on Alaska's response to this comment, OSM required no further revision of Alaska's rules.

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we also requested comments on the revisions to Alaska's proposed amendment from various Federal agencies with an actual or potential interest in the Alaska program (administrative record No. AK–9–4a). In response, by letter dated May 27, 2005 (administrative record No. AK–9–4c), BLM, Alaska State Office, stated that they had reviewed the submitted changes to the proposed Alaska amendment and found them to be consistent and in accordance with SMCRA and had no additional comments.

Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(i), OSM requested comments on the amendment from EPA (administrative record No. AK–9–a. EPA did not respond to our request.

State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On May 27, 2004, we requested comments on Alaska's amendment (administrative record No. AK–9–a), but neither SHPO or ACHP responded to our request.

V. OSM's Decision

Based on the above findings, we approve Alaska's May 11, 2004, amendment, as revised on April 1 and July 20, 2005. We approve the rules as proposed by Alaska with the provision that they be fully promulgated in identical form to the rules submitted to and reviewed by OSM and the public.

To implement this decision, we are amending the Federal regulations at 30 CFR Part 902, which codify decisions concerning the Alaska program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

VI. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian Tribes and have determined that the rule does not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes. The rule does not involve or affect Indian Tribes in any way.

Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4321 *et seq*).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2) of the Small Business Regulatory Enforcement Fairness Act. This rule: a. does not have an annual effect on the economy of $100 million; b. will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and c. does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

This determination is based upon the fact that the State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector

of $100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 902

Intergovernmental relations, Surface mining, Underground mining.

Dated: September 29, 2005.

Allen D. Klein,

Director, Western Region.

■ For the reasons set out in the preamble, 30 CFR part 902 is amended as set forth below:

PART 902—ALASKA

■ 1. The authority citation for part 902 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 2. Section 902.15 is amended in the table by adding a new entry in chronological order by ''Date of Final Publication'' to read as follows:

§ 902.15 Approval of Alaska regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
*	*	*
May 11, 2004	November 29, 2005	11 AAC 90.043(b); 90.045(a), (b), (c), (d), and (e); 90.057; 90.085(a)(5) and (c); 90.089(a)(1); 90.101(a) and (b); 90.173(a)(2), (b)(2) and (3); 90.179(a)(3), (b)(1) through (4) and (c); 90.185(a)(4) and (5); 90.201(d) and (f); 90.211(a); 90.331(d)(1); deletion of 90.311(g); 90.321(e); 90.323(a) through (c); 90.325(b) and (c); 90.327(b)(2); 90.331(e) and (h); 90.336(a), (b)(1) and (2), and (g); 90.337(a); 90.345(e); 90.349(l); 90.375(f) and (g); 90.391(b), (c), (h)(2), (l), and (n); 90.395(a); 90.397(a); 90.401(a), (d), and (e); 90.407(c) and (f); 90.443(a), (k)(2), (i), and (m); 90.447(c)(1); 90.461(b), (g), (h) and (i); 90.491(f)(1), (3) and (4); 90.601(h) and (i); 90.629(a); 90.631(a); 90.635(a) and (b); 90.637(a) and (b); 90.639(a) through (c); 90.641(a) through (d); 90.650 through 90.658; 90.701(a), (b), (c)(1) and (2), and (d)(1) and (2); 90.901(a)(2); and 90.911.

§ 902.16 [Amended]

■ 3. Section 902.16 is amended by removing and reserving paragraphs 902.16(a)(2) through (13); removing paragraphs 902.16(a)(16) and (17); and removing and reserving paragraph (b).

[FR Doc. 05–23400 Filed 11–28–05; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 913

[Docket No. IL–103–FOR]

Illinois Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are approving an amendment to the Illinois regulatory program (Illinois program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The Illinois Department of Natural Resources, Office of Mines and Minerals (Department or Illinois) is revising its regulations regarding revegetation success standards, to update statutory citations, to correct regulatory citations, and to clarify language in various provisions. Illinois is revising its program to clarify ambiguities and to improve operational efficiency.

DATES: Effective November 29, 2005.

FOR FURTHER INFORMATION CONTACT: Andrew R. Gilmore, Chief, Alton Field Division—Indianapolis Area Office. Telephone: (317) 226–6700. E-mail: *IFOMAIL@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Illinois Program
II. Submission of the Amendment
III. OSM's Findings
IV. Summary and Disposition of Comments
V. OSM's Decision
VI. Procedural Determinations

I. Background on the Illinois Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, ''a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior (Secretary) conditionally approved the Illinois program on June 1, 1982. You can find background information on the Illinois program, including the Secretary's findings, the disposition of comments, and the conditions of approval, in the June 1, 1982, **Federal Register** (47 FR 23858). You can also find later actions concerning the Illinois program and program amendments at 30 CFR 913.10, 913.15, 913.16, and 913.17.

II. Submission of the Amendment

By letter dated February 1, 2005 (Administrative Record No. IL–5088), Illinois sent us an amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*). Illinois sent the amendment at its own initiative. Illinois proposed to amend its regulations at 62 Illinois Administrative Code (IAC) parts 1816 (Surface Mining Operations), 1817 (Underground Mining Operations), and 1823 (Prime Farmland).

We announced receipt of the proposed amendment in the April 4, 2005, **Federal Register** (70 FR 17014). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the adequacy of the amendment. We did not hold a public

hearing or meeting because no one requested one. The public comment period ended on May 4, 2005. We received comments from one Federal agency.

During our review of the amendment, we identified concerns about some editorial-type errors. We notified Illinois of these concerns by letters dated March 3 and April 6, 2005 (Administrative Record Nos. IL–5092 and IL–5095).

By e-mail dated August 3, 2005 (Administrative Record No. IL–5099), Illinois sent us revisions to its proposed program amendment. Because the revisions merely corrected the editorial-type errors that we identified in Illinois' amendment, we did not reopen the public comment period.

III. OSM's Findings

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment as described below.

A. Minor Revisions to Illinois' Regulations

Illinois proposed minor wording, editorial, punctuation, grammatical, and recodification changes to the following previously-approved regulations:

1. 62 IAC 1816.Appendix A, Agricultural Lands Productivity Formula (ALPF); 62 IAC 1817.42, Hydrologic Balance—Water Quality Standards and Effluent Limitations; 62 IAC 1817.43, Diversions; and 62 IAC 1817.116, Revegetation: Standards for Success

Illinois proposed to correct citation references at 62 IAC 1816.Appendix A, 1817.42, 1817.43, and 1817.116.

2. 62 IAC 1816.Appendix A

Illinois proposed minor wording changes in the corn and soybean sampling technique sections.

3. 62 IAC 1816.Appendix A, 1817.43(b)(3) and (c)(3), and 1823.15(b)(3)

At 62 IAC 1816.Appendix A, 1817.43(b)(3) and (c)(3), and 1823.15(b)(3), Illinois proposed to simplify its use of numbers by eliminating numbers that are in words and retaining the numbers that are in figures. For example, Illinois changed a numerical reference from ''ten (10) year, six (6) hour'' to ''10 year, 6 hour.''

Because these changes are minor, we find that they will not make Illinois' regulations less effective than the corresponding Federal regulations at 30 CFR 816.116, 817.42, 817.43, 817.116, and 823.15.

B. 62 IAC 1816.116 (Surface Mining) and 1817.116 (Underground Mining) Revegetation: Standards for Success

Illinois proposed to amend its regulations at 62 IAC 1816.116 to (1) Incorporate at new subsection (a)(6), an alternative method for determining success of revegetation for cropland and pasture land and/or hayland or grazing land; (2) update requirements pertaining to adjustment for abnormal, catastrophic, growing conditions when the ALPF or the new alternative method is used for determining success of revegetation; (3) remove references to oats as a crop that may be used to prove success of revegetation; (4) update information in the soil master file, county average yield file, the agricultural lands productivity formula sampling method, and Exhibit A in the ALPF; and (5) delete Tables A through F from the ALPF. Illinois proposed to amend its regulation at 62 IAC 1817.116 to reference the new alternative method for determining success of revegetation for cropland and pasture land and/or hayland or grazing land at 62 IAC 1816.116(a)(6). Illinois proposed to amend 62 IAC 1816.116 and 1817.116 to update references to and requirements in existing regulations concerning the new alternative method.

1. 62 IAC 1816.116(a)(2)(C) and 1817.116(a)(2)(C)

a. At 62 IAC 1816.116(a)(2)(C) and 1817.116(a)(2)(C), Illinois proposed to change its references from the ''Illinois Agronomy Handbook (1999–2000)'' to the ''Illinois Agronomy Handbook, 23rd Edition (University of Illinois at Champaign-Urbana, College of Agriculture, Consumer and Environmental Science, 1917 Wright St., Champaign, IL 61820 (2001–2002; this incorporation includes no later amendment or editions)).''

b. At 62 IAC 1816.116(a)(2)(C) and 1817.116(a)(2)(C), Illinois also proposed to change its references from the old Federal conservation plan act, ''Food, Agriculture, Conservation and Trade Act of 1990 (7 U.S.C. 1421 *et seq.*),'' to the new Federal conservation plan act, ''Farm Security and Rural Investment Act of 2002 (Pub. L. 107–171; 116 Stat. 134).''

c. Finally, at 62 IAC 1816.116(a)(2)(C), Illinois proposed to remove the following language:

The Illinois Agronomy Handbook is published by the University of Illinois Cooperative Extension Service, Office of Agricultural Communications and Education, 69E Mumford Hall, 1301 West Gregory Drive, Urbana, Illinois 61801.

The removed language was replaced by information in Illinois' new reference to the Illinois Agronomy Handbook.

Illinois proposed these changes as a result of comments received from the Natural Resources Conservation Service (NRCS). Because these editorial and reference changes are minor, we find that they will not make Illinois' regulations less effective than the corresponding Federal regulations at 30 CFR 816.116 and 817.116.

2. 62 IAC 1816.116(a)(3)(C) and (E) and 1817.116(a)(3)(C) and (E)

a. At subsection (a)(3)(C) and (E), Illinois proposed to add a reference to new 62 IAC 1816.116(a)(6). Subsection (a)(3)(C) concerns areas, in the approved reclamation plan, designated as cropland, except those prime farmland cropland areas subject to 62 IAC 1823.15. Subsection (a)(3)(E) concerns areas, in the approved reclamation plan, designated as pasture and/or hayland or grazing land, except for erosion control devices and other structures. As revised, subsection (a)(3)(C) requires that the determination of success of revegetation for cropland areas be made in accordance with 62 IAC 1816.116(a)(4) or (a)(6). Also, revegetation will be considered successful if it is 90 percent of the crop production required in 62 IAC 1816.116(a)(4) or (a)(6) with 90 percent statistical confidence. As revised, subsection (a)(3)(E) requires that the determination of success of revegetation (tons of grasses and/or legumes per acre) for pasture and/or hayland or grazing land be made in accordance with 62 IAC 1816.116(a)(4) or (a)(6). Also, revegetation will be considered successful if it is 90 percent of the crop production required in 62 IAC 1816.116(a)(4) or (a)(6) with 90 percent statistical confidence. Currently approved 62 IAC 1816.116(a)(4) references the ALPF, which includes the standards and sampling techniques to be used to evaluate success of revegetation for cropland and pasture and/or hayland or grazing land. Proposed new 62 IAC 1816.116(a)(6) is an alternative to using the ALPF and includes an optional method for determining the standard to be used to evaluate success of revegetation for cropland and pasture and/or hayland or grazing land. The currently approved method in the ALPF for calculating the standard for determining success of revegetation is based on the current level of yield for a soil type within the county. At proposed 62 IAC 1816.116(a)(6), the alternative method for calculating the standard for

determining success of revegetation, is based on an average of the last five years of yield for a specific crop for a specific soil type in the county.

The Federal regulations at 30 CFR 816.116(a)(1) and 817.116(a)(1) require that standards for success of revegetation and statistically valid sampling criteria for measuring success must be selected by the regulatory authority and included in an approved regulatory program. The Federal regulations at 30 CFR 816.116(a)(2) and 817.116(a)(2) require that standards for success of revegetation must include criteria representative of unmined lands in the area being reclaimed to evaluate the appropriate vegetation parameters of ground cover, production, or stocking. We find that Illinois' proposed alternative method at 62 IAC 1816.116(a)(6) for calculating the standard for determining success of revegetation is no less effective than the requirements of the Federal regulations at 30 CFR 816.116(a) and 817.116(a). Therefore, we are approving the addition of a reference to 62 IAC 1816.116(a)(6) at 62 IAC 1816.116(a)(3)(C) and (E) and 817.116(a)(3)(C) and (E).

b. Illinois also proposed to add the following requirement at the end of subsections (a)(3)(C) and (a)(3)(E): ''Once chosen by the permittee, the productivity alternative in 62 IAC 1816.116(a)(6) may not be modified without approval from the Department.''

In accordance with the Federal regulation at 30 CFR 774.13(c), no permit revision can be approved unless the application demonstrates and the regulatory authority finds that reclamation as required by the Act and regulatory program can be accomplished. Because, Illinois requires that the productivity alternative under 62 IAC 1816.116(a)(6), once chosen by the permittee, may not be modified without approval of the Department, we find that the proposed requirement is no less effective than the requirement of the Federal regulation at 30 CFR 774.13(c), and we are approving it.

3. 62 IAC 1816.116(a)(4) and 62 IAC 1817.116(a)(4)

At 62 IAC 1816.116(a)(4) and 1817.116(a)(4), Illinois proposed to reference the new alternative method at 62 IAC 1816.116(a)(6) for determining success of revegetation. At 62 IAC 1816.116(a)(4), Illinois also proposed to update requirements pertaining to adjustment for abnormal, catastrophic, growing conditions when the ALPF or the new alternative method is used for determining success of revegetation and to remove a reference to oat crops from several provisions.

a. At 62 IAC 1816.116(a)(4) and 1817.116(a)(4), Illinois proposed to reference the new alternative method at 62 IAC 1816.116(a)(6). As revised, subsections (a)(4) provide that in order to use the ALPF, 62 IAC 1816.Appendix A, or the alternative method at 62 IAC 1816.116(a)(6) to determine success of revegetation, the requirements of 62 IAC 1816.116(a)(4) apply.

At 62 IAC 1816.116(a)(4)(A), the permittee is required to submit annually a scale drawing or aerial photograph delineating field boundaries, a field numbering scheme, the total acreage for each field, and the crop that will be grown on each field to demonstrate proof of productivity for the coming crop year. Once approved by the Department, the information required by 62 IAC 1816.116(a)(4)(A) cannot be changed without restarting the responsibility period, unless the submittal is amended in accordance with Illinois' permit revision regulation at 62 IAC 1774.13(b)(2). Illinois' regulation at 62 IAC 1816.116(a)(4)(B) requires the permittee to use the sampling methods of the ALPF for measuring success of revegetation. At 62 IAC 1816.116(a)(4)(C), the permittee may make adjustments to crop yields due to abnormal growing conditions by meeting specified requirements. Illinois' regulation at 62 IAC 1816.116(a)(4)(D) specifies the kind of crops that must be grown to determine success of revegetation.

The Federal regulations at 30 CFR 816.116(a)(1) and 817.116(a) require that standards for success of revegetation and statistically valid sampling criteria for measuring success must be selected by the regulatory authority and included in an approved regulatory program. The Federal regulations at 30 CFR 816.116(a)(2) and 817.116(a)(2) require that standards for success of revegetation must include criteria representative of unmined lands in the area being reclaimed to evaluate the appropriate vegetation parameters of ground cover, production, or stocking. We find that Illinois' proposed alternative method at 62 IAC 1816.116(a)(6) for calculating the standard for determining success of revegetation is no less effective than the requirements of the Federal regulations at 30 CFR 816.116(a) and 817.116(a). Therefore, we are approving the addition of a reference to new 62 IAC 1816.116(a)(6) at 62 IAC 1816.116(a)(4) and 1817.116(a)(4). Also, the Federal regulations at 30 CFR 780.18(b)(5)(vi) and 784.13(b)(5)(vi) require the reclamation plan to contain a plan for revegetation as required in 30 CFR 816.111 through 816.116 and 817.111 through 817.116 including, but not limited to, measures proposed to be used to determine the success of revegetation as required by 30 CFR 816.116 and 817.116. We find that Illinois' requirement that the permittee must meet the requirements of 62 IAC 1816.116(a)(4)(A) through (D) in order to use the ALPF or the alternative method in 62 IAC 1816.116(a)(6) to determine success of revegetation, is no less effective than the requirements of 30 CFR 780.18(b)(5) and 784.13(b)(5).

b. Illinois proposed to revise the requirements of 62 IAC 1816.116(a)(4)(C) concerning adjustments for abnormal growing conditions to read as follows: ''Adjustments for abnormal growing conditions shall be accepted by the Department if such adjustments are certified by a qualified professional (American Society of Agronomy certified) or National Association of State Departments of Agriculture crop enumerators used under this Section, whose ability to perform such adjustments has been previously approved by the Department.'' Currently approved 62 IAC 1816.116(a)(4)(C) requires adjustments for abnormal growing conditions to be certified by a crop adjuster certified to perform adjustments by the Federal Crop Insurance Corporation (FCIC). Because FCIC crop adjusters in Illinois are no longer available to certify adjustments for abnormal growing conditions, Illinois proposed to allow such adjustments to be certified by a qualified professional (American Society of Agronomy certified) or National Association of State Departments of Agriculture crop enumerators. Illinois provided a letter dated December 17, 2004, from the NRCS State Conservationist, which stated that the NRCS concurred with the proposed change (Administrative Record No. IL–5088).

Based on the discussion above, we find that the proposed change to this previously approved provision will not alter our original approval of Illinois' regulation at 62 IAC 1816.116(a)(4)(C) to allow adjustments for abnormal growing conditions, and we are approving the change.

c. Illinois proposed to make the following changes to 62 IAC 1816.116(a)(4)(D):

(1) Illinois proposed to remove a reference to ''oats'' as a type of crop commonly grown on surrounding unmined cropland and as a crop that may be used for one year to demonstrate productivity on prime farmland and

other cropland areas. Oats is being removed because it is not grown enough in Illinois to have agricultural statistics upon which to establish a standard of yield. With the removal of oats, the types of crops commonly grown on surrounding unmined cropland in Illinois include corn, soybeans, hay, sorghum, and wheat. The Federal regulation at 30 CFR 823.15(a)(6) requires that the reference crop on which restoration of soil productivity is proven shall be selected from the crops most commonly produced on the surrounding prime farmland. The Federal regulation at 30 CFR 816.116(a)(2) requires standards for success to include criteria representative of unmined lands in the area being reclaimed to evaluate the appropriate vegetation parameters of ground cover, production, or stocking. We find that the deletion of oats as a reference crop meets the requirements of 30 CFR 823.15(a)(6) and 816.116.(a)(2), and we are approving it.

(2) Illinois proposed to add the following requirement concerning deep tillage of prime farmland and other cropland areas:

If deep tillage has been completed to a minimum depth of 36 inches prior to bond release, the applicant may use more than one successful year of hay or wheat as a crop to be used for the productivity demonstration. The requirement for one successful year of corn remains unchanged under this provision.

Currently, if the Department approves a hay crop use, subsection (a)(4)(D) requires operators to grow a minimum of one successful year of corn and allows operators to grow one year of hay and one year of wheat to demonstrate revegetation success on prime farmland and other cropland areas. Illinois' proposed change would allow operators to grow two years of hay or two years of wheat if deep tillage has been completed to a minimum depth of 36 inches, while retaining the requirement for one successful year of corn. The Federal regulation at 30 CFR 816.116(a)(1) requires that standards for success of revegetation and statistically valid sampling criteria for measuring success must be selected by the regulatory authority and included in an approved regulatory program. We find that Illinois' proposal is no less effective than the requirements of the Federal regulation at 30 CFR 816.116(a)(1), and we are approving this change.

4. 62 IAC 1816.116(a)(6)

Illinois proposed a new productivity alternative at new subsection (a)(6). It reads as follows:

(6) In order to use the alternative to the Agricultural Lands Productivity Formula, Appendix A, to determine success of revegetation, the following shall apply: use of this alternative is contingent that the permittee can demonstrate for the entire field that the soil strength of the entire soil profile will average <= 200 psi or has been deep tilled to a minimum depth of 36 inches prior to bond release, and soil fertility will average Optimum Management for pH, P and K values as defined under the current Illinois Agronomy Handbook, and intensive land leveling is implemented, as needed, for the entire field. Areas to be tested are allowed under the provisions of subsections (a)(3)(C) or (E).

(A) The following substitution of Column F—Appendix A—County Average Yield File shall read:

Column F is a derived optimum management production (Figure) obtained by multiplying the figures in Column D times the figures in Column E. This production figure will normally exceed actual production because the optimum level management yield is used. The purpose of using the optimum management production is to derive a weighted average optimum management yield which is the total optimum management production (Column F) divided by the total grain acres in the county (Column D). The weighted optimum management yield figure will be used to derive a ''factor'' as described below:

Factor = Average of Official County Crop Yield for the Five Previous Years ÷ Average of Weighted Optimum Management Yield for the Five Years

(B) When the above ''factor'' and hand sampling is used, the harvest loss will be calculated by averaging the harvest loss of the five previous years for the crop being tested.

The Federal regulation at 30 CFR 816.116(a)(1) requires that standards for success and statistically valid sampling criteria for measuring success be selected by the regulatory authority and included in an approved regulatory program. The Federal regulation at 30 CFR 816.116(a)(2) requires that standards for success include criteria representative of unmined lands in the area being reclaimed to evaluate the appropriate vegetation parameters of ground cover, production, or stocking. The previously approved regulation at 62 IAC 1816.116(a)(4) that references the Agricultural Lands Productivity Formula at Appendix A includes both the standards and sampling techniques to be used to evaluate revegetation success for cropland. The proposed regulation to allow the use of 62 IAC 1816.116(a)(6) would allow the operator the option of an alternative method for determining the cropland standard when the field has been determined to have a maximum soil strength and a minimum fertility. The current approved program calculates the standard on the current level of yield for a soil type within the county. The alternative method would allow the use of a standard based on an average of the last five years of yield for a specific crop for a specific soil type in the county. We find that the optional method at 62 IAC 1816.116(a)(6) reduces the annual variability of the productivity standard while maintaining the representative character of the standard. Therefore, the revised regulation is no less effective than the Federal regulation at 30 CFR 816.116(a), and we are approving it.

5. 62 IAC 1816.Appendix A—ALPF

Illinois proposed to update information in the soil master file, county cropped acreage file, county average yield file, the agricultural lands productivity formula sampling method, and Exhibit A in the ALPF. Illinois also proposed to delete Tables A through F from the ALPF.

a. Illinois proposed to remove its reference to ''oats'' as a grain crop used for evaluation of success of revegetation from the Soil Master File; the County Average Yield File; the Agricultural Lands Productivity Formula Sampling Method; and Exhibit A, County Crop Yields by Soil Mapping Unit. Illinois also proposed to remove the sections ''Oats Sampling Technique (Rows >8″)'' and ''Oats Sampling Technique (Discernible Rows)'' from the Agricultural Lands Productivity Formula Sampling Method.

For the reasons discussed in finding III.B.3.c.(1), we find that the proposed revisions to remove a reference to a grain crop that is no longer commonly grown in Illinois is no less effective than the Federal regulations at 30 CFR 823.15(a)(6) and 816.116(a)(2), and we are approving them. We also find that the proposed revision to remove the sampling techniques for a crop that is no longer commonly grown in Illinois is no less effective than the Federal regulations, and we are approving it.

b. *Soil Master File.* Illinois proposed to revise the introductory paragraph by changing the word ''high'' to the word ''optimum'' in its reference to the ''high level of management yields'' and to add a reference to Bulletin 811, ''Optimum Crop Productivity Ratings for Illinois Soil,'' University of Illinois, College of Agricultural, Consumer and Environmental Sciences, Office of Research, August 2000. Bulletin 811 is the reference document for information contained in the soil master file. Illinois also proposed to remove the information regarding additional components of the soil master file.

The level of management applied for the productivity standard needs to be

representative of the unmined lands in the area. Bulletin 811 applies a recognized standard of crop productivity as determined by the University of Illinois, College of Agriculture. Because of the change to new Bulletin 811, the deleted additional components of the soil master file are no longer necessary. The Federal regulation at 30 CFR 816.116(a)(2) requires that the standards for success must include criteria representative of unmined lands in the area being reclaimed to evaluate the appropriate vegetation parameters of ground cover, production, or stocking. We find that Illinois' proposal to eliminate outdated information and to use a contemporary University agricultural publication to support its standard is consistent with the Federal regulation at 30 CFR 816.116(a)(2), and we are approving it.

c. *County Average Yield File.* Illinois proposed to change the word ''high'' to the word ''optimum'' in the phrase ''high management yield.'' Illinois also proposed to add the following new provision:

> If official county crop yields are unavailable for a specific crop in a given year, the Department, in consultation with the permittee, and with the concurrence of the Illinois Department of Agriculture, will substitute a county crop yield from an adjacent county with similar soils, if it can be determined that similar weather conditions occurred in that year.

For the reasons discussed above in finding III.B.5.b, we find that Illinois' proposal to change the word ''high'' to ''optimum'' is consistent with the Federal regulations at 30 CFR 823.15(a)(6) and 816.116(a)(2), and we are approving the word change. Illinois provided a letter dated December 17, 2004, from the NRCS State Conservationist that concurs with the new provision proposed by Illinois regarding the substitution of a county crop yield from an adjacent county if official county crop yields are unavailable for a specific crop in a given year under specified conditions (Administrative Record No. IL–5088). Illinois has determined that hay and wheat are grown so little in some counties that data from adjacent counties must be used as the standard.

For prime farmland, the Federal regulation at 30 CFR 823.15(b)(7)(i) requires that reference crop yields for a given crop season are to be determined from the current yield records of representative local farms in the surrounding area, with the concurrence by the NRCS. For other cropland, the Federal regulation at 30 CFR 816.116(a)(2) requires that the standards for success shall include criteria representative of unmined lands in the area being reclaimed to evaluate the appropriate vegetation parameters of ground cover, production, or stocking. We find that Illinois has provided the necessary concurrence of the NRCS for prime farmland and the proposed revision is no less effective than the Federal regulation at 30 CFR 823.15(b)(7)(i). We also find that because the soils and weather conditions must be similar in the adjacent county and the concurrence of the Illinois Department of Agriculture is required, the proposed revision for other cropland is no less effective than the Federal regulations at 30 CFR 816.116(a)(2). Therefore, we are approving the new provision.

d. *Agricultural Lands Productivity Formula Sampling Method.*

Corn Sampling Technique. Illinois proposed to delete the current row factor information under step 10 of its corn sampling technique and replace it with ''average row width in feet × 15 feet of row ÷ 43560 square feet/acre and .845 = the standard moisture content conversion factor of corn per bushel (1.0 − (15.5%/100).'' The existing table provides a row factor for four row spacing widths of 30, 36, 38, and 40 inches. The table is being replaced by a formula for calculating a row factor for any row width. The Federal regulation at 30 CFR 816.116(a)(1) requires that standards for success and statistically valid sampling criteria for measuring success shall be selected by the regulatory authority and included in an approved regulatory program. We find that Illinois' revision meets the requirements of the Federal regulation, and we are approving it.

e. *Exhibit A County Crop Yields by Soil Mapping Unit.* Illinois proposed to change the word ''high'' to the word ''optimum'' in columns E and F.

The Federal regulation at 30 CFR 816.116(a)(2) requires that the standards for success shall include criteria representative of unmined lands in the area being reclaimed to evaluate the appropriate vegetation parameters of ground cover, production, or stocking. The Illinois proposal is the result of replacing the obsolete soil master file with Bulletin 811 that references optimum rather than high levels of production for the State of Illinois. Bulletin 811 applies a recognized standard of crop productivity as determined by the University of Illinois, College of Agriculture and is consistent with the Federal regulations. We find that the proposal to eliminate outdated information and use a contemporary University agricultural publication to support its standard is consistent with the Federal regulations, and we are approving it.

f. Illinois proposed to delete Tables A through F from the ALPF. The information in Tables A, B, and D is redundant of other information found in the ALPF and the information in Tables C, E, and F are no longer needed.

The Federal regulation at 30 CFR 816.116(a)(1) requires that standards for success and statistically valid sampling criteria for measuring success shall be selected by the regulatory authority and included in an approved regulatory program. Because these tables are redundant or no longer needed, we find that the proposed deletions are not inconsistent with the Federal regulations.

C. 62 IAC 1817.121 Subsidence Control

At subsection (c) entitled ''Repair of damage,'' Illinois proposed to remove the last sentence from paragraph (2) and to make it the new introductory paragraph to subsection (c). Illinois also proposed to add a new exception clause to the end of the relocated sentence. The new introductory paragraph reads as follows:

> The requirements of this subsection apply only to subsidence-related damage caused by underground coal extraction conducted after February 1, 1983, except as noted in Section 1817.41(j).

Illinois removed the last sentence from paragraph (2) and made it the introductory paragraph to subsection (c) in order to clarify that all parts of subsection (c) are subject to the February 1, 1983, date. Illinois added the exception clause because the replacement of water supplies was effective January 19, 1996, the date that 62 IAC 1817.41(j) was promulgated, rather than the February 1, 1983, date. We find that Illinois' proposed revisions are appropriate and will not make the Illinois regulation at 62 IAC 1817.121(c) less effective than the counterpart Federal regulation at 30 CFR 817.121(c), and we are approving the revisions.

D. 62 IAC 1823.15 Prime Farmland: Revegetation

1. At subsections (b)(2) and (b)(3), Illinois proposed to add a reference to new 62 IAC 1816.116(a)(6). As revised, subsection (b)(2) requires that success of revegetation be measured in accordance with 62 IAC 1816.116(a)(4) or (a)(6). As revised, subsection (b)(3) now requires that revegetation be considered a success when crop production is equivalent to or exceeds the production standards of 62 IAC 1816.116(a)(4) or (a)(6) with 90 percent statistical confidence. Currently approved 62 IAC

1816.116(a)(4) references the ALPF, which includes the yield standards and sampling techniques to be used to evaluate success of revegetation for cropland, including prime farmland, and pasture and/or hayland or grazing land. As revised, 62 IAC 1816.116(a)(4) will also reference the alternative method at 62 IAC 1816.116(a)(6). Proposed new 62 IAC 1816.116(a)(6) is an alternative to using the ALPF and includes an optional method for determining the standard to be used to evaluate success of revegetation for cropland and pasture and/or hayland or grazing land. The currently approved method in the ALPF for calculating the standard for determining success of revegetation is based on the current level of yield for a soil type within the county. The alternative method at proposed 62 IAC 1816.116(a)(6) for calculating the standard for determining success of revegetation is based on an average of the last five years of yield for a specific crop for a specific soil type in the county.

The Federal regulation at 30 CFR 823.15(b)(2) requires that soil productivity be measured on a representative sample or on all of the mined and reclaimed prime farmland area using the reference crop determined under 30 CFR 823.15(b)(6). A statistically valid sampling technique at a 90 percent or greater statistical confidence that has been approved by the regulatory authority in consultation with the NRCS must be used. The Federal regulation at 30 CFR 823.15(b)(6) requires that the reference crop that will be used to prove soil productivity must be selected from the crops most commonly produced on the surrounding prime farmland. Illinois provided documentation of the NRCS consultation process. In a letter dated December 17, 2004, the NRCS stated that it concurs with the proposed rule changes and the revised reference crop yield determinations and procedures will make for a better rule (Administrative Record No. IL–5088). Therefore, we find that Illinois' revised regulations at 62 IAC 1823.15(b)(2) and (b)(3) are no less effective than the Federal regulations at 30 CFR 823.15(b)(2) and (b)(3), and we are approving them.

2. Illinois also proposed to add the following requirement at the end of subsection (b)(3): ''Once chosen by the permittee, the productivity alternative in 62 IAC 1816.116(a)(6) may not be modified without approval from the Department.''

In accordance with the Federal regulation at 30 CFR 774.13(c), no permit revision can be approved unless the application demonstrates and the regulatory authority finds that reclamation as required by the Act and regulatory program can be accomplished. Because, Illinois requires that the productivity alternative under 62 IAC 1816.116(a)(6), once chosen by the permittee, may not be modified without approval of the Department, we find that the proposed requirement is no less effective than the requirement of the Federal regulation at 30 CFR 774.13(c), and we are approving it.

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the amendment, but did not receive any.

Federal Agency Comments

On February 8, 2005, under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Illinois program (Administrative Record No. IL–5090). We received comments from the NRCS. The NRCS responded on February 28, 2005 (Administrative Record No. IL–5091), that it recommended that Illinois' reference to the ''1999–2000 Illinois Agronomy Handbook'' be changed to ''current Illinois Agronomy Handbook'' and questioned whether the reference to ''the Food, Agriculture, Conservation, and Trade Act of 1990'' needs to be updated to the ''Farm Security and Rural Investment Act of 2002.''

These references that the NRCS wanted to change are found in Illinois' regulations at 62 IAC 1816.116(a)(2)(C) and 1817.116(a)(2)(C). As discussed in findings III.B.1, Illinois revised these regulations in accordance with the NRCS comments.

Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(ii), we are required to get a written concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). None of the revisions that Illinois proposed to make in this amendment pertain to those air or water quality standards. Therefore, we did not ask EPA to concur on the amendment.

On February 8, 2005, under 30 CFR 732.17(h)(11)(i), we requested comments on the amendment from EPA (Administrative Record No. IL–5090). EPA did not respond to our request.

State Historical Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On February 8, 2005, we requested comments on Illinois' amendment (Administrative Record No. IL–5090), but neither responded to our request.

V. OSM's Decision

Based on the above findings, we approve the amendment Illinois sent us on February 1, 2005, and as revised on August 3, 2005.

To implement this decision, we are amending the Federal regulations at 30 CFR part 913, which codify decisions concerning the Illinois program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this rule effective immediately will expedite that process.

VI. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulations.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations

and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. This determination is based on the fact that the Illinois program does not regulate coal exploration and surface coal mining and reclamation operations on Indian lands. Therefore, the Illinois program has no effect on Federally-recognized Indian tribes.

Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of $100 million; (b) will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulations did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 913

Intergovernmental relations, Surface mining, Underground mining.

Dated: September 21, 2005.

Charles E. Sandberg,

Regional Director, Mid-Continent Region.

■ For the reasons set out in the preamble, 30 CFR part 913 is amended as set forth below:

PART 913—ILLINOIS

■ 1. The authority citation for part 913 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 2. Section 913.15 is amended in the table by adding a new entry in chronological order by ''Date of final publication'' to read as follows:

§ 913.15 Approval of Illinois regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
*	*	*
February 1, 2005	November 29, 2005	62 IAC 1816.116(a)(2)(C), (a)(3)(C) and (a)(3)(E), (a)(4), (a)(4)(C) and (D), (a)(6); 1816. Appendix A; 1817.42; 1817.43(a)(2)(D), (b)(3), (c)(3); 1817.116(a)(2)(C), (a)(3)(C) and (a)(3)(E), (a)(4), (b)(2); 1817.121(c), (c)(2); 1823.15(b)(2) and (b)(3).

[FR Doc. 05–23401 Filed 11–28–05; 8:45 am]
BILLING CODE 4310–05–P

DEPARTMENT OF THE TREASURY

Fiscal Service

31 CFR Part 356

Sale and Issue of Marketable Book-Entry Bills, Notes, and Bonds; Correction

AGENCY: Bureau of the Public Debt, Fiscal Service, Treasury.

ACTION: Final rule; correction.

SUMMARY: The Bureau of the Public Debt published a final rule in the September 30, 2005, **Federal Register**, amending the Sale and Issue of Marketable Book-Entry Treasury Bills, Notes, and Bonds to permit Treasury bills, notes, and bonds to be held in the TreasuryDirect system. Several paragraphs were inadvertently omitted. This correction document corrects that omission.

DATES: Effective November 29, 2005.

ADDRESSES: You can download this correction at the following Internet address: *http://www.publicdebt.treas.gov.*

FOR FURTHER INFORMATION CONTACT: Chuck Andreatta, Associate Director, Government Securities Regulations Staff, Bureau of the Public Debt, at (202) 504–3632 or *govsecreg@bpd.treas.gov.*

Susan Klimas, Attorney-Adviser, Dean Adams, Assistant Chief Counsel, or Edward Gronseth, Deputy Chief Counsel, Office of the Chief Counsel, Bureau of the Public Debt, at (304) 480–8692 or *susan.klimas@bpd.treas.gov.*

SUPPLEMENTARY INFORMATION: The Bureau of the Public Debt published in the September 30, 2005, **Federal Register** (70 FR 57437), a final rule that amended 31 CFR part 356, the Sale and Issue of Marketable Book-Entry Treasury Bills, Notes, and Bonds, to permit investors to hold Treasury bills, notes, and bonds in the TreasuryDirect system. In section 356.17, several already-existing paragraphs were inadvertently deleted. This document corrects the deletion.

List of Subjects in 31 CFR Part 356

Bonds, Federal Reserve System, Government securities, Securities.

■ Accordingly, 31 CFR part 356 is corrected by making the following correcting amendments:

PART 356—SALE AND ISSUE OF MARKETABLE BOOK-ENTRY TREASURY BILLS, NOTES, AND BONDS (DEPARTMENT OF THE TREASURY CIRCULAR, PUBLIC DEBT SERIES NO. 1–93)

■ 1. The authority citation for part 356 continues to read as follows:

Authority: 5 U.S.C. 301; 31 U.S.C. 3102 *et seq.;* 12 U.S.C. 391.

■ 2. In § 356.17, add paragraphs (d)(1) and (d)(2), to read as follows:

§ 356.17 How and when do I pay for securities awarded in an auction?

* * * * *

(d) * * *

(1) A submitter that does not have a funds account at a Federal Reserve Bank or that chooses not to pay by charge to its own funds account must have an approved autocharge agreement on file with us before submitting any bids. Any depository institution whose funds account will be charged under an autocharge agreement will receive advance notice from us of the total par amount of, and price to be charged for, securities awarded as a result of the submitter's bids.

(2) A submitter that is a member of a clearing corporation may instruct that delivery and payment be made through the clearing corporation for securities awarded to the submitter for its own account. To do this, the following requirements must be met prior to submitting any bids:

(i) We must have acknowledged and have on file an autocharge agreement between the clearing corporation and a depository institution. By entering into such an agreement, the clearing corporation authorizes us to provide aggregate par and price information to the depository institution whose funds account will be charged under the agreement. The clearing corporation is responsible for remitting payment for auction awards of the clearing corporation member.

(ii) We must have acknowledged and have on file a delivery and payment agreement between the submitter and the clearing corporation. By entering into such an agreement, the submitter authorizes us to provide award and payment information to the clearing corporation.

Dated: November 21, 2005.

Van Zeck,

Commissioner of the Public Debt.

[FR Doc. 05–23333 Filed 11–28–05; 8:45 am]
BILLING CODE 4810–39–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 721

[OPPT–2004–0111; FRL–7740–7]

RIN 2070–AJ12

2-ethoxyethanol, 2-ethoxyethanol acetate, 2-methoxyethanol, and 2-methoxyethanol acetate; Significant New Use Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is issuing a significant new use rule (SNUR) under section 5(a)(2) of the Toxic Substances Control Act (TSCA) which requires persons to notify EPA at least 90 days before commencing the manufacture, import, or processing of 2-ethoxyethanol (CAS No. 110–80–5) (2-EE), 2-ethoxyethanol acetate (CAS No. 111–15–9) (2-EEA), 2-methoxyethanol (CAS No. 109–86–4) (2-ME), or 2-methoxyethanol acetate (CAS No. 110–49–6) (2-MEA) for domestic use in a consumer product or the manufacture or import of 2-MEA at levels greater than 10,000 pounds per year. This action finalizes the SNUR proposed in the **Federal Register** of March 1, 2005 (70 FR 9902) (FRL–7692–8). EPA believes this action is necessary because these chemicals may be hazardous to human health and their use in a consumer product may result in human exposure. The required notice will provide EPA with the opportunity to evaluate intended new uses and associated activities, and if necessary, prohibit or limit those uses and activities before they occur.

DATES: This final rule is effective on December 29, 2005.

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number OPPT–2004–0111. 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, will not be 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 OPPT Docket, EPA Docket Center, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal

holidays. The EPA Docket Center Reading Room telephone number is (202) 566–1744 and the telephone number for the OPPT Docket, which is located in the EPA Docket Center, is (202) 566–0280.

FOR FURTHER INFORMATION CONTACT: *For general information contact:* Colby Lintner, Regulatory Coordinator, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov*.

For technical information contact: Amy Breedlove, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–9823; e-mail address: *breedlove.amy@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

You may be potentially affected by this action if you manufacture, import, or process 2-EE (CAS No. 110–80–5), 2-EEA (CAS No. 111–15–9), 2-ME (CAS No. 109–86–4), or 2-MEA (CAS No. 110–49–6) for use in consumer products or manufacture or import 2-MEA (CAS No. 110–49–6) at levels greater than 10,000 pounds per year.

Persons who intend to import any chemical substance governed by a final SNUR are subject to the TSCA section 13 (15 U.S.C. 2612) import certification requirements, and to the regulations codified at 19 CFR 12.118 through 12.127 and 127.28. Those persons must certify that they are in compliance with the SNUR requirements. The EPA policy in support of import certification appears at 40 CFR part 707, subpart B. In addition, any persons who export or intend to export a chemical substance that is the subject of this rule are subject to the export notification provisions of TSCA section 12(b) (15 U.S.C. 2611(b)) (see 40 CFR 721.20), and must comply with the export notification requirements in 40 CFR part 707, subpart D. Potentially affected entities may include, but are not limited to:

- Manufacturers (defined by statute to include importers) and processors of 2-EE, 2-EEA, 2-ME, and 2-MEA (NAICS 325 and 324110), e.g., chemical manufacturing and petroleum refineries.

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. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions in 40 CFR 721.5 for SNUR related obligations. If you have any questions regarding the applicability of this action to a particular entity, consult the technical 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 721 is available on E-CFR Beta Site Two at *http://www.gpoaccess.gov/ecfr/*.

II. Background

A. What Action Is the Agency Taking?

EPA is designating the manufacture, import, or processing of 2-EE (CAS No. 110–80–5), 2-EEA (CAS No. 111–15–9), 2-ME (CAS No. 109–86–4), and 2-MEA (CAS No. 110–49–6) for domestic use in consumer products as a significant new use, as well as the manufacture or import of 2-MEA (CAS No. 110–49–6) at levels greater than 10,000 pounds per year. ''Consumer product'' is defined at 40 CFR 721.3 as ''a chemical substance that is directly, or as part of a mixture, sold or made available to consumers for their use in or around a permanent or temporary household or residence, in or around a school, or in recreation.'' This rule requires persons intending to manufacture or import 2-MEA at levels greater than 10,000 pounds per year as well as those intending to manufacture, import, or process 2-EE, 2-EEA, 2-ME, or 2-MEA for domestic use in a consumer product to submit a Significant New Use Notice (SNUN) to EPA at least 90 days before such activity.

B. What Is the Agency's Authority for Taking This Action?

Section 5(a)(2) of TSCA (15 U.S.C. 2604(a)(2)) authorizes EPA to determine that a use of a chemical substance is a ''significant new use.'' EPA must make this determination by rule after considering all relevant factors, including those listed in TSCA section 5(a)(2). Once EPA determines that a use of a chemical substance is a significant new use, and promulgates a SNUR, section 5(a)(1)(B) of TSCA requires persons to submit a SNUN to EPA at least 90 days before commencement of manufacture, import, or processing of the chemical substance for that use.

C. Applicability of General Provisions

General regulatory provisions for SNURs appear under subpart A of 40 CFR part 721. These provisions describe persons subject to the rule, recordkeeping requirements, and exemptions to reporting requirements. Provisions relating to user fees appear at 40 CFR part 700. Persons subject to the rule are required to comply with the same notice requirements and EPA regulatory procedures as submitters of premanufacture notices (PMNs) under section 5(a)(1)(A) of TSCA. In particular, these requirements include the information submission requirements of TSCA section 5(b) and 5(d)(1), the exemptions authorized by TSCA section 5(h)(1), (2), (3), and (5), and the regulations at 40 CFR part 720. Receipt of a SNUN by EPA may trigger regulatory action under TSCA sections 5(e), 5(f), 6, or 7, if appropriate, to control the activities on which it has received the SNUN. If EPA does not take action, EPA is required under TSCA section 5(g) to explain in the **Federal Register** its reasons for not taking action.

Persons who intend to export a substance identified in a proposed or final SNUR are subject to the export notification provisions of TSCA section 12(b). The regulations that interpret TSCA section 12(b) appear at 40 CFR part 707, subpart D. Persons who intend to import a chemical substance identified in a final SNUR are subject to the TSCA section 13 import certification requirements, which are codified at 19 CFR 12.118 through 12.127 and 127.28. Such persons must certify that they are in compliance with TSCA requirements. The EPA policy relating to import certification appears at 40 CFR part 707, subpart B.

III. Summary of and Response to Comments

A. Final Rule

In the **Federal Register** of March 1, 2005 (70 FR 9902), EPA proposed a SNUR for 2-ethoxyethanol, 2-ethoxyethanol acetate, 2-methoxyethanol, or 2-methoxyethanol acetate where the significant new uses were for domestic use in a consumer product or the manufacture or import of 2-methoxyethanol at levels greater than

10,000 pounds per year. The Agency reviewed and considered the six comments received by the end of the comment period (May 2, 2005) for the March 1, 2005 proposed rule. A discussion of the comments and the Agency's response follow in Unit III.B. None of the comments received identified any ongoing uses of these four chemicals in domestic consumer products nor any production of 2-methoxyethanol acetate. In addition, no new data were submitted or identified that would change EPA's findings regarding the SNUR for these four chemicals. Therefore, EPA is issuing the SNUR as proposed. This final rule requires persons to notify EPA at least 90 days before commencing the manufacture, import, or processing of 2-EE (CAS No. 110–80–5), 2-EEA (CAS No. 111–15–9), 2-ME (CAS No. 109–86–4), or 2-MEA (CAS No. 110–49–6) for domestic use in a consumer product or the manufacture or import of 2-MEA at levels greater than 10,000 pounds per year. A complete copy of all comments received is available in the public docket for this action.

B. Response to Comments

EPA received six comments, two from an individual and one each from the American Chemistry Council (ACC), on behalf of the Ethylene and Propylene Glycol Ethers Panel; the Lyondell Chemical Company (Lyondell); the National Paint and Coatings Association (NPCA); and The Dow Chemical Company (Dow). The one individual submitted two separate sets of comments. The first set was a general statement that the author did not think any new uses should be allowed or that the product should be for sale or use in the United States. The second set of comments pointed out the several statements in the SNUR that led the author to be concerned that these chemicals are sold or used at all. Neither set of comments recommended any specific changes to the SNUR.

Comment: ACC and Lyondell expressed support for the SNUR. Both also requested that the Agency clarify whether or not products containing 1% or less of the substances listed in the rule are subject to the TSCA section 12(b) export notification requirements of 40 CFR part 707, subpart D. The NPCA pointed out that solvent substitutes may still contain trace amounts of the four chemicals listed in the SNUR which would trigger TSCA section 12(b) requirements. They also referred to EPA amending the final TSCA section 6 rulemaking for 40 CFR 749.68 (hexavalent chromium-based water treatment chemicals in cooling systems) to exclude those hexavalent chromium compounds that could not be used in the prohibited application from section 12(b) export notification requirements (59 FR 42769, August 19, 1994).

EPA response: If an exporter is aware of the presence of a chemical subject to this SNUR, at any level in the products to be exported, then pursuant to TSCA section 12(b), the exporter must notify EPA of the export regardless of whether the substance is being exported for the use regulated by the SNUR. See Chemical Imports and Exports; Notification of Export, final rule (45 FR 82844, at 82845; December 16, 1980). Thirty days after publication in the **Federal Register** of a proposed SNUR, the export or intended export of a chemical subject to a SNUR requires export notification under TSCA section 12(b), regardless of the amount of the substance in a product, or its use or intended use. In the August 1994 hexavalent chromium rule-related action noted by NPCA, EPA amended 40 CFR 749.68 to clarify that only hexavalent chromium chemicals that can be used for water treatment were the subjects of the underlying TSCA section 6 regulation, not other hexavalent chromium chemicals. That amendment had the parallel effect of limiting the scope of TSCA section 12(b) export notifications that were required for those hexavalent chromium chemicals that could be used to treat water.

Comment: ACC and Lyondell also noted that two of the SNUR references referred generally to glycol ethers and that all glycol ethers were not subject to the SNUR.

EPA response: EPA agrees and notes that the SNUR refers only to the chemicals by their names, not the general term glycol ethers.

Comment: The Dow Chemical Company requested the Agency clarify that the proposed rule does not apply when the subject substances appear as impurities in consumer products consisting primarily of other chemical substances. NPCA stated that EPA should limit the scope of the recordkeeping and reporting requirements to exempt products with only trace or *de minimus* amounts of these chemicals.

EPA response: EPA does not intend for the SNUR reporting and recordkeeping requirements to apply to persons that manufacture, import, or process the subject substances only as an impurity.

IV. Significant New Use Determination

Section 5(a)(2) of TSCA provides that EPA's determination that a use of a chemical substance is a significant new use must be made after consideration of all relevant factors including:

- The projected volume of manufacturing and processing of a chemical substance.
- The extent to which a use changes the type or form of exposure of human beings or the environment to a chemical substance.
- The extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance.
- The reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of a chemical substance.

EPA construes the statute to allow consideration of any other relevant factors, in addition to those enumerated in section 5(a)(2)(A) through (D) of TSCA.

To determine what would constitute a significant new use of 2-EE, 2-EEA, 2-ME, and 2-MEA, EPA considered relevant information about the toxicity of the substances, likely exposures/releases associated with possible uses, and the four factors listed in section 5(a)(2) of TSCA.

The latest information available to EPA indicates that there is no ongoing domestic use of 2-EE, 2-EEA, 2-ME, or 2-MEA in consumer products. EPA believes that the renewed use of 2-EE, 2-EEA, 2-ME, or 2-MEA in a consumer product would increase the magnitude and duration of exposure. Considering the health concerns for 2-EE, 2-EEA, 2-ME, and 2-MEA, EPA believes that individuals could suffer adverse effects from their use in consumer products. Thus, EPA is designating ''domestic use in a consumer product,'' as well as the manufacture or import of 2-MEA at levels greater than 10,000 pounds per year, as a significant new use of 2-EE, 2-EEA, 2-ME, and 2-MEA.

Based on these considerations, EPA is pursuing the following objectives with regard to the use of 2-EE, 2-EEA, 2-ME, and 2-MEA in consumer products:

- EPA wants to ensure that it would receive notice of any person's intent to manufacture or import 2-MEA at levels greater than 10,000 pounds per year or intending to manufacture, import, or process 2-EE, 2-EEA, 2-ME, and 2-MEA for domestic use in a consumer product before that activity begins.
- EPA wants to ensure that it would have the opportunity to review and evaluate data submitted in a SNUN before the notice submitter begins manufacturing, importing, or processing 2-EE, 2-EEA, 2-ME, and 2-MEA for domestic use in a consumer product or manufacturing or importing 2-MEA at

levels greater than 10,000 pounds per year.

• EPA wants to ensure that it would be able to regulate prospective manufacturers, importers, or processors of 2-EE, 2-EEA, 2-ME, and 2-MEA before use of any of these chemicals in a consumer product occurs as well as prospective manufacturers or imports of 2-MEA before manufacture or import of the substance at levels greater than 10,000 pounds per year occurs, provided that the degree of potential risk is sufficient to warrant such regulation.

As noted in Unit III.B. of the proposed SNUR (70 FR 9902, March 1, 2005), the production of the chemicals included in this SNUR have declined significantly over time. EPA is not aware of current domestic consumer uses for the chemicals, and substitutes are available. The Agency will use information submitted pursuant to the Inventory Update Rule (40 CFR part 710) to track the production volumes and uses of these chemicals. If needed, EPA may pursue additional regulatory actions as appropriate under TSCA sections 4, 5, 6, or 8.

V. Test Data and Other Information

EPA recognizes that section 5 of TSCA does not require the development of any particular test data before submission of a SNUN. Persons are required only to submit test data in their possession or control and to describe any other data known to or reasonably ascertainable by them (15 U.S.C. 2604(d); 40 CFR 721.25).

However, SNUN submitters should be aware that EPA will be better able to evaluate SNUNs which provide detailed information on:

• Human exposure and environmental releases that may result from the significant new use of the chemical substances.

• Potential benefits of the chemical substances.

• Information on risks posed by the chemical substances relative to risks posed by potential substitutes.

Submitters should consider including with a SNUN any other available studies on the chemical substances or studies on analogous substances which may demonstrate that the significant new uses being reported are unlikely to present an unreasonable risk.

In view of the potential risks posed by these chemicals, EPA would recommend that potential SNUN submitters include data that would permit a reasoned evaluation of risks posed by these chemicals. EPA encourages persons to consult with the Agency before submitting a SNUN for these substances. As part of this optional pre-notice consultation, EPA would discuss specific data it believes are necessary to evaluate a significant new use. A SNUN submitted without sufficient data to reasonably evaluate risks posed by a significant new use of 2-EE, 2-EEA, 2-ME, and/or 2-MEA may increase the likelihood that EPA will take action under TSCA section 5(e) to prohibit or limit activities associated with these chemicals. EPA recommends that potential SNUN submitters contact the Agency early enough that they will be able to conduct any appropriate tests.

VI. SNUN Submissions

SNUNs should be mailed to the Environmental Protection Agency, OPPT Document Control Office (7407M), 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. Information must be submitted in the form and manner set forth in EPA Form No. 7710–25. This form is available from the Environmental Assistance Division (7408M), OPPT, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001 (see 40 CFR 721.25(a) and 720.40(a)(2)(i)).

VII. Applicability of Rule to Uses Occurring Before Effective Date of the Final Rule

As discussed in the **Federal Register** of April 24, 1990 (55 FR 17376), EPA believes that the intent of TSCA section 5(a)(1)(B) is best served by designating a use as a significant new use as of the date of publication of the proposal rather than as of the effective date of the final rule. If uses begun after publication of the proposed SNUR were considered ongoing rather than new, it would be difficult for EPA to establish SNUR notice requirements, because a person could defeat the SNUR by initiating the proposed significant new use before the rule became effective.

Any person who began manufacture, import, or processing of 2-EE, 2-EEA, 2-ME, or 2-MEA for the significant new use listed in the proposed SNUR after the date of publication of the proposed SNUR must stop that activity before the effective date of this final rule. Persons who ceased those activities will have to meet all SNUR notice requirements and wait until the end of the notification review period, including all extensions, before engaging in any activities designated as significant new uses. If, however, persons who began manufacture, import, or processing of any of these chemical substances between the date of publication of the proposed SNUR and the effective date of this final SNUR meet the conditions of advance compliance as codified at 40 CFR 721.45(h), those persons would be considered to have met the final SNUR requirements for those activities.

VIII. Economic Analysis

EPA evaluated the potential costs of establishing SNUR reporting requirements for potential manufacturers, importers, and processors of the chemical substances included in this rule. While there is no precise way to calculate the total annual cost of compliance with the final rule, given the uncertainties related to predicting the number of SNUN's that would be submitted as a result of this SNUR, EPA estimates that the cost for preparing and submitting a SNUN is $7,174, including a $2,500 user fee required by 40 CFR part 700.45(b)(2)(iii). Small businesses with annual sales of less than $40 million when combined with those of the parent company (if any) are subject to a reduced user fee of $100 (40 CFR part 700.45(b)(1)). Based on past experience with SNURs and the low number of SNUNs which are submitted on an annual basis, EPA believes that there will be few, if any, SNUNs submitted as a result of this SNUR. The costs of submission of SNUNs will not be incurred by any company unless a company decides to pursue a significant new use as defined in this SNUR. Furthermore, while the expense of a notice and the uncertainty of possible EPA regulation may discourage certain innovations, that impact would be limited because such factors are unlikely to discourage an innovation that has high potential value. EPA's complete economic analysis is available in the public docket for this rule.

Under section 12(b) of TSCA, among other requirements, exporters must notify EPA if they export or intend to export a chemical substance or mixture for which a rule has been proposed or promulgated under TSCA section 5, such as this SNUR. Notice must be provided for the first export or intended export to a particular country in a calendar year. In an economic analysis of an amendment to the rules implementing TSCA section 12(b), EPA estimated that the one-time cost of preparing and submitting an export notification was $62.60 in 1992, or $93.02 when inflated to 2003 dollars by a factor of approximately 1.5, from the Employment Cost Index for White Collar Occupations. The total costs of export notification will vary per chemical, depending on the number of required notifications (i.e., number of countries to which the chemical is exported). EPA is unable to make any

estimate of the likely number of export notifications for chemicals covered in this SNUR.

IX. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993), the Office of Management and Budget (OMB) has determined that proposed or final SNURs are not a ''significant regulatory action'' subject to review by OMB, because they do not meet the criteria in section 3(f) of the Executive Order.

B. Paperwork Reduction Act

According to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, an Agency may not conduct or sponsor, and a person is not required to respond to a collection of information that requires OMB approval under the PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register**, are listed in 40 CFR part 9, and included on the related collection instrument or form, if applicable.

The information collection requirements related to this action have already been approved by OMB pursuant to the PRA under OMB control number 2070–0038 (EPA ICR No. 1188). This action would not impose any burden requiring additional OMB approval. If an entity were to submit a SNUN to the Agency, the annual burden is estimated to average 105 hours per submission. This burden estimate includes the time needed to review instructions, search existing data sources, gather and maintain the data needed, and complete, review, and submit the required SNUN.

Send any comments about the accuracy of the burden estimate, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques, to the Director, Collection Strategies Division, Office of Environmental Information (2822T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. Please remember to include the OMB control number in any correspondence, but do not submit any completed forms to this address.

C. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agency hereby certifies that promulgation of this SNUR would not have a significant adverse economic impact on a substantial number of small entities. The rationale supporting this conclusion is as follows. A SNUR applies to any person (including small or large entities) who intends to engage in any activity described in the rule as a ''significant new use.'' By definition of the word ''new,'' and based on all information currently available to EPA, it appears that no small or large entities presently engage in such activity. Since a SNUR only requires that any person who intends to engage in such activity in the future must first notify EPA by submitting a SNUN, no economic impact would even occur until someone decides to engage in those activities. Although some small entities may decide to conduct such activities in the future, EPA cannot presently determine how many, if any, there may be. However, EPA's experience to date is that, in response to the promulgation of over 1,000 SNURs, the Agency receives on average only 10 notices per year. Of those SNUNs submitted, none appear to be from small entities in response to any SNUR. In addition, the estimated reporting cost for submission of a SNUN (see Unit X. of the proposed SNUR (70 FR 9902, March 1, 2005), is minimal regardless of the size of the firm. Therefore, EPA believes that the potential economic impact of complying with this SNUR is not expected to be significant or adversely impact a substantial number of small entities. In a SNUR that published on June 2, 1997 (62 FR 29684) (FRL–5597–1), the Agency presented its general determination that proposed and final SNURs are not expected to have a significant economic impact on a substantial number of small entities, which was provided to the Chief Counsel for Advocacy of the Small Business Administration.

D. Unfunded Mandates Reform Act

Based on EPA's experience with proposing and finalizing SNURs, State, local, and Tribal governments have not been impacted by these rulemakings, and EPA does not have any reasons to believe that any State, local, or Tribal government would be impacted by this rulemaking. As such, EPA has determined that this regulatory action would not impose any enforceable duty, contain any unfunded mandate, or otherwise have any affect on small governments subject to the requirements of sections 202, 203, 204, or 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

E. Executive Order 13132: Federalism

This action does 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).

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

This rule does not have Tribal implications because it is not expected to have substantial direct effects on Indian Tribes. This rule does not significantly or uniquely affect the communities of Indian Tribal governments, nor does it involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000), do not apply to this rule.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

This action is not subject to Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997), because this is not an economically significant regulatory action as defined by Executive Order 12866, and this action does not address environmental health or safety risks disproportionately affecting children.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001), because this action is not expected to affect energy supply, distribution, or use.

I. National Technology Transfer Advancement Act

In addition, since this action does not involve any technical standards, 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), does not apply to this action.

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

This action does not entail special considerations of environmental justice related issues as delineated by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

K. Executive Order 12988: Civil Justice Reform

In issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct, as required by section 3 of Executive Order 12988, entitled *Civil Justice Reform* (61 FR 4729, February 7, 1996).

X. 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 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**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 721

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: November 17, 2005.

Charles M. Auer,

Director, Office of Pollution Prevention and Toxics.

■ Therefore, 40 CFR part 721 is amended as follows:

PART 721—[AMENDED]

■ 1. The authority citation for part 721 continues to read as follows:

Authority: 15 U.S.C. 2604, 2607, and 2625(c).

■ 2. By adding new § 721.10001 to subpart E to read as follows:

§ 721.10001 2-Ethoxyethanol, 2-ethoxyethanol acetate, 2-methoxyethanol, and 2-methoxyethanol acetate.

(a) *Chemical substances and significant new uses subject to reporting.* (1) The chemical substances identified as 2-ethoxyethanol (CAS No. 110–80–5), 2-ethoxyethanol acetate (CAS No. 111–15–9), 2-methoxyethanol (CAS No. 109–86–4), and 2-methoxyethanol acetate (CAS No. 110–49–6) are subject to reporting under this section for the significant new use described in paragraph (a)(2) of this section.

(2) The significant new use is domestic use in a consumer product or the manufacture or import of 2-methoxyethanol acetate at levels greater than 10,000 pounds per year.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), and (c) apply to the significant new use specified in § 721.10001. In addition, records documenting compliance with the significant new use of domestic use in a consumer product or the manufacture or import of 2-methoxyethanol acetate at levels greater than 10,000 pounds per year must be maintained.

(2) [Reserved]

[FR Doc. 05–23421 Filed 11–28–05; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 222 and 223

[Docket No. 050922245–5307–03; I.D. 092005A, 100505D]

RIN 0648–AT89

Sea Turtle Conservation; Shrimp Trawling Requirements

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

ACTION: Temporary rule.

SUMMARY: NMFS issues this 30–day temporary rule to allow shrimp fishermen to continue to use limited tow times as an alternative to Turtle Excluder Devices (TEDs) in inshore and offshore waters from the Florida/Alabama border, westward to the boundary shared by Matagorda and Brazoria Counties, Texas, and extending offshore 20 nautical miles. The previous 30–day variances of the TED requirements were from September 23 through October 23, 2005; October 11 through November 10, 2005; and from October 22 through November 23, 2005, for waters affected by Hurricanes Katrina and Rita. These variances were for 50 nautical miles offshore. After an investigation, NMFS has determined that excessive debris is still affecting fishermen's ability to use TEDs effectively; however, the debris field has decreased to approximately 20 nautical miles offshore. This action is necessary because environmental conditions resulting from Hurricanes Katrina and Rita persist on the fishing grounds, preventing some fishermen from using TEDs effectively.

DATES: Effective from November 23, 2005, through 11:59 p.m, local time, December 23, 2005.

ADDRESSES: Requests for copies of the Environmental Assessment on this action should be addressed to the Chief, Marine Mammal Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Michael Barnette, 727–551–5794.

SUPPLEMENTARY INFORMATION:

Background

All sea turtles that occur in U.S. waters are listed as either endangered or threatened under the Endangered Species Act of 1973 (ESA). The Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) turtles are listed as endangered. The loggerhead (*Caretta caretta*) and green (*Chelonia mydas*) turtles are listed as threatened, except for breeding populations of green turtles in Florida and on the Pacific coast of Mexico, which are listed as endangered.

Sea turtles are incidentally taken, and some are killed, as a result of numerous activities, including fishery-related trawling activities in the Gulf of Mexico and along the Atlantic seaboard. Under the ESA and its implementing regulations, the taking of sea turtles is prohibited, with exceptions identified in 50 CFR 223.206(d), or according to the terms and conditions of a biological opinion issued under section 7 of the ESA, or according to an incidental take permit issued under section 10 of the ESA. The incidental taking of turtles during shrimp or summer flounder trawling is exempted from the taking prohibition of section 9 of the ESA if the conservation measures specified in the sea turtle conservation regulations (50 CFR 223) are followed. The regulations

require most shrimp trawlers and summer flounder trawlers operating in the southeastern United States (Atlantic area, Gulf area, and summer flounder sea turtle protection area, see 50 CFR 223.206) to have a NMFS-approved TED installed in each net that is rigged for fishing to allow sea turtles to escape. TEDs currently approved by NMFS include single-grid hard TEDs and hooped hard TEDs conforming to a generic description, the flounder TED, and one type of soft TED B the Parker soft TED (see 50 CFR 223.207).

TEDs incorporate an escape opening, usually covered by a webbing flap, which allows sea turtles to escape from trawl nets. To be approved by NMFS, a TED design must be shown to be 97 percent effective in excluding sea turtles during testing based upon specific testing protocols (50 CFR 223.207(e)(1)). Most approved hard TEDs are described in the regulations (50 CFR 223.207(a)) according to generic criteria based upon certain parameters of TED design, configuration, and installation, including height and width dimensions of the TED opening through which the turtles escape.

The regulations governing sea turtle take prohibitions and exemptions provide for the use of limited tow times as an alternative to the use of TEDs for vessels with certain specified characteristics or under certain special circumstances. The provisions of 50 CFR 223.206(d)(3)(ii) specify that the NOAA Assistant Administrator for Fisheries (AA) may authorize compliance with tow time restrictions as an alternative to the TED requirement if the AA determines that the presence of algae, seaweed, debris, or other special environmental conditions in a particular area makes trawling with TED-equipped nets impracticable. The provisions of 50 CFR 223.206(d)(3)(i) specify the maximum tow times that may be used when tow time limits are authorized as an alternative to the use of TEDs. Each tow may be no more than 55 minutes from April 1 through October 31 and no more than 75 minutes from November 1 through March 31, as measured from the time that the trawl doors enter the water until they are removed from the water. These tow time limits are designed to minimize the level of mortality of sea turtles that are captured by trawl nets not equipped with TEDs.

Recent Events

On September 12, 2005, the NMFS Southeast Regional Administrator received requests from the Marine Fisheries Division of the Alabama Department of Conservation and Natural Resources (ALDCNR) and the Louisiana Department of Wildlife and Fisheries (LADWF) to allow the use of tow times as an alternative to TEDs in inshore and offshore waters because of excessive storm related debris on the fishing grounds as a result of Hurricane Katrina. NMFS received a similar request from the Mississippi Department of Marine Resources (MDMR) on September 13. On September 27, 2005, the NMFS Southeast Regional Administrator received requests from the LADWF and the Texas Parks and Wildlife Department (TPWD) to allow the use of tow times as an alternative to TEDs in inshore and offshore waters because of excessive storm related debris on the fishing grounds as a result of Hurricane Rita. Subsequent to these requests, NMFS issued 30–day exemptions to the TED requirements from September 23 through October 23, 2005, and October 11 through November 10, 2005, for waters affected by Hurricanes Katrina and Rita, respectively (70 FR 56593 and 70 FR 60013, respectively).

On October 11, 2005, the NMFS Southeast Regional Administrator received requests from the ALDCNR, MDMR, LADWF, and the TPWD for an additional 30–day period allowing the use of restricted tow times as an alternative to TEDs in inshore and offshore waters because of excessive storm-related debris that was still present on the fishing grounds as a result of Hurricanes Katrina and Rita. Subsequent to these requests, NMFS issued a 30–day extension encompassing both previous exemptions to the TED requirements, from October 23, 2005, through November 23, 2005.

On November 15, 2005, the NMFS Southeast Regional Administrator received requests from the Marine Fisheries Division of the ALDCNR, MDMR, LADWF, and TPWD for an additional 30–day period allowing the use of restricted tow times as an alternative to TEDs in state and federal waters because of excessive storm-related debris on the fishing grounds as a result of Hurricanes Katrina and Rita. The area cumulatively affected by the two hurricanes extends from the Florida/Alabama border, westward to the boundary shared by Matagorda and Brazoria Counties, Texas, and offshore 20 nautical miles. When a TED is clogged with debris it can no longer catch shrimp effectively nor can it effectively exclude turtles. An investigation by NMFS, confirmed there are continuing problems with debris in inshore and offshore waters off Alabama, westward to the boundary shared by Matagorda and Brazoria Counties, Texas, and extending offshore 20 nautical miles, which are likely to affect the effectiveness of TEDs.

Special Environmental Conditions

The AA finds that debris washed into inshore and offshore waters by Hurricanes Katrina and Rita off Alabama, westward to the boundary shared by Matagorda and Brazoria Counties, Texas, and extending offshore 20 nautical miles, has created ongoing special environmental conditions that make trawling with TED-equipped nets impracticable. Therefore, the AA issues this notification to extend the current authorization for the use of restricted tow times as an alternative to the use of TEDs in inshore and offshore waters off Alabama, westward to the boundary shared by Matagorda and Brazoria Counties, Texas, and extending offshore 20 nautical miles, through 11:59 p.m., local time, December 23, 2005. Tow times must be limited to no more than 75 minutes measured from the time trawl doors enter the water until they are retrieved from the water.

Continued Use of TEDs

NMFS encourages shrimp trawlers in the affected areas to continue to use TEDs if possible, even though they are authorized under this action to use restricted tow times.

NMFS' gear experts have provided several general operational recommendations to fishermen to maximize the debris exclusion ability of TEDs that may allow some fishermen to continue using TEDs without resorting to restricted tow times. To exclude debris, NMFS recommends the use of hard TEDs made of either solid rod or of hollow pipe that incorporate a bent angle at the escape opening, in a bottom-opening configuration. In addition, the installation angle of a hard TED in the trawl extension is an important performance element in excluding debris from the trawl. High installation angles can trap debris either on or in front of the bars of the TED; NMFS recommends an installation angle of 45°, relative to the normal horizontal flow of water through the trawl, to optimize the TED's ability to exclude turtles and debris. Furthermore, the use of accelerator funnels, which are allowable modifications to hard TEDs, is not recommended in areas with heavy amounts of debris or vegetation. Lastly, the webbing flap that is usually installed to cover the turtle escape opening may be modified to help exclude debris quickly: the webbing flap can either be cut horizontally to shorten it so that it does not overlap the frame of the TED or be slit in a fore-and-aft

direction to facilitate the exclusion of debris. The use of the double cover flap TED will also aid in debris exclusion.

All of these recommendations represent legal configurations of TEDs for shrimpers fishing in the affected areas. This action does not authorize any other departure from the TED requirements, including any illegal modifications to TEDs. In particular, if TEDs are installed in trawl nets, they may not be sewn shut.

Alternative to Required Use of TEDs

The authorization provided by this rule applies to all shrimp trawlers that would otherwise be required to use TEDs in accordance with the requirements of 50 CFR 223.206(d)(2) who are operating in inshore and offshore waters affected by Hurricanes Katrina and Rita off Alabama, westward to the boundary shared by Matagorda and Brazoria Counties, Texas, and extending offshore 50 nautical miles, through December 23, 2005. Through this temporary rule, shrimp trawlers may choose either restricted tow times or TEDs to comply with the sea turtle conservation regulations, as prescribed above.

Alternative to Required Use of TEDs; Termination

The AA, at any time, may withdraw or modify this temporary authorization to use tow time restrictions in lieu of TEDs through publication of a notice in the **Federal Register**, if necessary to ensure adequate protection of endangered and threatened sea turtles. Under this procedure, the AA may modify the affected area or impose any necessary additional or more stringent measures, including more restrictive tow times, synchronized tow times, or withdrawal of the authorization if the AA determines that the alternative authorized by this rule is not sufficiently protecting turtles or no longer needed. The AA may also terminate this authorization if information from enforcement, state authorities, or NMFS indicates compliance cannot be monitored effectively. This authorization will expire automatically at 11:59 p.m., local time, December 23, 2005, unless it is explicitly extended through another notification published in the **Federal Register**.

Classification

This action has been determined to be not significant for purposes of Executive Order 12866.

The AA has determined that this action is necessary to respond to special environmental conditions to allow more efficient fishing for shrimp, while providing adequate protection for endangered and threatened sea turtles pursuant to the ESA and applicable regulations.

Pursuant to 5 U.S.C. 553(b)(B), the AA finds that there is good cause to waive prior notice and opportunity to comment on this rule. The AA finds that unusually high amounts of debris has created ongoing special environmental conditions that make trawling with TED-equipped nets impracticable. Prior notice and opportunity to comment are impracticable and contrary to the public interest in this instance because providing notice and comment would prevent the agency from providing the affected industry relief from the effects of Hurricanes Katrina and Rita in a timely manner.

The AA finds that there is good cause to waive the 30–day delay in effective date pursuant to 5 U.S.C. 553(d)(3) to provide alternatives to comply with the sea turtle regulations in a timely manner. Many fishermen may be unable to operate under the special environmental conditions created by Hurricanes Katrina and Rita without an alternative to using TEDs. Providing a 30–day delay in effective date would prevent the agency from providing the affected industry relief from the effects of Hurricanes Katrina and Rita in a timely manner. For the reasons stated above, the AA finds that this temporary rule should not be subject to a 30–day delay in effective date, pursuant to 5 U.S.C. 553(d)(1).

Since prior notice and an opportunity for public comment are not required to be provided for this action by 5 U.S.C. 553, or by any other law, the analytical requirements of 5 U.S.C. 601 *et seq.* are inapplicable.

The AA prepared an Environmental Assessment (EA) for this rule. Copies of the EA are available (see **ADDRESSES**).

Dated: November 22, 2005.

William T. Hogarth,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 05–23442 Filed 11–23–05; 3:02 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 70, No. 228
Tuesday, November 29, 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 ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM06–4–000]

Promoting Transmission Investment Through Pricing Reform

Issued November 18, 2005.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: Pursuant to the requirements of the Transmission Infrastructure Investment provisions in section 1241 of the Energy Policy Act of 2005, which adds a new section 219 to the Federal Power Act, the Federal Energy Regulatory Commission is proposing to amend its regulations to establish incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce by public utilities for the purpose of benefiting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.

DATES: Comments are due on or before January 11, 2006.

ADDRESSES: Comments may be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov.* Commenters unable to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, NE., Washington, DC, 20426. Refer to the Comment Procedures section of the preamble for additional information on how to file comments.

FOR FURTHER INFORMATION CONTACT:
Jeffrey Hitchings (Technical Information), Office of Markets, Tariffs and Rates, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. 202–502–6042.
Sebastian Tiger (Technical Information), Office of Market Oversight and Investigations, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. 202–502–6079.
Andre Goodson (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. 202–502–8560.
Tina Ham (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. 202–502–6224.

SUPPLEMENTARY INFORMATION:

Issued November 17, 2005.

I. Introduction

1. On August 8, 2005, the Energy Policy Act of 2005 (EPAct 2005 or the Act)[1] became law. Section 1241 of the Act (Transmission Infrastructure Investment) adds a new section 219 to the Federal Power Act (FPA) which mandates that not later than one year after enactment of section 219, the Commission establish, by rule, incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce by public utilities for the purpose of benefiting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion. FPA section 219 was implemented against the backdrop of declining investment in transmission infrastructure and increasing electric load. Transmission investment declined in real dollar terms for 23 years, from 1975 to 1998, before increasing again, although investment for the most recent year available, 2003, is still below 1975 levels.[2] Over the same time period, electric load more than doubled, resulting in a significant decrease in transmission capacity relative to load in every North American Electric Reliability Council region.[3] Edison Electric Institute (EEI) estimates that capital spending must increase by 25 percent, from $4 billion annually to $5 billion annually, to assure system reliability and to accommodate wholesale electric markets, and that the 2.5 percent growth rate in transmission mileage since 1999 is insufficient to meet the expected 50 percent growth in consumer demand for electricity over the next two decades.[4] The Secretary of Energy's Advisory Board at the Department of Energy determined that investment in the transmission grid will only occur when regulatory policy: (a) Provides reasonably certain cost recovery; (b) provides regulatory certainty, in terms of who can operate the system and under what rules; and (c) provides a return that makes investment in transmission a reasonable option, considering other available investment options.[5]

2. The purpose of the proposed rulemaking is to promote greater capital investment in new transmission capacity. As the foregoing analysis indicates, the need for capital investment in energy infrastructure is a national problem that requires a national solution. Inadequate transmission infrastructure results in transmission congestion that impedes competitive wholesale markets and impairs the reliability of the electric grid. To address the need for transmission capacity, the proposed rulemaking provides price reforms applicable to the entire electric grid, in both organized and in other markets and to both vertically-integrated utilities and transcos.[6] We note that the Commission has been active in responding to the need for new transmission capacity for several years prior to the enactment of EPAct 2005, as evidenced by its issuance of a proposed policy statement to promote the efficient operation and expansion of the transmission grid[7] and

[1] Public Law No. 109–58, 119 Stat. 594 (2005).

[2] EEI Survey of Transmission Investment: Historical and Planned Capital Expenditures (1999–2008) at 3 (2005).

[3] Barriers to Transmission Investment, Presentation by Brendan Kirby (U.S. Department of Energy, Oak Ridge National Laboratory), April 22, 2005 Technical Conference, Transmission Independence and Investment, Docket No. AD05–5–000 (April 22, 2005 Technical Conference).

[4] Energy Policy Act of 2005: Hearings before the House Subcommittee on Energy and Commerce, 109th Congress, First Sess. (2005) (Prepared statement of Thomas R. Kuhn, President of EEI).

[5] Comprehensive National Energy Policy: Hearings before the House Subcommittee on Energy and Commerce, 108th Congress, First Sess. (Prepared statement of Glenn English, Chief Executive Officer of National Rural Electric Cooperatives Association).

[6] Transcos are stand-alone transmission companies that have been approved by the Commission.

[7] *Proposed Pricing Policy for Efficient Operation and Expansion of Transmission Grid,* 102 FERC ¶ 61,032 (2003). That proposed policy statement,

Continued

a policy statement on transco independence.[8]

3. To address the need for new transmission infrastructure and to encourage necessary investment, the new section 219 specifically charges the Commission with the responsibility to establish, by rule, incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce that:

a. Promote reliable and economically efficient transmission and generation of electricity by promoting capital investment in the enlargement, improvement, maintenance, and operation of all facilities for the transmission of electric energy in interstate commerce, regardless of the ownership of the facilities;

b. Provide a return on equity that attracts new investment in transmission facilities (including related transmission technologies);

c. Encourage deployment of transmission technologies and other measures to increase the capacity and efficiency of existing transmission facilities and improve the operation of the facilities; and

d. Allow the recovery of all prudently incurred costs necessary to comply with mandatory reliability standards established pursuant to section 215 of the FPA, and all prudently-incurred costs related to transmission infrastructure development, pursuant to section 216 of the FPA (transmission national interest corridors).

4. Section 219 also requires the Commission to issue a rule to provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization[9] and to ensure that any recoverable costs associated with joining may be recovered through transmission rates charged by the utility or through the transmission rates charged by the Transmission Organization that provides transmission service to the utility. Finally, section 219 provides that all rates approved under these rules are subject to the requirements of sections 205 and 206 of the FPA,[10] which provides that all rates, charges, terms and conditions be just and reasonable and not unduly discriminatory or preferential.

5. As discussed in detail below, consistent with the above provisions of FPA section 219, in this proposed rulemaking the Commission seeks to provide incentives and regulatory certainty sufficient to support expanded and improved transmission infrastructure (including advanced technologies) while at the same time ensuring that transmission rates remain just, reasonable, and not unduly discriminatory or preferential. We recognize that there may be other incentives or regulatory steps that could be taken (for example, ensuring that incentive rates, once approved, cannot be reopened for a period of time absent compelling circumstances) to provide greater incentive for needed investment. We seek comments not only on the proposals herein but also on other incentives or regulatory steps that would help fulfill the purposes of FPA section 219.

II. Summary of Proposed Regulations

6. Pursuant to new section 219 of the FPA, the proposed amendments to the existing regulations are intended to promote reliable and economically efficient transmission and generation of electricity by providing incentives for increased capital investment by providing a rate of return that attracts new investment in transmission facilities, and by providing incentives to utilities that join Transmission Organizations. The Commission proposes to amend part 35 of Chapter I, Title18, of the Code of Federal Regulations. First, section 35.34(e) (innovative transmission rate treatments for regional transmission organizations) in subpart F of the Commission's regulations[11] will be removed in its entirety. Second, a new section 35.35 under subpart G, titled Transmission Infrastructure Investment Provisions, will be added and will supersede section 35.34(e).

7. As proposed, new section 35.35 under subpart G would establish the regulation's purpose, definitions, general rules, and incentive-based rate treatments for transmission infrastructure investment.

8. The proposed new paragraph (a) would outline the purpose of the regulation, stating that section 35.35 establishes rules for incentive-based (including performance-based) rate treatments for transmission of electric energy in interstate commerce by public utilities for the purpose of benefiting consumers by ensuring reliability, and reducing the cost of delivered power by reducing transmission congestion.

9. The proposed new paragraph (b) would define the terms, ''transco'' and ''transmission organization,'' as used in the regulation:

> For purposes of this rulemaking, ''transco'' means a stand-alone transmission company that has been approved by the Commission. As used herein, ''stand-alone transmission company'' refers to a company engaged solely in selling transmission at wholesale or on an unbundled retail basis. For purposes of the proposed rule, transcos may be independent or they may have some passive ownership interests by affiliated traditional vertically-integrated public utilities (traditional public utilities).[12]''Transmission Organization,'' as defined in new section 3(29) of the FPA, means a regional transmission organization (RTO), independent system operator (ISO), independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities.

10. The proposed new paragraph (c) would establish the general rule that all rates approved under the rules of this section 35.35, including any revisions to the rules, are subject to the requirements of sections 205 and 206 of the FPA that all rates, charges, terms and conditions be just and reasonable and not unduly discriminatory or preferential. The proposed new paragraph (d) would describe the incentive-based rate treatments for transmission infrastructure investments that the Commission would authorize. For all jurisdictional public utilities, including transcos, the Commission encourages incentive-based rate proposals, including proposals to: (1) Provide a rate of return on equity (ROE), within the zone of reasonableness, that is sufficient to attract new investment in transmission facilities; (2) recover 100 percent of prudently incurred transmission-related Construction Work in Progress (CWIP) in rate base; (3) recover prudently incurred pre-commercial operations costs by expensing these costs instead of capitalizing them; (4) adopt a hypothetical capital structure; (5)

which was issued in Docket No. PL03–1–000, has been superseded by this proposed rulemaking. Accordingly, the Commission will take no further action in Docket No. PL03–1–000.

[8] Policy Statement Regarding Evaluation of Independent Ownership and Operation of Transmission, 111 FERC ¶ 61,473 (2005) (Transco Independence Policy Statement).

[9] Section 3(29) of the FPA (as added by section 1291(b)(29) of EPAct 2005) defines a Transmission Organization as a regional transmission organization, independent system operator, independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities.

[10] 16 U.S.C. 824(d) and 824(e) (2000).

[11] Subpart F of the Commission's regulations consists of § 35.34 (procedures and requirements regarding regional transmission organizations).

[12] A transco is also a public utility under the FPA unless it is wholly owned and operated by entities that fall within section 201(f) of the FPA (*e.g.*, governmental and certain electric cooperative entities). So, in order to distinguish traditional vertically-integrated public utilities from transcos for purposes of this notice of proposed rulemaking, we refer to traditional vertically-integrated public utilities as ''traditional public utilities.''

accelerate the recovery of depreciation expense; (6) recover all prudently-incurred development costs in cases where construction of facilities may subsequently be abandoned as a result of factors beyond the public utility's control; (7) provide deferred cost recovery; and (8) provide any other incentives approved by the Commission that are determined to be just and reasonable and not unduly discriminatory or preferential.

11. For transcos only, the Commission would authorize the following additional incentives, subject to the requirements of sections 205 and 206 of the FPA that all rates, charges, terms and conditions be just and reasonable and not unduly discriminatory or preferential: (1) A higher ROE which is both sufficient to encourage Transco formation as well as to attract new investment in transmission facilities; and (2) an adjustment to the book value of transmission assets being sold to a Transco to remove the disincentive associated with the impact of accelerated depreciation on Federal capital gains tax liabilities.

12. The proposed new paragraph (e) would describe the incentive-based rate treatment for public utilities that join a Transmission Organization. The Commission will consider authorizing an ROE for a public utility that joins a Transmission Organization that is higher than the return on equity that the Commission might otherwise allow if the public utility did not join a Transmission Organization (but still within the zone of reasonableness). The Commission will also allow public utilities that join a Transmission Organization to recover prudently incurred costs associated with joining the Transmission Organization, either through transmission rates charged by public utilities or through transmission rates charged by the Transmission Organization that provides services to the public utilities.

13. The proposed new paragraph (f) would state that the Commission will approve prudently-incurred costs necessary to comply with the mandatory reliability standards pursuant to section 215 of the FPA.

14. The proposed new paragraph (g) would state that Commission will approve prudently-incurred costs related to transmission infrastructure development pursuant to section 216 of the FPA.

15. The proposed new paragraph (h) would require that jurisdictional public utilities file an annual report with the Commission specifying current and projected transmission investment activity.

16. The Commission does not propose to require applicants for incentive ratemaking treatment under section 35.35 to support their applications with cost-benefit analyses. Customers will be protected by the Commission's review of applications pursuant to sections 205, 206 and 219 of the FPA, which require that all rates be just and reasonable and not unduly discriminatory or preferential.

III. Proposed Incentives and Issues for Comment

17. Public comments on this notice of proposed rulemaking (NOPR) are due on January 11, 2006. The Commission will carefully weigh and consider all public comments received.

18. The following sections detailing the proposed incentives are organized as follows:

(1) Provisions applicable to all public utilities;

(2) Provisions applicable to transcos; and

(3) Provisions applicable to public utilities that join Transmission Organizations.

These explanations are intended to clarify certain aspects of the proposed regulations in this NOPR in terms of their role in fulfilling the goals of EPAct 2005 and thereby allow for more informed comments. Public utilities would be required to file for approval of any incentives under section 205 of the FPA and include an explanation of the proposed accounting for these incentives.

A. Incentives Available to All Jurisdictional Public Utilities

19. As mentioned earlier, EEI reports that transmission capital spending must increase an estimated 25 percent annually to assure system reliability and accommodate wholesale markets. Undertaking significant new transmission investment can present cash flow, revenue recovery and financing issues, regardless of corporate structure. This section proposes incentives applicable to all public utilities, consistent with section 219 of the FPA, that would foster transmission investment and thereby help to ensure reliability and reduce transmission congestion.

1. Providing an ROE That Attracts New Investment in Transmission Facilities

20. Public utilities investing in transmission capacity will not invest unless they can earn a return they consider to be sufficiently attractive. The Commission's historical approach to developing an allowed rate of return on equity begins with developing a proxy group of similar risk companies. Next, a discounted cash flow (DCF) analysis is performed on the applicant, if possible, and on the companies in the proxy group, and a zone of reasonableness is typically developed based on the proxy group. A DCF return within the zone of reasonableness is then typically specified for the applicant based on a comparison of risk factors between the applicant and the proxy group. While the Commission has typically utilized a DCF analysis, we seek comment on whether the Commission should consider alternatives to the DCF analysis as a way to incent investment in new transmission capacity.

21. As we recognized in Order No. 2000, the risk profile of the transmission business is changing and the historical data typically used to evaluate returns on equity may not be reliable since it reflects a different industry structure from the one that currently exists. A sufficient return that reflects the current industry environment is fundamental to a public utility's decision to invest in new capacity. Therefore, the Commission will continue to consider and approve ROE levels that attract investment for new transmission projects, thereby fulfilling a requirement of section 219.[13] For example, the Commission approved an ROE adder for Pacific Gas and Electric Company, and a 13.5 percent ROE for the recently completed Path 15 project in California.[14] Similarly, Sierra Pacific Power Company received a ROE of 12.5 to 13.5 percent for certain new facilities it proposed that were designed to relieve congestion, increase the transfer capability of electricity to other markets, enhance regional reliability and connect new merchant generation supply throughout the region.[15] We seek comment on whether ROE adders are an appropriate mechanism for requesting and receiving approval for an acceptable ROE.

22. Specifically, the Commission will consider granting an incentive-based ROE to all public utilities (*i.e.*, traditional public utilities and Transcos) that build new transmission facilities that benefit consumers by ensuring

[13] FPA section 219(b)(2).

[14] *See Western Area Power Administration,* 99 FERC ¶ 61,306 (2002), *reh'g denied,* 100 FERC ¶ 61,331 (2002), *aff'd sub nom. Public Utilities Commission of the State of California* v. *FERC*, 367 F.3d 925 (D.C. Cir. 2004) (*Western Area Power Administration*). The District of Columbia Circuit held that ''using price incentives to increase the supply of energy available to customers is a valid, non-cost consideration in setting rates.''

[15] *Sierra Pacific Resources Operating Companies,* 105 FERC ¶ 61,178 (2003), *order on reh'g,* 106 FERC ¶ 61,096 (2004).

reliability and reducing the cost of delivered power by reducing transmission congestion. To receive an incentive-based ROE, a public utility must submit a request in an application under section 205 of the FPA and must support the ROE request by demonstrating how the new facilities will improve regional reliability and reduce transmission congestion. In addition, the application must explain if the facilities are part of an independent regional planning process, such as that administered by an RTO or ISO or another independent regional planning process recognized by the Commission and how the proposed ROE was derived and why it is appropriate to encourage new investment. We also seek comment on whether the final rule should establish a definition of ''independent regional planning process'' or if the Commission should consider them on a case-by-case basis.

2. Prudently Incurred Construction Work in Progress and Prudently Incurred Pre-Commercial Operations Costs

23. The long lead times required to plan and construct new transmission can impact utility cash flow, in turn affecting the overall financial health of a company and its ability to attract capital at reasonable prices. For example, during the initial phases of a transmission construction project, a utility may have significant expenses associated with planning and siting that typically are not 100 percent recovered in rate base until commercial operation. The Commission believes that there are at least two ways it can further the goals of section 219 by relieving the pressures on utility cash flows associated with transmission investment programs: (1) Including 100 percent of CWIP in rate base; and (2) expensing rather than capitalizing pre-commercial operations costs associated with new transmission investment.

24. The inclusion of CWIP in rate base rather than the accrual of allowance for funds used during construction (AFUDC) on new construction expenditures is one way to increase cash flow. Since 1987, the Commission's general policy has been to allow only 50 percent of the non-pollution control/fuel conversion construction costs as CWIP in rate base.[16] The remaining construction costs (including an AFUDC which provides a return on those expenditures) generally would have been capitalized and included in rate base only when the plant went into commercial operation, *i.e.*, when the plant became used and useful. Allowing some portion of the costs in rate base prior to commercial operation provides utilities with additional cash flow in the form of an immediate earned return.

25. The second way to improve utility cash flows, as mentioned above, is to allow utilities to expense pre-commercial operations costs related to new transmission investment rather than capitalize these costs. Expensing the costs provides immediate cash flow that the utility can then use as and where needed, whereas capitalizing the costs would produce cash flow over the life of the asset.[17]

26. In 2004, the Commission accepted a proposal by American Transmission Company (American Transmission) to include 100 percent of CWIP in the calculation of transmission rates and to expense pre-commercial operations costs for new transmission investment, instead of capitalizing those costs and earning a return.[18] American Transmission stated that these incentives would help maintain adequate cash flow during the construction process and that without these incentives it could face a downgrade of its fixed income rating over the next several years due to inadequate cash flow, thereby increasing its capital costs by $176 million over a twenty-year horizon.

27. The Commission believes that allowing public utilities to include up to 100 percent of prudently incurred transmission-related CWIP in rate base and permitting them to expense prudently incurred pre-commercial operations costs will further the goals of section 219 by relieving the pressures on utility cash flows associated with their transmission investment programs and providing up-front regulatory certainty. We propose to evaluate the applicability of these incentives to transmission investment applications on a case-by-case basis.

28. In addition to inviting comment on this provision, we specifically request comment on (1) the types of costs that should be considered ''pre-commercial operation costs''; and (2) whether there should be a presumption that these incentives meet the requirements of FPA section 219 that investments ensure reliability and reduce the cost of delivered power.

3. Hypothetical Capital Structure

29. The Commission has largely relied on the actual capitalization of a utility in setting its rate of return, but we recognize that an overly rigid approach to evaluating a proposed capital structure could be a disincentive to investment in new transmission projects. Each project may have unique financial and cash flow requirements, and a rigid approach to acceptable capital structures could threaten the viability of some projects. Accordingly, we propose that applicants be permitted to propose an overall rate of return based on a hypothetical capital structure, and have the flexibility to refinance or employ different capitalizations as may be needed to maintain the viability of new capacity additions. We expect that applicants will develop their proposals based on the specific requirements and circumstances of their projects, and that the Commission will evaluate proposals for this incentive on a case-by-case basis. In their applications for incentive treatment, public utilities should provide support for why the hypothetical capital structure incentive is needed to promote investment consistent with the goals of section 219. The applicant must also provide its transmission investment plan and explain the specific projects to which the proposed return will apply. We seek comment on this proposal.

4. Accelerated Depreciation

30. Accelerated depreciation is another way to increase cash flow to utilities, thereby removing a potential disincentive to investing. The Commission has determined in some circumstances that allowing accelerated depreciation is warranted as an incentive to encourage investment in transmission infrastructure because it provides improved cash-flow and better positions public utilities for longer-term transmission investments.[19] While the Commission has allowed accelerated depreciation for emergency conditions or special projects,[20] we believe that permitting accelerated depreciation

[16] *See* 18 CFR 35.25(c)(3).

[17] The Commission recognizes that not all corporate models ascribe to the philosophy of early cash returns; some prefer the stable long-term returns resulting from the higher rate base.

[18] The Commission conditionally accepted the proposal for filing, set it for hearing, subject to refund. Subsequently, the Commission accepted a settlement that allowed American Transmission to recover transmission-related CWIP and pre-certification costs in rate base. *See American Transmission Company,* LLC, 105 FERC ¶ 61,388 (2003), *order approving settlement,* 107 FERC ¶ 61,117 (2004).

[19] *See Removing Obstacles to Increased Electric Generation and Natural Gas Supply in the Western United States*, 94 FERC ¶ 61,272, *further order on removing obstacles to increased energy supply and reduced demand in the Western United States and dismissing reh'g*, 95 FERC ¶ 61,225, *order on reh'g*, 96 FERC ¶ 61,155, *order on reh'g*, 97 FERC ¶ 61,024 (2001) (*Removing Obstacles*). *See also Western Area Power Administration, supra* note 14.

[20] *Id.*

more broadly may further the goals of section 219 by providing incentives to undertake transmission projects that have the potential to reduce the cost of delivered power and ensure reliability. We therefore propose to allow transmission facilities to be depreciated over a period of 15 years,[21] in place of the typical Commission practice to allow depreciation over the useful life of the facilities, and seek comment on whether 15 years is an appropriate time period for cost recovery or whether the Commission should establish a presumption of a shorter or longer depreciable life for new transmission facilities.[22] We also seek comment on whether accelerated depreciation has any longer-term negative impacts that would undermine the goals of the Act.

5. Recovery of Costs of Abandoned Facilities

31. Public utilities, in considering investments that fulfill the requirements of FPA section 219, may encounter investment opportunities with significant risk associated with factors beyond their control, such as generation developers' decisions to develop or terminate the development of potential resources or state or local siting decision problems. In these circumstances, it may be appropriate to consider ways to reduce the risk associated with potential upgrades or other improvements to the transmission system. By providing for recovery of the costs of facilities that may be later cancelled or abandoned due to factors beyond the control of the public utility, the Commission could reduce the uncertainty associated with higher risk projects, thereby facilitating investment in these projects.

32. Until recently, the Commission's abandoned plant policy was based on a 50/50 sharing.[23] The intent of this policy was to equitably balance the interests of ratepayers and investors. The Commission noted that the competing standards of ''used and useful to the ratepayer'' and ''recovery of prudent investment'' were both relevant and determined that 50 percent of the prudently incurred costs of a cancelled generating plant should be amortized as an expense over a period reflecting the life of the plant if it had been completed and that the remaining 50 percent of the prudently incurred costs of the cancelled plant should be written off as a loss.[24] The Commission in *Public Service Company of New Mexico*,[25] extended its abandoned plant policy to include transmission projects, finding that the policy was not limited to generation facilities only, or to facilities that had no customer support or involvement or to cancellations that were the result of economics.

33. The policy was further expanded in a recent decision by the Commission to allow Southern California Edison Company (SoCal Edison) to recover all prudently incurred costs related to certain proposed transmission facilities if those facilities were later cancelled or abandoned.[26] The Commission noted that the company's management did not control the decision to develop or cancel the wind farm generation project and that the company's shareholders did not share in the earnings associated with the generation project. The Commission further determined that the company might be at a higher risk in developing the project because of factors beyond its control, such as a developer's decision to develop or terminate development of the project. It also noted that SoCal Edison was not a wind farm developer and therefore would not directly benefit from the facilities. Thus, the Commission concluded that SoCal Edison should not shoulder the risk of the project.[27]

34. We believe that extension of the recent precedent on abandoned plant cost recovery is warranted in light of the need to attract new transmission investment. We propose to permit recovery of 100 percent of the prudently incurred costs of transmission facilities that are cancelled or abandoned due to factors beyond the control of the public utility because it will reduce regulatory uncertainty associated with investments in new transmission capacity and therefore meet the objectives of FPA section 219. We seek comment on this proposal.

6. Deferred Cost Recovery

35. Public utilities with a retail rate moratorium may have less incentive to build transmission facilities that could reduce congestion or ensure reliability because of concerns about cost recovery for those facilities. Accordingly, the Commission proposes to permit such utilities to use a deferred cost recovery mechanism which allows them to commence recovery of new facility costs in FERC-jurisdictional rates at the end of a retail rate moratorium. By providing a mechanism to facilitate cost recovery by public utilities that build transmission facilities during a retail rate moratorium, we will meet the goals of FPA section 219 by providing certainty to investors that costs can be recovered as quickly as possible.[28] We seek comment on whether there are other mechanisms that the Commission could institute to provide regulatory certainty of the recovery of the costs of transmission facilities both through retail as well as wholesale rates.

B. Incentives for Transco Formation and Transco Investment

36. While the incentives we are proposing in this rule should facilitate transmission expansion for all jurisdictional entities in furtherance of the goals of section 219, we recognize that for any transmission rate incentive that is approved by the Commission, utilities whose rates are 100 percent FERC jurisdictional may derive more benefit. Consequently, incentives may be more effective in fostering new transmission investment for transcos than for traditional public utilities that are dependent upon retail regulators for some portion of their transmission rate recovery.

37. In this NOPR, the Commission proposes to define a transco as a stand-alone transmission company, approved by the Commission, which sells transmission service at wholesale and/or on an unbundled retail basis, regardless of whether it is affiliated with another public utility. We invite comments on this proposed definition of transcos.

38. We believe that transcos are an important part of the Commission's mandate to support transmission capacity investments that reduce the cost of delivered power by reducing transmission congestion and that ensure reliability. This is because they have demonstrated the capability to invest, on a timely basis, significant amounts of capital in transmission projects and in efforts to reduce congestion. For example, Michigan Electric Transmission Company (METC) is doubling the net book value of its

[21] *Removing Obstacles*, 94 FERC at 61,968–69.

[22] For example, in *Removing Obstacles, Id.*, the Commission permitted a 10-year depreciable life for facilities that will increase transmission capacity to relieve existing constraints and could be in service within a few months.

[23] *See New England Power Co.*, Opinion No. 295, 42 FERC ¶ 61,016 at 61,068, 61,081–83, *order on reh'g*, 43 FERC ¶ 61,285 (1988).

[24] Under this policy, ratepayers are entitled to the income tax deduction associated with that portion of the loss for which they are paying. In addition, they are entitled to a rate base reduction to reflect the accumulated deferred income tax amounts associated with 50 percent of the abandonment loss

[25] 75 FERC ¶ 61,266 at 61,859 (1996).

[26] *Southern California Edison Co.*, 112 FERC ¶ 61,014 at P 58–61, *reh'g denied*, 113 FERC ¶ 61,143 at P 9–15 (2005) (*SoCal Edison*).

[27] *Id.* at P 61.

[28] The Commission has approved for Trans-Elect, Inc. (Trans-Elect) a proposal for a deferred cost recovery provision that allowed Trans-Elect to commence recovery of the cost of new facilities upon the end of the retail rate moratorium. *See Trans Elect, Inc.*, 98 FERC ¶ 61,142, *reh'g denied*, 98 FERC ¶ 61,368 (2002).

transmission system over seven years.[29] Similarly, since launching its capital program in 2001, American Transmission has more than doubled the net book value of its system, much of which is in a highly congested area in the Midwest Independent Transmission System Operator (Midwest ISO),[30] and plans to invest $3.4 billion over the next 10 years.[31] In addition, International Transmission Company (International Transmission) made transmission investments of $81 million in 2004 and plans to invest $100 million in 2005.[32]

1. ROE-Based Incentive for Transcos

39. The positive record of transco investment in transmission facilities is, we believe, related to the stand-alone nature of these entities. For instance, transcos may be better situated to meet the transmission infrastructure goals of the FPA section 219 because they eliminate the competition for capital between the generation and transmission functions within corporations. In addition, transcos, unlike some traditional public utilities, do not face a potential decrease in value to their generation assets as a result of additional transmission. Further, by their structure, transcos have incentives to better manage transmission assets, have incentives to develop innovative services, and may have better access to capital markets given a more focused business model.[33] Also, because transcos' sole focus is on the business of transmission, they may be in a better position to respond to market signals that indicate when and where transmission investment is needed, and, therefore, are more likely to yield additional capital investment in transmission. Unlike investments by traditional public utilities subject to company-wide state-level rate case risks that can undermine incentive ratemaking at the Federal level,[34] ratemaking for transcos is entirely subject to Federal jurisdiction. Thus, unlike many traditional public utilities, transcos avoid potential uncertainty associated with the need for additional rate recovery approval by state regulatory agencies.

40. Given the positive contribution to transmission investment made by transcos in the relatively short period since their creation, we believe the formation of additional transcos will promote needed investment in transmission facilities and we therefore want to encourage their formation.[35] As part of this encouragement of transco formation, we will permit properly structured transcos to receive an ROE that both encourages transco formation and is sufficient to attract investment. For example, the Commission approved equity returns for METC and International Transmission that reflect the significant benefits that their status as transcos provide, and are higher than those approved for integrated entities.[36] Continuing to allow a higher ROE (that falls within a zone of reasonableness) in recognition of the benefits transcos provide, we believe, is an appropriate way to ensure that the objectives of new FPA section 219 are achieved. Therefore, the Commission will consider the positive impact transcos have on transmission investment and in turn on the reliable and economically efficient transmission and generation of electricity when it evaluates ROEs proposed by properly structured transcos.

41. We recognize that transcos can be structured with varying degrees of independence, ranging from entities where some measure of control and/or ownership continues to be exercised by market participants[37] to total structural independence, such as International Transmission and METC. The Commission's Transco Independence Policy Statement recognized the range of independence that would be acceptable for Commission approval, including passive ownership subject to the evaluation of factors that affect the independent operation, planning and construction of transmission systems.

42. Furthermore, the Commission believes that the expansion and investment objectives of section 219 are best met by a definition of transcos that does not restrict the formation of transcos to only certain organized markets. Therefore, the Commission proposes to clarify and broaden the definition of transcos to be stand-alone transmission companies approved by the Commission, without a condition of membership in a RTO or ISO. We request comment on how to factor the level of independence into any request for ROE-based incentives for transcos. We seek comment on whether the Commission should specify additional incentive levels, that remain within the zone of reasonableness, to correspond to certain levels of independence and if so, what those amounts should be. We also seek comments concerning whether membership in an RTO or ISO should be considered in setting incentive-based ROEs approved by the Commission for a transco. We also seek comment on whether the Commission should reconsider how it establishes a zone of reasonableness associated with stand-alone transmission companies.

2. Recovery of Accumulated Deferred Income Taxes (ADIT)

43. In order to encourage transco formation, we must also remove disincentives that might prevent the sale or purchase of transmission assets. For example, transmission owners are unlikely to sell transmission assets at book value if they are not held harmless from capital gains taxes on such sales by including an adjustment for taxes associated with those sales. At the same time, buyers of transmission assets may be unwilling to pay such an adjustment without some assurance that they will be able to recover the adjustment in their rate base.[38] The Commission

[29] April 22, 2005 Technical Conference, Tr. 187 (statement of Paul McCoy, Trans-Elect, Inc.).

[30] April 22, 2005 Technical Conference, Tr. 192 (statement of Dan Langren, American Transmission).

[31] *See* American Transmission's 10-Year Transmission System Assessment Summary Report 2005 at p. 12, which is available on ATC's Web site at *http://www.atc10yearplan.com*.

[32] April 22, 2005 Technical Conference, Tr. 79 (statement of Joe Welch, International Transmission).

[33] *See, e.g., ITC Holdings Corp.*, 102 FERC ¶ 61,182 at P 62, *reh'g denied*, 104 FERC ¶ 61,033 (2003) (*ITC Holdings Corp.*) (''Moreover, we believe that International Transmission's for-profit, stand-alone transmission business will bring significant benefits through, among other things, improved asset management, development of innovative services, and improved access to capital markets given a more focused business model than that of vertically-integrated utilities.''); *TRANSLink Transmission Co., L.L.C.*, 99 FERC ¶ 61,106 at 61,455 (2002), *order on reh'g*, 101 FERC ¶ 61,140 (2003) (''We have recognized that the ITC business model can bring significant benefits to the industry. Their for-profit nature with a focus on the transmission business is ideally suited to bring about: (1) Improved asset management including increased investment; (2) improved access to capital markets given a more focused business model than that of vertically-integrated utilities; (3) development of innovative services; and (4) additional independence from market participants.'').

[34] *See* April 22, 2005 Technical Conference, Tr. 44 (statement of Jon Larson, Trimaran Capital Partners).

[35] We also note that, as entities that do not own or control generation assets, transcos further ensure non-discriminatory transmission service.

[36] *Michigan Electric Transmission Co., LLC*, 105 FERC ¶ 61,214 (2003); *ITC Holdings Corp., supra* note 33.

[37] Section 35.34(b)(2) of the Commission's RTO regulations defines a market participant as:

(i) Any entity that, either directly or through an affiliate, sells or brokers electric energy, or provides ancillary services to the [RTO], unless the Commission finds that the entity does not have economic or commercial interests that would be significantly affected by the [RTO's] actions or decisions; and

(ii) Any other entity that the Commission finds has economic or commercial interests that would be significantly affected by the [RTO's] actions or decisions.

[38] *See, e.g., International Transmission Co.*, 92 FERC ¶ 61,276 at 61,915–16 (2000) (explaining potential disincentives to sellers and buyers of

addressed those concerns in two orders in which it allowed two Transcos (International Transmission and METC) to include in their rates an adjustment to recover ADIT.[39] To remove any disincentive, the Commission will continue to consider proposals to include adjustments for ADIT in rates when a transco is purchasing transmission facilities. In addition, we clarify that a transco that requests an incentive ROE would not be precluded from also requesting the ADIT adjustment

3. Other Potential Incentives for Transcos

44. We seek comments on whether there are other potential rate treatments that would provide incentives to form transcos and promote capital investment or reduce disincentives to the divestiture of transmission facilities. Do any of the incentives we are proposing need to be modified or adapted to recognize the inherent regulatory differences between transcos and traditional public utilities?

C. ROE Incentive for Joining a Transmission Organization

45. FPA section 219 requires that the Commission issue a rule to provide incentives to transmitting or electric utilities that join a Transmission Organization and to ensure that any recoverable costs associated with joining may be recovered through transmission rates charged by the utility or through the rates charged by the Transmission Organization. For certain RTOs, such as the Midwest ISO and the Pennsylvania-New Jersey-Maryland Interconnection (PJM), the Commission has considered incentives for public utilities that join an RTO by allowing a public utility that joins an RTO to receive an ROE within the zone of reasonableness that is higher than it would have received had it not joined. We will continue to consider requests for ROE-based incentives for utilities that join an RTO, in recognition of the benefits such organizations bring to customers, as outlined in detail in Order No. 2000.[40] In addition, we will consider similar requests by utilities that join an ISO for an incentive ROE that, while still in the zone of reasonableness, is higher than the ROE the Commission might otherwise allow if the utility did not join. We will require a public utility to make a request for the incentive by making a filing with the Commission under section 205 of the FPA.

46. We also seek comment on whether the Commission should consider incentive-based ROE requests for public utilities that are not in an RTO but that join a Commission-approved regional planning organization.

D. Approval of All Prudently Incurred Costs Associated With Reliability Standards and Transmission Infrastructure Development

47. Under new FPA section 215 (Electric Reliability), an Electric Reliability Organization may propose, and the Commission may approve by rule or order, reliability standards.[41] New FPA section 219(b)(4)(A) requires that the Commission allow recovery of all prudently incurred costs necessary to comply with these mandatory reliability standards. Proposed new section 35.35(f) allows for such recovery.

48. New FPA section 216 (siting of interstate electric transmission facilities) gives the Commission certain backstop siting authority for transmission facilities when the Secretary of Energy designates a geographic area experiencing electric transmission capacity constraints or congestion that adversely affects consumers as a National Interest Electric Transmission Corridor. New FPA section 219(b)(4)(B) requires that the Commission allow recovery of all prudently incurred costs related to infrastructure development pursuant to new section 216. Proposed new section 35.35(g) allows for recovery of such prudently incurred costs.

E. Commission Reporting Requirement

49. To provide a basis for determining the effectiveness of the proposed rules and to provide the Commission with an accurate assessment of the state of the industry with respect to transmission investment, proposed section 35.35(h) would require that jurisdictional public utilities provide information annually on their current and projected transmission investment activity. This information would be reported to the Commission on a proposed new form which would consist of a basic spreadsheet. For purposes of this NOPR, the proposed form is designated as ''Form X.'' It is an appendix to this NOPR.

F. Proposal To Remove 18 CFR 35.34(e) Concerning Innovative Transmission Rate Treatments for RTOs

50. Section 35.34(e) of the Commission's regulations provides that the Commission will consider authorizing certain innovative transmission rate treatments for an approved RTO, including: A transmission rate moratorium; innovative treatment of rates of return; non-traditional depreciation schedules for new transmission investment; transmission rates based on levelized recovery of capital costs; transmission rates that combine elements of incremental cost pricing for new transmission facilities with an embedded-cost access fee for existing transmission facilities; and performance-based transmission rates.

51. Unless otherwise ordered by the Commission, the authorization for RTOs to include innovative rate treatments in their rates expired after January 1, 2005, with respect to transmission rate moratoriums and rates of return that do not vary with capital structure.[42]

52. In view of section 219's mandate to provide incentives to the entities identified therein and in order to avoid confusion that could arise from potential conflicts between innovative rate treatments available under section 35.34(e) and the proposed incentives discussed in this proposed rule, the Commission proposes to remove section 35.34(e) from the regulations.

G. Other Options

53. To fully meet the requirements of section 219, the Commission must consider all incentives that will encourage capital spending that reduces congestion and ensures reliability, including incentives that have not been fully evaluated by the Commission, or may require additional modifications to past Commission policy. Accordingly, the Commission is proposing that eligible incentives not be limited to the list of proposed incentives, but also include any potential incentives proposed by public utilities and ultimately approved by the Commission that are determined to be just and reasonable, and not unduly discriminatory or preferential. To facilitate comments on the full range of eligible incentives, we identify several potential incentives and their applicability to FPA section 219. We request comments on these potential

transmission assets if the ADIT adjustment is not granted).

[39] *See ITC Holdings Corp.*, 102 FERC ¶ 61,182 at P 62 (with regard to International Transmission Company); *Trans-Elect, Inc.*, 98 FERC ¶ 61,368 at 62,590 (2002) (with regard to METC).

[40] *Regional Transmission Organizations*, Order No. 2000, 65 FR 809 (Jan. 6, 2000), FERC Stats. & Regs., Regulations Preambles July 1996–December 2000 ¶ 31,089 (1999), *order on reh'g*, Order No. 2000–A, 65 FR 12088 (Mar. 8, 2000), FERC Stats. & Regs., Regulations Preambles July 1996–December 2000 ¶ 31,092 (2000), *aff'd sub nom. Public Utility District. No. 1 of Snohomish County, Washington* v. *FERC*, 272 F.3d 607 (D.C. Cir. 2001).

[41] An Electric Reliability Organization is the organization certified by the Commission to establish and enforce reliability standards for the bulk power system, subject to Commission review.

[42] *See* 18 CFR 35.34(e)(4) (2005).

incentives and invite commenters to propose any other potential incentives.

1. Single Issue Ratemaking

54. We recognize that transmission pricing issues are some of the most difficult issues facing the industry and that the Commission's policy of not allowing selective adjustments to a cost-of-service may serve as a disincentive to transmission investment.[43] Certain applicants for incentive rate-making treatment will be making investments potentially affecting currently effective transmission rates on file at the Commission. Potential applicants may consider the time requirements and the uncertainties associated with rate proceedings that encompass their entire transmission systems to be disincentives to making incentive filings, as specified in this NOPR. To ensure that the approval process for incentive treatment is as streamlined as possible, thereby ensuring timely infrastructure investments, the Commission is willing to consider incentive filings that propose rates applicable only to the new transmission project.[44] Such an incentive would be applicable to both Transcos and traditional public utilities. We invite comments on this option.

2. Acquisition Premiums for Transco Creation

55. The Commission has historically allowed acquisition adjustments (the premium paid above net book value) in rates only upon a specific showing of ratepayer benefit.[45] However, given the positive contributions of transcos on transmission investment noted above, it may be appropriate to adopt a new policy regarding the recovery in rates of an acquisition premium for purchases of transmission facilities by a transco.[46] We request comments on whether the Commission should make a generic determination that general benefits would accrue to ratepayers as a result of transco formation. We also seek comment on whether any change in the acquisition premium/ratepayer benefits review at the Federal level would risk increased resistance to such acquisitions at the state level. And, we seek comment on whether there are other mechanisms that the Commission could institute to provide regulatory certainty of the recovery of the acquisition premium both through retail as well as wholesale rates. Also, we seek comment on what measure the Commission might use in evaluating the appropriateness of such premiums as measured against, for example, the size of the premium, the location of the assets, the level of independence of the transco, and other relevant factors.

H. Other Issues for Comment

56. In addition to seeking comments on the proposed rules and options contained herein, the Commission seeks comments on the following issues:

1. Performance-Based Ratemaking

57. Because it is difficult to observe directly the level of effort a utility, transmission company, ISO or RTO expends on cutting costs and improving efficiency, performance-based regulation may provide a valuable tool to motivate transmission entities to maintain and operate their systems reliably and efficiently. In addition to incentive regulation proposed in this NOPR to encourage expansion of the electric transmission system generally, performance-based regulation would establish rewards for cost saving measures or specific performance (apart from transmission expansions). Common performance-based models include: (1) Price-cap regulation which places ceilings on the average price that a regulated company can charge, allowing the company rate flexibility;[47] (2) targeted incentives, which give a regulated company incentives to improve specific components of its operation; and (3) benchmark incentives which establish rewards based on the performance of a reference group performing similar activities. The Commission seeks comment on specific methods to incent efficiency in the maintenance and operation of existing transmission facilities, including rate moratoria as well as sophisticated methods of performance based ratemaking based on specific performance metrics.

58. We seek comment on ways performance-based regulation might apply to for-profit transcos and traditional public utilities, and not-for-profit public utility ISOs and RTOs. In the case of for-profit entities, we seek comment on specific transmission performance metrics and other relevant quality-of-service measures that should be subject to a performance standard. The Commission seeks comment on whether there should be mechanisms for sharing gains with ratepayers and, if so, what those mechanisms should be. In the case of not-for-profit public utility ISOs and RTOs, we seek comment on whether and how performance-based regulation developed for for-profit entities might be applied to not-for-profit entities. For example, we are interested in comments on whether and how executive performance measures might be relevant, and whether and how performance might be benchmarked to that of for-profit entities or other not-for-profit entities. Further, in the discussion of advanced technologies, *infra*, we seek comment on whether performance-based benchmarks for transmission costs would provide incentives for the deployment of advanced technologies.

2. The Role of Public Power

59. Although the transmission infrastructure provisions of section 219 apply only to public utilities, it is important that the Commission encourage needed transmission expansion from all sectors of the industry, including public power.[48] Public power has demonstrated its ability to provide capital and build transmission capacity in some of the most critical transmission projects. For example, public power participates as an equity owner in the American Transmission transco, providing capital to fund transmission construction in a highly congested market. In addition to equity ownership, public power entities have shown that they can participate in, and benefit from, grid expansion opportunities as counterparties to long-term contracts such as the long-term commitment to purchase capacity from transmission projects that are needed to allow such projects to go forward. The Long Island Power Authority's (LIPA)

[43] *See, e.g., City of Westerville, Ohio* v. *Columbus Southern Power Co.*, 111 FERC ¶ 61,307 at P 18 & n.11 (2005).

[44] *See Removing Obstacles, supra* note 20, for one type of approach utilizing a limited section 205 filing.

[45] *See, e.g., UtiliCorp United Inc. and Centel Corp.*, 56 FERC ¶ 61,031 at 61,120 & nn. 26–28, *reh'g denied*, 56 FERC ¶ 61,427 at 62,528–29 (1991); *Minnesota Power & Light Co.*, 43 FERC ¶ 61,104 at 61,341–42, *reh'g denied*, 43 FERC ¶ 61,502 (1989), *appeal dismissed*, No. 88–2234 (8th Cir. Sept. 14, 1989). While the proposed ADIT incentive discussed above would adjust book value and therefore may be considered a premium on net book value, we note that the acquisition premium discussed here is separate and distinct from the proposed ADIT incentive.

[46] *See* April 22, 2005 Technical Conference, Docket No. AD05–5–000, Tr. 44–45 (statement of Jon Larsen, Trimaran Capital Partners); Tr. 215 (statement of Christopher Leslie, MacQuarie Securities (USA), Inc.).

[47] The Commission has approved performance-based rates for oil pipelines based on this model. *See Revisions To Oil Pipeline Regulation Pursuant to the Energy Policy Act of 1992*, Order No. 561, FERC Stats. & Regs. ¶ 30,985 (1993), 58 FR 58753 (Nov. 4, 1993), *order on reh'g*, Order No. 561–A, FERC Stats. & Regs. ¶ 31,000 (1994), 59 FR 40243 (Aug. 8, 1994), *aff'd, Association of Oil Pipelines* v. *FERC*, 83 F.3d 1424 (D.C. Cir. 1996).

[48] The term ''public power'' as used in this NOPR refers to such traditional entities as municipal and cooperatively owned utilities, state power authorities, Federal power marketing administrations and power authorities, and others that do not fall within the Commission's FPA sections 205 and 206 ratemaking jurisdiction as public utilities.

success in the Cross Sound Cable project's open season resulted in LIPA securing long-term rights to schedule power between nodes in two RTOs. LIPA also obtained rights for 20 years to all 660 megawatts on the Neptune merchant transmission project, a 67-mile-long cable capable of transporting electricity to Long Island, and in conjunction with the Cross Sound Cable between New Haven, Connecticut, and Shoreham, will, according to LIPA, open up an energy corridor from the Mid-Atlantic states through Long Island into New England and Canada.[49]

60. Another option is for public power to participate in specific transmission projects along with developers with other business models. For example, Western Area Power Administration helped the Path 15 project to move forward by serving as project manager, acquiring needed land rights, and owning the transmission line and the land. When public power entities voluntarily participate in grid investments with entities that are under the Commission's rate jurisdiction, those non-jurisdictional public power entities can benefit from the rate policies described in this NOPR that provide for improved certainty and possibly enhanced revenues.

61. New forms of public power entities may also be formed to address infrastructure challenges. For example, the western states spearheading the development of the Frontier transmission line project (Frontier Line) are identifying potential business models to complete the project. Participants in the planning of the Frontier Line are looking to the Commission to, among other things, provide the necessary certainty to attract investment to this type of project,[50] and incentives in this proposed rule may encourage interest in this type of regional partnership, which involve both public and private entities across several states.

62. A consortium approach to building new transmission may also provide an avenue for public power to participate in new transmission projects. Under a consortium approach, as described by PJM,[51] the RTO planning process becomes the platform to facilitate development of transmission business solutions—solutions in which all parties can participate. For example, should public power wish to lend its access to lower cost financing to help fund such a project, the planning process would become the forum for such discussions.

63. Given the importance of public power participation and the requirements of section 219, we request comments on what actions the Commission should take in this rulemaking to encourage public power participation in new transmission projects. For example, would the consortium approach help to promote expansion of the transmission grid? If so, should consortia receive incentives similar to those proposed for Transcos, and what, if any, additional incentives could the Commission provide to encourage such consortia?

3. Advanced Technology

64. We also want to encourage the use of advanced technology in new transmission projects.[52] Advanced transmission technologies are defined in section 1223 of EPAct 2005 to be technologies that increase the capacity, efficiency, or reliability of an existing or new transmission facility, including:

(1) High-temperature lines (including superconducting cables);

(2) Underground cables;

(3) Advanced conductor technology (including advanced composite conductors, high temperature low-sag conductors, and fiber optic temperature sensing conductors);

(4) High-capacity ceramic electric wire, connectors, and insulators;

(5) Optimized transmission line configurations (including multiple phased transmission lines);

(6) Modular equipment;

(7) Wireless power transmission;

(8) Ultra-high voltage lines;

(9) High-voltage DC technology;

(10) Flexible AC transmission systems;

(11) Energy storage devices (including pumped hydro, compressed air, superconducting magnetic energy storage, flywheels, and batteries);

(12) Controllable load;

(13) Distributed generation (including PV, fuel cells, and microturbines);

(14) Enhanced power device monitoring;

(15) Direct system state sensors;

(16) Fiber optic technologies;

(17) Power electronics and related software (including real time monitoring and analytical software);

(18) Mobile transformers and mobile substations; and

(19) Any other technologies the Commission considers appropriate.

65. Generally, we expect that the proposed incentives discussed in this NOPR, including the ROE-based incentives, will stimulate investment in new transmission facilities, which will, in turn, provide opportunities for the deployment of innovative technologies for those new transmission facilities. Consequently, providing the proposed incentives will fulfill the requirement of section 219(b)(3) to encourage deployment of transmission technologies and other measures to increase the capacity and efficiency of existing transmission facilities and improve the operation of facilities. We ask for comments on whether, in applications for incentive-based treatment, we should require a technology statement. This technology statement could, for example, describe what advanced transmission technologies were considered and, if those technologies were not employed, why not. We also seek comment on any other incentives that the Commission could offer to fulfill the goals of section 219(b)(3) regarding transmission technologies.

66. We seek comment on whether performance-based benchmarks for transmission costs would provide incentives for the deployment of advanced technologies. In this risk-sharing approach, the project sponsor would be allowed to recover costs up to a benchmark level and ratepayers would be protected from costs above the benchmark level. If the new technology is adopted and fails to live up to expectations, how are those costs shared with ratepayers? And, if the new technology is successful, how are the gains shared with ratepayers?

67. In addition to the comments invited above, the Commission welcomes comments on additional provisions that commenters believe would accomplish the transmission infrastructure objectives of the Act.

IV. Information Collection Statement

68. The Office of Management and Budget (OMB) regulations require approval of certain information collection requirements imposed by agency rules.[53] Upon approval of a collection(s) of information, OMB will assign an OMB control number and an expiration date. Respondents subject to

[49] *See* LIPA's description at *http://www.lipower.org/projects/neptune.html.*

[50] *See* April 22, 2005 Technical Conference, Tr. 166 (statement of Joe Desmond, Deputy Secretary of Energy for the State of California).

[51] *See* April 22, 2005 Technical Conference, Tr. 75–76, Tr. 123–124 (statement of Audrey Zibelman, PJM Interconnection); Supplemental Comments of PJM Interconnection at p. 4 (submitted May 2, 2005, Docket No. PL03–1–000).

[52] New FPA section 219(b)(3), added by EPAct 2005, requires that the rule established pursuant to section 219 ''encourage deployment of transmission technologies and other measures to increase the capacity and efficiency of existing transmission facilities and improve the operation of the facilities.''

[53] 5 CFR 1320.13 (2005).

the filing requirements of this rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number. The NOPR amends the Commission's regulations to implement the statutory provisions of section 1241 of EPAct 2005. The Act directs the Commission to establish incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce by public utilities in order to benefit consumers by ensuring reliability and reducing the cost of delivered power by relieving transmission congestion. Entities seeking to build new transmission facilities must file under part 35 of the Commission's regulations, an application describing how the entity will bring benefits to the grid. The information provided for under part 35 is identified as FERC–516.

69. The Commission is submitting these reporting requirements to OMB for its review and approval under section 3507(d) of the Paperwork Reduction Act.[54] Comments are solicited on the Commission's need for this information, whether the information will have practical utility, the accuracy of provided burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing the respondent's burden, including the use of automated information techniques.

Burden Estimate: The Public Reporting burden for the requirements contained in the NOPR is as follows:

Data collection	Number of respondents	Number of responses	Hours per response	Total annual hours
FERC–516				
Transco	30	1	296	8,880
Traditional Public Utilities	200	1	211	42,200
Totals	230	1	222	51,080

Total Annual Hours for Collection: (Reporting + recordkeeping, (if appropriate)= 51,080 hours.

Information Collection Costs: The Commission seeks comments on the costs to comply with these requirements. It has projected the average annualized cost to be the total annual hours of 51,080 times $120 = $6,129,600. (The hourly rate was determined by taking the median annual salary from Bureau of Labor Statistics, Department of Labor Occupational Outlook Handbook. The figures reported by BLS are for 2002 and added to them was an inflation factor of 4.73 percent for the period January 2003 through December 2004.)

Title: FERC–516 ''Electric Rate Schedule Filings.''

Action: Proposed Collections.

OMB Control No: 1902–0096.

Respondents: Business or other for profit.

Frequency of Responses: On occasion for applicants and annually for transmission investment report.

Necessity of the Information: This proposed rule, if adopted, would implement the Congressional mandate of the Energy Policy Act of 2005 to establish incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce. This mandate addresses an identified need to encourage construction of transmission infrastructure and encourage investment. Sufficient supplies of energy and a reliable way to transport those supplies are necessary to assure reliable energy availability and to enable competitive markets. Without sufficient delivery infrastructure, some suppliers will not be able to enter the market, customer choices will be limited, and prices may be needlessly higher or volatile. The implementation of incentive and performance-based rate treatments support the Commission's mandate to support investments in transmission capacity to reduce the cost of delivered power by reducing congestion.

Internal review: The Commission has reviewed the requirements pertaining to public utilities and transmission companies and determined the proposed requirements are necessary to meet the statutory provisions of the Energy Policy Act of 2005.

70. These requirements conform to the Commission's plan for efficient information collection, communication and management within the energy industry. The Commission has assured itself, by means of internal review, that there is specific, objective support for the burden estimates associated with the information requirements.

71. Interested persons may obtain information on the reporting requirements by contacting: Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 [Attention: Michael Miller, Office of the Executive Director, Phone: (202) 502–8415, fax: (202) 273–0873, e-mail: *michael.miller@ferc.gov*]. Comments on the requirements of the proposed rule may also be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission].

V. Environmental Analysis

72. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[55] The Commission has categorically excluded certain actions from these requirements as not having a significant effect on the human environment.[56] The actions proposed here fall within categorical exclusions in the Commission's regulations for promulgation of rules that are clarifying, corrective, or procedural, and for electric rate filings submitted by public utilities, the establishment of just and reasonable rates, and confirmation, approval and disapproval of rate filings submitted by Federal power marketing agencies.[57] Therefore, an environmental assessment is unnecessary and has not been prepared for this NOPR.

[54] 44 U.S.C. 3507(d) (2000).

[55] Order No. 486, *Regulations Implementing the National Environmental Policy Act*, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs., Regulations Preamble 1986–1990 ¶ 30,783 (1987).

[56] 18 CFR 380.4 (2005).

[57] 18 CFR 380.4(a)(2)(ii) and 380.4(a)(15).

VI. Regulatory Flexibility Act Certification

73. The Regulatory Flexibility Act (RFA)[58] requires that a rulemaking contain either a description and analysis of the effect that the proposed rule will have on small entities or a certification that the rule will not have a significant economic impact on a substantial number of small entities. However, the RFA does not define ''significant'' or ''substantial'' instead leaving it up to any agency to determine the impacts of its regulations on small entities. The proposed regulations would not have a significant adverse impact on a substantial number of small entities. The proposed rule applies only to entities that own, control, or operate facilities for transmitting electric energy in interstate commerce and not to electric utilities per se. Small entities that believe this proposed rule will have a significant impact on them may apply to the Commission for waivers.

VII. Comment Procedures

74. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due on or before January 11, 2006. Comments must refer to Docket No. RM06–4–000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments. Comments may be filed either in electronic or paper format.

75. Comments may be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov*. The Commission accepts most standard word processing formats and commenters may attach additional files with supporting information in certain other file formats. Commenters filing electronically do not need to make a paper filing. Commenters that are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street NE., Washington, DC 20426.

76. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

[58] 5 U.S.C. 601–612 (2000).

VIII. Document Availability

77. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (*http://www.ferc.gov*) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

78. From FERC's Home Page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

79. User assistance is available for eLibrary and the FERC's website during normal business hours. For assistance, please contact the Commission's Online Support at 1–866–208–3676 (toll free) or TTY (202) 502–8659, or e-mail at *FERCOnlineSupport@ferc.gov*. You may also contact the Public Reference Room at (202) 502–8371 or e-mail at *public.referenceroom@ferc.gov*.

List of Subjects in 18 CFR Part 35

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

By direction of the Commission.

Magalie R. Salas,

Secretary.

In consideration of the foregoing, the Commission proposes to amend part 35 of Chapter I, Title 18, *Code of Federal Regulations*, as follows:

PART 35—FILING OF RATE SCHEDULES AND TARIFFS

1. The authority citation for part 35 continues to read as follows:

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

Subpart F—Procedures and Requirements Regarding Regional Transmission Organizations

§ 35.34 [Amended]

2. In § 35.34, remove and reserve paragraph (e).

3. A new subpart G is added to read as follows:

Subpart G—Transmission Infrastructure Investment Provisions

§ 35.35 Transmission infrastructure investment.

(a) *Purpose*. This section establishes rules for incentive-based (including performance-based) rate treatments for transmission of electric energy in interstate commerce by public utilities for the purpose of benefiting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.

(b) *Definitions*.

(1) *Transco* means a stand-alone transmission company that has been approved by the Commission and that sells transmission services at wholesale and/or on an unbundled retail basis, regardless of whether it is affiliated with another public utility.

(2) *Transmission Organization* means a Regional Transmission Organization, Independent System Operator, independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities.

(c) *General rule*. All rates approved under the rules of this section, including any revisions to the rules, are subject to the filing requirements of sections 205 and 206 of the Federal Power Act and to the substantive requirements of sections 205 and 206 of the Federal Power Act that all rates, charges, terms and conditions be just and reasonable and not unduly discriminatory or preferential.

(d) *Incentive-based rate treatments for transmission infrastructure investment*. The Commission will authorize any incentive-based rate treatment, as discussed in this paragraph (d), for transmission infrastructure investment, provided that the proposed incentive-based rate treatment is just and reasonable and not unduly discriminatory or preferential. An applicant's request, to be made in a filing pursuant to section 205 of the Federal Power Act, or in a petition for a declaratory order that precedes a filing pursuant to section 205, must include a detailed explanation of how the proposed rate treatment justifies incentive-based (or performance-based) treatment based on the purposes and requirements of this section. For purposes of this paragraph (d), incentive-based rate treatment means any of the following:

(1) The Commission will authorize the following incentive-based rate treatments for investment by public utilities, including Transcos, in new transmission capacity that reduces the cost of delivered power by reducing

transmission congestion and ensures reliability, as demonstrated in an application to the Commission:

(i) A rate of return on equity sufficient to attract new investment in transmission facilities;

(ii) 100 percent of prudently incurred Construction Work in Progress (CWIP) in rate base;

(iii) Recovery of prudently incurred pre-commercial operations costs;

(iv) Hypothetical capital structure;

(v) Accelerated regulatory book depreciation;

(vi) Recovery of 100 percent of prudently incurred costs of transmission facilities that are cancelled or abandoned due to factors beyond the control of the public utility;

(vii) Deferred cost recovery; and

(viii) Any other incentives approved by the Commission, pursuant to the requirements of this paragraph, that are determined to be just and reasonable and not unduly discriminatory or preferential.

(2) In addition to the incentives in paragraph (d)(1) of this section, the Commission will authorize the following incentive-based rate treatments for Transcos, provided that the proposed incentive-based rate treatment is just and reasonable and not unduly discriminatory or preferential:

(i) A return on equity that both encourages Transco formation and is sufficient to attract investment; and

(ii) An adjustment to the book value of transmission assets being sold to a transco to remove the disincentive associated with the impact of accelerated depreciation on federal capital gains tax liabilities.

(e) *Incentives for joining a Transmission Organization.* The Commission will authorize an incentive-based rate treatment, as discussed in this paragraph (e), for public utilities that join a Transmission Organization, provided that the proposed incentive-based rate treatment is just and reasonable and not unduly discriminatory or preferential. Applicants for the incentive-based rate treatment must make a filing with the Commission under section 205 of the Federal Power Act. For purposes of this paragraph (e), an incentive-based rate treatment means a return on equity that is higher than the return on equity the Commission might otherwise allow if the public utility did not join a Transmission Organization. The Commission will also permit public utilities that join a Transmission Organization the ability to recover prudently incurred costs associated with joining the Transmission Organization, either through transmission rates charged by public utilities or through transmission rates charged by the Transmission Organization that provides services to the public utilities.

(f) *Approval of prudently-incurred costs.* The Commission will approve recovery of prudently-incurred costs necessary to comply with the mandatory reliability standards pursuant to section 215 of the Federal Power Act, provided that the proposed rates are just and reasonable and not unduly discriminatory or preferential.

(g) *Approval of prudently incurred costs related to transmission infrastructure development.* The Commission will approve recovery of prudently-incurred costs related to transmission infrastructure development pursuant to section 216 of the Federal Power Act, provided that the proposed rates are just and reasonable and not unduly discriminatory or preferential.

(h) *Reporting transmission investment activity to the Commission.* Jurisdictional public utilities are required to report annually to the Commission no later than April 18, 2007 and, in succeeding years, on the date on which Form 1 information is due, the following information on Form X:

(i) In dollar terms, actual transmission investment for the most recent calendar year, and planned investments for the next five years.

(ii) For all current and planned investments over the next five years, a project by project listing that specifies for each project the expected completion date, percentage completion as of the date of filing, and reasons for delays.

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APPENDIX

Form X - Proposed form to be provided in compliance with proposed section 35.35 (h)

Company Name

	Actual	Projected				
	2006	2007	2008	2009	2010	2011
Capital Spending On Electric Transmission Facilities 1/ ($ Thousands)						

1/ Respondents are to specify their definition of electric transmission facilities, e.g., transmission lines over __kv capacity, substations, and control and visualization equipment.

Project Detail 1/

Project Name	Expected Project Completion Date (month/year)	Completion Status (%)	Is The Project On Schedule? (Y/N)	If Project Not On Schedule, Indicate Reasons For Delay

1/ Respondents Must List All Projects Included In Current and Projected Electric Transmission Capital Spending Table

[FR Doc. 05–23404 Filed 11–28–05; 8:45 am]
BILLING CODE 6717–01–C

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Part 205

RIN 1010–AC29

Reporting and Paying Royalties on Federal Leases on Takes or Entitlements Basis

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Advance notice of proposed rulemaking and announcement of public meeting.

SUMMARY: The MMS requests comments and suggestions to assist us in proposing regulations regarding so-called ''takes versus entitlements'' reporting and payment of royalties when oil and gas production is commingled upstream of the point of royalty measurement. See IV, Description of Information Requested, for details.

DATES: You must submit your comments by January 30, 2006. A public meeting will be held on December 14, 2005.

ADDRESSES: Please use the regulation identifier number (RIN), RIN 1010–AC29, in all your correspondence. Submit your comments, suggestions, or objections regarding the advanced notice of the proposed rulemaking by any of the following methods:

By regular U.S. mail. Minerals Management Service, Minerals Revenue Management, P.O. Box 25165, MS 302B2, Denver, Colorado 80225–0165;

By overnight mail, courier, or hand-delivery. Minerals Management Service, Minerals Revenue Management, Building 85, Room A–614, Denver Federal Center, West 6th Avenue and Kipling Blvd., Denver, Colorado 80225; or

By e-mail. mrm.comments@mms.gov. Please submit Internet comments as an ASCII file and avoid the use of special characters and any form of encryption. Also, please include ''Attn: RIN 1010–AC29'' and your name and return

address in your Internet message. If you do not receive a confirmation that we have received your Internet message, call the contact person listed below.

FOR FURTHER INFORMATION CONTACT: Sharron L. Gebhardt, Lead Regulatory Specialist, Minerals Management Service, Minerals Revenue Management, P.O. Box 25165, MS 302B2, Denver, Colorado 80225–0165, telephone (303) 231–3211, FAX (303) 231–3781, or e-mail *Sharron.Gebhardt@mms.gov.*

SUPPLEMENTARY INFORMATION:

I. Dates Information

The MMS may not necessarily consider or include in the Administrative Record, for any proposed rule, comments that MMS receives after the close of the comment period or comments delivered to an address other than those listed in the **ADDRESSES** section of this document.

II. Public Meeting Information

The MMS will hold a public meeting to allow the public an opportunity to comment on how MMS should implement the royalty reporting and payment provision at section 6(d) of the Federal Oil and Gas Royalty Simplification and Fairness Act (RSFA). The meeting will be held in Houston, Texas, on the following date at the following specified time and location: Wednesday, December 14, 2005, from 9 a.m.–1 p.m. central time, in the San Antonio Room located on the second floor of the Sheraton North Houston Hotel, located at 15700 John F. Kennedy Blvd, Houston, Texas 77032. For further information, please contact Roman A. Geissel at (303) 231–3226.

III. Public Comment and Meeting Procedures

A. Written Comment Procedures

We are particularly interested in receiving comments and suggestions about the topics identified in IV, Description of Information Requested. Your written comments should: (1) Be specific; (2) explain the reason for your comments and suggestions; (3) address the issues outlined in this notice; and (4) where possible, if you refer to the specific provision, section, or paragraph of statutory law, case law, or existing regulations, please cite that provision.

The comments and recommendations that are most useful and have greater likelihood of influencing decisions on the content of a possible future proposed rule are: (1) Comments and recommendations supported by quantitative information or studies; and/or (2) comments that include citations to, and analyses of, the applicable laws and regulations.

B. Public Meeting Procedures

At the public meeting, those attending will be able to comment on the scope, proposed action, and possible alternatives the MMS should consider. The purpose of the meeting is to gather comments and input from a variety of stakeholders and the public.

If you do not wish to speak at the meeting but you have views, questions, or concerns with regard to the MMS's implementation of section 6(d) of RSFA, Public Law 104–185, Aug. 13, 1996, 110 Stat 1700, 1713–1714, as corrected by Public Law 104–200, Sept. 22, 1996, codified at 30 U.S.C. 1721(k), entitled ''Volume Allocations of Oil and Gas Production,'' you may submit written statements at the meeting for inclusion in the public record. You may also submit written comments and suggestions regardless of whether you attend or speak at the public meeting. See the **ADDRESSES** section of this document for instructions on submitting written comments.

The site for the public meeting is accessible to individuals with physical impairments. If you need a special accommodation to participate in the meeting (e.g., interpretive service, assistive listening device, or materials in alternative format), please notify Lonnie Kimball at (281) 987–6800, no later than 2 weeks prior to the scheduled meeting. Although we will make every effort to accommodate requests received, it may not be possible to satisfy every request.

C. Public Comment Policy

Our practice is to make comments, including names and home addresses of respondents, available for public review at our Denver office during regular business hours and on our Web site at *http://www.mrm.mms.gov/Law_R_D/FRNotices/FRHome.htm*, or on request to Sharron Gephardt at (303) 231–3211. Individual respondents may request that we withhold their individual home address from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comments. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

IV. Description of Information Requested

On August 13, 1996, the President signed RSFA into law. Section 6(d) of RSFA, entitled, ''Volume Allocations of Oil and Gas Production,'' amended section 111 of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), Public Law 97–451—Jan. 12, 1983 (30 U.S.C. 1721), by adding new paragraphs (k)(1)–(5). The proposed rulemaking would implement RSFA amendments to FOGRMA section 111(k)(1)–(4).

Congress enacted these amendments to clarify and resolve the long-standing issues regarding so-called ''takes versus entitlements.'' Those issues arose primarily where the amount of natural gas taken (''takes'') and sold by a lessee from Federal leases subject to a unit or communitization agreement was not equal to the lessee's entitled share (''entitlements''), based on its ownership interest in leases in the unit or communitization agreement. These imbalances led to numerous questions about who should report and pay on what volumes and for what leases.

To obtain input from parties affected by RSFA amendments to FOGRMA section 111(k)(1)–(4), MMS formed a consultation team comprised of representatives from interested states, oil and gas trade associations, and MMS. The consultation team held meetings on October 30, November 19, and December 6, 1996. The meetings resulted in general agreement on definitions, the reporting requirements for 100-percent Federal units and communitization agreements, the definition of a ''marginal property,'' and how a marginal property reporting exception would be determined.

Subsequent to those meetings, in the process of trying to develop a proposed rule implementing RSFA amendments to FOGRMA section 111(k)(1)–(4), an issue arose regarding the commingling of oil and gas production from multiple properties upstream of the point of royalty measurement. For purposes of this discussion:

- A ''property'' is defined as a lease, unit, or communitization agreement.
- A ''100-percent Federal unit or communitization agreement'' means any unit or communitization agreement that contains only Federal leases having the same fixed royalty rate and funds distribution.
- A ''unit'' means a unit participating area, enhanced recovery unit, or field-wide unit.

• A ''mixed unit or communitization agreement'' means any unit or communitization agreement other than 100-percent Federal unit or communitization agreement. These are unit or communitization agreements that contain any mixture of Federal, Indian, state or private mineral estates, or that contain all Federal leases with different royalty rates (fixed or variable) or different funds distribution.

• A ''stand-alone lease'' means a lease or a portion of a lease that is not in a unit or communitization agreement.

The RSFA cldarly identifies when it is appropriate to initially report and pay on a ''takes'' or ''entitlements'' basis for production from leases, units or communization agreements that is not commingled with production from other properties before the royalty measurement point. For instance:

• When taking production from a 100-percent Federal unit or communitization agreement, the lessee(s) must pay on actual takes (30 U.S.C. 1721(K)(1)(A)), or

• When taking production from a mixed Federal unit or communitization agreement, the Federal lessee(s) must pay on entitlements (30 U.S.C. 1721(k)(1)(B)), or

• When taking production from a stand-alone Federal lease, the lessee(s) must pay on takes (30 U.S.C. 1721(k)(1)(C)).

It is important to note that, while RSFA section 6(d) amended FOGRMA by adding section 111(k)(1), which addressed the reporting and payment requirements, the addition of section 111(k)(2) went on to clarify that the requirements outlined in section 111(k)(1) ''apply only to requirements for reporting and paying royalties. Nothing in this subsection is intended to alter a lessee's liability for royalties on oil or gas production allocated to lease, in accordance with the terms of the lease, a unit or communitization agreement, or any other agreement.'' Thus, the lessee's ultimate liability to pay royalties on its entitled share of production is not changed.

Commingling adds additional complications to the issue of how to report and pay royalties. Not only do imbalances between operating rights owners within a property occur, but imbalances between properties also are commonplace.

Commingling is the combining of production from multiple properties before measurement for royalty purposes and requires approval of the MMS Offshore Minerals Management program for offshore leases or the Bureau of Land Management for onshore leases. The commingling approval identifies where the volume is measured by royalty purposes and how that volume must be allocated to each property that is subject to the commingling approval. It does not affect how volume is allocated to leases within a unit or communitization agreement. Commingling can be, and often is, approved between properties with the same royalty rate and funds distribution and between properties with different royalty rates or different funds distributions.

The RSFA provision added to FOGRMA at 30 U.S.C. 1721(k)(1)–(5) does not address the effect of commingling or commingling imbalances. Commingling complicates reporting requirements because there is an impact on royalty payments when there are properties with mixed royalty rates or funds distribution upstream of the approved commingling point. For example, assume that production from two stand-alone Federal leases that are not unitized or communitized, each with a different royalty rate, is commingled before the royalty measurement point. Assume that each lease receives a 50 percent allocation of the total measure production (1,000 Mcf) under the commingling approval. The lessee of the lease with a 16⅔ percent royalty rate actually sells (takes) 750 Mcf of gas and the lessee of the lease with the 12½ percent royalty rate actually sells (takes) 250 Mcf of gas. Based on the commingling approval, the leases are out of balance. The commingling approval determines the volume deemed to have been removed or sold from each lease upon which the lessees ultimately must pay royalty. Should each lessee pay royalties on its actual sales (takes), the Federal Government initially would be paid more than the royalty ultimately owed. If the sales were reversed, the Federal Government initially would be paid on less than the royalty ultimately owed.

RSFA prescribes how lessees should initially report and pay royalty on production removed or sold from a lease or unit or communitization agreement. The commingling approval determines the volume removed or sold from the leases or unit or communitization agreements subject to the commingling approval. RSFA was silent on the effect of commingling approvals. We are asking for your input on several questions regarding RSFA's application to production subject to a commingling approval before the royalty measurement point. Those questions include the following:

(1) Should lessees of a lease or a 100-percent Federal unit or communitization agreement report and pay initially on their takes in a situation where production from that lease or unit or communitization agreement is commingled with other production upstream of the royalty measurement point:

(2) RSFA requires that Federal lessees in mixed unit or communitization agreements report royalties on an entitlement basis, regardless of whether the unit or communitization agreement is subject to a commingling approval. Should MMS treat a commingling approval as the equivalent of a unit or communitization agreement and apply the RSFA reporting and payment provisions on that basis? For example, if all properties measured at the commingling point are 100 percent Federal leases or units or communitization agreements with the same fixed royalty rate and funds distribution, then payments could be made on takes. If one or more of the properties measured at or after the commingling point have different royalty rates (fixed or variable, different funds distribution, or are not 100 percent Federal, all lessees would pay on entitlements.

The three examples presented below illustrate some alternative methodologies to apply the provisions of RSFA to situations where production is commingled before royalty measurement. For each example, assume there is a stand-alone Federal lease with two lessees (lessee A and lessee B, each of whom owns 50 percent of the working interest), a 100-percent Federal unit or communitization agreement with two lessees (with lessee C owning 75 percent of the combined working interest in the two leases, and lessee D owning the remaining 25 percent), and a state lease, all of which are subject to a commingling approval. (For simplicity, assume that all of the Federal leases have the same royalty rate.) Additionally, assume that for each example, the total commingled production allocated to the properties is 100,000 Mcf of gas. Further assume that, for the month shown in the examples, the stand-alone Federal lease and the state lease are each allocated 25 percent of the commingled production under the commingling approval, and that the Federal unit or communitization agreement is allocated 50 percent. Further, assume that lessee A takes and sells 20,000 Mcf of gas. Assume that lessee B has no takes. Assume that lessee C takes and sells 30,000 Mcf of gas while lessee D takes and sells 23,000 Mcf of gas. Assume that the lessee of the state lease takes and sells 27,000 Mcf of gas. In each example, lessee ownership percentages and liability remain the

same, but the volume on which royalty initially must be paid varies depending on the methology used. (The numbers used in the following examples are rounded to the nearest whole number.)

EXAMPLE 1—"PURE TAKES" REPORTING AND PAYING

Property	Allocated volume per commingling approval (Mcf)	Lessee	Ownership percentage	Entitled share of allocated volume (Mcf)	Sales by lessees (Mcf)	Volume on which royalty paid to MMS (Takes) (Mcf)
Federal Lease (2 lessees)	25,000	A	50	12,500	20,000	20,000
		B	50	12,500	0	0
100-percent Federal Unit or Communitization Agreement (2 lessees).	50,000	C	75	37,500	30,000	30,000
		D	25	12,500	23,000	23,000
State Lease	25,000			25,000	27,000	0
Totals	100,000			100,000	100,000	73,000

By using a pure takes methodology, the volume deemed sold and removed from each lease and the unit or communitization agreement as determined under the commingling approval is not properly accounted for. Under this methodology, MMS could be paid on a volume either greater than or less than that on which the lessees ultimately owe royalty because the takes on which the Federal lessees reported and paid royalty would not always equal the volume on which royalty is due under the commingling approval. In this example, the MMS would be paid royalty on 2,000 Mcf less than the volume on which the Federal lessees ultimately owe royalty because under the commingling approval the Federal lessees owe royalty on 75,000 Mcf and on a pure takes basis, the Federal lessees only paid on 73,000 Mcf. Therefore, adopting this methodology presumably would require each royalty reporter to adjust royalty payments (at least on an annual basis) to its entitled volume (equal to its ownership percentage times the volume allocated to its lease or unit or communitization agreement under the commingling approval).

EXAMPLE 2.—"PURE ENTITLEMENTS" REPORTING AND PAYING

Property	Allocated volume per commingling approval (Mcf)	Lessee	Ownership percentage	Entitled share of allocated volume (Mcf)	Sales by lessee (Mcf)	Volume on which royalty paid to MMS (entitlements) (Mcf)
Federal Lease (2 lessees)	25,000	A	50	12,500	20,000	12,500
		B	50	12,500	0	12,500
100-percent Federal Unit or Communitization Agreement (2 lessees).	50,000	C	75	37,500	30,000	37,500
		D	25	12,500	23,000	12,500
State Lease	25,000			25,000	27,00	0
Totals	100,000			100,000	100,000	75,000

Reporting on a ''pure entitlements'' basis that the Federal government is made whole with respect to royalties, but would not allow for initial reporting and payment based on takes if production is commingled before the royalty measurement point. Under this methodology, MMS would be made whole each month because lessees would report and pay on their entitled volume each month, even if a particular lessee (lessee B in this example) took no production. Therefore, an adjustment to the entitled volume, as discussed above for Example 1, would not be necessary.

EXAMPLE 3.—"PROPORTIONATE TAKES" REPORTING AND PAYING

Property	Allocated volume per commingling approval (Mcf)	Lessee	Ownership percentage	Entitled share of allocated volume (Mcf)	Sales by lessee (Mcf)	Volume on which royalty paid to MMS (proportionate takes) (Mcf)
Federal Lease (2 lessees)	25,000	A	50	12,500	20,000	25,000
		B	50	12,500	0	0
100-percent Federal Unit or Communitization Agreement (2 lessees).	50,000	C	75	37,500	30,000	28,302
		D	25	12,500	23,000	21,698
State Lease	25,000			25,000	27,000	0
Totals	100,000			100,000	100,000	75,000

This methodology would combine takes and entitlements by requiring lessees to report and pay on volumes equal to the sales by the lessee divided by the total sales for the property times the allocated volume under the commingling approval for the property. Consider lessees C and D: In this example, lessee C would report and pay on 28,302 Mcf, even though it actually took 30,000 Mcf, and its entitled volume is 37,500 Mcf. The 28,302 Mcf is computed as follows:

(30,000 Mcf/53,000 Mcf) × 50,000 Mcf = 28,302 Mcf for lessee C, where 53,000 Mcf (total sales for the property) is the sum of 30,000 Mcf (lessee C's total sales) and 23,000 Mcf (lessee D's total sales), and 50,000 Mcf is the allocated volume under the commingling approval for the property. Lessee D's initial reporting and payment would be computed similarly.

Considering lessees A and B: If a lessee took no production (lessee B in this example), it would not have to pay any royalty. However, a lessee (lessee A in this example) could pay royalty on a volume greater than either its actual takes or its entitled share. Under this methodology, MMS would be made whole each month because it would receive royalty based on the total Federal production subject to the commingling approval each month. Therefore, an adjustment to the entitled volume, as discussed above for Example 1, would not be necessary. In Example 3, lessees would have to adjust their payments among themselves.

As explained above, in instances where a lessee pays on ''Pure Entitlements'' such as Example 2, or ''Proportionate Takes'' such as Example 3, the lessee may take production that is more or less than its entitled share. In that case, a lessee would need to value its entitled share. The MMS believes that the best means of valuing the entitled share is to apply a volume weighted average of the royalty values of the volumes actually taken to the entitled shared volumes. The MMS requests comments on any other alternatives for valuing such volumes.

In addition, MMS is interested in receiving comments on these three Examples which describe alternative methodologies. The MMS is also interested in receiving comments on any other alternative methodologies. If you propose a methodology different from those discussed above, please use our example criteria and explain why you believe your methodology is the best alternative. In addition, MMS would like your input on how the various methodologies would affect your business practices, bookkeeping, etc.

Dated: November 14, 2005.

R.M. ''Johnnie'' Burton,

Assistant Secretary for Land and Minerals Management.

[FR Doc. 05–23380 Filed 11–28–05; 8:45 am]

BILLING CODE 4310–MR–M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 925

[Docket No. MO–038–FOR]

Missouri Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are announcing receipt of a proposed amendment to the Missouri regulatory program (Missouri program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Missouri intends to revise its program to improve operational efficiency.

Currently, we are substituting direct Federal enforcement for portions of the Missouri program. With the substitution of Federal enforcement authority, we outlined a process by which Missouri could regain full authority for its program. As part of this process, Missouri proposes to amend its approved regulatory program and submitted a temporary emergency regulatory program rule (emergency rule). The purpose of the emergency rule is to revise Missouri's regulations regarding bonding of surface coal mining and reclamation operations to allow Missouri to transition from a ''bond pool'' approach to a ''full cost bond'' approach. We are announcing receipt of the emergency rule in this rulemaking. Missouri has indicated that, in the near future, it will submit a permanent regulatory program rule (permanent rule) regarding its bonding regulations and that this rule will contain regulatory language that is substantially identical to the language in this emergency rule. If we approve the emergency rule and Missouri submits the permanent rule with language that has the same meaning as the emergency rule, we will publish a final rule and the permanent rule will become part of the Missouri program.

This document gives the times and locations that the Missouri program and proposed amendment to that program are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments on this amendment until 4 p.m., c.t., December 29, 2005. If requested, we will hold a public hearing on the amendment on December 27, 2005. We will accept requests to speak at a hearing until 4 p.m., c.t. on December 14, 2005.

ADDRESSES: You may submit comments, identified by Docket No. MO–038–FOR, by any of the following methods:

- E-mail: *IFOMAIL@osmre.gov*. Include Docket No. MO–038–FOR in the subject line of the message.
- Mail/Hand Delivery: Andrew R. Gilmore, Chief, Alton Field Division, Office of Surface Mining Reclamation and Enforcement, 501 Belle Street, Alton, Illinois 62002.
- Fax: (618) 463–6470
- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Comment Procedures'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to review copies of the Missouri program, this amendment, and all written comments received in response to this document, you must go to the address listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSM's Alton Field Division. Andrew R. Gilmore, Chief, Alton Field Division, Office of Surface Mining Reclamation and Enforcement, 501 Belle Street, Alton, Illinois 62002, Telephone: (618) 463–6460, E-mail: *IFOMAIL@osmre.gov*.

In addition, you may review a copy of the amendment during regular business hours at the following location: Missouri Department of Natural Resources, Land Reclamation Program, 205 Jefferson Street, P.O. Box 176, Jefferson City, Missouri 65102, Telephone: (573) 751–4041.

FOR FURTHER INFORMATION CONTACT: Andrew R. Gilmore, Chief, Alton Field Division. Telephone: (618) 463–6460. E-mail: *IFOMAIL@osmre.gov*.

SUPPLEMENTARY INFORMATION:

I. Background on the Missouri Program
II. Description of the Proposed Amendment
III. Public Comment Procedures
IV. Procedural Determinations

I. Background on the Missouri Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, ''a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior (Secretary) conditionally approved the Missouri program on November 21, 1980. You can find background information on the Missouri program, including the Secretary's findings, the disposition of comments, and the conditions of approval, in the November 21, 1980, **Federal Register** (45 FR 77017). You can also find later actions concerning the Missouri program and program amendments at 30 CFR 925.10, 925.12, 925.15, 925.16, 925.17, 925.18, and 925.19.

II. Description of the Proposed Amendment

On November 21, 1980, the Secretary conditionally approved the Missouri program under the Act. On June 19, 2003, the Missouri Department of Natural Resources, Air and Land Protection Division, Land Reclamation Program's (MLRP) notified us that the Missouri Legislature did not fully fund the Missouri program for the period beginning July 1, 2003, and ending June 30, 2004. On July 21, 2003, the Governor of Missouri (Governor) notified us that the State of Missouri was experiencing difficult budget and revenue shortfalls (Administrative Record No. MO–664.3). On August 4, 2003, we notified the Governor that we were obligated, in accordance with 30 CFR 733.12(e), to substitute Federal enforcement for those portions of the Missouri program that were not fully funded and staffed (Administrative Record No. MO–664.4). In accordance with the provisions of 30 CFR 733.12(f), we announced our decision, effective August 22, 2003, to institute direct Federal enforcement for those portions of the Missouri program that the MLRP could not adequately implement and enforce. With the substitution of Federal enforcement authority, we outlined a process by which Missouri could regain full authority for its program (See 68 FR 50944, dated August 22, 2003, and 69 FR 19927, dated April 15, 2004).

By letter dated May 27, 2005, the Governor of Missouri petitioned us to consider returning to Missouri the authority to implement and enforce those parts of the Missouri program for which we substituted Federal enforcement (Administrative Record No. MO–664.42). As part of the process of resuming the regulatory authority, Missouri proposes to amend the Missouri program in two steps. The first step involves the State submitting a temporary emergency rule in order to revise its regulations regarding bonding of surface coal mining and reclamation operations. The emergency rule will allow Missouri to transition, in a timely manner, from a ''bond pool'' approach to bonding to a ''full cost bond'' approach.

The second step in amending Missouri's approved regulatory program is for Missouri to submit a permanent rule regarding its bonding regulations. Missouri has indicated that the State will submit this permanent rule in the near future and that it will contain regulatory language that is substantively identical to the language in the emergency rule. If we approve the emergency rule and Missouri submits the permanent rule with language that has the same meaning as the emergency rule, we will publish a final rule and the permanent rule will become part of the Missouri program.

To fulfill the first step in amending its approved regulatory program and to improve operational efficiency, Missouri sent us an amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*) dated October 31, 2005 (Administrative Record No. MO–665). We are announcing receipt of the ''emergency rule'' amendment in this rulemaking.

Below is a summary of the changes proposed by Missouri. The full text of the program amendment is available for you to read at the locations listed above under **ADDRESSES**.

A. 10 CSR 40–7.011 Bond Requirements

1. 10 CSR 40–7.011(1) Definitions

Missouri proposes to revise subparagraphs (1)(C) and (D) regarding definitions for ''Personal bond'' and ''Phase I bond,'' respectively.

2. 10 CSR 40–7.011(2) Requirement to File a Bond

Missouri proposes to revise subsection (2) pertaining to the permit applicant's requirement to file a bond after an application for a surface coal mining and reclamation operation has been approved.

3. 10 CSR 40–7.011(4) Bond Amounts

Missouri proposes to revise subsection (4) regarding how the bond amount for a surface coal mining and reclamation operation is to be determined.

4. 10 CSR 40–7.011(5) Changing Bond Amounts

Missouri proposes to revise subparagraphs (5)(A) through (5)(D) and to delete subparagraph (5)(E). This subsection describes how and when bond adjustments for a surface coal mining and reclamation operation are to be determined and the procedures to be followed for adjusting the bond amounts.

5. 10 CSR 40–7.011(6) Types of Bonds

a. 10 CSR 40–7.011(6)(A) Surety Bonds

Missouri proposes to revise subparagraphs (6)(A)6 and 8 of its regulations regarding surety bonds.

b. 10 CSR 40–7.011(6)(B) Personal Bonds Secured by Certificates of Deposit

Missouri proposes to revise subparagraphs (6)(B)1, 2, and 4 through 7 regarding personal bonds secured by certificates of deposit.

c. 10 CSR 40–7.011(6)(C) Personal Bonds Secured by Letters of Credit

Missouri proposes to revise subparagraphs (6)(C)1, 3, 4, 8, and 9 regarding personal bonds secured by letters of credit.

d. 10 CSR 40–7.011(6)(D) Self Bonding

Missouri proposes to revise subparagraphs (6)(D)1, 2, 3, 5, 6, and 8 regarding self bonding by permit applicants.

6. 10 CSR 40–7.011(7) Replacement of Bonds

Missouri proposes to revise subparagraph (7)(A) regarding a permittee's election to replace the bond for a surface coal mining and reclamation operation.

B. 10 CSR 40–7.021 Duration and Release of Reclamation Liability

1. 10 CSR 40–7.021(1) Period of Liability

Missouri proposes to revise subparagraph (1)(A) regarding the period of liability coal operators have for surface coal mining and reclamation operations.

2. 10 CSR 40–7.021(2) Criteria and Schedule for Release of Reclamation Liability

Missouri proposes to revise subparagraphs (2)(A) through (2)(E) regarding the criteria and schedule for releasing reclamation liability.

C. 10 CSR 40–7.031 Permit Revocation, Bond Forfeiture and Authorization to Expend Reclamation Fund Monies

1. 10 CSR 40–7.031(2) Procedures

Missouri proposes to revise subparagraph (2)(E) regarding procedures for revoking or suspending a surface coal mining and reclamation permit.

2. 10 CSR 40–7.031(3) Bond Forfeiture

Missouri proposes to revise subparagraph (3)(C) regarding forfeiture of bond after a surface coal mining and reclamation permit is revoked.

3. 10 CSR 40–7.031(4) Declaration of Permit Revocation

Missouri proposes to revise subsection (4) regarding the director of the Land Reclamation Program's (director) authority to use appropriated reclamation fund monies from the Coal Mine Land Reclamation Fund for bonds forfeited before January 1, 2006. Missouri also proposes to revise this subsection regarding the director's authority to use proceeds from bonds forfeited on or after January 1, 2006. The purpose of the revision is to ensure compliance with all applicable regulations and satisfactory completion of reclamation on surface coal mining and reclamation permit sites.

D. 10 CSR 40–7.041 Form and Administration of the Coal Mine Land Reclamation Fund

Missouri proposes to delete subsections (1) through (3) pertaining to the Coal Mine Land Reclamation Fund regarding payment of assessments, fund ceiling and reimbursements, and penalties for delinquent payment of fees. Missouri also proposes to revise subsections (4) and (5) and redesignate them as subsections (1) and (2), respectively. These subsections pertain to expenditure of reclamation fund monies and reimbursement of the reclamation fund.

E. 10 CSR 40–7.050 Requirements, Conditions and Terms of Liability Insurance

Missouri proposes to revise subsection (2) regarding the terms and conditions for liability insurance.

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the State program.

Written Comments

Send your written or electronic comments to OSM at the address given above. Your written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of your recommendations. We will not consider or respond to your comments when developing the final rule if they are received after the close of the comment period (see DATES). We will make every attempt to log all comments into the administrative record, but comments delivered to an address other than the Alton Field Division may not be logged in.

Electronic Comments

Please submit Internet comments as an ASCII or Word file avoiding the use of special characters and any form of encryption. Please also include ''Attn: [Docket No. MO–038–FOR]'' and your name and return address in your Internet message. If you do not receive a confirmation that we have received your Internet message, contact the Alton Field Division at (618) 463–6460.

Availability of Comments

We will make comments, including names and addresses of respondents, available for public review during normal business hours. We will not consider anonymous comments. If individual respondents request confidentiality, we will honor their request to the extent allowable by law. Individual respondents who wish to withhold their name or address from public review, except for the city or town, must state this prominently at the beginning of their comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public review in their entirety.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4 p.m., c.t. on December 14, 2005. If you are disabled and need special accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT.** We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold a hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at the public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT.** All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES.** We will make a written summary of each meeting a part of the administrative record.

IV. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments

submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. This determination is based on the fact that the Missouri program does not regulate coal exploration and surface coal mining and reclamation operations on Indian lands. Therefore, the Missouri program has no effect on Federally-recognized Indian tribes.

Executive Order 13211—Regulations That Significantly Affect The Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of $100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 925

Intergovernmental relations, Surface mining, Underground mining.

Dated: November 18, 2005.

Charles E. Sandberg,

Regional Director, Mid-Continent Region.

[FR Doc. 05–23456 Filed 11–28–05; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 926

[MT–025–FOR]

Montana Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: We are announcing receipt of a proposed amendment to the Montana regulatory program (hereinafter, the ''Montana program'') under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Montana proposes revisions to, additions of, and deletions of rules about: Definitions; permit application requirements; application processing and public participation; application review, findings, and issuance; permit conditions; permit renewal; performance standards; prospecting permits and notices of intent; bonding and insurance; protection of parks and historic sites; lands where mining is prohibited; inspection and enforcement; civil penalties; small operator assistance program (SOAP); restrictions on employee financial interests; blasters license; and revision of permits.

Montana intends to revise its program to be consistent with the corresponding Federal regulations and SMCRA, and to clarify ambiguities.

This document gives the times and locations that the Montana program and proposed amendment to that program are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we

will follow for the public hearing, if one is requested.

DATES: We will accept written comments on this amendment until 4 p.m., m.s.t. December 29, 2005. If requested, we will hold a public hearing on the amendment on December 27, 2005. We will accept requests to speak until 4 p.m., m.s.t. on December 14, 2005.

ADDRESSES: You may submit comments, identified by ''MT–025–FOR,'' by any of the following methods:

- E-mail: *rbuckley@osmre.gov*. Include ''MT–025–FOR'' in the subject line of the message.
- Mail, Hand Delivery/Courier: Richard Buckley, Acting Director, Casper Field Office, Office of Surface Mining Reclamation and Enforcement, Federal Building, 150 East B Street, Room 1018, Casper, WY 82601–1018, (307) 261–6550.
- Fax: (307) 261–6552.
- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and the identifier ''MT–025–FOR.'' For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Comment Procedures'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: Access to the docket, to review copies of the Montana program, this amendment, a listing of any scheduled public hearings, and all written comments received in response to this document, may be obtained at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting Office of Surface Mining Reclamation and Enforcement (OSM) Casper Field Office. In addition, you may review a copy of the amendment during regular business hours at the following locations:

Richard Buckley, Acting Director, Casper Field Office, Office of Surface Mining Reclamation and Enforcement, Federal Building, 150 East B Street, Room 1018, Casper, WY 82601–1018, (307) 261–6550, *rbuckley@osmre.gov*.

Neil Harrington, Chief, Industrial and Energy Minerals Bureau, Montana Department of Environmental Quality, P.O. Box 200901, Helena, MT 59620–0901, (406) 444–2544, *neharrington@mt.gov*.

FOR FURTHER INFORMATION CONTACT: Richard Buckley, Telephone: (307) 261–6550. E-mail: *rbuckley@osmre.gov*.

SUPPLEMENTARY INFORMATION:

I. Background on the Montana Program
II. Description of the Proposed Amendment
III. Public Comment Procedures
IV. Procedural Determination

I. Background on the Montana Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, ''a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Montana program on April 1, 1980. You can find background information on the Montana program, including the Secretary's findings, the disposition of comments, and conditions of approval of the Montana program in the April 1, 1980; **Federal Register** (45 FR 21560). You can also find later actions concerning Montana's program and program amendments at 30 CFR 926.15, 926.16, and 926.30.

II. Description of the Proposed Amendment

By letter dated August 29, 2005, Montana sent us a proposed amendment to its program (MT–025–FOR, Administrative Record No. MT–22–1) under SMCRA (30 U.S.C. 1201 *et seq.*). Montana sent the amendment in response to legislative revisions to its statutes, to the required program amendments at 30 CFR 926.16(e)(1), (k), (l), and (m), and to include the changes made at its own initiative. The full text of the program amendment is available for you to read at the locations listed above under **ADDRESSES.**

The provisions of the Administrative Rules of Montana (ARM) that Montana proposes to revise, delete, and/or add are: ARM 17.24.301, definitions; 17.24.302, permit application format; 17.24.303, application requirements for legal, financial, and compliance information; 17.24.306, application requirements for baseline environmental information; 17.24.305, permit application map requirements; 17.24.306, prime farmland investigation; 17.24.308, operations plan; 17.24.312, fish and wildlife plan; 17.24.313, reclamation plan; 17.24.315, plans for ponds and embankments; 17.24.321, transportation facilities plan; 17.24.322, geologic information and coal conservation; 17.24.323, grazing plan; 17.24.324, prime farmland special application requirements; 17.24.401, application filing and notice; 17.24.404, application review; 17.24.405, findings and decision; 17.24.412, extension of time to commence mining; 17.24.413, permit conditions; 17.24.416, permit renewal; 17.24.427, change of contractor; 17.24.501, backfilling and grading; 17.24.515, highwall reduction; 17.24.520, thick overburden and excess spoil; 17.24.522, permanent cessation of operations; 17.24.523, coal fires and coal conservation; 17.24.602, location of roads and railroads; 17.24.603, road and railroad embankments; 17.24.605, hydrologic impact of roads and railroads; 17.24.609, other support facilities; 17.24.623, blasting schedule; 17.24.624, surface blasting requirements; 17.24.626, blasting records; 17.24.633, water quality performance standards; 17.24.634, reclamation of drainage basins; 17.24.635, diversions; 17.24.636, temporary diversions; 17.24.638, sediment control; 17.24.639, sediment ponds and other treatment facilities; 17.24.642, permanent impoundments; 17.24.645, ground water monitoring; 17.24.646, surface water monitoring; 17.24.701, soil removal; 17.24.702, soil storage and redistribution; 17.24.703, soil substitutes; 17.24.711, revegetation establishment; 17.24.714, soil stabilization; 17.24.716, revegetation methods; 17.24.717, tree and shrub planting; 17.24.718, soil amendments and land use practices; 17.24.719, grazing; 17.24.720, revegetation inspections; 17.24.723, revegetation monitoring; 17.24.724, revegetation success standards; 17.24.725, responsibility period; 17.24.726, vegetation measurement; 17.24.730, seasonality; 17.24.732, revegetation of previously cropped areas; 17.24.733, measurement of trees and shrubs; 17.24.751, fish and wildlife protection; 17.24.761, air quality protection; 17.24.762, postmining land use; 17.24.764, cropland; 17.24.815, prime farmland revegetation; 17.24.821, alternate reclamation—alternative postmining land use, plans; 17.24.823, alternate reclamation— alternative postmining lands use, approval of plan; 17.24.824, alternate reclamation and alternative postmining land use; 17.24.825, alternate reclamation, alternate revegetation; 17.24.826, alternate reclamation, liability period; 17.24.832, auger mining; 17.24.901, underground mining application requirements; 17.24.903, underground mining performance standards; 17.24.911, subsidence control;

17.24.924, underground development waste, general; 17.24.927, durable rock fills; 17.24.930, coal processing waste; 17.24.932, disposal of coal processing waste; 17.24.1001, prospecting permit application; 17.24.1002, prospecting monthly reports; 17.24.1003, renewal and transfer of prospecting permits; 17.24.1017, bond release for drilling operations; 17.24.1018, notice of intent to prospect; 17.24.1104, bonding amounts; 17.24.1106, bond terms and conditions; 17.24.1108, certificates of deposit; 17.24.1109, letters of credit; 17.24.1116, bond release; 17.24.1125, liability insurance; 17.24.1129, annual report; 17.24.1131, protection of parks and historic sites; 17.24.1132, lands prohibited, definitions and standards; 17.24.1133, lands prohibited, procedures; 17.24.1201, inspections; 17.24.1202, compliance reviews; 17.24.1206, enforcement; 17.24.1211, civil penalties; 17.24.1212, civil penalty point system; 17.24.1219, individual civil penalties; 17.24.1225, small operator assistance program (SOAP); 17.24.1226, SOAP providers; 17.24.1250, restrictions on employee financial interests; 17.24.1255, multiple interest advisory boards; 17.24.1263, revocation or suspension of blasters license; and 17.24.1301, revision of existing permits.

Specifically, Montana proposes to the following revisions to its rules, all contained within the Administrative Rules of Montana (ARM). We note that in many but not all cases, Montana has proposed changing the numbering scheme for sub-requirements within the revised rules.

17.24.301, Definitions

(6) ''adjacent area'' proposed to be revised by deleting the existing definition and incorporating the statutory definition at 82–4–203(2), Montana Code Annotated (MCA).

(11) the definition is proposed to be changed from ''alternate reclamation'' to ''alternative postmining land use''.

(13) ''approximate original contour'' is proposed to be extensively revised to read as follows:

''Approximate original contour'' is defined in 82–4–203, MCA, as ''that surface configuration achieved by backfilling and grading of the mined areas so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls, spoil piles, and coal refuse piles eliminated so that:

(a) the reclaimed terrain closely resembles the general surface configuration if it is comparable to the premine terrain. For example, if the area was basically level or gently rolling before mining, it should retain these features after mining, recognizing that rolls and dips need not be restored to their original locations and that level areas may be increased;

(b) the reclaimed area blends with and complements the drainage pattern of the surrounding area so that water intercepted within or from the surrounding terrain flows through and from the reclaimed area in an unobstructed and controlled manner;

(c) postmining drainage basins may differ in size, location, configuration, orientation, and density of ephemeral drainageways compared to the premining topography if they are hydrologically stable, soil erosion is controlled to the extent appropriate for the postmining land use, and the hydrologic balance is protected as necessary to support postmining land uses within the area affected and the adjacent area; and

(d) the reclaimed surface configuration is appropriate for the postmining land use.''

(26) ''community or institutional building'' is proposed to be extensively revised to read as follows:

''Community or institutional building'' means any structure, other than a public building or a dwelling, which is used primarily for meetings, gatherings or functions of local civic organizations or other community groups; functions as an educational, cultural, historic, religious, scientific, correctional, mental-health or physical health care facility; or is used for public services, including, but not limited to, water supply, power generation or sewage treatment.

(33) ''diversion'' is proposed to be extensively revised to read as follows:

''Diversion'' means a channel, embankment, or other manmade structure constructed to divert undisturbed runoff around an area of disturbance and back to an undisturbed channel.

(36) a new definition of ''dwelling'' is proposed to be added to read as follows:

''Dwelling'' means a building inhabited by or useful for habitation by a person or persons.

(38) the existing definition of ''ephemeral stream'' is proposed to be revised to quote the statutory definition of ''ephemeral drainageway'' at 82–4–203(17), MCA.

(46) a new definition of ''good ecological integrity'' is proposed to be added to read as follows:

''Good ecological integrity'' means that the complex of community of organisms and its environment functioning as an ecological unit possesses components and processes in good working order. Pastureland and cropland managed in accordance with county or local conservation district or state or federal best management practices (resource management strategies, such as normal husbandry practices, used to manage or protect a resource and promote ecological and economic sustainability) generally reflect good ecological integrity with regard to such land uses.

(50) the definition of ''higher or better uses'' is proposed to be revised to quote the statutory definition at 82–4–203(23), MCA.

(53) the definition of ''historically used for cropland'' is proposed to be revised by adding a new subparagraph (53)(c) to read as follows:

(c) lands that would likely have been used for cropland for any five or more years out of the 10 years immediately preceding such acquisition but for the same fact of ownership or control of the land as in (53)(a) unrelated to the productivity of the land.

(53) the definition of ''hydrologic balance'' is proposed to be revised to quote the statutory definition at 82–4–203(24), MCA.

(59) the definition of ''incidental boundary change'' is proposed to be revised to read ''incidental boundary revision''.

(64) The introduction to and subparagraphs (b), (c), (d), (g), and (h) of the definition of ''land use'' is proposed to be revised to quote from the statutory definitions at 82–4–203, subparagraphs (28), (37), (22), (21), (43), and (20), MCA, to read as follows:

''Land use'' is defined in 82–4–203, MCA, as ''specific uses or management-related activities, rather than the vegetative cover of the land. Land uses may be identified in combination when joint or seasonal uses occur and may include land used for support facilities that are an integral part of the land use. Land use categories include cropland, developed water resources, fish and wildlife habitat, forestry, grazing land, industrial or commercial, pastureland, land occasionally cut for hay, recreation, or residential.''

(a) [remains the same]

(b) ''Pastureland'' is defined in 82–4–203, MCA, as ''land used primarily for the long-term production of adapted, domesticated forage plants to be grazed by livestock or occasionally cut and cured for livestock feed.''

(c) ''Grazing land'' is defined in 82–4–203, MCA, as ''land used for grasslands and forest lands where the indigenous vegetation is actively managed for livestock grazing or browsing or occasional hay production.''

(d) ''Forestry'' is defined in 82–4–203, MCA, as ''land used or managed for the long-term production of wood, wood fiber, or wood-derived products.''

(e) Through (f)(ii) [remain the same]

(g) ''Recreation'' is defined in 82–4–203, MCA, as ''land used for public or private leisure-time activities, including developed recreation facilities, such as parks, camps, and amusement areas, as well as areas for less intensive uses, such as hiking, canoeing, and other undeveloped recreational uses.''

(h) ''Fish and wildlife habitat'' is defined in 82–4–203, MCA, as ''land dedicated wholly or partially to the production, protection, or management of species of fish or wildlife.''

(i) [remains the same]

(67) a new definition of ''material damage'' is proposed to be added to quote the statutory definition at 82–4–203(30), MCA.

(68) the definition of ''materially damage the quantity or quality of water'' is proposed to be revised by deleting references to other definitions.

(90) the definition of ''prime farmland'' is proposed to be revised to quote the statutory definition at 82–4–203(40), MCA.

(103) the definition of ''reference area'' is proposed to be revised to quote the statutory definition at 82–4–203(44).

(107) the definition of ''road'' is proposed to be revised to delete the final sentence of the main clause, which currently reads:

> The term does not include pioneer or construction roadways that are used for part of the road construction procedure and that are promptly replaced by roads associated with the prospecting or mining operation in the identical right-of-way as the pioneer or construction roadway.

Further, subparagraph (107)(b), defining ''haul road,'' is proposed to be revised to read as follows: '' 'Haul road' means a road used for more than six months to transport coal, soil, or spoil.''

(143) a new definition of ''wildlife habitat enhancement features'' is proposed to be added to quote from the statutory definition at 82–4–203(55), MCA.

17.24.302, permit application requirements. Montana proposes to revise subparagraphs (1) and (2) to require that information in the application must be accurate, and that all tests, analyses, surveys, and data collection must be carried out at appropriate times and under appropriate conditions.

17.24.303, permit application legal and financial requirements. Montana proposes to require that applications include a copy of the proposed newspaper advertisement and proof of publication after it is published.

17.24.304, permit environmental baseline information. Montana proposes to: (1) Add a requirement that the uses of springs and uses of surface water bodies be added to the required listings; (2) revise the requirements for vegetation information to change the word ''vegetative'' to ''vegetation,'' revise the description of dominant species by deleting the phrase ''2 or more'' and change the term ''number'' to ''density''; (3) delete the requirements for a narrative discussing current condition or trend for plant community sub-types and also delete the requirement for a range site map; (4) specify that the operator contact the department (of Environmental Quality) at least three months before planning the required wildlife survey; (5) revise the requirement for a listing of fish and wildlife species by specifying all species and deleting the non-inclusive list that now exists; and (6) revising land use information to require the condition, capability, productivity, and history of use of the land and vegetation within the proposed permit area.

17.24.305, maps and plans. Montana proposes: (1) To revise subparagraph (1)(j) to require that maps showing the land to be affected include the pre-mine topography; (2) to revise subparagraph (2)(a) to require that map certifications submitted separately from the map must be in affidavit form; (3) revise subparagraph (2)(b) to add to the list of maps, plans, and cross-sections that must be prepared by (or under the direction of) and certified by a licensed professional engineer, the materials required under subparagraphs (1)(d), (e), (j), (k), (p), (q), (x), and (z); and (4) revise subparagraph (2)(b)(i) to add to the list of required materials that may be prepared by (or under the direction of) and certified by a licensed professional land surveyor, the materials required under subparagraphs (1)(d), (p), (x), and (z).

17.24.308, operations plan. Montana proposes to: (1) Revise the description of the operations for which a description is required by deleting the word ''mining'' and the phrase ''within the proposed mine plan area''; (2) add to the requirements for which the narrative must demonstrate compliance the applicable rules of subchapter 10 (underground mining); and (3) add to the proposed operations for which compliance must be demonstrated a new subsection which reads as follows:

> (vii) facilities or sites and associated access routes for environmental monitoring and data gathering activities [or] for the gathering of subsurface data by trenching, drilling, geophysical or other techniques to determine the nature, depth, and thickness of all known strata, overburden, and coal seams.

Montana notes that the bracketed word ''or'' was mistakenly omitted but will be added in the next rule-making.

17.24.312, fish and wildlife plan. Montana proposes: (1) To change from ''statement'' to ''description'' the description of the required plan; (2) to delete the statement that nothing ''herein'' may be construed to weaken the requirement of 82–4–233(1)(a), MCA; and (3) to add a requirement for a description of the wildlife habitat enhancement features that will be integrated with other land uses, pursuant to 82–4–232(9), MCA, and ARM 17.24.313.

17.24.313, reclamation plan. Montana proposes: (1) To require that the reclamation plan include the proposed postmining land use pursuant to ARM 17.24.762; (2) to require that the timetable for completion of reclamation steps be ''detailed''; (3) add ''other means as approved by the department'' to other specified means for showing the plan of highwall backfilling, reduction, ''or an alternative thereof''; (4) deleting a provision for ''alternate plans other than highwall reduction'' if ''consistent with the purposes of 82–4–232(7), MCA, and ARM 17.24.821 through 17.24.824''; (5) add a new requirement that the backfilling plan contain:

> a demonstration that the proposed postmining topography can be achieved. This demonstration must include a cross-section or set of cross-sections, or other method as approved by the department, to depict the removal of overburden and mineral and the replacement of the swelled spoil;

(6) delete an existing requirement for a plan for early detection of grading problems; (7) add a requirement to include:

> a description of postmining drainage basin reclamation that ensures protection of the hydrologic balance, achievement of postmining land use performance standards, and prevention of material damage to the hydrologic balance in adjacent areas, including:
>
> (i) A comparison of premining and postmining drainage basin size, drainage density, and drainage profiles as necessary to identify characteristics not distinguishable on the premining and postmining topographic maps;
>
> (ii) A discussion of how, within drainage basins:
>
> (A) The plan meets each performance standard in ARM 17.24.634;
>
> (B) The requirements of 82–4–231(10)(k), MCA, and ARM 17.24.314 will be met where the postmining topography differs from the premining as allowed by ARM 17.24.301(13)(c);
>
> (f) Drainage channel designs appropriate for preventing material damage to the hydrologic balance in the adjacent area and to meet the performance standards of ARM 17.24.634, including:
>
> (i) Detailed drainage designs for channels that contain critical hydrologic, ecologic or land use functions not already addressed in this rule such as alluvial valley floors, wetlands, steep erosive upland drainages, drainages named on USGS topographic maps, or intermittent or perennial streams. Detailed drainage designs include fluvial and geomorphic characteristics pertinent to the specific drainages being addressed; and
>
> (ii) For all other channels, typical designs and discussions of general fluvial and geomorphic habit, pattern, and other relevant functional characteristics;

(8) revise the plans for material handling to require:

plans for removal, storage, and redistribution of soil, overburden, spoils, and other material in accordance with ARM 17.24.501, 17.24.502, 17.24.503, 17.24.504, 17.24.505, 17.24.507, 17.24.510, 17.24.514, 17.24.515, 17.24.516, 17.24.517, 17.24.518, 17.24.519, 17.24.520, 17.24.521, and 17.24.522, and 17.24.701 through 17.24.703;

(9) require that the operator must submit plans for any necessary monitoring of soils, overburden, spoils, or other materials; (10) require that the narrative of revegetation methods include a discussion of revegetation types, including the acreage of each; and (11) require that the discussion of measures to be used to determine the success of revegetation include the use of reference areas and/or technical standards in relation to the revegetation types.

17.24.315, plans for ponds and embankments. Montana proposes to change the phrase ''registered professional engineer'' to the phrase ''licensed professional engineer'' in three places.

17.24.321, transportation facilities plan. Montana proposes (1) to delete the limiting words ''haul'' and ''access,'' leaving the general word ''road''; (2) revise the requirements for application materials to ''the following as appropriate for the type of construction'' and deleting in several subsequent itemized requirements the word ''appropriate''; (3) to change the phrase ''registered professional engineer'' to the phrase ''licensed professional engineer''; (4) add low water crossings to the plans and drawings required to be prepared by (or under the direction of), and certified by, a ''licensed professional engineer''; and (5) add 17.24.602, 17.24.603, 17.24.605, and delete 17.24.606, to and from the specified performance standards.

17.24.322, geologic information and coal conservation plan. Montana proposes: (1) To delete, from the coal conservation plan requirements, the location and dimensions of existing areas of spoil, waste, and garbage and other debris disposal, dams, embankments, other impoundments, and water treatment and air pollution control facilities within the proposed permit area; and (2) to add a requirement that:

For an operator with a federal resource recovery and protection plan, the department may review all applicable coal recovery information retained by the bureau of land management, in lieu of or in addition to the information requirements under (3).

17.24.323, grazing plan. Montana proposes to delete this rule.

17.24.324, prime farmland special application requirements. Montana proposes to delete ARM 17.24.821 through 17.24.825 (alternate reclamation) from the performance standards which the prime farmland reclamation plan must address.

17.24.401, filing of permit application and notice. Montana proposes in two places to revise the phrase ''alternate reclamation plan(s)'' to the phrase ''alternative postmining land use plan(s).''

17.24.404, review of application. Montana proposes: (1) To delete paragraph (9), which provides the applicant with the opportunity for a hearing under the Montana Administrative Procedure Act; and (2) to delete paragraph (10), which forbids the department to approve applications that may be inconsistent with other existing, proposed, or anticipated coal mining and reclamation operations in adjacent areas.

17.24.405, findings and notice of decision. Montana proposes: (1) To revise the date by which the department must approve or deny an application to ''no later than 45 days from the date of the acceptability determination except as provided by 75–1–208(4)(b), MCA; (2) revise the allowed time for an environmental impact statement from ''within 365 days of its notice given pursuant to ARM 17.24.401(2)'' to ''in accordance with 82–4–231, MCA''; (3) delete a requirement that the department publish a summary of the decision in a newspaper in the vicinity of the proposed project; (4) among the required findings, revise the finding dealing with ''alternate reclamation'' to ''alternative postmining land use'' and add 17.24.821 to the requirements that must be met; and (5) delete paragraph (7), which provides the applicant with an opportunity for a contested case hearing if prior violations prohibit issuance of the permit.

17.24.412, extension of time to commence mining. Montana proposes: (1) To add a requirement that requests for extensions are subject to the public participation requirements of 17.24.401–17.24.403; and (2) to delete from paragraph (3) a requirement for special newspaper notices of the request.

17.24.413, conditions of permits. Montana proposes to add an additional condition to all permits, to read as follows:

A permittee shall immediately notify the department whenever a creditor of the permittee has attached or obtained a judgment against the permittee's equipment or materials in the permit area or on the collateral pledged to the department.

17.24.416, permit renewals. Montana proposes to revise the required newspaper notice so that the renewal application must include the proposed newspaper notice and proof of publication in a newspaper approved by the department.

17.24.427, change of contractor. Montana proposes: (1) To revise paragraph (1) to require that the permittee must notify the department of any proposed new contractor or changes in an existing contractor, and require that notification to the department is required prior to proposed contractor changes if the permit has not been transferred; and (2) to revise paragraph (2) by deleting the existing requirement and adding a new requirement to ensure that the contractor may not conduct any activities on the permit area unless and until the department determines that the information submitted is acceptable and satisfies the requirements of ARM 17.24.303.

17.24.501, general backfilling and grading requirements. Montana proposes to revise paragraph (4) to: (1) Require that grading to approximate original contour must be in accordance with 82–4–232(1), MCA; (2) delete existing requirements that final slopes be graded to prevent slope failure, not exceed the angle of repose, and achieve a minimum long-term safety factor of 1.3; (3) revise subparagraph (4)(a) to require that the operator transport, backfill, and compact to ensure compliance with subparagraph (3)(b) and ARM 17.24.505; (4) further revise subparagraph (4)(a) to require that highwalls must be reduced or backfilled in compliance with ARM 17.24.515(1) or approved highwall reduction alternatives in compliance with ARM 17.24.515(2); and (5) still further revise subparagraph (4)(a) to delete existing requirements pertaining to box-cut spoils. Montana further proposes to revise paragraph (4) by adding a requirement that depressions must be eliminated except as provided in ARM 17.24.503(1).

Montana also proposes to revise 17.24.501, subparagraph (6)(d), to require that all backfilling and grading achieve the approved postmining topography. Montana also proposes to add a new paragraph (7), requiring the operator to notify the department, in writing, upon detection of grading problems that would result in topography not consistent with the approved postmine topography.

17.24.515, highwall reduction. Montana proposes to revise paragraph (1) to require that highwalls must be eliminated and the reduced highwall slope must be no greater than whatever slope is necessary to achieve a minimum long-term static safety factor

of 1.3. Montana also proposes to revise paragraph (2) by deleting existing subparagraph (2)(c) (which provides that highwall reduction alternatives must comply with 17.24.313, 17.24.821–17.21.824). Montana proposes additional new language to read as follows:

(2) Highwall reduction alternatives may be permitted only to replace bluff features that existed before mining and where the department determines that:

(a) Postmining bluffs are compatible with the proposed postmining land use;

(b) Postmining bluffs are stable, achieving a minimum long-term static safety factor of 1.3;

(c) Similar geometry and function exists between pre- and postmining bluffs;

(d) The horizontal linear extent of postmining bluffs does not exceed that of the premining condition; and

(e) Highwalls will be backfilled to the extent that the uppermost mineable coal seam is buried in accordance with ARM 17.24.505(1).

17.24.520, thick overburden and excess spoil. Montana proposes to change the phrase ''registered professional engineer'' to ''licensed professional engineer.'' Montana further proposes in subparagraph (3)(k) to delete a reference to 17.24.520(13) in addressing coal mine wastes disposed in mine excavations. Montana further proposes to revise at subparagraph (3)(m) the requirements for a program to return wastes to underground workings to include the performance standards of 17.24.920, 17.24.924(1), 17.24.930, and 17.24.932(1).

17.24.522, permanent cessation of operations. Montana proposes to delete the first two sentences of paragraph (3), which provide for completion of backfilling and grading within 90 days after the department determines the operation is completed, and that final pit reclamation must be as close to the coal loading operation as technical factors allow.

17.24.523, coal fires and coal conservation. Montana proposes to add a second paragraph to read as follows:

(2) Strip or underground mining operation must be conducted to prevent failure to conserve coal, utilizing the best technology currently available to maintain appropriate environmental protection.

The operator shall adhere to the approved coal conservation plan required in ARM 17.24.322.

17.24.601, road and railroad facility construction requirements. Montana proposes to change the phrase ''registered professional engineer'' to ''licensed professional engineer.''

17.24.602, location of roads and railroad facilities. Montana proposes to delete a requirement that the proposed locations of these facilities be marked on site prior to pre-inspection of the proposed operation.

17.24.603, road and railroad embankments. Montana proposes at paragraph (4) to delete a requirement for a minimum seismic safety factor, and revise the required minimum static safety factor from 1.5 to 1.3.

17.24.605, hydrologic impact of roads and railroads. Montana proposes to revise the existing requirement that drainage structures are required for stream channel crossings. The revision would allow the use of riprap for road crossings of ephemeral streams that are too shallow for placement of a culvert.

17.24.609, other support facilities. This rule requires that certain support structures meet certain design and construction requirements. Montana proposes to revise the rule to specify additional facilities, including septic systems and sewage lagoons, fuel storage and distribution facilities, and environmental monitoring sites.

17.24.623, blasting schedule. Montana proposes to revise paragraph (2) to require that blasting schedules be delivered to each residence within one-half mile of the permit area. Montana further proposes to revise at subparagraph (5)(b) the information required in blasting schedules, to include the township, range, and section of the specific areas, and to delete the requirement that specific blasting areas that are described be compact and no larger than 100 acres.

17.24.624, surface blasting requirements. Montana proposes to revise paragraph (4) to delete the phrase ''at all points'' within the one-half mile range for audibility of blast warnings. Montana proposes to revise subparagraph (6)(a) to require that airblast be controlled at any dwelling, or public, commercial, community or institutional building, unless the structure is owned by the operator. Similarly, Montana proposes to revise subparagraph (7)(a) to require that (unless approved by the department), no blasting be conducted within 1,000 feet of any dwelling or public, commercial, community or institutional building. Montana proposes to revise paragraph (11) to specify that peak particle velocities apply at any dwelling, or public, commercial, community or institutional building. Montana proposes to revise paragraph (14) to specify that the scaled-distance formula be calculated from the blast hole nearest to a dwelling, or public, commercial, community or institutional building, except as noted in paragraph (12).

17.24.626, blasting records. Montana proposes to revise subparagraph (1)(d) to require that blast records include direction and distance, in feet, from the blast hole nearest to a dwelling or commercial, public, community, or institutional building. Montana proposes to revise subparagraph (1)(j) to require blast records to contain total weight of explosives used and total weight of explosives used in each hole.

17.24.633, water quality performance standards. Montana proposes to revise paragraph (2) to read as follows:

(2) Sediment control through BTCA [best technology currently available] practices must be maintained until the disturbed area has been restored, the revegetation requirements of ARM 17.24.711, 17.24.713, 17.24.714, 17.24.716 through 17.24.718, 17.24.721, 17.24.723 through 17.24.726, and 17.24.731 have been met, the area meets state and federal requirements for the receiving stream, and evidence is provided that demonstrates that the drainage basin has been stabilized consistent with the approved postmining land use.

17.24.634, reclamation of drainage basins. Montana proposes numerous revisions to paragraph (1); the proposed paragraph (1) reads as follows:

(1) Reclaimed drainage basins, including valleys, channels, and floodplains must be constructed to:

(a) Comply with the postmining topography map required by ARM 17.24.313(1)(d)(iv) and approved by the department;

(b) Approximate original contour;

(c) An appropriate geomorphic habit or characteristic pattern consistent with 82–4–231(10)(k), MCA;

(d) [Remains the same]

(e) Provide separation of flow between adjacent drainages and safely pass the runoff from a six-hour precipitation event with a 100-year recurrence interval, or larger event as specified by the department;

(f) Provide for the long-term relative stability of the landscape. The term ''relative'' refers to a condition comparable to an unmined landscape with similar climate, topography, vegetation and land use;

(g) Provide an average channel gradient that exhibits a concave longitudinal profile;

(h) Establish or restore a diversity of habitats that are consistent with the approved postmining land use, and restore, enhance where practicable, or maintain natural riparian vegetation as necessary to comply with ARM subchapter 7; and

(i) Exhibit dimensions and characteristics that will blend with the undisturbed drainage system above and below the area to be reclaimed and that will accommodate the approved revegetation and postmining land use requirements.

Montana also proposes to revise paragraph (2) to change the phrase ''registered professional engineer'' to ''licensed professional engineer.''

17.24.635, general requirements for diversions. Montana proposes to revise paragraph (5) to change the phrase

''registered professional engineer'' to ''licensed professional engineer.'' Montana also proposes to delete paragraphs (6) and (7).

17.24.636, special requirements for temporary diversions. Montana proposes several revisions to existing paragraph (1), to read (renumbered) as follows:

(1)(a) remains the same, but is renumbered (1).

(2) If channel lining is required to prevent erosion, the channel lining must be designed using standard engineering practices to safely pass design velocities.

(3) Freeboard must be as specified by the department, but no less than 1.0 foot.

Montana also proposes to delete existing subparagraph (2)(a).

17.24.638, sediment control measures. Montana proposes to revise subparagraph (2)(a) to change the specified performance standards that must be met to minimize sediment, to include ARM 17.24.711, 17.24.713, 17.24.714, 17.24.716 through 17.24.721, and 17.24.723 through 17.24.726.

17.24.639, sediment ponds and other treatment facilities. Montana proposes to add a new subparagraph (1)(e), to require that sediment ponds be constructed as approved unless modified under ARM 17.24.642(7). Montana further proposes to revise paragraph (2) by deleting the final clause of existing subparagraph (2)(a) [''except as provided below''] and existing subparagraphs (b) through (e). Montana proposes to revise paragraph (3) to specify that the inlet to dewatering devises must not be below the maximum elevation of the sediment storage volume. Montana proposes to revise subparagraph (7)(a) to require that spillway designs assume the impoundment is at full pool; and further to delete a provision that no spillway is required if the sediment pond is entirely excavated. Montana proposes to revise paragraph (10) by adding a provision allowing the department to exempt the top-width requirement for some ponds. Montana proposes to revise paragraph (11) to require that the side slopes of the settled embankment must not be steeper than 3h:1v upstream and 2h:1v downstream, unless otherwise approved by the department. Montana proposes to revise paragraph (17) to change the phrase ''registered professional engineer'' to ''licensed professional engineer.'' Montana proposes to revise subparagraph (20)(a) to require that spillway designs assume the impoundment is at full pool. Montana proposes to revise subparagraph (22)(a) to read as follows:

(22)(a) All ponds with embankments must be designed and inspected regularly during construction under the supervision of, and certified after construction by, a qualified licensed professional engineer experienced in the construction of impoundments. After construction, inspections and certifications must be made and reports filed with the department, pursuant to ARM 17.24.642(4). Inspection and certification reports must be submitted until the embankments are removed.

Montana further proposes to delete subparagraph (22)(c). Montana proposes to revise paragraph (23) to limit inspection requirements to ponds with embankments. At newly renumbered paragraph (25), Montana proposes to change the list of required revegetation performance standards to include ARM 17.24.711, 17.24.713, 17.24.714, 17.24.716 through 17.24.718, 17.24.721, 17.24.723 through 17.24.726, and 17.24.731. At renumbered subparagraph (28)(a), Montana proposes that excavated sediment ponds require no spillway and must be able to contain the 10-year, 24-hour precipitation event, and conform with paragraphs (1), (2), (4), (6), (18), (22)(a), (24) and (27). At subparagraph (28)(b), Montana proposes to change the phrase ''registered professional engineer'' to ''licensed professional engineer.''

17.24.642, permanent impoundments and flood control impoundments. Montana proposes to revise paragraph (1) to read as follows:

(1) Permanent impoundments are prohibited unless constructed in accordance with ARM 17.24.504 and 17.24.639, and have open-channel spillways that will safely discharge runoff resulting from a 100-year, 24-hour precipitation event, assuming the impoundment is at full pool for spillway design, or larger event specified by the department. The department may approve a permanent impoundment upon the basis of a demonstration that:

Montana further proposes to delete subparagraphs (1)(g), (1)(h), and (1)(i). At paragraph (2), Montana proposes to limit to permanent impoundments the existing requirement that impoundments meet the performance requirements of 17.24.639. Montana proposes to delete paragraphs (3) through (6). Montana proposes to revise the maintenance provisions of renumbered paragraph (3) to require that all permanent impoundments be routinely maintained, and that ditches and spillways must be cleaned. Montana proposes to revise the inspection and certification provisions of renumbered paragraph (4) to limit the requirement to permanent impoundments, change the phrase ''registered professional engineer'' to ''licensed professional engineer,'' and require inspection reports until phase IV bond release. In the content requirements for inspection reports at subparagraphs (4)(c) and (4)(d), Montana proposes to change the phrases ''dam or embankment'' to the term ''impoundment.'' Montana proposes to delete existing paragraphs (9) and (10). Montana proposes new requirements to read as follows:

(5)(a) Flood control impoundments are located upstream of disturbance areas for the purpose of preventing or controlling flooding or discharge and are not designed for sediment control or to be permanent.

(b) Flood control impoundments with embankments must be constructed in accordance with (1)(f) and ARM 17.24.639(7) through (21), and be inspected, maintained and certified according to (3), (4)(a), (4)(d), and (6) and ARM 17.24.639(22) and (23).

(c) Excavated flood control impoundments:

(i) Must be in compliance with ARM 17.24.639(18);

(ii) Must have perimeter slopes that are stable; and

(iii) Must be protected against erosion where surface runoff enters the impoundment area.

(d) An initial pond certification report and inspections must be made for excavated flood control impoundments in accordance with ARM 17.24.639(28)(b). If the volume of the flood control impoundment is used in determination of required volume for a downstream pond, annual certification reports are required in accordance with (4)(a), (4)(c), and (4)(d).

(e) Prior to construction, flood control impoundments must be approved by the department.

(6) Permanent impoundments and flood control impoundments with embankments meeting the size or other criteria of 30 CFR 77.216(a) or the Class B or C criteria for dams in TR–60 [Technical Release 60] must be routinely inspected by a qualified licensed professional engineer or by someone under the supervision of a qualified licensed professional engineer, in accordance with 30 CFR 77.216–3.

(7) Plans for any enlargement, reduction in size, reconstruction, or other modifications of permanent impoundments and flood control impoundments must be submitted to the department and must comply with the requirements of this subchapter. Except where a modification is required to eliminate an emergency condition constituting a hazard to public health, safety, or the environment, the modification must not be initiated until the department approves the plans.

17.24.645, ground water monitoring. Montana proposes to revise paragraph (1) by deleting ''infiltration rates'' from the required parameters, and adding that the monitoring must be based on the monitoring program under 17.24.314, and changing the phrase ''in the mine plan and adjacent areas'' to ''in the permit and adjacent areas.'' In paragraph (3), Montana proposes to revise the allowance for additional ''hydrologic tests'' to additional ''observations and analyses.'' At paragraph (6), Montana proposes to update the citations of water sampling guidelines and the department's address where the guidelines may be obtained.

17.24.646, surface water monitoring. Montana proposes to revise paragraph

(1) to require that the monitoring be based on the information submitted under 17.24.304. At paragraph (4), Montana proposes that data from post-grading monitoring must be used to determine whether runoff meets requirements, that those data must be used by the department to review requests for water treatment systems; also, other information may be used for those purposes with departmental approval. At paragraph (6), Montana proposes to update the citations of water sampling guidelines and the department's address where the guidelines may be obtained.

17.24.701, removal of soil. Montana proposes to delete existing paragraph (3), and add a new paragraph (4) providing that soil removal is not required for minor disturbances which occur at the site of small structures such as power poles, signs or fences or where operations will not destroy vegetation and cause erosion.

17.24.702, redistribution and stockpiling of soil. Montana proposes to revise paragraph (4) to include requirements for the distribution of soil substitutes, and too revise subparagraph (4)(b) to provide that the department may grant exemptions from the requirement to scarify spoil materials, and provide that if no adverse effects to the redistributed material or postmining land use will occur, such treatments may be conducted after the soil or soil substitute is replaced. At paragraph (6), Montana proposes to delete a requirement that soil replacement be done on the contour whenever possible.

17.24.703, soil substitutes. Montana proposes that one requirement for soil substitutes is that the medium must be the best available in the permit area to support revegetation.

17.24.711, establishment of vegetation. Montana proposes extensive revisions, to read as follows:

(1) Vegetation must be reestablished in accordance with 82–4–233(1), (2), (3), and (5), MCA, as follows:

(a) Sections 82–4–233(1), (2), and (3), MCA, state: ''(1) The operator shall establish on regraded areas and on all other disturbed areas, except water areas, surface areas of roads, and other constructed features approved as part of the postmining land use, a vegetative cover that is in accordance with the approved permit and reclamation plan and that is:

''(a) diverse, effective, and permanent;

''(b) composed of species native to the area or of introduced species when desirable and necessary to achieve the postmining land use and when approved by the department;

''(c) at least equal in extent of cover to the natural vegetation of the area; and

''(d) capable of stabilizing the soil surface in order to control erosion to the extent appropriate for the approved postmining land use.

''(2) The reestablished plant species must:

''(a) be compatible with the approved postmining land use;

''(b) have the same seasonal growth characteristics as the original vegetation;

''(c) be capable of self-regeneration and plant succession;

''(d) be compatible with the plant and animal species of the area; and

''(e) meet the requirements of applicable seed, poisonous and noxious plant, and introduced species laws or regulations.

''(3) Reestablished vegetation must be appropriate to the postmining land use so that when the postmining land use is:

''(a) cropland, the requirements of subsections (1)(a), (1)(c), (2)(b), and (2)(c) are not applicable;

''(b) pastureland or grazing land, reestablished vegetation must have use for grazing by domestic livestock at least comparable to premining conditions or enhanced when practicable;

''(c) fish and wildlife habitat, forestry, or recreation, trees and shrubs must be planted to achieve appropriate stocking rates.''

(b) Section 82–4–233(5), MCA, states: ''For land that was mined, disturbed, or redisturbed after May 2, 1978, and that was seeded prior to January 1, 1984, using a seed mix that was approved by the department and on which the reclaimed vegetation otherwise meets the requirements of subsections (1) and (2) and applicable state and federal seed and vegetation laws and rules, introduced species are considered desirable and necessary to achieve the postmining land use and may compose a major or dominant component of the reclaimed vegetation.''

(2) For areas designated prime farmland, the requirements of ARM 17.24.811 and 17.24.815 must be met.

(3) The department shall determine cover, planting, and stocking specifications either on a programmatic basis or for each operation based on local and regional conditions after consultation with and approval by:

(a) [remains the same]

(b) the department of natural resources and conservation for reclamation to land uses involving forestry.

17.24.714, soil stabilization. Montana proposes to revise this rule to read as follows:

(1) Such practices as seedbed preparation, mulching, or cover cropping must be used on all regraded and resoiled areas to control erosion, to promote germination of seeds, and to increase the moisture retention of the soil until an adequate, permanent cover is established. This requirement may be suspended if the operator demonstrates to the department's satisfaction that it is not needed to control air or water pollution and erosion.

17.24.716, method of revegetation. Montana proposes to revise paragraph (1) by changing the phrase ''manner that encourages a prompt vegetative cover and recovery of productivity levels'' to ''manner that encourages prompt vegetation establishment.'' At paragraph (3), Montana proposes to delete a requirement that the operator shall utilize seed and seedlings genotypically adapted to the area when available in sufficient quality and quantity. Montana proposes to revise paragraph (4) by deleting a requirement that the department approve specific weed control plans. Montana also proposes to delete existing paragraph (5), addressing the use of introduced species.

17.24.717, planting of trees and shrubs. Montana proposes several revisions, to read as follows:

(1) Tree or shrub species necessary to meet the approved postmining land use must be adapted for local site conditions and climate. Trees and shrubs must be planted in combination with herbaceous species as necessary to achieve the postmining land use and as approved by the department. If necessary to increase tree and shrub survival, seeding of the herbaceous species may be delayed providing that measures are taken to control air and water pollution and erosion.

17.24.718, soil amendments and management practices. Montana proposes to revise paragraph (2) and add a new paragraph (3) to read as follows:

(2) An operator may use only normal husbandry practices to ensure the establishment of vegetation consistent with the approved reclamation plan.

(3) Reclamation land use practices including, but not limited to, grazing, haying, or chemical applications, may not be conducted in a manner or at a time that interferes with establishment and/or persistence of seeded and planted grasses, forbs, shrubs, and trees or with other reclamation requirements.

17.24.719, livestock grazing. Montana proposes to delete this rule.

17.24.720, annual inspections of revegetated areas. Montana proposes to delete this rule.

17.24.723, reclamation monitoring. Montana proposes to revise paragraph (1) to require monitoring under plans submitted under ARM 17.24.312(1)(d) and 17.24.313(1)(f)(iv) and (1)(g)(ix) and the approved postmining land use as approved by the department. Paragraph (2) is proposed to be revised by adding that monitoring is to demonstrate compliance with other State and Federal laws, in addition to Montana's equivalent of SMCRA. Montana proposes to revise paragraph (3) to delete the requirement that corrective actions be proposed to and approved by the department, but also to require the operator to implement measures to comply with permit requirements. Montana also proposes to delete paragraph (5), which referred the reader

to ARM 17.24.645, 17.24.646, and 17.24.1129.

17.24.724, revegetation success criteria. Montana proposed extensive revision to this rule, to read as follows:

(1) Success of revegetation must be determined by comparison with unmined reference areas or by comparison with technical standards. Reference areas and standards must be representative of vegetation and related site characteristics occurring on lands exhibiting good ecological integrity. The department must approve the reference areas, technical standards, and methods of comparison.

(2) Reference areas are parcels of land chosen for comparison to revegetated areas. A reference area is not required for vegetation parameters with approved technical standards. Reference areas must be in a condition that does not invalidate or preclude comparison to revegetated areas and the operator must:

(a) Have legal right to control the management of all approved reference areas; and

(b) Manage reference areas in a manner that is comparable to the management of the revegetated areas and in accordance with the approved postmining land use.

(3) Technical standards may be derived from:

(a) Historical data generated for a sufficient time period to encompass the range in climatic variations typical of the premine or other appropriate area; or

(b) Data generated from revegetated areas that are compared to historical data representing the range of climatic conditions comparable to those conditions existing at the time revegetated areas are sampled; or

(c) U.S. department of agriculture, U.S. department of the interior, or other publications or sources relevant to the area and land use of interest and approved by the department.

17.24.725, period of responsibility. Montana proposes to revise paragraph (1) so that the responsibility period begins after any activity related to phase III (rather than final) reclamation.

17.24.726, vegetation measurements. Montana proposes to revise this rule extensively, to read as follows:

(1) Standard and consistent field and laboratory methods must be used to obtain and evaluate vegetation data consistent with 82–4–233 and 82–4–235, MCA, and to compare revegetated area data with reference area data and/or with technical standards. Specific field and laboratory methods used and schedules of assessments must be detailed in a plan of study and be approved by the department. Sample adequacy must be demonstrated. In addition to these and other requirements described in this rule, the department shall supply guidelines regarding acceptable field and laboratory methods.

(2) Production, cover, and density shall be considered equal to the approved success standard when they are equal to or greater than 90% of the standard with 90% statistical confidence, using an appropriate (parametric or non-parametric) one-tail test with a 10% alpha error.

(3) The revegetated areas must meet the performance standards in (1) and (2) for at least two of the last four years of the phase III bond period. Pursuant to ARM 17.24.1113, the department shall evaluate the vegetation at the time of the bond release inspection for phase III to confirm the findings of the quantitative data.

(existing 9) remains the same, but is renumbered (4).

17.24.728, composition of vegetation. Montana proposes to delete this rule.

17.24.730, season of use. Montana proposes to delete this rule.

17.24.732, vegetation requirements for previously cropped areas. Montana proposes to delete this rule.

17.24.733, measurement standards for trees and shrubs. Montana proposes to delete this rule.

17.24.751, fish and wildlife. Montana proposes to revise paragraph (1) by adding a requirement for the operator to report any bald or golden eagle roost site, seasonal concentration area, or breeding territory; and also by adding a requirement that protective measures required by the U.S. Fish & Wildlife Service must be implemented when determined by the department in consultation with the U.S. Fish & Wildlife Service. Montana proposes to revise subparagraph (2)(a) by requiring that all powerlines be constructed in accordance with ''Suggested Practices for Raptor Protection on Power Lines: The State of the Art in 1996 (Avian Power Line Interaction Committee, 1996)''; and further by deleting a requirement that distribution lines must be designed and constructed in accordance with ''REA Bulletin 61–10, Powerline Contacts by Eagles and Other Large Birds,'' or in alternative guidance manuals approved by the department. Montana proposes to revise subparagraph (2)(c) to require operators to design and construct fences, overland conveyers, and other potential structures to permit passage of large mammals, except where the department determines that such requirements are unnecessary. Montana proposes to revise subparagraph (2)(e) to delete a requirement that that reclamation provide habitat in an equal or greater capacity than was provided prior to mining, and replace it with a requirement to provide habitat in accordance with the approved postmining land use; a requirement for inanimate habitat features is proposed to be revised by citing 82–4–231(10)(j) and 82–4–232(9), MCA; and a requirement that vegetative cover may not be less than that required by the approved postmining land use is proposed for deletion. Montana proposes to revise subparagraph (2)(f) to add the requirements of 82–4–231(10)(j), 82–4–232(9) for wetlands, riparian vegetation along rivers and streams and bordering ponds and lakes. Montana proposes to delete subparagraphs (2)(g), (2)(i), and (2)(j).

17.24.761, air resources protection. Montana proposes to delete most of this rule, leaving only existing paragraph (4) (renumbered as paragraph (2)) and, in paragraph (1), the requirement that operators employ fugitive dust controls in accordance with 82–4–231(10)(m), MCA, the operator's air quality permit.

17.24.762, postmining land use. Montana proposes to largely revise this rule, to read as follows:

(1) The postmining land use must satisfy 82–4–203(28) and 82–4–232(7), MCA. In applying 82–4–232(7), MCA, the following principles apply:

(a) The premining uses of the land to which the postmining land use is compared are those that the land previously supported or could have supported if the land had not been mined and had been properly managed.

(b) The postmining land use for land that has been previously mined and not reclaimed must be judged on the basis of the land use that existed prior to any mining. If the land cannot be reclaimed to the use that existed prior to any mining because of the previously mined condition, the postmining land use must be judged on the basis of the highest and best use that can be achieved and is compatible with surrounding areas.

(c) The postmining land use for land that has received improper management must be judged on the basis of the premining use of surrounding lands that have received proper management.

(d) If the premining use of the land was changed within five years of the beginning of mining, the comparison of postmining use to premining use must include a comparison with the use of the land prior to the change as well as its uses immediately preceding mining.

(2) Alternative postmining land uses may be proposed and must be determined in accordance with 82–4–232(7) and (8), MCA, and ARM 17.24.821 and 17.24.823.

(3) Certain premining facilities may be replaced pursuant to 82–4–232(10), MCA.

17.24.764, cropland reclamation. Montana proposes to add this new rule, to read as follows:

17.24.764 CROPLAND RECLAMATION (1) The department may not approve a postmining land use of cropland unless the following criteria are met:

(a) Prior to mining, all soils within the proposed cropland reclamation area must have been at least capability class IV, based on U.S. natural resources conservation service criteria;

(b) Soils proposed for use must have the following properties:

(i) Loamy texture, as defined by the U.S. soil conservation service in the Soil Survey

Manual, chapter 4 as revised May, 1981, pp. 4–56 and 4–57;

(ii) Rock fragment (gravels, cobbles, and channers only) contents less than 20% in the first lift and less than 35% in the second lift;

(iii) After materials are replaced, no greater than moderate wind and water erosion hazards as determined by U.S. natural resources conservation service procedures; and

(iv) Levels of electrical conductivity, sodium adsorption ratio, and plant available water-holding capacity meeting the criteria for class III soils according to the ''Land Capability Guide for Montana, U.S. Soil Conservation Service, June 1988'', which is incorporated by reference into this rule. A copy of this document may be obtained from the Natural Resources Conservation Service, 10 E. Babcock St., Bozeman, MT 59715;

(c) Soil materials must be capable of selection and handling in such a way, and redistribution to such a thickness, and the underlying regraded spoil properties must be of sufficient quality, that the postmining productivity of the root zone will be sufficient to support cropland as the postmining land use;

(d) Slope gradients must not exceed 8%;

(e) The area must receive a minimum of 12 inches average annual precipitation, or there must be sufficient irrigation water available and committed to maintain crop production;

(f) The area must not be subject to flooding that would impair its suitability as cropland due to flood effects including, but not limited to, erosion, siltation, and inundation;

(g) The area must have a minimum of 90 frost-free days per year; and

(h) The department must determine that:

(i) Saline seep on the proposed cropland area will not occur; and

(ii) The reclaimed area will not function as a saline seep recharge area for lands down-gradient.

(2) The operator shall comply with the following requirements in reclaiming to cropland:

(a)(i) Soil materials must be selected and handled in such a way and redistributed to such a thickness, and the underlying regraded spoil properties must be of sufficient quality such that the postmining productivity of the root zone will be sufficient to support cropland as the postmining land use.

(ii) The following minimum requirements must be met:

(A) Soils must be replaced to a minimum thickness of 24 inches; and

(B) The root zone thickness must be consistent with the requirements of ARM 17.24.501(2);

(b) If necessary to protect replaced soil materials from wind and water erosion, or if necessary to enhance soil productivity, stability or the capacity for root penetration, a grass-legume mixture must be planted and maintained as determined by the department; and

(c) Soil amendments must be added in accordance with ARM 17.24.718.

17.24.815, prime farmland revegetation. Montana proposes to create a new subparagraph (1)(a) to require that if the approved postmining land use is not cropland, either (1) test plots must be cropped to demonstrate restoration of productivity; the rest of the area, and the test plots after productivity demonstration, must be revegetated in accordance with the standards of ARM 17.24.711, 17.24.713, 17.24.714, 17.24.716 through 17.24.718, 17.24.721, 17.24.723 through 17.24.726, and 17.24.731 and with the approved postmining land use; or (2), the entire disturbed area might be cropped until productivity demonstration, after which the entire area must be revegetated as above. Montana also proposes a new subparagraph (1)(b) to provide that if the approved postmining land use is cropland, that the area be permanently reclaimed to cropland.

17.24.821. Montana proposes to change the title of this rule from ''Alternate Reclamation'' to ''Alternative Postmining Land Uses: Submission of Plan.'' The body of the rule is proposed to be revised extensively, to read:

(1) An operator may propose to the department a plan for a higher or better use as an alternative postmining land use pursuant to 82–4–232(7) and (8), MCA. With appropriate maps, narrative, and other materials, the plan must:

(a) describe the nature of the alternative postmining land use;

(b) address all of the criteria in 82–4–232(8) and (9), MCA; and

(c) address the applicable requirements of ARM 17.24.823(1).

(2) Each application for alternative postmining land use is subject to public review requirements of subchapter 4 either as part of a new application or as an application for a major revision. However, in its notice of application to government entities pursuant to ARM 17.24.401, the department shall allow 60 days for submission of comments from authorities having jurisdiction over land use policies and plans, and from appropriate state and federal fish and wildlife agencies.

17.24.823. Montana proposes to change the title of this rule from ''Alternate Reclamation: Approval Of Plan And Review Of Operation'' to ''Alternative Postmining Land Uses: Approval of Plan.'' The body of the rule is proposed to be revised extensively, to read:

(1) The department may approve a proposed alternative postmining land use if all of the following criteria are met:

(a) the requirements of 82–4–232(8) and (9), MCA;

(b) the proposed postmining land use is compatible, where applicable, with existing local, state or federal land use policies or plans relating to the permit area. Demonstration of compatibility with land use policies and plans must include, but is not limited to:

(i) written statement of the authorities with statutory responsibilities for land use policies and plans submitted pursuant to ARM 17.24.821(2); and

(ii) as applicable, obtaining any required approval, including any necessary zoning or other changes required for land use by local, state or federal land management agencies. This approval must remain valid throughout the strip or underground mining operations;

(c) specific plans are submitted to the department that show the feasibility of the postmining land use as related to projected land use trends and markets and that include a schedule showing how the proposed use will be financed, developed, and achieved within a reasonable time after mining and how it will be sustained. These plans must be supported, if appropriate, by letters of commitment from parties other than the operator;

(d) as applicable, provision of any necessary public facilities is ensured as evidenced by letters of commitment from parties other than the operator as appropriate, to provide the public facilities in a manner compatible with the plans submitted;

(e) plans for the postmining land use are designed under the general supervision of a licensed professional engineer, or other appropriate professional, to ensure that the plans conform to applicable accepted standards for adequate land stability, drainage, and aesthetic design appropriate for the postmining use of the site;

(f) the use will not involve unreasonable delays in reclamation; and

(g) appropriate measures submitted by state and federal fish and wildlife management agencies to prevent or mitigate adverse effects on fish, wildlife, and related environmental values and threatened or endangered plants have been incorporated into the plan.

17.24.824, alternate reclamation; alternative postmining land uses. Montana proposes to delete this rule.

17.24.825, alternate reclamation; alternative revegetation. Montana proposes to delete this rule.

17.24.826, alternate reclamation; period of responsibility for alternate revegetation. Montana proposes to delete this rule.

17.24.832, auger mining performance standards. Montana proposes to revise paragraph (4) by deleting the existing contemporaneous reclamation standard and replacing it with a cross-reference to the requirements of 17.24.501(6)(c). Montana also proposes to add a new subparagraph (5)(b) to require that each auger hole discharging water not containing acid- or toxic-forming materials must be sealed with an impervious noncombustible material, as contemporaneously as practicable with the augering operation, as approved by the department. And Montana proposes to revise subparagraph (5)(c) to change the requirement for auger holes not discharging water to be sealed within 30 days to ''as contemporaneously as

practicable with the augering operation.''

17.24.903, underground mining, general performance standards. Montana proposes to add a new paragraph (2) to require that adversely affected water supplies must be replaced in accordance with 82–4–243 and 82–4–253, MCA, and ARM 17.24.648.

17.24.911, subsidence control. Montana proposes to delete subparagraph (7)(d), which required replacement of any adversely affected domestic water supply.

17.24.924, disposal of underground development waste, general requirements. At subparagraphs (4)(a), (18)(a), and (18)(d), Montana proposes to change the phrase ''registered professional engineer'' to ''licensed professional engineer.'' At paragraph (9), Montana proposes to revise the list of revegetation performance standards, to include ARM 17.24.711, 17.24.713, 17.24.714, 17.24.716 through 17.24.718, 17.24.721, 17.24.723 through 17.24.726, and 17.24.731.

17.24.927, disposal of underground development waste, durable rock fills. In paragraphs (1) and (2), Montana proposes to change the phrase ''registered professional engineer'' to ''licensed professional engineer.''

17.24.930, placement and disposal of coal processing waste: special application requirements. At subparagraph (2)(a)(i), Montana proposes to change the phrase ''registered professional engineer'' to ''licensed professional engineer.''

17.24.932, disposal of coal processing waste. At subparagraph (5)(a), Montana proposes to change the phrase ''registered professional engineer'' to ''licensed professional engineer.''

17.24.1001, prospecting permit requirement. At subparagraph (1)(b), Montana proposes to add a requirement for a prospecting permit if conducted on an area designated unsuitable for strip or underground coal mining pursuant to ARM 17.24.1131. Montana also proposes to add a new subparagraph (2)(d), to read as follows:

(d) For any lands protected under 82–4–227(13), MCA, or ARM 17.24.1131, a demonstration that, to the extent technologically and economically feasible, the proposed prospecting activities will minimize interference with the values for which those lands were designated. The application must include documentation of consultation with the owner of the feature causing the land to come under the designation, and, when applicable, with the agency with primary jurisdiction over the feature with respect to the values that caused the land to be so designated;

Montana further proposes to add a new subparagraph (1)(q), to require a public notice and proof of publication in accordance with 17.24.303(23), and providing that the procedures of 17.24.401(3) and (5), 17.24.402, and 17.24.403 must be followed. Montana further proposes several new provisions, to read as follows:

(6) The department may not approve a prospecting permit application unless the application affirmatively demonstrates and the department finds in writing, on the basis of information set forth in the application or information otherwise available that is compiled by the department, that:

(a) The application is complete and accurate and that the prospecting and reclamation will be conducted in accordance with all applicable requirements of this subchapter;

(b) The proposed prospecting operation will not jeopardize the continued existence of endangered or threatened species or result in destruction or adverse modifications of their critical habitats;

(c) The application complies with applicable federal and state cultural resource requirements, including ARM 17.24.318, 17.24.1131 and 17.24.1137; and

(d) The proposed prospecting activities will meet the requirements of (2)(d) and that the owner of the feature causing any land to come under a protected designation, pursuant to 82–4–227(13), MCA, or ARM 17.24.1131, and, when applicable, with the agency with primary jurisdiction over the feature with respect to the values that caused the land to be so designated, have been provided the opportunity to comment on the department's finding on this matter.

(7) Prospecting related activities or facilities that are conducted or created in accordance with this rule and ARM 17.24.1002 through 17.24.1014 and 17.24.1016 through 17.24.1018 must be transferred to a valid strip or underground mining permit whenever such activities or facilities become part of mine operations in conjunction with ARM 17.24.308(2) or 17.24.609.

17.24.1003, renewal and transfer of permits. Montana proposes only to revise the title of this rule by adding the words ''and transfer.''

17.24.1018, notice of intent to prospect. Montana proposes to revise this rule by deleting existing subparagraph (1)(b)(i), which provides for a notice of intent if the purpose of the prospecting is not to determine the location, quality or quantity of a natural mineral deposit. Montana also proposes to add a new paragraph (2), to provide for a notice of intent if the prospecting is to gather environmental data. Montana also proposes to revise paragraph (9) to require that ARM 17.24.1001(2)(k) and (q) are applicable to notices of intent.

17.24.1104, bonding, adjustment of amount. Montana proposes to revise paragraph (1) to change bond ''adjustments'' to ''bond increases'' and ''area revised'' or ''work changes'' to ''increases.'' Montana proposes to revise paragraph (3) to limit bond adjustments for ''other circumstances'' to those not related to the completion of reclamation work, and to provide that bond reductions involving disturbed land previously released from reclamation liability in accordance with ARM 17.24.1111 through 17.24.1115 and 17.24.1116(6) are not considered bond releases subject to 17.24.1111.

17.24.1106, bonding: terms and conditions of bond. Montana proposes to delete existing paragraph (1), which provides that the department may not accept surety bonds in excess of 10% of the surety company's capital surplus account as shown on a balance sheet certified by a certified public accountant. Montana also proposes to add a new subparagraph (1)(b) providing that the department may not accept surety bonds from a surety company that is not listed in the U.S. Department of the Treasury's listing of approved sureties (Circular 570).

17.24.1108, bonding, certificates of deposit. Montana proposes to revise paragraph (1) to allow additional institutions to determine the maximum insurable amount. Montana also proposes to revise paragraph (2) to limit automatically renewable certificates of deposit to banks insured by the FDIC or credit unions insured by the national credit union administration.

17.24.1109, bonding, letters of credit. Montana proposes to revise subparagraph (1)(d), and add new subparagraphs (1)(e) through (1)(g), to read as follows:

(d) The letter must not be for an amount in excess of 10% of the bank's capital surplus account as shown on a balance sheet certified by a certified public accountant for the most recent annual reporting period.

(e) Using the balance sheet referenced in (1)(d) and a certified income and revenue sheet, the bank must meet the three following criteria:

(i) The bank must be earning at least a 1% return on total assets (net income/total assets = 0.01 or more);

(ii) The bank must be earning at least a 10% return on equity (net income/total stockholders equity = 0.1 or more); and

(iii) Capital or stockholders' equity must be at least 5.5% of total assets ((total stockholders equity [shareholders equity + capital surplus + retained earnings])/total assets = 0.055 or more).

(f) Under a general financial health category, from either Sheshunoff Information Services, Moody's (Mergent Ratings Service) or Standard and Poor's, the bank must have a b+ or better rating for the current and previous two quarters.

(g) The bank's qualifications must be reviewed yearly prior to the time the letter of credit is renewed.

17.24.1116, bonding, criteria and schedule for release. Montana proposes to delete paragraph (6), which addresses alternate reclamation. Montana also proposes to revise subparagraphs (6)(b) through (6)(d), and to add a new paragraph (7), to read as follows:

(b) Reclamation phase II is deemed to have been completed when:

(i) [remains the same].

(ii) At least two growing seasons (spring and summer for two consecutive years) have elapsed since seeding or planting of the affected area;

(iii) Vegetation is establishing that is consistent with the species composition, cover, production, density, diversity, and effectiveness required by the revegetation criteria in ARM 17.24.711, 17.24.713, 17.24.714, 17.24.716 through 17.24.718, 17.24.721, 17.24.723 through 17.24.726, 17.24.731 and 17.24.815 and the approved postmining land use;

(iii) through (v) remain the same, but are renumbered (iv) through (vi).

(c) Reclamation phase III is deemed to have been completed when:

(i) The applicable responsibility period (which commences with the completion of any reclamation treatments as defined in ARM 17.24.725) has expired and the revegetation criteria in ARM 17.24.711, 17.24.713, 17.24.714, 17.24.716 through 17.24.718, 17.24.721, 17.24.723 through 17.24.726, 17.24.731 and 17.24.815, as applicable to and consistent with the approved postmining land use are met;

(ii) A stable landscape has been established consistent with the approved postmining land use;

(iii) The lands are not contributing suspended solids to stream flow or runoff outside the permit area in excess of the requirements of ARM 17.24.633 or the permit; and

(iv) As applicable, the provisions of a plan approved by the department for the sound future management of any permanent impoundment by the permittee or landowner have been implemented to the satisfaction of the department; or

(v) The lands meet the special conditions provided in 82–4–235(3)(a), MCA;

(d) Reclamation phase IV is deemed to have been completed when:

(i) All disturbed lands within any designated drainage basin have been reclaimed in accordance with the phase I, II, and III requirements;

(ii) through (v) [remain the same].

(vi) Implementation of any alternative land use plan approved pursuant to ARM 17.24.821 and 17.24.823 has been successfully achieved; and

(vii) [remains the same].

(7) Information from annual reports and monitoring data, generated pursuant to ARM 17.24.645, 17.24.646, 17.24.723, and 17.24.1129, and from department inspection reports may be used or referenced to support applications for bond release.

17.24.1125, liability insurance. Montana proposes to revise paragraph (2) to require that liability insurance policies must be maintained in full force until final bond release on the permit area.

17.24.1129, annual report. Montana proposes to revise subparagraph (2)(e) to require to be included in annual reports any vegetation monitoring data and analyses pursuant to 17.24.723. Montana also proposes to revise paragraph (3) to clarify that only maps containing information listed in ARM 17.24.305(1) must be certified in accordance with ARM 17.24.305.

17.24.1131, protection of parks, historic sites, and other lands. Montana proposes to revise this rule to clarify that it applies to lands protected under paragraph (13) of 82–4–227, MCA.

17.24.1132, lands where mining is prohibited. Montana proposes to revise subparagraph (1)(a) to define ''valid existing rights'' to have the same definition as the definition of the term contained in 30 CFR 761.5 (2003), which is incorporated by reference into the rule.

17.24.1133, lands where mining is prohibited, procedures. Montana proposes to revise paragraph (2), add new subparagraphs (2)(a) and (2)(b) and new paragraph (3), to read as follows:

(2) Whenever a proposed operation would be located on any lands listed in 82–4–227(7) or (13), MCA, (except for proximity to public roads) or ARM 17.24.1131, the department shall reject the application unless:

(a) The applicant has valid existing rights for the proposed permit area; or

(b) The operation existed when the land came under the protection of 82–4–227(7) or (13), MCA, (except the proximity of public roads) or ARM 17.24.1131. This exception applies only to land within the permit area as it exists when the land comes under this protection.

(3) Procedures for submitting requests and for determining valid existing rights must be conducted in accordance with 30 CFR 761.16 (2003), which is incorporated into this rule by this reference. Copies of 30 CFR 761.16 may be obtained from the department at its Helena office.

17.24.1201, inspections. Montana proposes several revisions to this rule, to read as follows:

(1) The department shall conduct an average of at least one partial inspection per month of each active mining operation and such partial inspections of each inactive mining operation as are necessary to enforce the Act, the rules adopted under the Act and the permit, at least one complete inspection per calendar quarter of each active and inactive mining operation, and such periodic partial or complete inspections of prospecting operations as are necessary to enforce the Act, the rules adopted pursuant thereto, and the permit.

(2) A partial inspection is an on-site or aerial observation of the operator's compliance with some of the mining or prospecting permit conditions and requirements. Aerial inspections shall be conducted in a manner and at a time that reasonably ensure the identification and documentation of conditions at each operation in relation to permit conditions and requirements.

(3) A complete inspection is an on-site observation of the operator's compliance with all of the mining or prospecting permit conditions and requirements within the entire area disturbed or affected by the operation.

(4) Inspections must occur without prior notice to the permittee, except for necessary on-site meetings, be conducted on an irregular basis, and be scheduled to detect violations on nights, weekends, and holidays.

17.24.1202. Montana proposes revisions to both the title and body of this rule, to read as follows:

17.24.1202 CONSEQUENCES OF INSPECTIONS AND COMPLIANCE REVIEWS

(1) Inspectors shall examine mining and reclamation activities and promptly file with the department inspection reports adequate to determine whether violations exist.

(2) If it is determined on the basis of an inspection that the permittee is, or any condition or practice exists, in violation of any requirement of this part or any permit condition required by this part, the director or an authorized representative shall promptly issue a notice of noncompliance or order of cessation for the operation or the portion of the operation relevant to the condition, practice, or violation in accordance with 82–4–251, MCA, and this subchapter.

(3) The department may order changes in mining and reclamation plans as are necessary to ensure compliance with the Act and the rules adopted pursuant thereto.

(4) If on the basis of field inspection or review of records or reports the department determines that reclamation is unsuccessful in terms of the Act, the rules adopted pursuant thereto or permit conditions or requirements, the department shall order the operator to immediately investigate and determine the cause. The operator shall subsequently submit an investigative report along with a prescribed course of corrective action, so that alternatives can be employed to promptly ensure compliance with the Act, the rules adopted pursuant thereto, and the permit.

17.24.1206, enforcement. Montana proposes to revise paragraph (4) to delete a provision that if a notice of noncompliance or cessation order does not require any abatement, terminations of abatement need not be issued. Montana proposes to revise subparagraph (5)(d) to clarify that requests for abatement extensions beyond 90 days must be submitted to the board of environmental review, and that hearings must be a contested case

hearings in accordance with 82–4–206, MCA.

17.24.1211, civil penalties. Montana proposes to revise paragraph (2) to clarify that to contest the fact of violation or the amount of penalty, requests for hearings must be submitted to the board of environmental review, and that hearings must be a contested case hearings in accordance with 82–4–206, MCA.

17.24.1212, civil penalty point system. Montana proposes to revise paragraph (4) to clarify that the hearings specified are those requested under 82–4–254(3), MCA.

17.24.1219, individual civil penalties, procedures. Montana proposes to revise paragraph (2) to reduce the time for an assessment to become final from 30 days to 20 days, and decreases the length of time allowed for an individual to request a hearing from 30 days to 20 days; also, Montana proposes that a request for hearing is a hearing under 82–4–254(3), MCA. Montana proposes to revise paragraph (4) to provide that the hearing on the individual civil penalty must be a contested case hearing conducted in accordance with 82–4–206(2), MCA.

17.24.1226, small operator assistance, qualifications of providers. Montana proposes to revise subparagraph (2)(a)(vi) to require providers to be capable of meeting the applicable standards and methods contained in ARM 17.24.645 and 17.24.646.

17.24.1263, suspension or revocation of blasters license. Montana proposes to revise paragraph (3) to clarify that blasters have a right to request a contested case hearing before the board of environmental review.

17.24.1302, revision of permits. Montana proposes many revisions to this rule, to read as follows:

(1) Within one year of October 22, 2004, each operator and each test pit prospector shall submit to the department an application for all permit revisions necessary to bring the permit and operations conducted thereunder into compliance with subchapters 3 through 12 as they read on October 22, 2004.

(2) A permit revision application submitted solely for purposes of (1) is a minor revision for purposes of subchapter 4.

(3) No permittee may continue to mine or reclaim under an operating permit after the midterm (date that is two and one-half years after permit issuance or renewal) of the permit or the permit renewal date, whichever occurs later, unless the permit has been revised to comply with subchapters 3 through 12, as amended on October 22, 2004.

In addition to the proposed revisions described above, Montana proposed numerous editorial revisions and codification changes necessitated by additions or deletions of provisions.

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the Montana program.

Written Comments

Send your written or electronic comments to OSM at the address given above. Your comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of your recommendations. We will not consider or respond to your written comments when developing the final rule if they are received after the close of the comment period (see **DATES**). We will make every attempt to log all comments into the administrative record, but comments delivered to an address other than the Casper Field Office may not be logged in.

Electronic Comments

Please submit Internet comments as an ASCII file avoiding the use of special characters and any form of encryption. Please also include ''Attn: SATS No. MT–025-FOR'' and your name and return address in your Internet message. If you do not receive a confirmation that we have received your Internet message, contact the Casper Field Office at (307) 261–6550. In the final rulemaking, we will not consider or include in the administrative record any electronic comments received after the time indicated under **DATES** or at e-addresses other than the Casper Field Office.

Availability of Comments

We will make comments, including names and addresses of respondents, available for public review during normal business hours. We will not consider anonymous comments. If individual respondents request confidentiality, we will honor their request to the extent allowable by law. Individual respondents who wish to withhold their name or address from public review, except for the city or town, must state this prominently at the beginning of their comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public review in their entirety.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4 p.m., m.s.t. on December 14, 2005. If you are disabled and need special accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold the hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at a public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES.** We will make a written summary of each meeting a part of the administrative record.

IV. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of

SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA. Section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally recognized Indian Tribes and have determined that the rule does not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. The rule does not involve or affect Indian Tribes in any way.

Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

No environmental impact statement is required for this rule since agency decisions on proposed State regulatory programs and amendments thereof are categorically excluded from compliance with the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) by the Manual of the Department of the Interior (516 DM 6, appendix 8, paragraph 8.4B(29)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2) of the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of $100 million.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

This determination is based upon the fact that the State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 926

Intergovernmental relations, Surface mining, Underground mining.

Dated: October 27, 2005.

James F. Fulton,

Acting Regional Director, Western Region.

[FR Doc. 05–23396 Filed 11–28–05; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 943

[Docket No. TX–055–FOR]

Texas Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are announcing receipt of a proposed amendment to the Texas regulatory program (Texas program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Texas proposes revisions to and additions of regulations and statutes regarding the State's annual fees that are required from coal mining permit holders. In addition to the current annual fee, Texas proposes to add two new annual fees. Texas intends to revise its program to reduce the economic cost to the coal mining industry as a whole and to require coal mining permit holders that have ceased mining to pay annual fees.

This document gives the times and locations that the Texas program and proposed amendment to that program are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments on this amendment until 4 p.m., c.t., December 29, 2005. If

requested, we will hold a public hearing on the amendment on December 27, 2005. We will accept requests to speak at a hearing until 4 p.m., c. t. on December 14, 2005.

ADDRESSES: You may submit comments, identified by Docket No. TX–055–FOR, by any of the following methods:

- E-mail: *mwolfrom@osmre.gov.* Include ''Docket No. TX–055–FOR'' in the subject line of the message.
- Mail/Hand Delivery: Michael C. Wolfrom, Director, Tulsa Field Office, Office of Surface Mining Reclamation and Enforcement, 5100 East Skelly Drive, Suite 470, Tulsa, Oklahoma 74135–6547.
- Fax: (918) 581–6419.
- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Comment Procedures'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to review copies of the Texas program, this amendment, a listing of any scheduled public hearings, and all written comments received in response to this document, you must go to the address listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSM's Tulsa Field Office. Michael C. Wolfrom, Director, Tulsa Field Office, Office of Surface Mining Reclamation and Enforcement, 5100 East Skelly Drive, Suite 470, Tulsa, Oklahoma 74135–6547.

Telephone: (918) 581–6430. E-mail: *mwolfrom@osmre.gov.*

In addition, you may review a copy of the amendment during regular business hours at the following location: Surface Mining and Reclamation Division, Railroad Commission of Texas, 1701 North Congress Avenue, Austin, Texas 78711–2967.

Telephone: (512) 463–6900.

FOR FURTHER INFORMATION CONTACT: Michael C. Wolfrom, Director, Tulsa Field Office. Telephone: (918) 581–6430. E-mail: *mwolfrom@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Texas Program
II. Description of the Proposed Amendment
III. Public Comment Procedures
IV. Procedural Determinations

I. Background on the Texas Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, ''a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Texas program effective February 16, 1980. You can find background information on the Texas program, including the Secretary's findings, the disposition of comments, and the conditions of approval of the Texas program in the February 27, 1980, **Federal Register** (45 FR 12998). You can also find later actions concerning the Texas program and program amendments at 30 CFR 943.10, 943.15 and 943.16.

II. Description of the Proposed Amendment

By letter dated October 6, 2005 (Administrative Record No. TX–660), Texas sent us an amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*). Texas sent the amendment at its own initiative. Below is a summary of the changes proposed by Texas. The full text of the program amendment is available for you to read at the locations listed above under **ADDRESSES.**

A. Revisions to Texas' Statutes

Section 134.055 of the Texas Natural Resources Code currently requires each permit holder to pay an annual mined acreage fee for each acre of land in the permit area on which the permit holder actually conducted operations for removing coal during the year. Presently, this fee cannot be less than $120.00 per acre. Texas proposes to revise section 134.055 by eliminating the $120.00 per acre minimum fee and allowing the Railroad Commission of Texas (Commission) to determine the amount of this fee. Texas also proposes to add two new annual fees; a mining permit fee for mining permits in effect at the end of a calendar year and a bond acreage fee for each acre of land in the bonded permit area. Texas proposes to allow the Commission to determine the amount of each of the two new annual fees.

B. Revisions to Texas' Regulations

Texas proposes to revise its regulations at 16 Texas Administrative Code (TAC) 12.108, regarding permit fees, to implement the above proposed statutory amendments.

Texas proposes to add the title, ''Application Fees,'' and the title, ''Annual Fees,'' to paragraph (a) and paragraph (b), respectively, and to require the fees due and payable no later than March 15th of the year following the year for which these fees are applicable.

Texas also proposes to reduce the current annual mined acreage fee from $390.00 per acre to $160.00 per acre for each acre of land within the permit area on which coal or lignite was actually removed during the calendar year. In addition, Texas proposes to add a new bond acreage fee and proposes to set it at $3.00 per acre for each acre of land within a permit area covered by a reclamation bond on December 31st of the year. Finally, Texas proposes to add a new mining permit fee and proposes to set it at $3,550.00 for each permit in effect on December 31st of the year.

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the State program.

Written Comments

Send your written or electronic comments to OSM at the address given above. Your written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of your recommendations. We will not consider or respond to your comments when developing the final rule if they are received after the close of the comment period (see **DATES**). We will make every attempt to log all comments into the administrative record, but comments delivered to an address other than the Tulsa Field Office may not be logged in.

Electronic Comments

Please submit Internet comments as an ASCII or Word file avoiding the use of special characters and any form of encryption. Please also include ''Attn: Docket No. TX–055–FOR'' and your name and return address in your Internet message. If you do not receive a confirmation that we have received your Internet message, contact the Tulsa Field Office at (918) 581–6430.

Availability of Comments

We will make comments, including names and addresses of respondents, available for public review during normal business hours. We will not consider anonymous comments. If individual respondents request confidentiality, we will honor their request to the extent allowable by law. Individual respondents who wish to withhold their name or address from public review, except for the city or town, must state this prominently at the beginning of their comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public review in their entirety.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4 p.m., c.t. on December 14, 2005. If you are disabled and need special accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold a hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at the public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES.** We will make a written summary of each meeting a part of the administrative record.

IV. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. This determination is based on the fact that the Texas program does not regulate coal exploration and surface coal mining and reclamation operations on Indian lands. Therefore, the Texas program has no effect on Federally-recognized Indian tribes.

Executive Order 13211—Regulations That Significantly Affect The Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant

economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of $100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 943

Intergovernmental relations, Surface mining, Underground mining.

Dated: November 1, 2005.

Charles E. Sandberg,

Regional Director, Mid-Continent Region.

[FR Doc. 05–23402 Filed 11–28–05; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 950

[WY–033–FOR]

Wyoming Abandoned Mine Land Reclamation Plan

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: We are announcing receipt of a proposed amendment to the Wyoming abandoned mine land reclamation (AMLR) plan (the ''Wyoming plan'') under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Wyoming proposes revisions and additions to its AMLR Plan to be consistent with SMCRA by removing phrases concerning liens for reclamation on private lands and by removing and adding words concerning contract eligibility.

DATES: We will accept written comments on this amendment until 4 p.m., m.s.t., December 29, 2005. If requested, we will hold a public hearing on the amendment on December 27, 2005. We will accept requests to speak until 4 p.m., m.s.t., December 14, 2005.

ADDRESSES: You may submit comments, identified by ''WY–033–FOR'', by any of the following methods:

- E-mail: *rbuckley@osmre.gov.* Include ''WY–033–FOR'' in the subject line of the message.
- Mail/Hand Delivery/Courier: Richard W. Buckley, Casper Field Office, Office of Surface Mining Reclamation and Enforcement, Federal Building, 150 East B Street, Room 1018, Casper, Wyoming 82601–1018. Telephone: 307/261–6550. E-mail: *RBuckley@osmre.gov.*
- Fax: 307/261–6552.
- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and SATS No. WY–033–FOR. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Comment Procedures'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: Access to the docket (administrative record), to review copies of the Wyoming plan, this amendment, a listing of any scheduled public hearings, and all written comments received in response to this document at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting the Office of Surface Mining Reclamation and Enforcement (OSM) Casper Field Office. In addition, you may review a copy of the amendment during regular business hours at the following locations: Richard W. Buckley, Acting Director, Casper Field Office, Office of Surface Mining Reclamation and Enforcement, 150 East B Street, Room 1018, Casper, Wyoming 82601–1018. Telephone: 307/261–6550. E-mail: *RBuckley@osmre.gov.* Evan Green, AML Administrator, Wyoming Abandoned Mine Lands Program, Herschler Building, 4th Floor West, 122 West 25th Street, Cheyenne, Wyoming 82002. Telephone: 307/777–6145. E-mail: *egreen@state.wy.us.*

FOR FURTHER INFORMATION CONTACT: Acting Field Office Director Richard W. Buckley. Telephone: 307/261–6550. E-mail: *RBuckley@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Wyoming Plan
II. Description of the Proposed Amendment
III. Public Comment Procedures
IV. Procedural Determinations

I. Background on the Wyoming Plan

The Abandoned Mine Land Reclamation Program was established by Title IV of the Act (30 U.S.C. 1201 *et seq.*) in response to concerns over extensive environmental damage caused by past coal mining activities. The program is funded by a reclamation fee collected on each ton of coal that is produced. The money collected is used to finance the reclamation of abandoned coal mines and for other authorized activities. Section 405 of the Act allows States and Indian tribes to assume exclusive responsibility for reclamation activity within the State or on Indian lands if they develop and submit to the Secretary of the Interior for approval, a program (often referred to as a plan) for the reclamation of abandoned coal mines. On February 14, 1983, the Secretary of the Interior approved the Wyoming plan. You can find general background information on the Wyoming plan, including the Secretary's findings and the disposition of comments, in the February 14, 1983, **Federal Register** (48 FR 6536). You can also find later actions concerning Wyoming's plan and plan amendments at 30 CFR 950.35 and outstanding required amendments at 30 CFR 950.36.

II. Description of the Proposed Amendment

By letter dated September 1, 2005, Wyoming sent us a proposed amendment to its plan (WY–033–FOR, (administrative record No. WY–033–01) under SMCRA (30 U.S.C. 1201 *et seq.*). Wyoming sent the amendment in response to the required plan amendments at 30 CFR 950.36 (a) and (b). The full text of the plan amendment is available for you to read at the locations listed above under **ADDRESSES**.

Specifically, Wyoming proposes to remove from Wyoming Statute (W.S.)

35–11–1206(a) the phrases ''not to exceed the cost of reclamation work or'' and ''whichever is less;'' remove from W.S. 35–11–1206(b) the phrase ''of but not exceeding the cost of reclamation;'' remove from W.S. 35–11–1209 the words ''professional'' and ''contractors;'' and add to W.S. 35–11–1209 the phrase ''vii, Unresolved notice of violation.''

III. Public Comment Procedures

Under the provisions of 30 CFR 884.15(a), OSM requests your comments on whether the amendment satisfies the applicable State reclamation plan approval criteria of 30 CFR 884.14. If we approve the amendment, it will become part of the Wyoming plan.

Written Comments

Send your written comments to OSM at the address given above. Your written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of your recommendations. In the final rulemaking, we will not consider or include in the administrative record any comments received after the time indicated under **DATES** or at locations other than the Casper Field Office.

Electronic Comments

Please submit Internet comments as an ASCII or MS Word file avoiding the use of special characters and any form of encryption. Please also include ''Attn: SATS No. WY–033–FOR'' and your name and return address in your Internet message. If you do not receive a confirmation that we have received your Internet message, contact the Casper Field Office at 307/261–6555. In the final rulemaking, we will not consider or include in the administrative record any electronic comments received after the time indicated under **DATES** or at e-addresses other than the Casper Field Office.

Availability of Comments

We will make comments, including names and addresses of respondents, available for public review during normal business hours. We will not consider anonymous comments. If individual respondents request confidentiality, we will honor their request to the extent allowable by law. Individual respondents who wish to withhold their name or address from public review, except for the city or town, must state this prominently at the beginning of their comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public review in their entirety.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4 p.m., m.s.t., December 14, 2005. If you are disabled and need special accommodations to attend a public hearing, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold the hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at a public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings will be open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the administrative record.

IV. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that, to the extent allowable by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of Wyoming AMLR plans and revisions thereof because each plan is drafted and promulgated by a specific State, not by OSM. Decisions on proposed State AMLR plans and revisions thereof submitted by a State are based on a determination of whether the submittal meets the requirements of Title IV of SMCRA (30 U.S.C. 1231–1243) and the applicable Federal regulations at 30 CFR part 884.

Executive Order 13132—Federalism

This rule does not have federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and section 503(a)(7) requires that state programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally recognized Indian Tribes and have determined that the rule does not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes. The rule does not involve or affect Indian Tribes in any way.

Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not

expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

No environmental impact statement is required for this rule since agency decisions on proposed State AMLR plans and revisions thereof are categorically excluded from compliance with the National Environmental Policy Act (42 U.S.C. 4331 *et seq.*) by the Manual of the Department of the Interior (516 DM 6, appendix 8, paragraph 8.4B(29)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of $100 million; (b) will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; (c) does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

This determination is based upon the fact that the State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded Mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 950

Abandoned mine reclamation programs, Intergovernmental relations, Surface mining, Underground mining.

Dated: October 7, 2005.

Allen D. Klein,

Regional Director, Western Region.

[FR Doc. 05–23399 Filed 11–28–05; 8:45 am]

BILLING CODE 4310–05–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R04–OAR–2005–GA–0005–200537; FRL–8003–4]

Approval and Promulgation of Implementation Plans; Georgia: Approval of Revisions to the State Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing a correction to the State Implementation Plan (SIP) for the State of Georgia regarding the State's general ''nuisance'' rule. EPA has determined that this rule, Georgia Rule 391–3–1.02(2)(a)1, was erroneously incorporated into the SIP. EPA is proposing to remove this rule from the approved Georgia SIP because the rule is not related to the attainment and maintenance of the national ambient air quality standards (NAAQS).

DATES: Written comments must be received on or before December 29, 2005.

ADDRESSES: Submit your comments, identified by Regional Material in EDocket (RME) ID No. R04–OAR–2005–GA–0005, by one of the following methods:

1. Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

2. Agency Web site: *http://docket.epa.gov/rmepub/* RME, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Once in the system, select ''quick search,'' then key in the appropriate RME Docket identification number. Follow the on-line instructions for submitting comments.

3. E-mail: *lakeman.sean@epa.gov.*

4. Fax: (404) 562–9019.

5. Mail: ''R04–OAR–2005–GA–0005'', Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960.

6. Hand Delivery or Courier. Deliver your comments to: Sean Lakeman, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division 12th floor, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

Instructions: Direct your comments to RME ID No. R04–OAR–2005–GA–0005. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://docket.epa.gov/rmepub/,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through RME, regulations.gov, or e-mail. The EPA RME Web site and the federal regulations.gov Web site are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through RME or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of

encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the RME index at *http://docket.epa.gov/rmepub/.* 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 RME or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Sean Lakeman, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9043. Mr. Lakeman can also be reached via electronic mail at *lakeman.sean@epa.gov.*

SUPPLEMENTARY INFORMATION: The first significant amendments to the CAA occurred in 1970 and 1977. Following these amendments, a large number of SIPs were submitted to EPA to fulfill new federal requirements. In many cases, states and districts submitted their entire programs, including many elements not required pursuant to the Act. Due to resource constraints during this timeframe, EPA's review of these submittals focused primarily on the required technical, legal, and enforcement elements of the submittals. At the time, EPA did not perform a detailed review of the numerous provisions submitted to determine if each provision was related to the attainment and maintenance of the NAAQS. However, provisions approved as part of states' SIPs should generally be related to attainment and maintenance of the NAAQS, consistent with the authority in section 110 of the Act under which these plans are approved by EPA.

During the process of responding to a recent citizen petition of a title V operating permit in Georgia, EPA determined that a provision of the State's rules, approved as part of the SIP on January 3, 1980, (45 FR 780), is not related to the attainment and maintenance of the NAAQS. This State rule, ''Georgia Air Quality Control Rule 391–3–1–.02(2)(a)1,'' is a general nuisance provision. In addition, Georgia has never used this rule as part of a federal air quality standard attainment or maintenance plan. Georgia has also not relied on or attributed any emission reductions from this rule to any such plans (October 31, 2005, e-mail from Ron Methier, Georgia Environmental Protection Division, to Dick Schutt, U.S. Environmental Protection Agency). For these reasons, EPA's 1980 approval of this provision into the Georgia SIP was in error and EPA is, therefore, proposing to remove the provision from the approved SIP under the authority of section 110(k)(6) of the Act. Section 110(k)(6) provides: ''Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.''

Proposed Action

Since the State's ''nuisance'' provision is not directed at the attainment and maintenance of the NAAQS, EPA has found that its prior approval of this particular rule (into the SIP) was in error. Consequently, in order to correct this error, EPA is proposing to remove Georgia Rule 391–3–1–.02(2)(a)1 from the approved Georgia SIP pursuant to section 110(k)(6) of the Act and to codify this deletion by revising the appropriate paragraph under 40 CFR part 52, subpart L, § 52.570 (Identification of Plan).

Statutory and Executive Order Reviews

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

This proposed rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely proposes to remove an erroneously approved State rule from the SIP, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This proposed rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant. This proposed rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Lead, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: November 21, 2005.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 05–23417 Filed 11–28–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 372

[TRI–2005–0073; FRL 7533–1]

RIN 2025–AA14

Extension of Comment Period for the Toxics Release Inventory Burden Reduction Proposed Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of comment period.

SUMMARY: EPA issued a proposed rule in the **Federal Register** on October 4, 2005, titled ''Toxics Release Inventory Burden Reduction Proposed Rule.'' (70 FR 57822) This document extends the closing date of the comment period for that rule from December 5, 2005, to January 13, 2006.

DATES: Comments on the October 4, 2005, proposed rule, identified by the docket identification number TRI–2005–0073, must be received on or before January 13, 2006.

ADDRESSES: Detailed instructions for submitting comments are provided in the proposed rule that was published on October 4, 2005 (70 FR 57822).

FOR FURTHER INFORMATION CONTACT: Marc Edmonds, Toxics Release Inventory Program Division, Office of Information Analysis and Access (2844T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–566–0758; fax number: 202–566–0741; e-mail: *edmonds.marc@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has received requests from several groups to extend the comment period for the ''Toxics Release Inventory Burden Reduction Proposed Rule.'' (70 FR 57822, October 4, 2005) These groups include Environmental Defense, the National Environmental Trust, the U.S. Public Interest Research Group, and the Working Group on Community Right-to-Know. These groups have requested additional time to conduct analysis of TRI data and prepare comments on the proposed rule. EPA has considered these comments and determined that extending the comment period is an appropriate action that will not cause a significant delay in evaluating comments on the proposed rule and promulgating the final rule. Therefore, EPA is extending the comment period on the October 4, 2005, proposed rule from December 5, 2005, until January 13, 2006. All comments must be submitted by January 13, 2006, following the detailed instructions provided in the proposed rule.

Dated: November 22, 2005.

Kimberly T. Nelson,

Assistant Administrator for the Office of Environmental Information and Chief Information Officer.

[FR Doc. 05–23416 Filed 11–28–05; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 10, 12, 16, 44, and 52

[FAR Case 2003–027]

RIN 9000–AK07

Federal Acquisition Regulation; Additional Contract Types

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule; reopening of comment period.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have extended the due date by two weeks for public comments on their proposed rule that would amend the Federal Acquisition Regulation (FAR) to implement section 1432 of the National Defense Authorization Act for Fiscal Year 2004. Title XIV of the Act, referred to as the Services Acquisition Reform Act of 2003 (SARA), amended section 8002(d) of the Federal Acquisition Streamlining Act of 1994 (FASA) to expressly authorize the use of time-and-materials (T&M) and labor-hour (LH) contracts for certain categories of commercial services under specified conditions. The proposed rule was published in the **Federal Register** at 70 FR 56318, September 26, 2005.

DATES: Interested parties should submit written comments on the proposed rule to the FAR Secretariat at the address shown in the proposed rule on or before December 9, 2005 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAR case 2003–027 by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Agency Web Site: *http://www.acqnet.gov/far/ProposedRules/proposed.htm*. Click on the FAR case number to submit comments.
- E-mail: *farcase.2003–027@gsa.gov*. Include FAR case 2003–027 in the subject line of the message.
- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR case 2003–027 in all correspondence related to this case. All comments received will be posted without change to *http://www.acqnet.gov/far/ProposedRules/proposed.htm*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Jeremy Olson, Procurement Analyst, at (202) 501–3221. Please cite FAR case 2003–027. Contact the FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules.

List of Subjects in 48 CFR Parts 2, 10, 12, 16, 44, and 52

Government procurement.

Dated: November 22, 2005.

Gerald Zaffos,

Director, Contract Policy Division.

[FR Doc. 05–23394 Filed 11–28–05; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 16, 32, and 52

[FAR Case 2004–015]

RIN 9000–AK32

Federal Acquisition Regulation; Payments Under Time-and-Materials and Labor-Hour Contracts

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule; reopening of comment period.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are extending the date for

submittal of public comments by two weeks for the proposed rule regarding payments under Time-and-Materials (T&M) and Labor-Hour (LH) Contracts. The proposed rule was published in the **Federal Register** at 70 FR 56314, September 26, 2005.

DATES: Interested parties should submit written comments on the proposed rule to the FAR Secretariat at the address shown in the proposed rule on or before December 9, 2005 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAR case 2004–015 by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Agency Web Site: *http://www.acqnet.gov/far/ProposedRules/proposed.htm*. Click on the FAR case number to submit comments.
- E-mail: *farcase.2004–015@gsa.gov*. Include FAR case 2004–015 in the subject line of the message.
- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR case 2004–015 in all correspondence related to this case. All comments received will be posted without change to *http://www.acqnet.gov/far/ProposedRules/proposed.htm*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Jeremy Olson, Procurement Analyst, at (202) 501–3221. Please cite FAR case 2004–015. Contact the FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules.

List of Subjects in 48 CFR Parts 16, 32, and 52

Government procurement.

Dated: November 22, 2005.

Gerald Zaffos,

Director, Contract Policy Division.

[FR Doc. 05–23395 Filed 11–28–05; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 041029298–5292–05; I.D. 091505E]

RIN 0648–AS38

Magnuson-Stevens Act Provisions; Fishing Capacity Reduction Program; Pacific Coast Groundfish Fishery; California, Washington, and Oregon Fisheries for Coastal Dungeness Crab and Pink Shrimp; Industry Fee Collection System for Fishing Capacity Reduction Loan

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

ACTION: Proposed rule.

SUMMARY: NMFS publishes this proposed rule to clarify that the fee regulations for the Pacific Coast groundfish fishing capacity reduction program do not apply to any shrimp landed under Washington State fishing licenses for Puget Sound shrimp. The fee regulations remain otherwise unchanged. The intent of this proposed rule is to clarify that the fee rules do not apply to the Puget Sound licenses.

DATES: Written comments on this proposed rule must be received by December 14, 2005.

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

- E-mail: *0648–AS38@noaa.gov*. Include in the subject line the following identifier: Pacific Coast Groundfish Buyback RIN 0648–AS38. E-mail comments, with or without attachments, are limited to 5 megabytes.
- Federal e-Rulemaking Portal: *http:www.regulations.gov*.
- Mail: Michael L. Grable, Chief, Financial Services Division, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3282.
- Fax: (301) 713–1306.

FOR FURTHER INFORMATION CONTACT: Michael L. Grable, Financial Services Division, NMFS headquarters, at 301–713–2390.

SUPPLEMENTARY INFORMATION:

Electronic Access

This **Federal Register** document is also accessible via the Internet at the Office of the **Federal Register**'s website at *http://www.access.gpo.gov/su-docs/aces/aces140.html*.

Background

Section 312(b)-(e) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1861a(b) through (e)) (Magnuson-Stevens Act) generally authorizes fishing capacity reduction programs. In particular, Magnuson-Stevens Act section 312(d) authorizes industry fee systems for repaying fishing capacity reduction loans which finance program costs.

Section 212 of Division B, Title II, of Public Law 108–7 (section 212) specifically authorizes the Pacific Coast groundfish fishing capacity reduction program. Pursuant to section 212, NMFS implemented the groundfish program by a July 18, 2003, **Federal Register** notice (68 FR 42613). On July 13, 2005, NMFS published this program's fee regulations as a final rule (70 FR 40225) which is codified under subpart M at § 600.1102.

The fee regulations require the payment and collection of fees as percentages of the ex-vessel value of certain fish landed in both a ''reduction fishery'' and in certain ''fee-share fisheries''. One of the fee-share fisheries is the Washington State fishery for pink shrimp.

Section 212 defines a ''fee-share fishery'' as ''a fishery, other than the reduction fishery, whose members are eligible to vote in a referendum for an industry fee system . . . .'' Section 212 also provides that ''persons who have been issued . . . Washington . . . Pink shrimp permits shall be eligible to vote in the referendum . . . .'' Consequently, under section 212, the fee-share fishery involving Washington pink shrimp is the fishery for pink shrimp conducted by person whom Washington has issued a ''pink shrimp permit.''

At the time the proposed and final rules were published, NMFS was aware of only one ''pink shrimp'' fishery. NMFS became aware after publication of both the groundfish program notice and the program's subsequent fee regulations of the existence of two additional Washington State licenses involving pink shrimp other then the ''pink shrimp'' licenses themselves.

These additional Washington State licenses are the ''Puget Sound Shrimp Pots'' licenses and ''Puget Sound Shrimp Trawl'' licenses. Although both these Puget Sound shrimp licenses involve some pink shrimp harvests in Puget Sound, both involve the harvest of other types of shrimp as well. The Washington ''pink shrimp'' permits issued for Puget Sound were not intended to be included in the Washington fee-share fishery involving pink shrimp.

The fee regulations, consequently, did not specifically exclude from fee payment and collection pink shrimp caught under the two Puget Sound shrimp licenses. The holders of the Puget Sound shrimp licenses did not vote in the groundfish program's fee referendum and NMFS did not include the ex-vessel value of pink shrimp landed under the Puget Sound licenses in the required section 212 formula both for referendum vote weighting and for establishing the reduction loan sub-amounts for whose repayment the reduction fishery and each of the fee-share fisheries were responsible.

The Puget Sound shrimp fisheries are not a fee-share fishery and section 212 does not authorize the payment and collection of fees on any shrimp, including pink shrimp, harvested under the Puget Sound shrimp licenses. Nevertheless, the fee regulations do not clearly exclude pink shrimp harvested under the Puget Sound shrimp licenses because NMFS was unaware of these licenses' existence until after adopting a final fee rule.

Fee collection and payment began on September 8, 2005, and this proposed rule is necessary to clarify that the fee-share fishery involving Washington pink shrimp includes only that portion of the Washington pink shrimp which is harvested by persons to whom Washington issued ocean pink shrimp licenses.

Classification

The Assistant Administrator for Fisheries, NOAA (AA), has determined that this proposed 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.

NMFS has certified to the Small Business Administration, under Section 605(b) of the Regulatory Flexibility Act, that this proposed rule would not have a significant economic impact on a substantial number of small entities.

There are currently six trawl fishing licenses in the Puget Sound within the Washington State shrimp fishery and 115 trawl fishing licenses total within the Washington State Ocean pink shrimp fishery according to the Washington Department of Fish and Wildlife. This regulation would apply to all 121 trawl fishing licenses issued in the Washington State shrimp fishery, although it will only directly affect the 6 Washington State Puget Sound shrimp license holders.

This proposed rule seeks to revise the regulations to expressly exclude the holders of the Puget Sound shrimp licenses from the groundfish program's fee collection system. The holders of the Puget Sound shrimp licenses did not vote in the groundfish program's fee referendum and NMFS did not include the ex-vessel value of pink shrimp landed under the Puget Sound licenses both for referendum vote weighting and for establishing the reduction loan sub-amounts for whose repayment the reduction fishery and each of the fee-share fisheries were responsible. The Puget Sound shrimp fisheries are not a fee-share fishery and the statute that created the program does not authorize the payment and collection of fees on any shrimp, including pink shrimp, harvested under the Puget Sound shrimp licenses.

The change to the regulations will have a de minimis impact on those remaining in the fishery because the total payments from the non-fee-share fisheries are minor. The total fee to be collected for any given year is calculated based on a formula using projected landings, the interest rate, and the amortization schedule, and it is calculated in advance for the entire year. In determining the annual fee, the contributions from holders of the Puget Sound shrimp licenses were not considered in the calculation. The collection of fees from holders of the Puget Sound shrimp licenses would result in the repayment of fees above what was expected for this year. As a result of the additional revenue, the buyback loan would be repaid slightly earlier than expected and would result in a slight decrease in the overall amount of interest accrued on the loan. Removal of the holders of the Puget Sound shrimp licenses would only slightly negatively impact the remaining pink shrimp licence holders because the contributions from the non-fee-share fisheries are small compared to the overall reduction loan amount. The contributions from the holders of Puget Sound shrimp licences represents only 5 percent of the total reduction loan amount. Although the impact of this rule is small, this proposed rule is necessary to ensure that holders of the Puget Sound shrimp licenses are excluded from the requirement to pay fees on pink shrimp landings. These six license holders would be positively affected by this proposed rule through their exemption from a fee they were not intended to have to pay.

List of Subjects in 50 CFR Part 600

Fisheries, Fishing capacity reduction, Fishing permits, Fishing vessels.

Dated: November 23, 2005.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 600 is proposed to be amended as follows:

PART 600—MAGNUSON-STEVENS ACT PROVISIONS

1. The authority citation for part 600 continues to read as follows:

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

Subpart M—Specific Fishery or Program Fishing Capacity Reduction Regulations

2. In § 600.1102, the definition of ''Fee-share fishery'' in paragraph (b) is revised, and paragraphs (d)(2)(vi) and (i)(1)(vi) are revised to read as follows:

§ 600.1102 Pacific Coast groundfish fee.

* * * * *

(b) * * *

Fee-share fishery means each of the fisheries for coastal Dungeness crab and pink shrimp in each of the states of California and Oregon and the fishery for coastal Dungeness crab and ocean pink shrimp in the State of Washington.

* * * * *

(d) * * *

(2) * * *

(vi) Washington ocean pink shrimp fee-share fishery, $259,400.

* * * * *

(i) * * *

(1) * * *

(vi) All fee collections from the Washington ocean pink shrimp fee-share fishery shall be accounted for in a Washington ocean shrimp fee-share fishery subaccount, and

* * * * *

[FR Doc. 05–23464 Filed 11–28–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 051116304–5304–01; I.D. 110805A]

RIN 0648–AT92

Fisheries of the Exclusive Economic Zone Off Alaska; Total Allowable Catch Amount for ''Other Species'' in the Groundfish Fisheries of the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues a proposed rule that would implement Amendment 69 to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP). Amendment 69, if approved, would amend the manner in which the total allowable catch (TAC) for the ''other species'' complex is annually determined in the Gulf of Alaska (GOA). The FMP amendment would allow the TAC amount for the ''other species'' complex to be set less than or equal to 5 percent of the sum of groundfish targets species in the GOA. This proposed rule would revise the maximum retainable amount (MRA) of ''other species'' in the directed arrowtooth flounder fishery from 0 to 20 percent. This action would allow conservation and management of species within the ''other species'' category and is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the FMP, and other applicable laws.

DATES: Comments must be submitted by January 13, 2006.

ADDRESSES: Send comments to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Lori Durall. Comments may be submitted by:

- E-mail: *0648–AT92–PR-GOA69@noaa.gov*. Include in the subject line the following document identifier: GOA 69 PR. E-mail comments, with or without attachments, are limited to 5 megabytes.
- Webform at the Federal eRulemaking Portal: *www.regulations.gov*. Follow the instructions at that site for submitting comments.
- Mail: P.O. Box 21668, Juneau, AK 99802
- Hand delivery: 709 West 9th Street, Room 420A, Juneau, AK.
- Fax: 907–586–7557.

Copies of Amendment 69 and the Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) prepared for the amendment may be obtained from the same address or from the NMFS Alaska Region website at *www.fakr.noaa.gov*. The FMP is available from *www.fakr.noaa.gov/npfmc/fmp/goa/goa.htm*.

FOR FURTHER INFORMATION CONTACT: Tom Pearson, 907–481–1780 or *tom.pearson@noaa.gov*.

SUPPLEMENTARY INFORMATION: The groundfish fisheries in the exclusive economic zone of the GOA are managed under the FMP. The North Pacific Fishery Management Council (Council) prepared the FMP under the authority of the Magnuson-Stevens Act, 16 U.S.C. 1801, *et seq*. Regulations implementing the FMP appear at 50 CFR part 679. General regulations governing U.S. fisheries also appear at 50 CFR part 600.

The Council has submitted Amendment 69 for review by the Secretary of Commerce, and a Notice of Availability of the FMP amendment was published in the **Federal Register** on November 16, 2005 (FR citation), with comments on the FMP amendment invited through January 17, 2006.

Comments may address the FMP amendment, the proposed rule, or both, but must be received by January 17, 2006, to be considered in the approval/disapproval decision on the FMP amendment. All comments received by that time, whether specifically directed to the FMP amendment or to the proposed rule, will be considered in the approval/disapproval decision on the FMP amendment.

Background

Designation and management of the ''other species'' complex have evolved through a series of amendments to the GOA FMP. The following section provides an overview of how the complex has been managed historically under the FMP, and the amendments that have modified the complex and its management.

The original FMP, implemented in 1978, identified three separate species categories: (1) prohibited species; (2) specific species or species complexes; and (3) ''other species.'' Under the original FMP, ''other species'' had a Maximum Sustained Yield/Optimum Yield (MSY/OY) of 16,200 mt based upon historic foreign catch.

Amendment 5 to the FMP removed grenadiers from the ''other species'' complex and established them as their own category with a separate MSY/OY of 13,200 mt based upon the recorded average grenadier catch from 1967–1979. Grenadiers were removed from the ''other species'' complex due to concerns that catches of grenadiers (specifically unforeseen incidental catches in the hook-and-line sablefish fishery) would exceed the MSY/OY for the ''other species'' complex and close directed fishing for target species. Because the population of grenadiers was not included in the development of the OY for ''other species'', the MSY/OY for the ''other species'' complex remained unchanged following the removal of grenadiers.

Amendment 8 to the FMP was implemented in 1980 (45 FR 73486, November 5, 1980). Under this amendment, the grenadiers category was renamed non-specified species. All species caught that were not classified as target, prohibited or ''other species'' were reported to the non-specified category. Amendment 8 was intended to alleviate operational problems from fishermen reporting non-specified species in the ''other species'' complex. ''Other species'' were defined as species that have ''only slight economic value and are not generally targeted upon, but which are either significant components of the ecosystem or have economic potential.'' The OY for the ''other species'' complex was established as 5 percent of the OYs for all target species. The ''other species'' complex included sculpins, sharks, skates, eulachon, smelts, capelin, and octopi. Squids were managed as a separate target fishery with a separate MSY and OY. Under Amendment 8, the OY for the ''other species'' complex was modified to be managed Gulf-wide, rather than allocated by management area.

Amendment 14 to the FMP was implemented November 18, 1985 (50 FR 43193). This amendment set the OY for the ''other species'' complex to 22,460 mt. Two years later, the FMP was amended by Amendment 15 (52 FR 7868, March 13, 1987 such that the TAC calculation for the ''other species'' complex was equal to 5 percent of the total TACs for all GOA target groundfish species. This percentage was consistent with previous approaches for setting OY for the ''other species'' complex, and was determined to be ample to provide for the anticipated incidental catch of those species.

Amendment 16 moved squids into the ''other species'' complex from the target species category (53 FR 7756, March 10, 1988). Atka mackerel was combined into the ''other species'' complex due to low abundance, and the absence of a directed fishery for several years. High landings in 1992 and a directed fishery in 1993 demonstrated Atka mackerel was a target species. Amendment 31 moved Atka mackerel from the ''other species'' complex and established it as a target species (58 FR 54553, October 22, 1993).

Amendment 39 defined a forage fish category in the FMP (63 FR 13798, March 23, 1998). Important prey species were included in this category. Regulations promulgated under

Amendment 39 prohibited directed fishing and commercial processing of forage fish. Retention, sale, barter, trade, or other commercial exchange were limited. Eulachon, capelin, and smelts were moved from the ''other species'' complex to the forage fish category. The full list of species included in the forage fish category is in the FMP (see **ADDRESSES**).

In 2003, as a skate directed fishery expanded, conservation concerns developed. As long as skates remained a part of the ''other species'' complex, NMFS could not manage skates as a distinct target category. Skate catch was limited only by the ''other species'' complex TAC minus catch of the remaining species in the complex. In 2004, Amendment 63 to the GOA FMP removed skates from the ''other species'' complex and placed them in a target category (69 FR 26313, May 12, 2004). Currently, overfishing levels, acceptable biological catches, and TACs are specified for big skates, longnose skates, and the remaining skates in the *Bathyraja sp.* (or other skate) complex. This amendment allowed for an appropriate sized directed fishery for skates based on the best available information on the stock, ensuring skate sustainability.

The ''other species'' complex currently contains the following species groups: squids, sculpins, sharks, and octopi. The ''other species'' complex is open to directed fishing up to the TAC level for the complex, after allowing for incidental catch needs in other groundfish fisheries. The current requirement to set the ''other species'' complex TAC to 5 percent of the combined groundfish TACs could present conservation issues. Removing species from the ''other species'' complex has two effects. First, the number of target categories are increased. More target categories may increase the combined TAC in the GOA. If the combined TAC is larger, the TAC for the ''other species'' complex will be larger because the ''other species'' TAC is equal to exactly 5 percent of the combined TAC. Second, the number of species in the ''other species'' complex is reduced. Fewer species in the complex and the larger TAC increase the chance that one or more species groups in the complex may experience excessive harvest, including up to the entire TAC for the ''other species'' complex. The current process for calculating the ''other species'' TAC provides no flexibility. NMFS cannot establish the TAC for the ''other species'' complex at an amount lower than 5 percent, if the best available information indicates a lower amount is the most prudent action.

Retention of squids has increased by 13 times between 2003 and 2005. During 2005, shoreside processors were offering increased prices for spiny dogfish sharks. As indicated by skates, markets can develop quickly for species previously thought of as having little value. In order to quickly respond to developing fisheries in the ''other species'' complex, NMFS would need the flexibility to establish the ''other species'' complex TAC at a value less than 5 percent of the combined GOA species TACs. Setting the ''other species'' complex TAC to less than 5 percent of the combined GOA species TACs could prevent catch of one or more groups in the complex from disproportionately dominating the entire ''other species'' complex catch. NMFS would be able to allow for a developing fishery on a group in the ''other species'' complex while limiting the potential for excessive catch. The increased incidental catch of squids and the potential developing market for spiny dogfish sharks indicate that this proposed action is necessary and timely to allow for the ''other species'' complex TAC to be set at a level appropriate for sustainable harvest of sharks, squids, sculpins, and octopi groups.

Amendment 69 would allow for sustainable management of any fishery targeting one or more species groups within the ''other species'' complex. As part of the annual groundfish harvest specifications process, Amendment 69 to the FMP would allow a TAC amount for ''other species'' to be set less than or equal to 5 percent of the sum of TACs of the target species in the GOA. The ''other species'' complex TAC could be set at an amount estimated to be sufficient to meet the annual incidental catch needs in other groundfish fisheries and could allow for directed fishing for ''other species'' to occur at sustainable levels. It is not necessary to amend existing regulations to implement the change in the ''other species'' complex TAC calculation. This calculation is described only in the FMP text and is not specified in the harvest specifications regulations at § 679.20. Because the ''other species'' TAC calculation is specified only in the FMP, no regulatory amendment is required to change the method of calculating the ''other species'' TAC. However, it is necessary to amend the harvest specification regulations in order to ensure conservation and management of ''other species'' incidental catch in groundfish fisheries, as described below.

Proposed Regulatory Amendment

To manage the incidental harvest of the ''other species'' complex with the implementation of Amendment 69, this proposed action would revise Table 10 of 50 CFR part 679 to raise the MRA for the ''other species'' complex from 0 to 20 percent in the arrowtooth flounder fishery in the GOA. This revision is necessary to properly manage the retention of ''other species'' in the arrowtooth flounder fishery and to potentially reduce the amount of discards of fish in the ''other species'' complex.

This action is intended to meet the conservation objectives of the Magnuson-Stevens Act to reduce the potential for overfishing the species groups in the ''other species'' complex and to efficiently use fishery resources by reducing potential discards. This action would be an interim step towards the Council's development of a more comprehensive approach towards the management of ''other species.''

Classification

NMFS has not yet determined whether the amendment that this proposed rule would implement is consistent with the national standards of the Magnuson-Stevens Act and other applicable laws. In making that determination, NMFS will take into account the data, views, and comments received during the comment period.

This proposed rule has been determined to be not significant for the purposes of Executive Order 12866.

NMFS prepared an IRFA which describes any adverse impacts this proposed rule, if adopted, would have on directly regulated small entities. Because this action is closely linked to the annual harvest specifications, the EA/RIR/IRFA (see **ADDRESSES**) prepared for this action also analyzes the action to establish annual harvest specifications for the ''other species'' complex in the GOA. The IRFA analyses two FMP alternatives to revise the manner in which the annual TAC for the ''other species'' in the GOA is established, along with the status quo or no action alternative. In addition, two suboptions to revise the MRAs for ''other species'' in the groundfish fisheries in the GOA are analyzed along with the status quo, or no action suboption. A summary of the IRFA for this action follows:

The proposed action for Amendment 69 revises the manner in which the annual TAC for the ''other species'' complex in the GOA is established and raises the MRA for ''other species'' from 0 to 20 percent in the arrowtooth

flounder fishery. As part of its annual groundfish harvest specification process, the Council would recommend a TAC amount for the ''other species'' complex at less than or equal to 5 percent of the sum of the groundfish TAC amounts. The objective of this action is to give the Council greater flexibility in recommending a TAC amount for ''other species'' in order to better protect individual species in the ''other species'' complex from overfishing and to make a sustainable fishery for the ''other species'' complex more likely.

The legal basis for this action is found in the Magnuson-Stevens Act and in the GOA groundfish FMP promulgated pursuant to that act.

The IRFA for this action ascertained that in 2003, 803 small catcher vessels and 13 small catcher processors might be directly regulated by this action. Most of these (655 catcher vessels and 9 small catcher processors) were hook-and-line vessels. In addition, 137 catcher vessels and 1 catcher processor used pot gear, and 93 small catcher vessels and 3 small catcher processors used trawl gear. All these vessels are considered ''small entities'' as defined by the Regulatory Flexibility Act. In 2003, these vessels had average revenues of $190,000 from the federally managed groundfish fisheries. Average revenues were $170,000 for catcher vessels and $1,530,000 for catcher processors.

This action would allow the TAC for ''other species'' to be set at less than 5 percent of the sum of other groundfish TACs, thereby limiting potential future harvests of ''other species'' and gross revenues from these harvests in the short run. In the long run, however, the biomass of ''other species'' would be given additional protection. Actual impacts to small entities would depend on the actual TAC amount recommended for ''other species'' by the Council and approved by NMFS. These impacts would be assessed in the IRFA for the TAC specification action.

Nothing in the proposed action would result in changes in reporting or recordkeeping requirements.

The analysis did not reveal any Federal rules that duplicate, overlap, or conflict with the proposed action.

The IRFA evaluated a no-action alternative, the preferred alternative and an alternative that would allow for only incidental catch of ''other species.'' Under the no-action alternative, the TAC for the ''other species'' complex would remain at 5 percent of the sum of other groundfish TACs. The ''other species'' complex 2006 TAC is 13,525 mt (70 FR 8958, February 24, 2005). If this amount were harvested by targeting a single species in the ''other species'' complex it could drive down that species biomass and reduce its reproductive potential. While revenues from the fishery would be higher in the short run, they would be lower in the longer run. Thus, while this alternative may have imposed fewer short run restrictions on small fishing operations, it did not meet the objectives of providing protection to individual species within the ''other species'' complex in the GOA and thereby protecting the future of a sustainable fishery. The incidental catch only alternative would not allow the Council to provide for a directed fishery for ''other species.'' This alternative would prevent the Council's use of the best available information in determining the appropriate management for ''other species.'' For example, if the best available information indicated that a directed fishery for ''other species'' could occur without harming its future sustainability, then achieving its optimum yield would be prevented by this alternative. The preferred alternative, however, would allow the Council to decide whether to allow for a target fishery or for only incidental catch based on the latest stock assessment information.

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Recordkeeping and reporting requirements.

Dated: November 22, 2005.

William T. Hogarth,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

For reasons set out in the preamble, 50 CFR part 679 is proposed to be amended as follows:

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

1. The authority citation for part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.*; 1540(f); 1801 et seq.; 1851 note; 3631 et seq.

2. Table 10 to part 679 is revised to read as follows:

Table 10 to Part 679—Gulf of Alaska Retainable Percentages

BASIS SPECIES		INCIDENTAL CATCH SPECIES (for DSR caught on catcher vessels in the SEO, see § 679.20 (j)[6])														
Code	Species	Pollock	Pacific cod	DW flat (2)	Rex sole	Flathead sole	SW flat (3)	Arrow tooth	Sablefish	Aggregated rockfish[8]	SR/RE ERA (1)	DSR SEO (C/Ps only): (6)	Atka mackerel	Aggregated forage fish (10)	Skates[11]	Other species (7)
110	Pacific cod	20	na[9]	20	20	20	20	35	1	5	(1)	10	20	2	20	20
121	Arrowtooth	5	5	0	0	0	0	na[9]	0	0	0	0	0	2	0	20
122	Flathead sole	20	20	20	20	na[9]	20	35	7	15	7	1	20	2	20	20
125	Rex sole	20	20	20	na[9]	20	20	35	7	15	7	1	20	2	20	20
136	Northern rockfish	20	20	20	20	20	20	35	7	15	7	1	20	2	20	20
141	Pacific ocean perch	20	20	20	20	20	20	35	7	15	7	1	20	2	20	20
143	Thornyhead	20	20	20	20	20	20	35	7	15	7	1	20	2	20	20
152/151	Shortraker/rougheye (1)	20	20	20	20	20	20	35	7	15	na[9]	1	20	2	20	20
193	Atka mackerel	20	20	20	20	20	20	35	1	5	(1)	10	na[9]	2	20	20
270	Pollock	na[9]	20	20	20	20	20	35	1	5	(1)	10	20	2	20	20
710	Sablefish	20	20	20	20	20	20	35	na[9]	15	7	1	20	2	20	20
Flatfish, deep water (2)		20	20	na[9]	20	20	20	35	7	15	7	1	20	2	20	20
Flatfish, shallow water (3)		20	20	20	20	20	na[9]	35	1	5	(1)	10	20	2	20	20
Rockfish, other (4)		20	20	20	20	20	20	35	7	15	7	1	20	2	20	20
Rockfish, pelagic (5)		20	20	20	20	20	20	35	7	15	7	1	20	2	20	20
Rockfish, DSR-SEO (6)		20	20	20	20	20	20	35	7	15	7	na[9]	20	2	20	20

BASIS SPECIES		INCIDENTAL CATCH SPECIES (for DSR caught on catcher vessels in the SEO, see § 679.20 (j)[6])														
Code	Species	Pollock	Pacific cod	DW flat (2)	Rex sole	Flathead sole	SW flat (3)	Arrow tooth	Sablefish	Aggregated rockfish[8]	SR/RE ERA (1)	DSR SEO (C/Ps only): (6)	Atka mackerel	Aggregated forage fish (10)	Skates[11]	Other species (7)
Skates[11]		20	20	20	20	20	20	35	1	5	(1)	10	20	2	na[9]	20
Other species (7)		20	20	20	20	20	20	35	1	5	(1)	10	20	2	20	na[9]
Aggregated amount of non-groundfish species		20	20	20	20	20	20	35	1	5	(1)	10	20	2	20	20

Notes to Table 10 to Part 679					
1	Shortraker/rougheye rockfish				
		SR/RE	shortraker/rougheye rockfish (171)		
			shortraker rockfish (152)		
			rougheye rockfish (151)		
		SR/RE ERA	shortraker/rougheye rockfish in the Eastern Regulatory Area.		
	Where numerical percentage is not indicated, the retainable percentage of SR/RE is included under Aggregated Rockfish				
2	Deep-water flatfish	Dover sole, Greenland turbot, and deep-sea sole			
3	Shallow water flatfish	Flatfish not including deep water flatfish, flathead sole, rex sole, or arrowtooth flounder			
4	Other rockfish	Western Regulatory Area	means slope rockfish and demersal shelf rockfish		
		Central Regulatory Area			
		West Yakutat District			
		Southeast Outside District	means slope rockfish		
		Slope rockfish			
		S. aurora (aurora)	S. variegatus (harlequin)	S. brevispinis (silvergrey)	
		S. melanostomus (blackgill)	S. wilsoni (pygmy)	S. diploproa (splitnose)	
		S. paucispinis (bocaccio)	S. babcocki (redbanded)	S. saxicola (stripetail)	
		S. goodei (chilipepper)	S. proriger (redstripe)	S. miniatus (vermilion)	
		S. crameri (darkblotch)	S. zacentrus (sharpchin)	S. reedi (yellowmouth)	
		S. elongatus (greenstriped)	S. jordani (shortbelly)		
		In the Eastern GOA only, Slope rockfish also includes S. polyspinous. (Northern)			
5	Pelagic shelf rockfish	S. ciliatus (dusky)	S. entomelas (widow)	S. flavidus (yellowtail)	
6	Demersal shelf rockfish (DSR)	S. pinniger (canary)	S. maliger (quillback)	S. ruberrimus (yelloweye)	
		S. nebulosus (china)	S. helvomaculatus (rosethorn)		

Notes to Table 10 to Part 679					
		S. caurinus (copper)	S. nigrocinctus (tiger)		
		DSR-SEO = Demersal shelf rockfish in the Southeast Outside District The operator of a catcher vessel that is required to have a Federal fisheries permit, or that harvests IFQ halibut with hook and line or jig gear, must retain and land all DSR that is caught while fishing for groundfish or IFQ halibut in the SEO. Limits on sale and requirements for disposal of DSR are set out at § 679.20 (j).			
7	Other species	sculpins	octopus	squid	sharks
8	Aggregated rockfish	means rockfish of the genera Sebastes and Sebastolobus defined at § 679.2 except in:			
		Southeast Outside District (SEO)	where DSR is a separate category for those species marked with a numerical percentage		
		Eastern Regulatory Area (ERA)	where SR/RE is a separate category for those species marked with a numerical percentage		
9	N/A	not applicable			
10	Aggregated forage fish (all species of the following families)				
		Bristlemouths, lightfishes, and anglemouths (family Gonostomatidae)			209
		Capelin smelt (family Osmeridae)			516
		Deep-sea smelts (family Bathylagidae)			773
		Eulachon smelt (family Osmeridae)			511
		Gunnels (family Pholidae)			207
		Krill (order Euphausiacea)			800
		Laternfishes (family Myctophidae)			772
		Pacific herring (family Clupeidae)			235
		Pacific Sand fish (family Trichodontidae)			206
		Pacific Sand lance (family Ammodytidae)			774
		Pricklebacks, war-bonnets, eelblennys, cockscombs and Shannys (family Stichaeidae)			208

Notes to Table 10 to Part 679		
	Surf smelt (family Osmeridae)	515
11	Skates Species and Groups	
	Big Skates (702)	
	Longnose Skates (701)	
	Other Skates (700)	

[FR Doc. 05–23465 Filed 11–28–05; 8:45 am]
BILLING CODE 3510–22–S

Notices

Federal Register

Vol. 70, No. 228

Tuesday, November 29, 2005

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

November 23, 2005.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *Pamela_Beverly_OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Cooperative State Research, Education, and Extension Service

Title: Expanded Food and Nutrition Education Program (EFNEP).

OMB Control Number: 0524–0044.

Summary of Collection: The Department of Agriculture's Cooperative State Research, Education, and Extension Service (CSREES), Expanded Food and Nutrition Education Program (EFNEP) is a unique program that began in 1969, designed to reach limited resource audiences, especially youth and families with young children. EFNEP operates in 50 states of the United States, American Samoa, Guam, Micronesia, and the Commonwealth of the Northern Marianas, the Commonwealth of Puerto Rico, and the Virgin Islands of the United States. The objectives of EFNEP are to assist limited resource families and youth in acquiring the knowledge, skills, attitudes, and changed behaviors necessary for making diet decisions that are nutritionally sound, and to contribute to their personal development and the improvement of the total family diet and nutritional well being.

Need and Use of the Information: CSREES will collect information using the Evaluation/Reporting System (E/RS) a database that was develop to capture the impacts of EFNEP. The system will provide a variety of reports that are useful for management purposes, provide diagnostic assessments of participants needs and export summary data for State and National assessment of the program's impact. E/RS stores information in the form of records about the program participants, their family structure and their dietary practices. Without the information it would be extremely difficult for the national office to compare, assess, and analyze the effectiveness and the impact of EFNEP without the annual collection of data.

Description of Respondents: State, Local or Tribal Government.

Number of Respondents: 56.

Frequency of Responses: Recordkeeping; Reporting: Annually.

Total Burden Hours: 69,588.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. E5–6665 Filed 11–28–05; 8:45 am]

BILLING CODE 3410–09–P

DEPARTMENT OF AGRICULTURE

Forest Service

Stanislaus National Forest, Mi-Wok Ranger District, California, Great Hunt Reforestation and Release Project

AGENCY: Forest Service, USDA.

ACTION: Notice of intent.

SUMMARY: The Stanislaus National Forest is in the process of preparing an environmental analysis for the Great Hunt Reforestation and Release Project. This project is being planned on National Forest lands encompassing portions of the Groveland, Mi-Wok and Summit Ranger Districts. The proposal to be analyzed consists of conducting site preparation, planting, and plantation release treatments using a combination of methods on approximately 2330 acres. Treatments will include backpack application of the herbicide glyphosate on approximately 545 acres; mechanically shredding or hand cutting competing vegetation on 1,655 acres with follow-up glyphosate applications on 1,530 acres; and burning and hand cutting competing vegetation with follow up glyphosate applications on 30 acres. Treatments are designed to assure adequate survival and growth of planted conifers by reducing competing vegetation.

The goals tied to this project in the Stanislaus National Forest Plan Direction 2005 (STF FPD) are to increase the frequency of large trees, improve the continuity and distribution of old forests, and restore forest species composition and structure following large scale, stand-replacing disturbance events (STF FPD page 9). The areas under consideration for management activities are old timber harvest units, as well as areas burned by the following wildfires: Granite Fire, 1973; River Fire, 1987; Cotton Fire, 1990; Ruby Fire, 1992; and Creek Fire, 1994. In areas identified for site preparation and planting, natural regeneration of conifer seedlings following the harvest or fire disturbance events is inadequate due to

rapid and vigorous growth of competing vegetation and the lack of a seed source in some areas (STF FPD page 146, Standard and Guideline 15–J: ''Reforest all openings in available, capable, and suitable lands for timber production created by timber harvest, wind, fire, or insect and disease pests (36 CFR 219.27(b)(2))''). These areas are not on track to meet the goals of the STF FPD. As such, the benefits of a forested environment, and all the associated benefits of forest structure have not occurred.

Decision to be Made: The decision to be made is whether to implement the proposed action as described above, to meet the purpose and need for action through some other combination of activities, or to take no action at this time.

Scoping Process: Comments concerning the scope of the analysis should be received in writing within 15 days of the date of publication of this Notice of Intent in the **Federal Register.**

The project was initially listed in the Forest's July and October 2005 quarterly edition of the *Schedule of Proposed Actions* (SOPA). Scoping letters were sent in September 1, 2005 to those who responded to the SOPA and to other identified interested and affected individuals and government agencies. In the SOPA, the mode of environmental documentation was predicted as an environmental assessment.

It has now been determined that the environmental analysis will be documented in an environmental impact statement. Since there are no changes being made to the proposed action that was previously scoped, the scoping period at this point is brief. Scoping letters previously received by the Forest Service from the first scoping period will continue to be used for this process. A public scoping meeting is not anticipated at this time.

The scoping process will be used to identify issues regarding the proposed action. An issue is defined as a point of dispute, debate, or disagreement related to a specific proposed action based on its anticipated effects. Significant issues brought to our attention are used during environmental analysis to develop alternatives to the proposed action. Some issued raised in scoping may be considered non-significant because they are: (1) Beyond the scope of the proposed action and its purpose and need; (2) already decided by law, regulation, or the Land and Resource Management Plan; (3) irrelevant to the decision to be made; or (4) conjectural and not supported by scientific or factual evidence.

Alternatives: Alternatives proposed to date are the Proposed Action as described above and the No Action.

Identification of Permits or Licenses Required: No permits or licenses have been identified to implement the proposed action.

Lead, Joint Lead, and Cooperating Agencies: The USDA Forest Service is the lead agency for this proposal; there are no cooperating agencies.

Estimated Dates for Filing: The expected filing date with the Environmental Protection Agency for the draft EIS is March 1, 2006. The expected filing date for the final EIS is July 1, 2006.

Person to Whom Comments May Be Mailed: Comments may be submitted to: District Ranger, Mi-Wok Ranger District, P.O. Box 100, Mi-Wuk Village, CA 95346 or (209) 586–0643 (fax) during normal business hours. The Mi-Wok Ranger District business hours are from 8 a.m. to 4:30 p.m Monday through Friday. Electronic comments, in acceptable plain text (.txt), rich text (.rtf), or Word (.doc) formats, may be submitted to: *mgmelin@fs.fed.us* using Subject: Great Hunt Reforestation and Release Project.

Reviewer's Obligation to Comment: The comment period on the draft EIS will be 45 days from the date the Environmental Protection Agency publishes the notice of availability of the draft EIS in the **Federal Register**.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon* v. *Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns with the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

Further Information: Marty Gmelin, Interdisciplinary Team Leader may be contacted by phone at (209) 586–3234 ex. 629 for more information about the proposed action and the environmental impact statement or at the Mi-Wok Ranger District, P.O. Box 100, Mi-Wuk Village, CA 95348.

Responsible Official and Mailing Address: Tom Quinn, Forest Supervisor, 19777 Greenly Road, Sonora, CA 95370.

Dated: November 22, 2005

Tom Quinn,

Forest Supervisor, Stanislaus National Forest.

[FR Doc. 05–23426 Filed 11–28–05; 8:45 am]

BILLING CODE 5410–99– M

DEPARTMENT OF AGRICULTURE

National Agricultural Statistics Service

Notice of Intent To Revise and Extend a Currently Approved Information Collection

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13) and Office of Management and Budget regulations at 5 CFR part 1320 (60 FR 44978, August 29, 1995), this notice announces the intention of the National Agricultural Statistics Service (NASS) to request revision and extension of a currently approved information collection, the Vegetable Surveys Program.

DATES: Comments on this notice must be received by January 30, 2006 to be assured of consideration.

ADDRESSES: Comments may be mailed to Ginny McBride, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue, SW., Washington, DC 20250 or sent

electronically to *gmcbride@nass.usda.gov.*

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

SUPPLEMENTARY INFORMATION:

Title: Vegetable Surveys Program.

OMB Number: 0535–0037.

Expiration Date of Approval: June 30, 2006.

Type of Request: Intent to revise and extend a currently approved information collection.

Abstract: The objective of the National Agricultural Statistics Service is to prepare and issue State and national estimates of crop and livestock production, prices, and disposition. The Vegetable Surveys Program obtains basic agricultural statistics for fresh market and processing vegetables in major producing States. Vegetable statistics are used by the U.S. Department of Agriculture to help administer programs and by growers, processors, and marketers in making production and marketing decisions. The fresh market estimating program now consists of 25 selected crops and the processing program consists of 8 principal crops. These data will be collected under the authority of 7 U.S.C. 2204(a). Individually identifiable data collected under this authority are governed by Section 1770 of the Food Security Act of 1985, 7 U.S.C. 2276, which requires USDA to afford strict confidentiality to non-aggregated data provided by respondents.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 12 minutes per response.

Respondents: Farms and businesses.

Estimated Number of Respondents: 31,400.

Estimated Total Annual Burden on Respondents: 6,280 hours.

Copies of this information collection and related instructions can be obtained without charge from Ginny McBride, NASS Clearance Officer, at (202) 720–5778.

Comments: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) 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) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on 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. All responses to this notice will become a matter of public record and be summarized in the request for OMB approval.

Signed at Washington, DC, November 14, 2005.

Joe Reilly,

Associate Administrator.

[FR Doc. E5–6667 Filed 11–28–05; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

National Agricultural Statistics Service

Notice of Intent to Revise an Information Collection

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13) and Office of Management and Budget regulations at 5 CFR part 1320 (60 FR 44978, August 29, 1995), this notice announces the intent of the National Agricultural Statistics Service (NASS) to request revision of a currently approved information collection, the National Childhood Injury and Occupational Injury Survey of Farm Operators.

DATES: Comments on this notice must be received by January 30, 2006 to be assured of consideration.

ADDRESSES: Comments may be sent to Ginny McBride, NASS Clearance Officer, U.S. Department of Agriculture, Room 5330B South Building, 1400 Independence Avenue, SW., Washington, DC 20250–2024 or *gmcbride@nass.usda.gov.*

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

SUPPLEMENTARY INFORMATION:

Title: National Childhood Injury and Occupational Injury Survey of Farm Operators.

OMB Control Number: 0535–0235.

Expiration Date of Approval: 06/30/2008.

Type of Request: Revision of a Currently Approved Information Collection.

Abstract: The National Childhood Injury and Occupational Injury Survey of Farm Operators is designed to (1) Provide estimates of childhood nonfatal injury incidence and description of injury occurring to children less than 20 years of age who reside, work, or visit farms and (2) describe the occupational injury experience of all farm operators. Data will be collected from 25,000 operations from all 50 States by telephone. The survey instrument will be tested on 500 operations to ensure proper flow and comprehension. Questions will relate to the existence of hazards on the farm operation at the time of the interview which may cause injury. These data will update and enhance existing data series used by the National Institute of Occupational Safety and Health to establish a measure of the number of hazards present on farms and the number of children potentially exposed to farm hazards. Reports will be generated and information disseminated to all interested parties concerning the finding of this study. These data will be collected under the authority of 7 U.S.C. 2204(a). Individually identifiable data collected under this authority are governed by Section 1770 of the Food Security Act of 1985, 7 U.S.C. 2276, which requires USDA to afford strict confidentiality to non-aggregated data provided by respondents.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 27 minutes per response; screen-outs will be allowed early in the instrument if the respondent does not operate a farm.

Respondents: Farm operators.

Estimated Number of Respondents: 25,500.

Estimated Total Annual Burden on Respondents: 11,500 hours.

Copies of this information collection and related instructions can be obtained without charge from Ginny McBride, NASS Clearance Officer, at (202) 720–5778. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) 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) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on 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. All responses to this notice will become a matter of public record and be summarized in the request for OMB approval.

Signed at Washington, DC, November 14, 2005.

Joe Reilly,

Associate Administrator.

[FR Doc. E5–6675 Filed 11–28–05; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Central Electric Power Cooperative, Inc.; Notice of Intent to Hold Public Scoping Meetings and Prepare an Environmental Assessment

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice of intent to hold public scoping meetings and prepare an environmental assessment (EA).

SUMMARY: The Rural Utilities Service (RUS) intends to hold public scoping meetings and prepare an environmental assessment in connection with possible impacts related to a project proposed by Central Electric Power Cooperative, Inc. (CEPCI) of South Carolina. The proposal consists of the construction of approximately 20 miles of 115 kilovolt transmission line to provide more reliable transmission power to McClellanville, SC. The proposed 115-kilovolt transmission line project would be constructed within one of several alternative corridors under consideration. The alternative transmission line corridors originate at existing power delivery points near Jamestown and Charity, Berkeley County and Winyah and Belle Isle south of the city of Georgetown in Georgetown County, SC and at a potential new substation that would be built in the vicinity of the town of Honey Hill, Berkeley County, SC. The corridors terminate at the proposed location of a substation in McClellanville from which electric power distribution lines would service the community. Portions of the alternative corridors include Federal lands of the Francis Marion National Forest therefore the United States Department of Agriculture (USDA) Forest Service (FS) is a cooperating agency in the National Environmental Policy Act (NEPA) analysis. CEPCI is requesting RUS to provide financing for the proposed project.

DATES: RUS will conduct a scoping meeting in an open house format from 4 p.m. until 8 p.m. on Thursday, December 14, 2005, at the McClellanville Government Services Building, located at 405 Pinckney Street, McClellanville, SC 29458 Phone: (843) 887–3712. The purpose of the meeting is to provide information and solicit comments for the preparation of an EA.

FOR FURTHER INFORMATION CONTACT: Stephanie Strength, Environmental Protection Specialist, USDA, Rural Development, Utilities Programs, Engineering and Environmental Staff, Stop 1571, 1400 Independence Avenue, SW., Washington, DC 20250–1571, telephone (202) 720–0468. Mrs. Strength's e-mail address is *stephanie.strength@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION: CEPCI proposes to construct a 115 kilovolt transmission line between a source substation and a proposed substation located in McClellanville.

Single pole structures ranging in height from 80- to 150-feet would support the conductors and would require a right-of-way of 70 feet. One alternative route includes an approximately 2-mile subsurface directionally-drilled section below the Santee River delta. Depending on which route is chosen the approximate length of the transmission line would be from 16 to 26 miles. It is anticipated that this transmission line would be in service in the Spring of 2008.

Alternatives considered by RUS and CEPCI include: (a) No action, (b) alternative transmission improvements, and (c) alternative transmission line corridors. An Electric Alternative Evaluation and Macro Corridor Study Report, prepared by CEPCI will be presented at the public scoping meeting. The Report is available for public review at the USDA/Rural Development address provided in this notice, at Central Electric Power Cooperative, Inc., 121 Greystone Blvd., Columbia, SC 29210 and at:

Berkeley County Library, PO Box 1239, 1003 Hwy. 52, Moncks Corner, SC 29461, (843) 719–4223, (843) 719–4226 (Fax), Director: Colleen L. Carney, Web Site: *http://www.berkeley.lib.sc.us/.*

Charleston County Library, 68 Calhoun Street, Charleston, SC 29401, (843) 805–6801, (843) 727–3741 (Fax), Director: Jan Buvinger, Web Site: *http://www.ccpl.org.*

Georgetown County Library, 405 Cleland Street, Georgetown, SC 29440, (843) 546–2521, (843) 527–3251 (Fax), Director: Dwight McInvaill, Web Site: *http://www.gcpl.lib.sc.us/.*

McClellanville Branch Library, 222 Baker St., McClellanville, SC 29458, (843) 889–3300.

Government agencies, private organizations, and the public are invited to participate in the planning and analysis of the proposed project. Representatives from RUS and CEPCI will be available at the scoping meeting to discuss RUS' environmental review process, describe the project, the need for the project, the macro corridors under consideration, and discuss the scope of environmental issues to be considered, answer questions, and accept oral and written comments. Written comments will be accepted for 30 days after the public scoping meeting. Written comments should be sent to RUS at the address provided in this notice.

From information provided in the alternative evaluation and site selection study, input that may be provided by government agencies, private organizations, and the public, Central Electric Power Cooperative will prepare an environmental analysis to be submitted to RUS for review. RUS will use the environmental analysis to determine the significance of the impacts of the project and may adopt it as its environmental assessment of the project. RUS' environmental assessment of the project would be available for review and comment for 30 days.

Should RUS determine, based on the EA of the project, that the project would not have a significant environmental impact, it will prepare a finding of no significant impact. Public notification of a finding of no significant impact would be published in the **Federal Register** and in newspapers with a circulation in the project area.

Any final action by RUS related to the proposed project will be subject to, and contingent upon, compliance with environmental review requirements as prescribed by the Council on Environmental Quality and RUS environmental policies and procedures.

Benjamin Shuman,

Acting Director, Engineering and Environmental Staff, USDA/Rural Development/Utilities Programs.

[FR Doc. 05–23381 Filed 11–28–05; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the

following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Evaluation of NOAA's Bay Watershed Education and Training (B-WET) Programs.

Form Number(s): None.

OMB Approval Number: 0648–0530.

Type of Request: Regular submission.

Burden Hours: 4,235.

Number of Respondents: 6,528.

Average Hours Per Response: One half hour for students; 20 minutes for teachers; 1 hour for program providers; 20 minutes for professional development teachers; 1 hour for professional development program providers; and 20 minutes for past professional development teachers.

Needs and Uses: NOAA seeks to ascertain whether B-WET-funded Meaningful Watershed Educational Experience (MWEE) programs are improving students' stewardship and academic achievement as well as teachers' confidence in implementing MWEEs with their students. NOAA, with additional funding from the Chesapeake Bay Trust and the Keith Campbell Foundation, has contracted with an external team of evaluators to conduct an initial, exploratory evaluation to collect baseline data on the MWEE and professional development (PD) programs..

Affected Public: Individuals or households; not-for-profit institutions; State, Local or Tribal Government.

Frequency: Annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David_Rostker@omb.eop.gov.*

Dated: November 22, 2005.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 05–23409 Filed 11–28–05; 8:45 am]

BILLING CODE 3510–12–U

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Alaska Saltwater Sport Fishing Economic Survey.

Form Number(s): None.

OMB Approval Number: None.

Type of Request: Regular submission.

Burden Hours: 1,380.

Number of Respondents: 3,276.

Average Hours Per Response: 25 minutes.

Needs and Uses: The objective of this project is to collect data necessary for estimating the demand for saltwater fishing trips by Alaska saltwater anglers and for understanding the factors affecting this demand. This information is needed to improve federal management decisions affecting Alaska saltwater recreational fisheries, principally the halibut fishery. The data collection consists of conducting a formal pretest and full implementation of a mail survey using a random sample of U.S. residents who have purchased a license to fish in Alaska.

Affected Public: Individuals or households.

Frequency: One time only.

Respondent's Obligation: Voluntary.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David_Rostker@omb.eop.gov.*

Dated: November 22, 2005.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 05–23410 Filed 11–28–05; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Documentation of Fish Harvest.

Form Number(s): None.

OMB Approval Number: 0648–0365.

Type of Request: Regular submission.

Burden Hours: 50.

Number of Respondents: 25.

Average Hours Per Response: 30 minutes.

Needs and Uses: Seafood dealers who possess red porgy, gag, black grouper, or greater amberjack during seasonal fishery closures must maintain documentation that such fish were harvested from areas other than the South Atlantic. The documentation includes information on the vessel that harvested the fish and on where and when the fish were offloaded. The information is required for the enforcement of fishery regulations.

Affected Public: Business or other for-profit organizations; individuals or households.

Frequency: On occasion.

Respondent's Obligation: Mandatory.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David_Rostker@omb.eop.gov.*

Dated: November 22, 2005.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 05–23411 Filed 11–28–05; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–475–818]

Notice of Final Results of the Eighth Administrative Review of the Antidumping Duty Order on Certain Pasta From Italy and Determination to Revoke in Part

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On July 22, 2005, the Department of Commerce (''the Department'') published the preliminary results and partial rescission of the eighth administrative review and revocation of the antidumping duty order in part, for the antidumping duty order on certain pasta from Italy. The review covers six manufacturers/exporters: (1) Barilla G.e.R. Fratelli, S.p.A. (''Barilla'') (formerly Barilla Alimentare, S.p.A.), (2) Corticella Molini e Pastifici S.p.A. and its affiliate Pasta Combattenti S.p.A. (''Corticella''), (3) Industrie Alimentare Colavita, S.p.A. (''Indalco''), (4) Pastificio F.lli Pagani S.p.A. (''Pagani''), (5) Pastificio Antonio Pallante S.r.L. and its affiliate Vitelli Foods LLC (''Pallante''), and (6) Pastificio Riscossa F.lli Mastromauro, S.r.L. (''Riscossa''). The period of review (''POR'') is July 1, 2003, through June 30, 2004.

As a result of our analysis of the comments received, these final results differ from the preliminary results. We have also determined to revoke the antidumping duty order with respect to subject merchandise produced and also exported by Pallante because the company sold the subject merchandise at not less than normal value (''NV'') for a period of at least three consecutive years. *See* 19 CFR 351.222(b)(2) and the ''Revocation'' section of this notice. The final results are listed in the ''Final Results of Review'' section below.

EFFECTIVE DATE: November 29, 2005.

FOR FURTHER INFORMATION CONTACT: Dennis McClure and Robert Copyak, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 482–5973 and (202) 482–2209, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 22, 2005, the Department published the preliminary results of the eighth administrative review of the antidumping duty order on certain pasta from Italy. *See Notice of Preliminary Results, Partial Rescission of Antidumping Duty Administrative Review and Revocation of the Antidumping Duty Order in Part: For the Eighth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy,* 70 FR 42303 (July 22, 2005) (''*Preliminary Results*'').

We invited parties to comment on our *Preliminary Results.* On August 22, 2005, we received case briefs from petitioners [1] and from Barilla, Indalco, Pagani, and Pallante. On August 26, 2005, we received rebuttal briefs from petitioners and Indalco, and from Pagani and Barilla on August 29, 2005. On August 30, 2005, petitioners requested that the Department reject Pagani's and Barilla's rebuttal briefs because they failed to meet the filing deadline. Pagani and Barilla state in their August 31, 2005, letters that their rebuttal briefs were timely filed in accordance with 19 CFR 351.303(b). The due date of filing a rebuttal brief fell on Saturday, August 27, 2005. Pagani and Barilla filed their rebuttal briefs on the first business day—Monday, August 29, 2005. We accept Pagani's and Barilla's rebuttal briefs because they were timely filed within the meaning of 19 CFR 351.303(b). On October 5, 2005, a public hearing was held at the Department of Commerce with respect to Pagani.

Scope of the Order

Imports covered by this order are shipments of certain non-egg dry pasta in packages of five pounds four ounces or less, whether or not enriched or fortified or containing milk or other optional ingredients such as chopped vegetables, vegetable purees, milk, gluten, diastasis, vitamins, coloring and flavorings, and up to two percent egg white. The pasta covered by this scope is typically sold in the retail market, in fiberboard or cardboard cartons, or polyethylene or polypropylene bags of varying dimensions.

Excluded from the scope of this order are refrigerated, frozen, or canned pastas, as well as all forms of egg pasta, with the exception of non-egg dry pasta containing up to two percent egg white. Also excluded are imports of organic pasta from Italy that are accompanied by the appropriate certificate issued by the Instituto Mediterraneo Di Certificazione, by Bioagricoop Scrl, by QC&I International Services, by Ecocert Italia, by Consorzio per il Controllo dei Prodotti Biologici, or by Associazione Italiana per l'Agricoltura Biologica.

The merchandise subject to this order is currently classifiable under item 1902.19.20 of the *Harmonized Tariff Schedule of the United States* (''*HTSUS*''). Although the *HTSUS* subheading is provided for convenience and customs purposes, the written description of the merchandise subject to the order is dispositive.

Revocation

On July 30, 2004, Pallante and Pagani submitted requests for revocation of the antidumping duty order with respect to their sales of the subject merchandise pursuant to 19 CFR 351.222(b). In the *Preliminary Results,* we preliminarily determined to revoke the antidumping duty order with respect to subject merchandise produced and exported by Pallante. *See* 70 FR at 42304. We did not receive any comments from interested parties concerning our revocation with respect to Pallante. For the reasons set forth in the Preliminary Results, 70 FR at 42304, we continue to find that revocation is appropriate with respect to Pallante and, thus, we revoke the antidumping duty order with respect to subject merchandise produced and exported by Pallante. With regards to Pagani, we find that Pagani made sales of subject merchandise at less than NV. Therefore, we are not revoking the antidumping duty order with respect to Pagani.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the Issues and Decision Memorandum, which is hereby adopted by this notice. A list of the issues which parties have raised, and to which we have responded in the Issues and Decision Memorandum, is attached to this notice as an Appendix. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the Web at *http://ia.ita.doc.gov/frn.* The paper copy and electronic version of the Issues and Decisions Memorandum are identical in content.

Final Results of Review

We determine that the following weighted-average margins exist for the period July 1, 2003, through June 30, 2004:

Manufacturer/Exporter	Margin (percent)
Barilla	20.68
Corticella	3.41
Indalco	2.59
Pagani	2.76
Pallante	[1] 0.34

[1] Petitioners are New World Pasta Company, Dakota Growers Pasta Company, Borden Foods Corporation and American Italian Pasta Company.

Manufacturer/Exporter	Margin (percent)
Riscossa	2.03

[1] De minimis.

Assessment

The Department shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b), we have calculated exporter/importer-specific duty assessment rates by aggregating the dumping margins for the examined U.S. sales for each importer and dividing the amount by the total entered value of the sales for that importer. In situations in which the importer-specific assessment rate is above *de miminis*, we will instruct CBP to assess antidumping duties on that importer's entries of subject merchandise. The Department will issue appropriate assessment instructions directly to CBP within 15 days of publication of these final results of review.

Cash Deposit Requirements

The following deposit requirements will be effective upon publication of this notice of final results of the administrative review for all shipments of certain pasta from Italy entered, or withdrawn from warehouse, for consumption on or after the date of publication of these final results, as provided by section 751(a)(1) of the Act: (1) The cash deposit rates for the reviewed companies will be the rates shown above, except where the margin is *de minimis* or zero we will instruct CBP not to collect cash deposits; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 11.26 percent, the ''All Others'' rate established in the less-than-fair-value investigation. *See Notice of Antidumping Duty Order and Amended Final Determination of Sales at Less Than Fair Value: Certain Pasta from Italy*, 61 FR 38547 (July 24, 1996). These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

Notification

This notice also 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 and/or countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement may result in the Secretary's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent increase in antidumping duties by the amount of antidumping and/or countervailing duties reimbursed.

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of 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 are sanctionable violations.

We are issuing and publishing this determination and notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: November 21, 2005.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

Appendix I—List of Comments and Issues in the Decision Memorandum

Barilla G.e.R. Fratelli, S.p.A.

Comment 1: *Freight Expenses For Certain U.S. Sales.*
Comment 2: *U.S. Indirect Selling Expense.*

Industria Alimentare Colavita, S.p.A. and Fusco S.r.l.

Comment 3: *Liquidation Instructions.*
Comment 4: *Treatment of Negative Dumping Margins.*
Comment 5: *Treatment of Affiliated Party G&A.*
Comment 6: *Ministerial Errors.*
Comment 7: *Home-Market Level of Trade.*
Comment 8: *Cost Data Used to Calculate the Difference-in-Merchandise Adjustment.*

Pastificio F.lli Pagani S.p.A.

Comment 9: *Interest/Exchange Revenue Claim.*
Comment 10: *Interest Expense—Interest Free Loan from Parent Company.*
Comment 11: *G&A Expenses—Adjustments.*

Pastificio Antonio Pallante S.r.L. and Vitelli Food LLC

Comment 12: *Treatment of Free Pasta.*
Comment 13: *Correction to Cost Calculations.*

[FR Doc. 05–23459 Filed 11–28–05; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Application for Duty-Free Entry of Scientific Instrument

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether an instrument of equivalent scientific value, for the purposes for which the instrument shown below is intended to be used, is being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be filed within 20 days with the Statutory Import Programs Staff, U.S. Department of Commerce, Washington, DC 20230. Applications may be examined between 8:30 a.m. and 5 p.m. in Suite 4100W, U.S. Department of Commerce, Franklin Court Building, 1099 14th Street, NW., Washington, DC.

Docket Number: 05–045

Applicant: Department of Molecular Physiology and Biophysics, College of Medicine, HSFR Building, 149 Beaumont Avenue, Burlington, VT 05401.

Instrument: Electron Microscope, Model Morgagni 268

Manufacturer: FEI Company, Czech Republic.

Intended Use: The instrument is intended to be used to examine and photograph high-resolution digital images of the anatomical, physiological and pathological structures and processes of samples from a broad range of tissue specimens. The images can be conveniently stored for future use or shared with other researchers via the Internet. Application accepted by Commissioner of Customs: October 18, 2005.

Gerald A. Zerdy,

Program Manager, Statutory Import Programs Staff.

[FR Doc. 05–23458 Filed 11–28–05; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Questionnaire To Support Review of Federal Assistance Applications

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, 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.

DATES: Written comments must be submitted on or before January 30, 2006.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Shelby L. Mendez, (301) 713–1622 ext. 207 or *shelby.l.mendez@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Environmental Policy Act (NEPA) (42 U.S.C. 4321 through 4327) and the Council on Environmental Quality (CEQ) implementing regulations (40 CFR parts 1500 through 1508) require that an environmental analysis be completed for all major Federal actions significantly affecting the environment. NEPA applies only to the actions of Federal agencies. While those Federal actions may include a Federal agency's decision to fund non-Federal projects under grants and cooperative agreements, NEPA requires agencies to assess the environmental impacts of actions proposed to be taken by these recipients only when the Federal agency has sufficient discretion or control over the recipient's activities to deem those actions as Federal actions. To determine whether the activities of the recipient of a Federal financial assistance award (i.e., grant or cooperative agreement) involve sufficient Federal discretion or control, and to undertake the appropriate environmental analysis when NEPA is required, NOAA must assess information which can only be provided by the Federal financial assistance applicant. Thus, NOAA is developing an environmental information questionnaire to provide grantees and Federal grant managers with a simple tool to ensure that project and environmental information is obtained. The questionnaire will apply only to those programs where actions are considered major Federal actions or to those where NOAA must determine if the action is a major Federal action. The questionnaire will include a list of questions that encompasses a broad range of subject areas. The applicants will not be required to answer every question in the questionnaire. Each program will draw from the final comprehensive list of questions to create a relevant subset of questions for applicants to answer. The information provided in answers to the questionnaire will be used by NOAA staff to determine compliance requirements for NEPA and conduct subsequent NEPA analysis as needed. The information provided in the questionnaire may also be used for other regulatory review requirements associated with the proposed project, such as permitting.

II. Method of Collection

Methods of submittal include paper forms through the mail, Internet and facsimile transmission.

III. Data

OMB Number: None.

Form Number: None.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations; individuals or households; not-for-profit institutions; state, local or tribal government; and Federal government.

Estimated Number of Respondents: 1,750.

Estimated Time Per Response: 3 hours.

Estimated Total Annual Burden Hours: 5,250.

Estimated Total Annual Cost to Public: $8,750.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: November 22, 2005.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 05–23408 Filed 11–28–05; 8:45 am]

BILLING CODE 3510–NW–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 050905A]

Fisheries of the Gulf of Mexico; Southeastern Data, Assessment, and Review (SEDAR); Gulf of Mexico Vermilion Snapper, Greater Amberjack, and Gray Triggerfish

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

ACTION: Notice of change in SEDAR Workshops for Gulf of Mexico vermilion snapper, greater amberjack, and gray triggerfish.

SUMMARY: The SEDAR assessments of the Gulf of Mexico stocks of vermilion snapper, greater amberjack, and gray triggerfish will consist of a series of three workshops: a Data Workshop, an Assessment Workshop, and a Review Workshop. This is the ninth SEDAR. The Data and Assessment workshops are completed. An additional workshop to complete the assessment will be held in December 2005 and the review workshop will be delayed until March 2006, see **SUPPLEMENTARY INFORMATION**.

DATES: The Second Assessment Workshop will take place December 19–20, 2005; and the Review Workshop will take place March 27–31, 2006, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The Second Assessment Workshop will be held at the Doubletree Club Hotel Atlanta Airport, 3400 Norman Berry Drive, Atlanta GA, telephone: (404) 763–1600. The Review Workshop will be held at the Hotel Monteleone, 214 Royal Street, New Orleans, LA 70130, telephone: (504) 523–3341.

FOR FURTHER INFORMATION CONTACT: Steven Atran, Gulf of Mexico Fishery Management Council (GMFMC), 2203 North Lois Avenue, Suite 1100, Tampa FL 33607. telephone: (813) 348–1630. John Carmichael, SEDAR Coordinator, 1 Southpark Circle, Suite 306, Charleston, SC 29414. (843) 571–4366.

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR includes three workshops: (1) Data Workshop, (2) Stock Assessment Workshop and (3) Review Workshop. The product of the Data Workshop and the Stock Assessment Workshop is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The Assessment Report is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Consensus Summary which reports Panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the regional Fishery Management Councils, NOAA Fisheries' Southeast Regional Office (SERO), and the NOAA Fisheries' Southeast Fisheries Science Center (SEFSC), and include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and NGO's; International experts; and staff of Councils, Commissions, and state and federal agencies.

The stock assessments assigned to SEDAR 9 were not completed during the August Assessment Workshop. Therefore, an additional workshop will be held in December 2005 to finalize the stock assessment reports and complete the Assessment Workshop tasks. As a result of delay in completing the stock assessments, the Review Workshop will be moved from December 2005 to March 2006. The original announcement of the SEDAR Workshops for the Gulf of Mexico vermillion snapper, greater amberjack, and gray triggerfish published at 70 FR 25018, May 12, 2005.

SEDAR 9 Workshop Schedule:

December 19–20, 2005. SEDAR 9 Assessment Workshop II

December 19, 2005, 10 a.m.–8 p.m. and December 20, 2005,8 a.m.–5 p.m.

Participants will review proposed assessment models and recommend the most appropriate methods and configurations for determining stock status and estimating population parameters. Participants will review assessment reports, compare and contrast various assessment approaches, and determine whether the assessments are adequate for submission to the review panel.

March 27–31, 2006. SEDAR 9 Review Workshop

March 27, 2006, 1 p.m.–8 p.m., March 28–30, 2006, 8 a.m.–8 p.m. and March 31, 2006, 8 a.m.–1 p.m.

The Review Workshop is an independent peer review of the assessment developed during the Data and Assessment Workshops. Workshop Panelists will review the assessment and document their comments and recommendations in a Consensus Summary. Panellists will summarize the assessment results in an Advisory Report.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accoomodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **FOR FURTHER INFORMATION CONTACT**) at least 5 business days prior to each workshop.

Dated: November 23, 2005

Tracey L. Thompson,

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

[FR Doc. E5–6650 Filed 11–28–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 110905B]

Magnuson-Stevens Act Provisions; Atlantic Highly Migratory Species; Exempted Fishing, Scientific Research, Display, and Chartering Permits

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

ACTION: Notice of intent to issue exempted fishing, scientific research, display, and chartering permits; request for comments.

SUMMARY: NMFS announces the intent to issue Exempted Fishing Permits (EFPs), Scientific Research Permits (SRPs), Display Permits, and Chartering Permits for the collection of Atlantic highly migratory species (HMS). The permits would authorize collections of a limited number of tunas, swordfish, billfishes, and sharks from Federal waters in the Atlantic Ocean and Gulf of Mexico for the purposes of scientific data collection and public display. Generally, these permits would be valid from the date of issuance through December 31, 2006. NMFS also announces the intent to consider issuing permits upon receiving applications from U.S. fishermen whose vessels fish for Atlantic HMS while operating under chartering arrangements within the Exclusive Economic Zone (EEZ) of other nations to collect data consistent with the International Commission for the Conservation of Atlantic Tunas (ICCAT) recommendations and to ensure consistency with that country's regulations without violating U.S. regulations.

DATES: Written comments on these collection, research, and fishing activities will be considered by NMFS when issuing EFPs, SRPs, Display, and/or Chartering Permits if received on or before December 29, 2005.

ADDRESSES: Comments may be submitted by any of the following methods:

- Email: *ID110905B@noaa.gov*. Include in the subject line the following identifier: I.D. 110905B.
- Mail: Margo Schulze-Haugen, Chief, Highly Migratory Species Management Division (F/SF1), NMFS, 1315 East-West Highway, Silver Spring, MD 20910.
- Fax: (301)713–1917.

FOR FURTHER INFORMATION CONTACT: Heather Stirratt, by phone: (301)713–2347; or fax: (301)713–1917.

SUPPLEMENTARY INFORMATION: EFPs, SRPs, Display, and Chartering Permits are requested and issued under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*) and/or the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*). Regulations at 50 CFR 600.745 and 50 CFR 635.32 govern scientific research activity, exempted fishing, chartering arrangements, and exempted educational activity with respect to Atlantic HMS.

Issuance of EFPs, SRPs, Display, and Chartering Permits may be necessary for the collection of scientific data and for public display because the possession of certain shark species is prohibited, possession of billfishes on board commercial fishing vessels is prohibited, and/or because the commercial fisheries for bluefin tuna, swordfish, and large coastal sharks may be closed for extended periods, during which time the collection of live animals and/or biological samples would be otherwise prohibited. Collection of bluefin tuna may be authorized for scientific research, age and growth, genetic, and spawning studies. NMFS regulations at 50 CFR 635.32 regarding the implantation or attachment of archival tags in Atlantic HMS require prior authorization and a report on implantation activities.

NMFS seeks public comment on its intent to issue EFPs for the purpose of collecting biological samples under at-sea fisheries observer programs. NMFS intends to issue EFPs to any NMFS employee or NMFS-approved contractor/observer to bring onboard and possess (for scientific research purposes, biological sampling, measurement, etc.) any Atlantic swordfish, Atlantic shark, or Atlantic billfish provided the fish is a tag recapture fish, dead prior to being brought onboard, or specifically authorized for sampling by the Director of NMFS' Office of Sustainable Fisheries at the request of the Southeast Fisheries Science Center or the Northeast Fisheries Science Center. On average, several hundred swordfish and sharks are collected by at-sea observers under such EFPs in any given year.

NMFS is also seeking public comment on its intent to issue Display Permits for the collection of restricted species of sharks for the purpose of public display. In the Final Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks (1999 HMS FMP), NMFS established a 60 metric ton wet weight quota for the public display and research of sharks. NMFS preliminarily determined that, based on average weight of sharks landed, approximately 3,000 sharks could be taken with this current quota. The actual number of sharks taken depends on the species and size of the sharks collected. NMFS believes that harvesting this amount for public display will have a minimal impact on the stock and that the number of sharks harvested for display and research will remain under the annual 60 metric ton quota. In 2005, seven Display Permits were issued, authorizing the collection of 258 large coastal, 133 small coastal, and 92 prohibited sharks for display purposes. The total number reported as actually taken will not be known until early 2006. However, of the 373 large coastal, 60 small coastal, and 72 prohibited sharks authorized for collection via the issuance of nine Display Permits in 2004, only 10 large coastal sharks, no small coastal sharks, and nine prohibited species were reported taken from Federal waters. In 2004, 23.68 percent of the shark display and research quota was used for public display collections.

Generally, authorized collections or exemptions involve activities otherwise prohibited by regulations implementing the 1999 HMS FMP and Amendment 1 to the Atlantic Billfish FMP. The EFPs, if issued, may authorize recipients to fish for and possess tunas, billfish, swordfish, and sharks outside the applicable Federal commercial seasons, size limits and/or retention limits; to fish for and possess prohibited species; or to fish for and possess HMS collected for research purposes in closed areas. NMFS may consider exempted fishing applications for bycatch reduction research in closed regions of the Atlantic Ocean, Gulf of Mexico, and Caribbean Sea to test gear modifications and fishing techniques aimed to avoid incidental capture of non-target species. Such applications would likely require further National Environmental Policy Act (NEPA) analyses and possibly public comment.

Comments are also requested on the issuance of Chartering Permits to vessels fishing for HMS while operating under chartering arrangements within the EEZ of other nations. Chartering Permits allow a U.S. fishing vessel to fish in a manner consistent with another country's regulations without violating U.S. regulations, and ensure that such vessels report to the proper authorities, consistent with ICCAT recommendations. To date, NMFS has only issued one Chartering Permit for a pelagic longline vessel.

Table 1 summarizes the number of exempted permits and authorized collections in 2004 and 2005, as well as the number of specimens collected in 2004. The number of specimens collected in 2005 will be available when all of the 2005 annual reports are submitted to NMFS. In 2004, the number of authorized specimens for collection was greater than the number specimens actually collected under each permit. A total of 43 exempted permits were issued by NMFS in 2004 for the collection of HMS, whereas the number of permits issued in 2005 declined to 35 permits. In both 2004 and 2005, the greatest number of exempted permits issued were Tuna EFPs. Shark SRPs had the greatest number of specimens authorized for collection in 2004, whereas tuna EFPs authorized the greatest number of specimens in 2005.

Table 1. Summary of HMS Exempted Permits Issued in 2004 and 2005

	2004			2005	
	Number of Permits Issued	Number of Authorized Specimens	Number of Specimens Taken	Number of Permits Issued	Number of Authorized Specimens
EFP					
HMS	5	480	22	4	0
Shark	8	870	835	5	760
Tuna	12	385	102	7	859
Billfish*	1	100	0	2	625
SRP					
HMS	1	100	0	4	100
Shark	3	1,170	196	3	850
Display					
HMS	1	18	0	1	41
Shark	8	592	19	6	377
Total	39	3,715	1,174	32	3,612
LOA**					
Shark	4	2,445	1,114	4	1,974

* These permits authorize the collection of blue marlin, white marlin, sailfish, and swordfish, as well as larvae of each species.

**Collections made under an LOAs are not authorized; rather this estimated harvest for research is acknowledged by NMFS. All sources of mortality are accounted for and used to assess stock status.

Final decisions on the issuance of any EFPs, SRPs, Display, and Chartering Permits will depend on the submission of all required information about the proposed activities, NMFS' review of public comments received on this notice, consistency with conclusions in the Final Environmental Impact Statement (EIS) contained in the Final HMS FMP (64 FR 13575; March 19, 1999), Environmental Assessments (EAs) or EISs, and any consultations with appropriate Regional Fishery Management Councils, states, or Federal agencies. NMFS does not anticipate any environmental impacts from the issuance of these EFPs other than impacts already assessed in the 1999 HMS FMP.

All requests for EFPs, SRPs, Display, and Chartering Permits of a type or nature not addressed in this **Federal Register** notice will have a separate notice filed and separate public comment period.

Authority: 16 U.S.C. 971 *et seq.* and 16 U.S.C. 1801 *et seq.*

Dated: November 22, 2005.

Alan D. Risenhoover,

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

[FR Doc. 05–23469 Filed 11–28–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. [051121306–5306–01]]

Announcement of Funding Opportunity for the Coastal and Estuarine Land Conservation Program

AGENCY: Office of Ocean and Coastal Resource Management (OCRM), the National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Announcement of funding opportunity for financial assistance for project grants.

SUMMARY: NOS/OCRM is soliciting coastal and estuarine land conservation acquisition projects from eligible coastal states. The Coastal and Estuarine Land Conservation Program (CELCP) was established ''for the purpose of protecting important coastal and estuarine areas that have significant conservation, recreation, ecological, historical, or aesthetic values, or that are threatened by conversion from their natural or recreational state to other uses.'' This announcement solicits proposals for land acquisition projects, up to 3 years in duration, with the purpose of protecting important coastal and estuarine areas. Project proposals should reflect priorities identified in an approved state CELC plan or, if a state plan has not been completed, by the state's approved coastal management program. This solicitation will result in a prioritized list of projects that will be submitted to Congress in March 2006 for consideration in the FY 2007 appropriations process. Proposals should be prepared assuming a cost of no more than $3,000,000 per project and three projects per eligible applicant.

DATES: Proposals must be received by the NOS/OCRM no later than 5 p.m. e.s.t., December 30, 2005.

ADDRESSES: It is strongly preferred that you submit your application through Grants.gov at the Internet site: *http://www.grants.gov*. You may access, download, and submit an electronic grant application through Grants.gov.

The full funding announcement is available via the grants.gov Web site: *http://www.grants.gov*. The announcement will also be available at the NOAA Web site *http://www.ago.noaa.gov/ad/solindex.shtml* or by contacting the program officials identified below. Applicants must comply with all requirements contained in the full funding opportunity announcement. NOAA strongly recommends that you do not wait until the application deadline date to begin the application process through Grants.gov. Paper applications, a signed original and 4 copies, may be submitted to Attn: Elaine Vaudreuil, NOAA, Ocean and Coastal Resource Management, National Policy and Evaluation Division (N/ORM7), 1305 East-West Highway, SSMC4, 10th Floor Station 10657, Silver Spring, MD 20910. The closing deadline for applying through grants.gov is the same as for the paper submission noted in this announcement.

FOR FURTHER INFORMATION CONTACT: CELCP Program Managers: Elaine Vaudreuil, OCRM, 301–713–3155 ext 103; via Internet: *Elaine.Vaudreuil@noaa.gov* or Elisabeth Morgan, OCRM, 301–713–3155 ext 166; via Internet at *Elisabeth.Morgan@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Summary Description

The Coastal and Estuarine Land Conservation Program (CELCP) was established ''for the purpose of protecting important coastal and estuarine areas that have significant conservation, recreation, ecological, historical, or aesthetic values, or that are threatened by conversion from their natural or recreational state to other uses.'' This announcement solicits proposals for land acquisition projects up to 3 years in duration with the purpose of protecting important coastal and estuarine areas. Project proposals should be based upon a state's coastal and estuarine land acquisition priorities as outlined in approved state CELC plans or as part of an approved state coastal management program. The state's designated lead agency for implementing the CELCP may solicit, and include in their application, project proposals from additional state agencies, or local governments as defined at 15 CFR 24.3, or entities eligible for assistance under Section 306A(e) of the CZMA (16 U.S.C. 1455a(e)), provided that each has the authority to acquire and manage land for conservation purposes. For this solicitation, the requirement that states must have an approved CELC plan will be waived. Coastal states may select and submit up to three projects. Grants will be given for up to $3,000,000 for each project.

Project proposals should identify and discuss the project's primary focus and in addition describe all other relevant conservation, recreation, ecological, historical, and aesthetic values, and discuss threats of conversion of the project from its natural or recreational state to other uses. The proposals should also detail how the project will be completed in a timely manner, existing and proposed uses of the property, and how the project site will be managed in the future for long-term qualifications.

The CELCP Guidelines, published in the **Federal Register** on June 17, 2003, establish the eligibility, procedural and programmatic requirements for participation in the CELCP, including the criteria for financial assistance awards under the program. The guidelines outline the criteria and process for eligible coastal states to develop a state coastal and estuarine land conservation plan, nominate land conservation projects to a national competitive process, and for NOAA to select projects at the national level for funding. All applications submitted pursuant to this notice must be consistent with the requirements and guidelines implementing the CELCP published in the **Federal Register** (68 FR 35860–35869), on June 17, 2003, except that for this solicitation NOS waives the requirement for states to have an approved CELC plan. The Coastal and Estuarine Land Program Final Guidelines, June 2003 can be found at *http://coastalmanagement.noaa.gov/pdf/CELCPfinal02Guidelines.pdf*.

Funding Availability

Funding is dependent upon 2007 appropriations. It is anticipated that up to $60,000,000 in projects will be recommended to Congress for funding in FY 2007. This solicitation announces that award amounts to be determined by the proposals and available funds not to exceed $3,000,000 per project with a project duration from 1–3 years. It is anticipated that approximately 20–60 projects will be recommended for funding in FY 2007.

Statutory Authority: 16 U.S.C. 1456d.

CFDA: 11.419, Coastal and Estuarine Land Conservation Program.

Eligibility

Coastal states with Coastal Zone Management Programs or National Estuarine Research Reserves approved under the Coastal Zone Management Act of 1972 are eligible to participate. Each state's CELCP lead agency will be responsible for: soliciting projects that are consistent with priorities outlined in the state's approved CELC plan or if a CELC plan has not yet been approved, a state's coastal management program. A list of state lead agency contacts for the CELCP can be found at: *http://coastalmanagement.noaa.gov/landconservation.html*. The state's lead agency may solicit, and include in their application, project proposals from additional state agencies, or local governments as defined at 15 CFR 24.3, or entities eligible for assistance under section 306A(e) of the CZMA (16 U.S.C. 1455a(e)), provided that each has the authority to acquire and manage land for conservation purposes. Up to three project proposals may be submitted. The state will be responsible for ensuring that allocated funds are used for the purposes of and in a manner consistent with this program.

Cost Sharing Requirements

All funds under this program are to be matched with non-federal funds at a ratio of 1:1.

Intergovernmental Review

Applications under this program are subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

Proposal Review and Selection Process for Projects

NOAA published its agency-wide solicitation entitled ''Omnibus Notice Announcing the Availability of Grant Funds for Fiscal Year 2006'' for projects for Fiscal Year 2006 in the **Federal Register** on June 30, 2005 (70 FR 37766). The evaluation and selection criteria and procedures for projects contained in that omnibus notice are applicable to this notice. Copies of this notice are available on the Internet at *http://www.ofa.noaa.gov/%7Eamd/SOLINDEX.HTML*. Further details on evaluation and selection criteria and procedures applicable to this notice can be found in the full funding opportunity announcement.

National Environmental Policy Act (NEPA)

NOAA must analyze the potential environmental impacts, as required by the National Environmental Policy Act (NEPA), for applicant projects or proposals which are seeking NOAA federal funding opportunities. Detailed information on NOAA compliance with NEPA can be found at the following NOAA NEPA Web site: *http://www.nepa.noaa.gov/*, including our

NOAA Administrative Order 216–6 for NEPA, *http://www.nepa.noaa.gov/NAO216—6—TOC.pdf*, and the Council on Environmental Quality implementation regulations, *http://ceq.eh.doe.gov/nepa/regs/ceq/toc_ceq.htm*. Consequently, as part of an applicant's package, and under their description of their program activities, applicants are required to provide detailed information on the activities to be conducted, locations, sites, species and habitat to be affected, possible construction activities, and any environmental concerns that may exist (e.g., the use and disposal of hazardous or toxic chemicals, introduction of non-indigenous species, impacts to endangered and threatened species, aquaculture projects, and impacts to coral reef systems). In addition to providing specific information that will serve as the basis for any required impact analyses, applicants may also be requested to assist NOAA in drafting of an environmental assessment, if NOAA determines an assessment is required. Applicants will also be required to cooperate with NOAA in identifying feasible measures to reduce or avoid any identified adverse environmental impacts of their proposal. The failure to do so shall be grounds for not selecting an application. In some cases if additional information is required after an application is selected, funds can be withheld by the Grants Officer under a special award condition requiring the recipient to submit additional environmental compliance information sufficient to enable NOAA to make an assessment on any impacts that a project may have on the environment.

Pre-Award Notification Requirements for Grants and Cooperative Agreements

The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements contained in the **Federal Register** notice of December 30, 2004 (69 FR 78389) are applicable to this solicitation.

Limitation of Liability

Funding for the program listed in this notice is contingent upon the availability of Fiscal Year 2007 appropriations. In no event will NOAA be responsible for proposal preparation costs if this program fails to receive funding or is cancelled because of other agency priorities. Publication of this announcement does not oblige NOAA to award any specific project or to obligate any available funds.

Paperwork Reduction Act

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

The following requirements have been approved by OMB under control number 0648–0459: a Project Proposal and Project Application Checklist (up to five copies per project), including project budget and justification or proposed costs, site maps, and supporting information such as appraisal, title opinion, documentation of compliance with Federal laws, regulations, policies etc.; and documentation of landowner's willingness to sell.

Executive Order 12866

This notice has been determined to be not significant for purposes of Executive Order 12866.

Executive Order 13132 (Federalism)

It has been determined that this notice does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

Administrative Procedure Act/ Regulatory Flexibility Act

Prior notice and opportunity for public comment are not required by the Administrative Procedure Act or any other law for rules concerning public property, loans, grants, benefits, and contracts (5 U.S.C. 553(a)(2)). Because notice and opportunity for comments are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis has not been prepared.

Dated: November 22, 2005.

Charles Challstrom,

Acting Assistant Administrator, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. E5–6660 Filed 11–28–05; 8:45 am]

BILLING CODE 3510–NK–P

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Termination of Further Consideration of Requests for Textile and Apparel Safeguard Action on Imports from China

November 23, 2005.

AGENCY: The Committee for the Implementation of Textile Agreements (the Committee).

ACTION: Notice.

SUMMARY: The Committee is terminating further consideration of requests for safeguard action on imports from China of twenty-four textile and apparel product categories.

FOR FURTHER INFORMATION CONTACT: Jay Dowling, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-4058.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agriculture Act of 1956, as amended; Executive Order 11651, as amended.

Background:

Requests for China textile safeguard action based on the existence and/or threat of market disruption, on twenty-four textile and apparel product categories, were filed between November 12, 2004 and October 11, 2005, by a coalition of textile and apparel industry associations and a union representing textile and apparel industry workers. CITA accepted each of these requests for consideration and published notices in the **Federal Register** establishing a 30-day public comment period. The twenty-four product categories are:

Category	Description
222	Knit fabric
226	Cheesecloth, batistes, lawns/voiles
301	Combed cotton yarn
332/432 & 632pt.	Cotton, wool & man-made fiber socks
338/339	Cotton knit shirts & blouses
340/640	Men's & boys' cotton & man-made fiber shirts, not knit
341/641	Women's & girls' cotton & man-made fiber shirts & blouses, not knit
342/642	Cotton & man-made fiber skirts
345/645/646	Cotton & man-made fiber sweaters
347/348	Cotton trousers
349/649	Cotton & man-made fiber brassieres & other body supporting garments

Category	Description
350/650	Cotton & man-made fiber dressing gowns & robes
351/651	Cotton & man-made fiber nightwear & pajamas
352/652	Cotton & man-made fiber underwear
359-S/659-S	Cotton & man-made fiber swimwear
363	Cotton terry & other pile towels
369pt./666pt.	Curtains & drapery
443	Men's & boys' wool suits
447	Men's & boys' wool trousers
619	Polyester filament fabric
620	Other synthetic filament fabric
634/635	Other men's & boys' man-made fiber coats & women's & girls' man-made fiber coats
638/639	Man-made fiber knit shirts & blouses
647/648	Man-made fiber trousers

The Committee's procedures state that it will make a determination within 60 calendar days of the close of the public comment period as to whether the United States will request consultations with China. The deadlines for determination on these cases range from November 30, 2005, through February 5, 2006.

On November 8, 2005, the Governments of the United States and the People's Republic of China signed a broad agreement concerning textile and apparel products. This Memorandum of Understanding was reached with a view to further developing the bilateral economic and trade relationship between the United States and China, providing the textile and apparel industries in the United States and China with a stable and predictable trading environment, and resolving trade concerns through consultations under Paragraph 242 of the Report of the Working Party for the Accession of China to the World Trade Organization. In light of the Memorandum of Understanding, and consistent with its objectives, the Committee has terminated further consideration of all textile safeguard requests that were pending on the date the Memorandum of Understanding was signed, November 8, 2005.

James C. Leonard III,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 05–23460 Filed 11–28–05; 8:45 am]

BILLING CODE 3510–DS

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OBM Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by December 29, 2005.

Title and OMB Number: Corps of Engineers Civil Works Questionnaires—Generic Clearance; OMB Control Number 0710–0001.

Type of Request: Extension.

Number of Respondents: 185,500.

Responses Per Respondent: 1.

Annual Responses: 185,500.

Average Burden Per Response: 5 minutes (average).

Annual Burden Hours: 17,307.

Needs and Uses: The U.S. Army Corps of Engineers utilizes the data collected from the questionnaire items for planning data to formulate and evaluate alternative water resources development plans, to determine the effectiveness and evaluate the impacts of Corps projects, and in case of the flood damage mitigation, to obtain information on flood damage incurred, whether or not a project is being considered or exists. All survey questionnaires are administered either by face-to-face, mail, or telephone methods. Public surveys are used to gather data for planning and operating Corps projects and facilities and to determine public preferences and satisfaction.

Affected Public: Individuals or households; business or other for-profit; not-for-profit institutions; farms; and state, local or tribal government.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Mr. James Laity. Written comments and recommendations on the proposed information collection should be sent to Mr. Laity at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Ms. Patricia Toppings. Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 1777 North Kent Street, RPN, Suite 11000, Arlington, VA 22209–2133.

Dated: November 21, 2005.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 05–23371 Filed 11–28–05; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 06–14]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: Ms. J. Hurd, DSCA/DBO/ADM, (703) 604–6575.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 06–14 with attached transmittal and policy justification.

Dated: November 21, 2005.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–M

DEFENSE SECURITY COOPERATION AGENCY
WASHINGTON, DC 20301-2800

14 NOV 2005
In reply refer to:
I-05/0118084

The Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515-6501

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 06-14, concerning the Department of the Navy's proposed Letter(s) of Offer and Acceptance to Finland for defense articles and services estimated to cost $100 million. Soon after this letter is delivered to your office, we plan to notify the news media.

Sincerely,

Richard J. Millies
Deputy Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Same ltr to:

House	Senate
Committee on International Relations	Committee on Foreign Relations
Committee on Armed Services	Committee on Armed Services
Committee on Appropriations	Committee on Appropriations

Transmittal No. 06-14

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended

(i) **Prospective Purchaser**: Finland

(ii) **Total Estimated Value**:

Major Defense Equipment*	$ 75 million
Other	$ 25 million
TOTAL	$100 million

(iii) **Description and Quantity or Quantities of Articles or Services under Consideration for Purchase**: up to 150 AIM-9X SIDEWINDER Missiles, 11 AIM-9X Dummy Air Training Missiles, 40 AIM-9X Captive Air Training Missiles, missile containers, test sets and support equipment, spare and repair parts, publications and technical data, maintenance, personnel training and training equipment, U.S. Government and contractor representatives, contractor engineering and technical support services, and other related elements of logistics support.

(iv) **Military Department**: Navy (AAI)

(v) **Prior Related Cases, if any**: FMS case SAB - 21Jan94

(vi) **Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid**: none

(vii) **Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold**: See Annex attached.

(viii) **Date Report Delivered to Congress**: 14 NOV 2005

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Finland - AIM-9X SIDEWINDER Missiles

The Government of Finland has requested a possible sale of up to 150 AIM-9X SIDEWINDER Missiles, 11 AIM-9X Dummy Air Training Missiles, 40 AIM-9X Captive Air Training Missiles, missile containers, test sets and support equipment, spare and repair parts, publications and technical data, maintenance, personnel training and training equipment, U.S. Government and contractor representatives, contractor engineering and technical support services, and other related elements of logistics support. The estimated cost is $100 million.

This proposed sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a friendly country which has been and continues to be an important force for political stability and economic progress in Europe.

Finland intends to integrate the AIM-9X SIDEWINDER missile onto its existing fleet of F/A-18 aircraft as part of its aircraft mid-life upgrade program. Incorporation of the missiles onto Finnish F/A-18 aircraft will significantly enhance the Air Force's current air-to-air intercept capability. Finland, which already has SIDEWINDER missiles in its inventory, will have no difficulty absorbing these items.

The proposed sale of this equipment and support will not affect the basic military balance in the region.

The prime contractor will be Raytheon Systems Corporation of Tucson, Arizona. Offset agreements associated with this proposed sale are expected, but at this time the specific offset agreements are undetermined and will be defined in negotiations between the purchaser and contractor.

Implementation of this proposed sale will require the assignment of several additional U.S. Government and contractor representatives for two-week intervals twice annually to participate in training, program management and technical review.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 06-14

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended

Annex
Item No. vii

(vii) Sensitivity of Technology:

1. The AIM-9X represents a substantial increase in missile acquisition and kinematics performance over previous variants AIM-9. The missile includes a high off-boresight seeker, enhanced countermeasure rejection capability, low drag/high angle of attack airframe, and the ability to integrate the Joint Helmet Mounted Cueing System. The software algorithms are the most sensitive portions of the AIM-9X missile. The software continues to be modified during the testing phase in order to improve its counter-countermeasures capabilities. No software source code or algorithms will be released. Sensitive and/or classified (up to Secret) elements of the AIM-9X missiles include equipment/hardware, software, training, maintenance, documentation, and operation/performance.

2. The external view of the AIM-9X SIDEWINDER missile is unclassified and not sensitive. The seeker/guidance and control section and the target detector are confidential and contain sensitive state-of-the-art technology. Specifically, the infrared seeker sensitivity is a significant improvement over the previous AIM-9 variants. Manuals and technical documents for the AIM-9X that are necessary or support operational use and organizational maintenance, improved acquisition range, and the ability to integrate with aircraft sensors are classified up to Secret. Performance and operating logic of the counter-countermeasures circuits are Secret. The hardware, software, and data identified are classified to protect vulnerabilities, design and performance parameters and similar critical information.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures which might reduce weapon system effectiveness or could be used in the development of a system with similar or advanced capabilities.

[FR Doc. 05–23374 Filed 11–28–05; 8:45 am]
BILLING CODE 5001–06–C

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Intent To Prepare a Draft Environmental Impact Statement for Potential Multipurpose Projects for Ecosystem Restoration, Flood Damage Reduction, and Recreation Development Within and Along the West and Elm Forks and Main Stem of the Trinity River in Dallas, Dallas County, TX

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent.

SUMMARY: The study is being conducted in response to the authority contained in the following United States Senate Committee on Environment and Public Works Resolution dated April 22, 1988, as quoted below:

Resolved by the Committee on Environment and Public Works of the United States Senate, that the Board of Engineers for Rivers and Harbors is hereby requested to review the report of the Chief of Engineers on the Trinity River and Tributaries, Texas, House Document No. 276, Eighty-Ninth Congress, and other pertinent reports, with a view to determining the advisability of modifying the recommendations contained therein, with particular reference to providing improvements in the interest of flood protection, environmental enhancement, water quality, recreation, and other allied purposes in the Upper Trinity River Basin with specific attention on the Dallas-Fort Worth Metroplex.

An initial assessment based on the resolution guidance indicates a Federal interest in continuing with more detailed studies for these purposes. In accordance with the National Environmental Policy Act, a Draft Environmental Impact Statement (DEIS) will be prepared to evaluate and compare ecosystem restoration, flood damage reduction, and recreation alternatives within and along the Trinity River in, within and adjacent to the existing Dallas Floodway area of Dallas, TX. The DEIS will also assess the impacts to the quality of the human environment associated with each alternative. The study area will be bound on the upstream by Loop 12 crossings of the West and Elm Forks and at the downstream end by the existing terminus of the Dallas Floodway approximated by the abandoned Santa Fe railroad on the Trinity River. The construction and implementation of Joe Pool Lake, Grapevine Lake, Lake Lewisville and the Dallas Floodway project along with urbanization and development activities, have significantly degraded the terrestrial and aquatic habitat along and within the Trinity River. Consequently, ecosystem restoration measures will be developed and evaluated to address the degraded habitats. In addition, recreation measures will be developed and evaluated as complements to proposed ecosystem restoration measures. Preliminary findings indicate that due to major changes in runoff attributable to upstream development, the originally authorized flood damage reduction benefits have diminished within the study area and therefore opportunities to restore those Floodway benefits and explore options for improving flood damage reduction benefits within the interior drainages in the study area should be investigated. Flood damage reduction measures will address the loss of the authorized level of flood protection for the area.

DATES: A public scoping meeting will be held on December 13, 2005 at 7 p.m.

ADDRESSES: The meeting will be held at the Nash-Davis Recreation Center Activity Room, 3710 North Hampton Road, Dallas, TX 75212.

FOR FURTHER INFORMATION CONTACT: Questions pertaining to the proposed action and DEIS can be answered by: Mr. Gene T. Rice, CESWF–PM–C, U.S. Army Corps of Engineers, Fort Worth District, P.O. Box 17300, Fort Worth, TX 76102–0300, (817) 886–1734.

SUPPLEMENTARY INFORMATION: The original Dallas Floodway levees and interior drainage improvements were completed between 1928 and 1931 by the City of Dallas and Dallas County Levee Improvement District. The Trinity River was rerouted by constructing a channel within the leveed floodway. The original channel was either filled or used for sump storage.

In the mid-1940's, major floods, compounded with continued urbanization in the watershed draining into the Floodway system resulted in severe flooding. The Dallas Floodway was authorized by River and Harbor Acts of March 2, 1945 and May 17, 1950. The project, which was completed in April 1959, entailed the channel improvement, clearing of the floodway, strengthening of levees, installation and modification of drainage structures, construction of pressure sewers, pump station and sump areas. The improvements provided conveyance of the Standard Project Flood within the floodway plus 4 feet of freeboard.

Alternatives for ecosystem restoration, flood damage reduction, and recreation will be developed and evaluated based on ongoing fieldwork and data collection and past studies conducted by the Corps of Engineers, the City of Dallas, and the U.S. Fish and Wildlife Service. Ecosystem restoration alternatives that will be evaluated include creating meanders within the Trinity River, restoring, protecting and expanding the riparian corridor, improving aquatic habitat, creating riffle-pool complexes, and constructing wetlands. It is anticipated that ecosystem restoration measures would aid in improving water quality, optimizing aquatic and terrestrial habitat, and minimizing erosion and scouring along and within the river. Alternatives for flood damage reduction measures will be evaluated from both a non-structural and structural aspect. Non-structural measures that will be evaluated include acquisition and removal of structures or flood proofing of structures for protection from potential future flood damage. Structural measures that will be evaluated include levee height modification by fill or addition of flood walls, changes in interior drainage by enlarging storage areas or increasing widths and depths and/or a combination of these measures. Recreation measures that will be evaluated for include multipurpose trails and passive recreation features, such as interpretive guidance and media and picnic areas. Recreation measures will be developed to a scope and scale compatible with proposed ecosystem restoration measures without significantly diminishing ecosystem benefits.

A Programmatic Environmental Impact Statement (PEIS) for the Upper Trinity River Basin Feasibility study addressing the potential cumulative effects of reasonably foreseeable projects, including the Clear Fork West Fork studies was completed in June 2000. The DEIS will be tiered to the PEIS.

The public will be invited to participate in the scoping process, invited to attend public meetings, and given the opportunity to review the DEIS. The first public scoping meeting will be on (see **DATES** & **ADDRESSES**). Subsequent public meetings, if deemed necessary, will be announced in the local news media. Release of the DEIS for public comment is scheduled for March 2007. The exact release date, once established, will be announced through mailings to known interested individuals, agencies and officials and in the local news media.

Future coordination with other agencies and public scoping will be conducted to ensure full and open participation and aid in the development of the DEIS. All affected

Federal, state, and local agencies, affected Indian tribes, and other interested private organizations and parties are hereby invited to participate. Future coordination will also be conducted with the United States Fish and Wildlife Service (USFWS). The USFWS will furnish information on threatened and endangered species in accordance with the Endangered Species Act. In addition, the USFWS will also be requested to provide support with planning aid and to provide a Fish and Wildlife Coordination Act Report. The State Historic Preservation Office will be consulted as required by Section 106 of the National Historic Preservation Act.

John C. Dvoracek,

Lieutenant Colonel, Corps of Engineers, Deputy District Engineer.

[FR Doc. E5–6642 Filed 11–28–05; 8:45 am]

BILLING CODE 3710–P

DEPARTMENT OF DEFENSE

Department of the Navy

Meeting of the U.S. Naval Academy Board of Visitors

AGENCY: Department of the Navy, DoD.

ACTION: Notice of partially closed meeting.

SUMMARY: The U.S. Naval Academy Board of Visitors will meet to make such inquiry, as the Board shall deem necessary into the state of morale and discipline, the curriculum, instruction, physical equipment, fiscal affairs, and academic methods of the Naval Academy. The meeting will include discussions of personnel issues at the Naval Academy, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. The executive session of this meeting will be closed to the public.

DATES: The open session of the meeting will be held on Monday, December 12, 2005, from 8 a.m. to 10 a.m. The closed Executive Session will be held on Monday, December 12, 2005, from 10 a.m. to 1 p.m.

ADDRESSES: The meeting will be held in the U.S. Naval Academy in the Bo Coppedge Room of Alumni Hall, Annapolis, Maryland.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander, Marc D. Boran, Executive Secretary to the Board of Visitors, Office of the Superintendent, U.S. Naval Academy, Annapolis, MD 21402–5000, 410–293–1503.

SUPPLEMENTARY INFORMATION: This notice of meeting is provided per the Federal Advisory Committee Act (5 U.S.C. App. 2). The executive session of the meeting will consist of discussions of personnel issues at the Naval Academy and internal Board of Visitors matters. Discussion of such information cannot be adequately segregated from other topics, which precludes opening the executive session of this meeting to the public. Accordingly, the Secretary of the Navy has determined in writing that the meeting shall be partially closed to the public because it will be concerned with matters listed in section 552b(c)(2), (5), (6), (7) and (9) of title 5, United States Code.

Dated: November 22, 2005.

Eric McDonald,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. E5–6646 Filed 11–28–05; 8:45 am]

BILLING CODE 3810–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education

SUMMARY: The Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before January 30, 2006.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: November 22, 2005.

Angela C. Arrington,

Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer.

Federal Student Aid

Type of Review: Revision of a currently approved collection.

Title: Federal Direct PLUS Loan Application and Master Promissory Note, and Endorser Addendum (LO).

Frequency: On Occasion.

Affected Public: Individuals or household (primary).

Reporting and Recordkeeping Hour Burden:

Responses: 230,625.

Burden Hours: 115,313.

Abstract: The PLUS MPN is the means by which an individual applies for and agrees to repay a Federal Direct PLUS Loan. If an applicant for a Federal Direct PLUS Loan is determined to have an adverse credit history and obtains an endorser, the Endorser Addendum is the means by which an endorser agrees to repay the loan if the borrower does not repay it.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 02942. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to 202–245–6621. Please specify the

complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Joe Schubart at *Joe.Schubart@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E5–6629 Filed 11–28–05; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Order Addressing Change in Status Filing and Providing Guidance

Issued November 17, 2005.

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

	Docket Nos.
Calpine Energy Services, LP	ER00–3562–003; ER05–817–001;
Calpine PowerAmerica-OR, LLC	ER03–341–002
Calpine PowerAmerica-CA, LLC	ER03–342–002
Power Contract Financing, LLC	ER03–838–003
PCF2, LLC	ER04–1081–001
Calpine Energy Management, LP	ER04–1080–001
CES Marketing V, LP	ER03–209–002
Calpine Northbrook Energy Marketing, LLC	ER03–36–004
MEP Pleasant Hill, LLC	ER99–2858–008
Calpine Bethpage 3, LLC	ER05–48–001
Ontelaunee Power Operating Company, LLC	ER05–1266–001
CES Marketing VIII, LLC	ER05–818–001
CES Marketing IX, LLC	ER05–819–001
CES Marketing X, LLC	ER05–820–001
Zion Energy, LLC	ER02–1319–004
Calpine Newark, LLC	ER04–831–002
Calpine Parlin, LLC	ER04–832–002
Calpine Construction Finance Company, LP	ER00–1115–003
Calpine Philadelphia Energy, Inc.	ER03–446–002
CPN Bethpage 3rd Turbine, Inc.	ER02–1959–003
Bethpage Energy Center 3, LLC	ER04–1099–001
TBG Cogen Partners	ER04–1100–001
Gilroy Energy Center, LLC	ER01–2688–008
Creed Energy Center, LLC	ER02–2227–004
Delta Energy Center, LLC	ER02–600–006
Goose Haven Energy Center, LLC	ER02–2229–003
Los Esteros Critical Energy Facility, LLC	ER03–24–003
Metcalf Energy Center, LLC	ER05–67–001
Pastoria Energy Facility LLC	ER05–68–001
Geysers Power Company, LLC	ER99–1983–003
Calpine California Equipment Finance Company, LLC	ER03–290–002

1. In this order, the Commission accepts a notice of change in status filed by Calpine Energy Services, L.P. (CES) and its affiliated public utilities (collectively, the Calpine Entities), to report a change in status that reflects a departure from the characteristics that the Commission relied upon in granting these entities market-based rate authority, pursuant to the reporting requirements of Order No. 652.[1] For the reasons discussed below, and based on Calpine Entities' representations, we accept the Calpine Entities' change in status filing.

Background

2. On September 9, 2005, CES and the Calpine Entities filed a notice of change in status to report that CES, a power marketer, had entered into two Energy Management Agreements regarding certain third party-owned electric generating assets as described below. In addition, the Calpine Entities state that CES anticipates entering into a third such agreement, as also described below. The Calpine Entities state that under the Commission's regulations, they are required to report any change in status that would reflect a departure from the characteristics the Commission relied upon in granting them market-based rate authority.[2] The Calpine Entities assert that they are providing this notice here out of an abundance of caution based on their belief that the Energy Management Agreements described in their filing do not constitute a change in status, as contemplated by the Commission's regulations. The Calpine Entities claim that CES will not acquire control of the facilities at issue under these agreements.[3]

3. The Calpine Entities state that even assuming CES is deemed to acquire control of these facilities, this authority would not alter the Commission's prior determinations that CES and its affiliates satisfy the Commission's four-part test for market based rate authority.

The IECC Agreement

4. The Calpine Entities state that on July 29, 2005, CES and Inland Empire Energy Center, LLC (IECC) entered into an Energy Management Agreement (IECC Agreement), pursuant to which CES will provide certain services to IECC, the owner of a 775 MW natural gas-fired electric generating facility located in Riverside County, California (IECC Facility). The Calpine Entities state that the IECC Facility is expected to begin commercial operations in 2008, with the output of the facility to be delivered into the transmission system operated by the California Independent System Operator, Inc. (CAISO).

5. The Calpine Entities state that CES will act as IECC's agent to market and schedule the energy, capacity, ancillary services, and any other product produced by the IECC Facility and arrange for the procurement and maintenance of transmission service for the products produced by the IECC Facility. CES states it will also arrange for the procurement and scheduling of natural gas supplies for use at the IECC Facility. The Calpine Entities state that IECC will be the operator of the IECC Facility and that CES will act pursuant to orders from IECC. CES states it will have limited discretion as to prices for which it sells the output of the IECC Facility and purchases products used to generate the IECC's Facility's output and deliver this output to third parties.

The POA Agreement

6. The Calpine Entities state that on August 5, 2005, CES and Project Orange Associates, L.L.C. (POA) entered into an Energy Management Agreement (POA Agreement), pursuant to which CES will provide certain services to POA, the owner of an 80 MW natural gas-fired cogeneration facility located in Syracuse, New York (POA Facility). The Calpine Entities state that the output of the POA Facility will be sold into the markets operated by the New York Independent System Operator (NYISO). CES states that it will act as POA's agent and, as directed by POA, bid, schedule, and sell the output of the POA Facility in the NYISO market. CES also states it will schedule natural gas transportation deliveries and assist in managing POA's pipeline imbalances. The Calpine Entities state that CES will have limited discretion concerning the prices for which it sells the output of the POA Facility and purchases fuel and other products.

[1] Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority, FERC Stats. & Regs., Regulations Preambles III ¶ 31,175 (Feb. 10, 2005) (Order No. 652), order on reh'g, 111 FERC ¶ 61,413 (2005). 18 CFR 35.27(c) (2005).

[2] *See, e.g.,* 18 CFR 35.27(c)(1) (defining a ''change in status'' to include, but not be limited to, ''ownership or control of generating or transmission facilities or inputs to electric power production other than fuel supplies.'').

[3] The agreements themselves were not included by the Calpine Entities in their submittal.

The OPOC Agreement

7. The Calpine Entities state that CES and Ontelaunee Power Operating Company, LLC (OPOC) expect to enter into an Energy Management Agreement in September 2005 (OPOC Agreement), pursuant to which CES will provide certain services to OPOC, the owner of a 587 MW electric generation facility located in Reading, Pennsylvania. The Calpine Entities state that the output of the facility will be sold into the markets operated by PJM Interconnection, L.L.C. (PJM). CES states that it will provide the following services at the direction of, and subject to the approval of, OPOC: Power management services (including marketing, bidding, and scheduling), fuel management, and risk management services. CES states that it will have the authority to enter into transactions for the purchase or sale of fuel or power with a term of 31 days or less. In addition, the Calpine Entities state that the authority for CES to execute other types of transactions could be delegated by OPOC from time-to-time by written notice.

8. Finally, the Calpine Entities include in their submittal tariff revisions for those of their affiliates who have not previously filed to revise their market-based rate tariffs to include the reporting requirement for changes in status, as required by Order No. 652.

9. Notice of the Calpine Entities' submittal was published in the **Federal Register**,[4] with interventions or protests due on or before October 11, 2005. None was filed.

Discussion

10. For the reasons discussed below, we will accept the Calpine Entities' notice of change in status, as it relates to the POA Agreement and the OPOC Agreement. We will not address, at this time, the Calpine Entities' representations as they relate to the IECC Agreement, given the premature nature of any evaluation concerning market conditions in the CAISO market as of the IECC Facility's projected 2008 in-service date.

11. Order No. 652 requires that a seller with market-based rate authority notify the Commission of a change in status that would reflect a departure from the characteristics relied upon by the Commission in granting the seller market-based rate authority. Section 35.27(c)(1) of the Commission's regulations defines a change in status to include but not be limited to ''ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies.''

12. The Calpine Entities state that under the Energy Management Agreements described herein CES will not exercise control over the generating facilities at issue (*i.e.*, over the IECC Facility, the POA Facility, or the OPOC Facility), as contemplated by Order No. 652.[5] However, we cannot make this determination here based on the record before us, in the absence of the agreements at issue and/or a more detailed description of the services provided under these agreements and their effect on the Calpine Entities' market power analyses.

13. We clarify, in this regard, that sellers making a change in status filing to report an energy management agreement are required to make an affirmative statement in their filing as to whether the agreement at issue transfers control of any assets and whether the agreement results in any material effect on the conditions that the Commission relied upon for the grant of their market-based rate authority. On some occasions, and at the Commission's discretion, the Commission may request the seller to submit a copy of the agreement and provide supporting documentation.

14. We further clarify that a seller making a change in status filing is required to state whether it has made a filing pursuant to section 203 of the Federal Power Act.[6] To the extent the seller has made a section 203 filing that it submits is being made out of an abundance of caution and thus has voluntarily consented to the Commission's section 203 jurisdiction, the seller will be required to incorporate this same assumption in its market-based rate change in status filing (*e.g.*, if the seller assumes that it will control a jurisdictional facility in a section 203 filing, it should make that same assumption in its market-based rate change in status filing and, on that basis, inform the Commission as to whether there is any material effect on its market-based rate authority).[7]

15. The Calpine Entities argue that even assuming that CES will control the capacity attributable to its Energy Management Agreements, neither CES nor any of its affiliates would possess generation market power in the relevant markets (*i.e.*, in the CAISO, PJM, or the NYISO), or fail to satisfy the Commission's other requirements applicable to their market-based rate authority.[8]

16. We agree that even attributing the capacity associated with the POA Facility and the OPOC Facility to the Calpine Entities would not alter our recent determinations that the Calpine Entities, in these markets (*i.e.*, in the NYISO and PJM), continue to satisfy our requirements applicable to the grant of their market-based rate authority.[9] However, as noted above, we cannot decide this issue at this time, as it relates to the IECC Facility, which is not scheduled to become operational until 2008. A change in status filing regarding CES' agreement with regard to the IECC Facility should be made by the Calpine Entities no later than 30 days after the IECC Facility becomes operational.

17. Finally, we will accept for filing the Calpine Entities' proposed tariff revisions incorporating the reporting requirement for changes in status, as required by Order No. 652.

The Commission Orders

(A) The Calpine Entities' notice of change in status and proposed tariff revisions are hereby accepted for filing, in part, as discussed in the body of this order.

(B) The Secretary is directed to publish a copy of this order in the **Federal Register**.

By the Commission.

Magalie R. Salas,

Secretary.

[FR Doc. 05–23468 Filed 11–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice Of Filings #1

November 21, 2005.

Take notice that the Commission received the following electric rate filings

Docket Numbers: ER03–9–004; ER03–9–005; ER98–2157–005; ER98–2157–006 EL05–64–000.

Applicants: Westar Energy, Inc. and Kansas Gas and Electric Company.

Description: Westar Energy, Inc and Kansas Gas and Electric Co submit

[4] 70 FR 57,573 (2005).

[5] ''In short, if an applicant has control over certain capacity such that the applicant can affect the ability of the capacity to reach the relevant market, then the capacity should be attributed to the applicant when performing the generation market power screens.'' Order No. 652 at P 47.

[6] 16 U.S.C. 824b (2000).

[7] Order No. 652 at P 35.

[8] The Calpine Entities rely, in this regard, on their recently submitted triennial review analyses, for each of these three markets.

[9] *See Creed Energy Center, LLC*, Docket No. ER02–2227–003, (November 2, 2005) (unpublished letter order). *See also CES Marketing VI, LLC et al.*, 111 FERC ¶ 61,261 (2005).

response to FERC's 10/17/05 Information Request.

Filed Date: 11/15/2005.

Accession Number: 20051117–0014.

Comment Date: 5 p.m. eastern time on Tuesday, December 6, 2005.

Docket Numbers: ER05–1036–002.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: The Midwest Independent Transmission System Operator, Inc submits an errata to its 9/13/05 filing.

Filed Date: 11/14/2005.

Accession Number: 20051116–0185.

Comment Date: 5 p.m. eastern time on Monday, December 5, 2005.

Docket Numbers: ER05–1389–001.

Applicants: San Juan Mesa Project, LLC.

Description: San Juan Mesa Wind Project, LLC submits First Revised Sheet No. 1 et al to FERC Electric Tariff, Original Volume No. 1 to be effective 10/7/05 in compliance with FERC's 10/12/05.

Filed Date: 11/14/2005.

Accession Number: 20051116–0184.

Comment Date: 5 p.m. eastern time on Monday, December 5, 2005.

Docket Numbers: ER05–1439–001.

Applicants: Allegheny Energy Supply Company, LLC.

Description: Allgeheny Energy Supply Co, LLC submits its Full Requirements Service Agreement with West Penn Power Co.

Filed Date: 11/14/2005.

Accession Number: 20051116–0189.

Comment Date: 5 p.m. eastern time on Monday, December 5, 2005.

Docket Numbers: ER05–969–002.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc submits an errata to its 9/13/05 compliance filing of a Large Generator Interconnection Agreement.

Filed Date: 11/14/2005.

Accession Number: 20051116–0193.

Comment Date: 5 p.m. eastern time on Monday, December 5, 2005.

Docket Numbers: ER06–200–000.

Applicants: Big Horn Wind Project LLC.

Description: Big Horn Wind Project LLC submits its initial rate schedule, a request for the granting of authorizations and blanket authority and for waiver of certain requirements.

Filed Date: 11/14/2005.

Accession Number: 20051115–0137.

Comment Date: 5 p.m. eastern time on Monday, December 5, 2005.

Docket Numbers: ER06–201–000.

Applicants: Southern California Edison Company.

Description: Southern Califoria Edison Co informs FERC of the purchase price of the Mountainview Power Co LLC-owned generation facility.

Filed Date: 11/14/2005

Accession Number: 20051115–0135.

Comment Date: 5 p.m. eastern time on Monday, December 5, 2005.

Docket Numbers: ER06–205–000.

Applicants: Alcoa Power Generating Inc.

Description: Alcoa Power Generating, Inc submits revisions to the open access transmission tariff of its Long Sault Division.

Filed Date: 11/14/2005.

Accession Number: 20051116–0106.

Comment Date: 5 p.m. eastern time on Monday, December 5, 2005.

Docket Numbers: ER06–206–000.

Applicants: Arizona Public Service Company.

Description: Arizona Public Service Co's notice of cancellation of their FERC Electric Rate Schedule No.170, to be effective 12/31/05.

Filed Date: 11/14/2005.

Accession Number: 20051116–0043.

Comment Date: 5 p.m. eastern time on Monday, December 5, 2005.

Docket Numbers: ER06–207–000.

Applicants: Xcel Energy Services, Inc.

Description: Xcel Energy Services, Inc, on behalf of Public Service Company of Colorado submits an Amended & Restated Agreement for Interconnection Service with Fountain Valley Power, LLC.

Filed Date: 11/14/2005.

Accession Number: 20051116–0042.

Comment Date: 5 p.m. eastern time on Monday, December 5, 2005.

Docket Numbers: ER06–208–000.

Applicants: Xcel Energy Services, Inc.

Description: Xcel Energy Services Inc on behalf of Public Service Co of Colorado submits an Amended & Restated Agreement for Interconnection Service with Black Hills Colorado, LLC.in reference to Original Agreement No. 164–PSCo.

Filed Date: 11/14/2005.

Accession Number: 20051116–0066.

Comment Date: 5 p.m. eastern time on Monday, December 5, 2005.

Docket Numbers: ER06–209–000.

Applicants: Xcel Energy Services, Inc.

Description: Xcel Energy Service, Inc submits on behalf of Public Service Company of Colorado its Amended & Restated Agreement for Interconnection Service with Black Hills Colorado, LLC. in reference to Original Agreement No. 163–PSCo.

Filed Date: 11/14/2005.

Accession Number: 20051116–0035.

Comment Date: 5 p.m. eastern time on Monday, December 5, 2005.

Docket Numbers: ER06–210–000.

Applicants: Xcel Energy Services, Inc.

Description: Xcel Energy Service Inc on behalf of Public Service Co of Colorado submits an amended & restated agreement for interconnection service with BIV Generation Co, LLC.

Filed Date: 11/14/2005.

Accession Number: 20051116–0033.

Comment Date: 5 p.m. eastern time on Monday, December 5, 2005.

Docket Numbers: ER06–211–000.

Applicants: Rayburn Country Electric Cooperative Inc.

Description: Rayburn Country Electric Coop, Inc notifies FERC that they are no longer a public utility as defined by the Federal Power Act, due to amendments to section 201(f) of the FPA.

Filed Date: 11/14/2005.

Accession Number: 20051116–0041.

Comment Date: 5 p.m. eastern time on Monday, December 5, 2005.

Docket Numbers: ER06–212–000.

Applicants: Wisconsin Electric Power Company.

Description: Wisconsin Electric Power Co submits proposed amendments to the Power Service Agreement with the City of Crystal Falls, Michigan.

Filed Date: 11/15/2005.

Accession Number: 20051116–0197.

Comment Date: 5 p.m. eastern time on Tuesday, December 6, 2005.

Docket Numbers: ER06–213–000.

Applicants: Southern Company Services, Inc.

Description: Southern Company Services, Inc., as agent for Alabama Power Co, submits notice of cancellation of Original Sheet Nos.1 through 168 of the Amended & Restated Agreement for partial requirements service & complementary service with Alabama Municipal Authority.

Filed Date: 11/15/2005.

Accession Number: 20051116–0183.

Comment Date: 5 p.m. eastern time on Tuesday, December 6, 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.

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 dockets(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. E5–6630 Filed 11–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

November 9, 2005.

Take notice that the Commission received the following electric rate filings.

Docket Numbers: ER05–554–003.

Applicants: PacifiCorp.

Description: PacifiCorp reports that on 10/14/05 it paid $26,929 to Warm Springs Power Enterprises in compliance with FERC's 8/25/05 Order.

Filed Date: 11/03/2005.

Accession Number: 20051108–0212.

Comment Date: 5 p.m. eastern time on Friday, November 25 2005.

Docket Numbers: ER06–150–000.

Applicants: PJM Interconnection L.L.C.

Description: PJM Interconnection LLC submits its Third Revised Rate Schedule No. 24 and Sixth Revised Volume No. 1.

Filed Date: 11/02/2005.

Accession Number: 20051108–0285.

Comment Date: 5 p.m. eastern time on Wednesday, November 23, 2005.

Docket Numbers: ER06–151–000.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, LLC submits revisions to the PJM FERC Electric Tariff, Third Revised Rate Schedule No. 24 & Sixth Revised Volume No. 1.

Filed Date: 11/02/2005.

Accession Number: 20051108–0255.

Comment Date: 5 p.m. eastern time on Wednesday, November 23, 2005.

Docket Numbers: ER06–152–000.

Applicants: Wisconsin Public Service Corporation.

Description: Wisconsin Public Service Corp submits a revised Market-Base Rate Tariff designated as FERC Electric Tariff, Fourth Revised Volume No. 10.

Filed Date: 11/03/2005.

Accession Number: 20051108–0209.

Comment Date: 5 p.m. eastern time on Friday, November 25, 2005.

Docket Numbers: ER06–153–000.

Applicants: American Electric Power Service Corporation.

Description: American Electric Power Service Corp on behalf AEP Texas Central Company submits a restated and amended interconnection agreement dated 11/29/99.

Filed Date: 11/03/2005.

Accession Number: 20051108–0210.

Comment Date: 5 p.m. eastern time on Friday, November 25, 2005.

Docket Numbers: ER06–154–000; ER05–1307–000.

Applicants: Tampa Electric Company;

Description: Tampa Electric Co submits a Compliance Filing of Second Revised Sheet No. 121 to FERC Electric Tariff, Second Revised Volume No. 4.

Filed Date: 11/03/2005.

Accession Number: 20051108–0211.

Comment Date: 5 p.m. eastern time on Friday, November 25, 2005.

Docket Numbers: ER06–155–000.

Applicants: Walton Electric Membership Corporation.

Description: Walton Electric Membership Corp informs FERC it is no longer a public utility subject to jurisdiction pursuant to section 201(f) of the Federal Power Act and no longer is required to file reports effective 8/8/05.

Filed Date: 11/02/2005.

Accession Number: 20051108–0207.

Comment Date: 5 p.m. eastern time on Wednesday, November 23, 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.

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Magalie R. Salas,

Secretary.

[FR Doc. E5–6631 Filed 11–28–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

November 3, 2005.

Take notice that the Commission received the following electric rate filings.

Docket Numbers: ER01–1527–009; ER01–1529–009.
Applicants: Nevada Power Co.; Sierra Pacific Power Company.
Description: Nevada Power Co. & Sierra Pacific Power Co. notifies FERC of developments constituting a non-material change in status relating to Applicants' market rate authority.
Filed Date: 10/28/2005.
Accession Number: 20051102–0117.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2005.

Docket Numbers: ER05–1181–001.
Applicants: PJM Interconnection L.L.C.
Description: PJM Interconnection, LLC submits the revisions to the PJM Amended and Restated Operating Agreement in compliance with FERC's 8/31/05 Order.
Filed Date: 10/28/2005.
Accession Number: 20051101–0013.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2005.

Docket Numbers: ER05–1468–001.
Applicants: Ridge Generating Station Limited Partnership.
Description: Ridge Generating Station, Limited Partnership submits supplemental descriptive information re market-based rate schedule and a streamlined generation market power analysis pertaining to the Lakeland Electric control area.
Filed Date: 10/28/2005.
Accession Number: 20051101–0014.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2005.

Docket Numbers: ER06–74–000.
Applicants: Commonwealth Edison Company.
Description: Commonwealth Edison Co. submits a notice of cancellation, as Attachment A, regarding the cancellation of ComEd Rate Schedule 80.
Filed Date: 10/28/2005.
Accession Number: 20051101–0021.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2005.

Docket Numbers: ER06–75–000.
Applicants: NRG McClain LLC.
Description: NRG McClain LLC submits a notice of cancellation of its FERC Rate Schedule 1.
Filed Date: 10/28/2005.
Accession Number: 20051101–0022.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2005.

Docket Numbers: ER06–76–000.
Applicants: LSP-Nelson Energy LLC.
Description: LSP-Nelson Energy LLC submits notice canceling LSP-Nelson's FERC Rate Schedule 1.
Filed Date: 10/28/2005.
Accession Number: 20051101–0023.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2005.

Docket Numbers: ER06–77–000.
Applicants: Illinois Municipal Electric Agency.
Description: The Illinois Municipal Electric Agency submits an initial Rate Schedule No. 1 & supporting cost data to establish its annual revenue requirements for providing Reactive Supply & Voltage Control from Generation Sources etc.
Filed Date: 10/28/2005.
Accession Number: 20051101–0024.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2005.

Docket Numbers: ER06–78–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, LLC submits Schedule 9–OPSI, an amendment to the PJM FERC Electric Tariff, Sixth Revised Volume No. 1.
Filed Date: 10/28/2005.
Accession Number: 20051101–0025.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2005.

Docket Numbers: ER06–79–000.
Applicants: Styrka Energy Master Fund LLC.
Description: Stykra Energy Master Fund, LLC files to cancel its FERC market based rate tariff, Original Rate Schedule No. 1.
Filed Date: 10/28/2005.
Accession Number: 20051101–0026.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2005.

Docket Numbers: ER06–80–000.
Applicants: New York State Electric & Gas Corporation.
Description: New York State Electric & Gas Corp. submits a supplement to Rate Schedule FERC No. 72 Facilities Agreement with the Municipal Board of the Village of Bath.
Filed Date: 10/28/2005.
Accession Number: 20051101–0027.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2005.

Docket Numbers: ER06–81–000.
Applicants: Styrka Energy Fund LLC.
Description: Stryka Energy Fund LLC submits a cancellation to its Original Rate Schedule FERC No.1, effective 2/24/04.
Filed Date: 10/28/2005.
Accession Number: 20051101–0028.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2005.

Docket Numbers: ER06–82–000.
Applicants: Wisconsin Public Service Corp.
Description: Wisconsin Public Service Corp. submits its Eighth Revised Service Agreement No. 9 with Washington Island Electric Cooperative under FERC Electric Tariff, Fifth Revised Volume No. 1, effective 10/1/05.
Filed Date: 10/28/2005.
Accession Number: 20051101–0029.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2005.

Docket Numbers: ER06–83–000.
Applicants: Exelon Corporation.
Description: Exelon Corp on behalf of Commonwealth Edison Co submits notice of cancellation of Original Service Agreement C1059, FERC Electric Tariff, Sixth Revised Volume No. 1, effective 10/13/05.
Filed Date: 10/28/2005.
Accession Number: 20051101–0030.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2005.

Docket Numbers: ER06–84–000.
Applicants: Wisconsin Electric Power Company.
Description: Wisconsin Electric Power Co's submits a Notice of Cancellation of its FERC Electric Tariff, Rate Schedule No. 84, effective 1/1/06.
Filed Date: 10/28/2005.
Accession Number: 20051101–0032.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2005.

Docket Numbers: ER06–85–000.
Applicants: Vermont Electric Power Company, Inc.
Description: Vermont Electric Power Co submits revisions to the VELCO 1991 Transmission Agreement, effective 1/1/06.
Filed Date: 10/28/2005.
Accession Number: 20051101–0031.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2005.

Docket Numbers: ER06–86–000.
Applicants: New York State Electric & Gas Corporation.
Description: New York State Electric & Gas Corp submits supplement to Rate Schedule FERC No. 117—Facilities Agreement with Delaware County Electric Cooperative, etc.
Filed Date: 10/28/2005.
Accession Number: 20051101–0010.
Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2005.
Docket Numbers: ER06–87–000.
Applicants: Styrka Energy Fund Ltd.
Description: Styrka Energy Fund Ltd files to cancel its FERC market based rate tariff, Original Rate Schedule FERC No. 1, and requests waiver of any

obligation to file the quarterly report for the quarter ending December 2005.

Filed Date: 10/28/2005.

Accession Number: 20051101–0011.

Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2005.

Docket Numbers: ER06–88–000.

Applicants: El Paso Electric Company.

Description: El Paso Electric Co submits notice of cancellation & a cancellation tariff sheet for the purpose of canceling a Transaction Agreement with Southwestern Public Service Co.

Filed Date: 10/28/2005.

Accession Number: 20051101–0012.

Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2005.

Docket Numbers: ER06–96–000.

Applicants: American Electric Power Service Corporation.

Description: AEP on behalf of Southwestern Electric Power Co submits the executed Second Power Supply Agreement with East Texas Electric Coop, Inc. *et al.*

Filed Date: 10/28/2005.

Accession Number: 20051102–0367.

Comment Date: 5 p.m. Eastern Time on Friday, November 18, 2005.

Docket Numbers: ER99–830–013; ER04–925–005.

Applicants: Merrill Lynch Capital Services, Inc.; Merrill Lynch Commodities, Inc.

Description: Merrill Lynch Commodities, Inc & Merrill Lynch Capital Services, Inc reports the change in status in connection with the transfer of equity interests in Granite Ridge I SPE, LLC etc.

Filed Date: 10/28/2005.

Accession Number: 20051101–0015.

Comment Date: 5 p.m. Eastern Time on Friday, November 18, 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.

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 email notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E5–6632 Filed 11–28–05; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL06–16–000]

Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations; Order Proposing Revisions to Market-Based Rate Tariffs and Authorizations

Issued November 21, 2005.

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

1. The Commission issues this order pursuant to section 206 of the Federal Power Act (FPA) [1] to propose repeal of the Market Behavior Rules, which are currently included in all public utility sellers' market-based rate tariffs and authorizations.[2] The central purpose of the Market Behavior Rules is to prohibit market manipulation. In the Energy Policy Act of 2005 (EPAct 2005),[3] Congress enacted new section 222 of the FPA which specifically bars manipulation in connection with the purchase or sale of wholesale electric energy or transmission services and authorizes the Commission to promulgate rules and regulations prohibiting market manipulation. In a Notice of Proposed Rulemaking (NOPR) issued October 20, 2005, the Commission has proposed rules to implement the new statutory anti-manipulation provisions.[4] We propose repealing the Market Behavior Rules once we have issued final regulations implementing the anti-manipulation provisions of EPAct 2005 and have incorporated other aspects of the Market Behavior Rules in appropriate Commission orders, rules, and regulations. We are also requesting comment on whether the Market Behavior Rules should be repealed prospectively.

Background

2. On November 17, 2003, acting pursuant to section 206 of the FPA, we amended all market-based rate tariffs and authorizations to include the Market Behavior Rules. We determined that sellers' market-based tariffs and authorizations to make sales at market rates would be unjust and unreasonable unless they included clearly-delineated rules governing market participant conduct, and that the Market Behavior Rules fairly apprised market participants of their obligations in competitive power markets and were just and reasonable.[5]

3. Market Behavior Rule 1 requires sellers to follow Commission-approved rules and regulations in organized power markets. These rules and regulations are part of the tariffs of Independent System Operators (ISO) or Regional Transmission Organizations (RTO), and sellers' agreements to operate within ISOs and RTOs bind them to follow the applicable rules and regulations of the organized market.

4. Market Behavior Rule 2 prohibits ''actions or transactions that are without a legitimate business purpose and that are intended to or foreseeably could

[1] 16 U.S.C. 824e (2000).

[2] *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, ''Order Amending Market-Based Rate Tariffs and Authorizations,'' 105 FERC ¶ 61,218 (2003), *reh'g denied*, 107 FERC ¶ 61,175 (2004) at Appendix A (the Market Behavior Rules Order). The Market Behavior Rules are currently on appeal. *See Cinergy Marketing & Trading, L.P.* v. *FERC*, Nos. 04–1168 *et al.* (DC Cir., appeal filed April 28, 2004).

[3] Energy Policy Act of 2005, Public Law No. 109–58, 119 Stat. 594 (2005).

[4] *Prohibition of Energy Market Manipulation*, 113 FERC ¶ 61,067 (2005) (NOPR).

[5] Market Behavior Rules Order, 105 FERC ¶ 61,218 at PP 3, 158–74.

manipulate market prices, market conditions, or market rules for electric energy or electricity products.'' Actions or transactions explicitly contemplated in Commission-approved rules and regulations of an organized market, or undertaken by a market-based rate seller at the direction of an ISO or RTO, however, are not violations of Market Behavior Rule 2. In addition, Market Behavior Rule 2 prohibits certain specific behavior: Rule 2(a) prohibits wash trades, Rule 2(b) prohibits transactions predicated on submitting false information, Rule 2(c) prohibits the creation and relief of artificial congestion, and Rule 2(d) prohibits collusion for the purpose of market manipulation.

5. Market Behavior Rule 3 requires sellers to provide accurate and factual information, and not to submit false or misleading information or to omit material information, in any communication with the Commission, market monitors, ISOs, RTOs, or jurisdictional transmission providers.

6. Market Behavior Rule 4 deals with reporting of transaction information to price index publishers. It requires that if a seller reports transaction data, the data be accurate and factual, and not knowingly false or misleading, and be reported in accordance with the Commission's Policy Statement on price indices.[6] Rule 4 also requires that sellers notify the Commission of whether they report transaction data to price index publishers in accordance with the Policy Statement, and to update any changes in their reporting status.

7. Market Behavior Rule 5 requires that sellers retain for a minimum three year period all data and information upon which they billed the prices charged for electricity and related products in sales made under their market-based rate tariffs and authorizations or in transactions the prices of which were reported to price index publishers.

8. Finally, Market Behavior Rule 6 directs sellers not to violate, or to collude with others in actions that violate, sellers' market-based rate codes of conduct or the Standards of Conduct under Part 358 of our regulations.[7]

9. At the same time that the Market Behavior Rules were adopted for jurisdictional wholesale electric transactions, the Commission issued Order No. 644, which introduced parallel provisions in part 284 of our regulations under the Natural Gas Act governing pipelines and holders of blanket certificate authority that sell natural gas at wholesale.[8] Not every aspect of the electric Market Behavior Rules was applicable in the natural gas sales context, however. The part 284 regulations encompass Market Behavior Rule 2, including wash sales and collusion to manipulate, and Market Behavior Rules 4 and 5.

EPAct 2005 and Proposed New Rules

10. As noted, section 1283 of EPAct 2005 amended the FPA to add a new section 222, which prohibits the use or employment of ''any manipulative or deceptive device or contrivance'' in connection with the purchase or sale of electric energy or transmission services subject to the jurisdiction of the Commission. In order to implement the anti-manipulation provisions of FPA section 222, we issued the NOPR proposing new regulations (proposed part 47 regulations) to make it unlawful for any entity, directly or indirectly, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission (1) to use or employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person.[9]

11. In the NOPR we recognized that Market Behavior Rule 2 also prohibits manipulative conduct. We noted that conduct that violates both Market Behavior Rule 2 and the proposed part 47 regulations will be treated as one violation of anti-manipulation rules, and that we will not apply duplicative penalties for the same conduct in the event that conduct were to violate both Market Behavior Rule 2 and the proposed part 47 regulations. We also indicated that we would seek comment on whether Market Behavior Rule 2 should be revised or repealed in light of the proposed part 47 regulations.

Discussion

12. Our goal is to provide firm but fair enforcement of the statutes, orders, rules, and regulations we administer. To do so, it is important that our rules be as clear as possible so that market participants and entities subject to our rules and regulations understand what conduct is proscribed and can act accordingly.[10] We propose to repeal the Market Behavior Rules in light of the proposed part 47 regulations to implement the new anti-manipulation provisions contained in section 222 of the FPA and of the Commission's other rules and regulations.[11] All market-based rate sellers are ''entities'' subject to EPAct 2005 and therefore will be subject to the new regulations prohibiting manipulation, deceit, and fraud in connection with wholesale electricity transactions. Other aspects of the Market Behavior Rules either reflect existing requirements or can be incorporated into other rules, making it unnecessary to retain the separate list of rules in each seller's tariff.

13. We think that repeal of the Market Behavior Rules will simplify the Commission's rules and regulations, avoid confusion, and provide greater clarity and regulatory certainty to the industry. At the same time, we think that the behaviors described in the Market Behavior Rules will still be addressed through other rules and regulations. We emphasize our belief that repeal of the Market Behavior Rules is intended to take into account the passage of EPAct 2005, which has provided the Commission with expanded anti-manipulation authority, and to simplify and streamline the rules and regulations sellers must follow, not to eliminate beneficial rules governing market behavior.

14. The heart of the Market Behavior Rules are Rules 2 and 3, prohibiting manipulation and requiring complete, accurate, and factual representations. We recognize that there is overlap between Market Behavior Rules 2 and 3 and the proposed part 47 regulations. We are concerned that this could cause unnecessary confusion and regulatory uncertainty once the proposed part 47 regulations are in place. It is our view that the scope of the new statutory prohibition on manipulation and the reach of the proposed part 47 regulations eliminate the need for Market Behavior Rules 2 and 3.

15. We recognize there are some differences, but the differences do not seem to require keeping the Market Behavior Rules once the new part 47

[6] *Policy Statement on Natural Gas and Electric Price Indices*, 104 FERC ¶ 61,121 (2003).

[7] 18 CFR part 358 (2005).

[8] 18 CFR 284.288 and 284.403 (2005).

[9] The proposed part 47 regulations are also provided in Attachment A hereto.

[10] As discussed in the NOPR (at P 14), section 222 of the FPA, as added by section 1283 of EPAct 2005, and the proposed part 47 regulations are patterned after section 10(b) of the Securities Exchange Act of 1934 and related regulations, which provides a level of certainty as to how the proposed rules will operate that is not typically available.

[11] Concurrently with this order, we are issuing a Notice of Proposed Rulemaking in Docket No. RM06–5–000 to consider similar changes in our part 284 regulations promulgated in Order No. 644.

regulations are final.[12] For instance, there is a difference in the standard of proof between Market Behavior Rule 2 and the proposed part 47 regulations. In new section 222 of the FPA, Congress used the terms ''manipulative or deceptive device or contrivance'' and directed that they be given the same meaning as used in section 10b of the Securities Exchange Act of 1934.[13] Those terms have been interpreted to require a showing of scienter, that is, an intent to deceive, manipulate or defraud.[14] In other words, knowing, intentional, or reckless conduct is proscribed.[15] In contrast, Market Behavior Rule 2 does not require a showing of scienter, as it prohibits actions or transactions that ''foreseeably'' could manipulate market prices, conditions, or rules. The ''foreseeably'' requirement has generated controversy and uncertainty, however. We believe the use of a scienter standard, given the precedent in other regulatory contexts, will draw a clearer line between acceptable and prohibited behavior.

16. We also note that the new authority granted to the Commission in section 222 of the FPA and our proposed part 47 regulations cover more transactions and more entities than is the case for Market Behavior Rule 2, which governs only market-based rate sellers. More precisely, Congress made the anti-manipulation provisions of section 222 applicable to ''any entity'' and in connection with both the purchase and sale of electric energy, as well as the purchase and sale transmission services subject to our jurisdiction. Market Behavior Rule 2, on the other hand, is applicable only to sales by ''public utilities'' that have market-based rate authority, a smaller subset of the entities and types of transactions subject to the section 222 prohibition of manipulation.

17. Market Behavior Rule 2 also includes a statement that actions or transactions explicitly contemplated in Commission-approved rules and regulations of an organized market, or undertaken by a market-based rate seller at the direction of an ISO or RTO, are not violations of Market Behavior Rule 2. Actions or transactions pursuant to Commission-approved rules and regulations of an organized market, or pursuant to the direction of a Commission-approved RTO or ISO, are an affirmative defense to a claim of manipulation under the proposed part 47 regulations, and therefore we will presume that such actions or transactions are not a violation of the proposed part 47 regulations. However, we seek comment on whether it is necessary to retain this provision in market-based rate tariffs.

18. Similarly, it is our view that it is not necessary to retain the explicit prohibitions against certain conduct set forth in Market Behavior Rule 2 (wash trades, transactions predicated on submitting false information, transactions creating and relieving artificial congestion, and collusion for the purpose of market manipulation). These are examples of prohibited manipulation, all of which are manipulative or deceptive devices or contrivances. Thus, all would be barred by the proposed part 47 regulations. For example, wash trades or transactions to create and relieve artificial congestion would be devices or schemes to defraud (proposed § 47.1(a)(1)). Transactions predicated on false information would also involve untrue statements of material facts (proposed § 47.1(a)(2)). It is our view that market participants are on notice that these are prohibited activities under the proposed part 47 regulations, subject to penalty and remedial action.

19. Similarly, with respect to Market Behavior Rule 3, if a seller fails to provide accurate and factual information, or acts in a misleading way, that conduct would be a deceit or fraud and would be a violation of the proposed part 47 regulations. Our view is that, like Market Behavior Rule 2, conduct subject to Market Behavior Rule 3 would also be covered by the proposed part 47 regulations. Here too, it would be confusing to retain a duplicative set of rules governing market conduct.

20. Turning to the other Market Behavior Rules, it appears that the requirements imposed there either are duplicative of other rules or regulations or can be incorporated into other rules of general applicability. For instance, Market Behavior Rule 1 is essentially a restatement of existing obligations to comply with Commission rules and regulations in organized markets. These are tariff requirements of the ISOs and RTOs, and failure of a market participant to follow these rules and regulations is enforceable through the organized market's tariff and related agreements.

21. The first part of Market Behavior Rule 4, requiring sellers to provide accurate data to price index publishers if the seller is reporting transactions to such publishers, calls for accurate and truthful representations. It is our view that failure to do so would be a violation of the proposed part 47 regulations. Market Behavior Rule 4 also includes a requirement that sellers notify the Commission of their price reporting status and any changes in that status. This does not appear elsewhere in our current or proposed regulations. We note, however, that price transparency is also addressed by EPAct 2005, which adds new section 220 to the FPA.[16] Section 220 gives us authority to promulgate rules and regulations necessary to facilitate price transparency. We intend to address market transparency issues in a separate proceeding, and anticipate that rules adopted in that proceeding will address the Market Behavior Rule 4 requirements for providing transaction information to price index publishers and informing the Commission of price reporting status.

22. Market Behavior Rule 5 requires sellers to maintain certain records for a period of three years to reconstruct prices charged for electricity and related products. The Commission has a number of specific record retention requirements applicable to public utilities subject to the jurisdiction of the Commission in part 125 of our regulations.[17] In many cases, these requirements are for time periods longer than three years. The part 125 requirements are largely related to cost-of-service rate requirements, however. We believe it is important that all market-based rate sellers retain the data and information described in Market Behavior Rule 5. We intend to address this retention requirement in the context of our rules under the FPA, such that there will be no gap in the retention

[12] The timing of proposed repeal is important. We do not intend to leave any gap in our regulations prohibiting manipulation of energy markets or other requirements of the Market Behavior Rules.

[13] 15 U.S.C. 78j(b)(2005).

[14] *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 201 (1976).

[15] *Sundstrand Corp.* v. *Sun Chemical Corp.*, 553 F.2d 1033 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977) (defining recklessness in the section 10(b) and Rule 10b–5 context as ''a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.''); *accord In Re Silicon Graphics Securities Litigation*, 183 F.3d 970, 977 (9th Cir. 1999).

[16] In addition, EPAct 2005 section 1282 enacted new FPA section 221, which contains a new prohibition on providing false information. No entity, including an FPA section 201(f) entity, ''shall willfully and knowingly report any information relating to the price of electricity sold at wholesale or the availability of transmission capacity * * * to a Federal agency with intent to fraudulently affect the data being compiled by the Federal agency.'' This prohibition is wider in scope than current Market Behavior Rule 4 because it applies to any ''entity'' and is not restricted to jurisdictional sales or transmission services.

[17] 18 CFR part 125 (2005).

requirement. We believe that doing so would eliminate the need to retain Market Behavior Rule 5.

23. Finally, Market Behavior Rule 6 requires adherence to codes of conducts and the Standards of Conduct, and prohibits collusion to violate the codes of conduct or the Standards of Conduct. The codes of conduct are issued specifically to each market-based rate seller as part of their authorization, and the Standards of Conduct are applicable by rule to all market-based rate sellers engaged in or having affiliates engaged in transmission services. Our view is that Market Behavior Rule 6 restates requirements independently applicable to market-based rate sellers, except for the prohibition on colluding to violate the codes of conduct or Standards of Conduct. But collusion is a type of fraud,[18] and thus collusion to violate codes of conduct or Standards of Conduct would be subject to the proposed part 47 regulations.

24. In addition to simplifying our behavior rules, avoiding confusion, and providing more regulatory certainty, it is also our view that a smooth transition from the existing Market Behavior Rules to the proposed part 47 regulations and other rules and regulations achieves our original goal in adopting the Market Behavior Rules, that is, to assure that wholesale market rates for electric energy are just, reasonable, and not unduly discriminatory or preferential. In EPAct 2005, Congress has provided broad and strong prohibitions of market manipulation, and reliance on rules implementing these statutory prohibitions will likewise assure that wholesale markets reflect competitive forces and produce just and reasonable rates.

25. We seek comment on whether the Market Behavior Rules should be repealed prospectively, including responses to the following questions:

1. Are there any aspects of the Market Behavior Rules that should be retained in market-based rate sellers' tariffs and authorizations, or can all substantive provisions of the Market Behavior Rules be reflected in the proposed part 47 regulations and other Commission rules and regulations?

2. Is there a need or basis for retaining existing Market Behavior Rule 2 in light of the anti-manipulation provisions set forth in the proposed part 47 regulations?

3. Should the Commission incorporate the qualification that no action or transaction explicitly contemplated by Commission rules, or undertaken at the direction of an ISO or RTO, is a violation of Market Behavior Rule 2 into the proposed part 47 regulations?

4. Should the affirmative defense of ''legitimate business purpose'' in existing Market Behavior Rule 2 be retained in any form?

5. Is there any aspect of behavior forbidden by Market Behavior Rule 3 that would not act as a fraud or deceit in connection with the purchase or sale of electric energy or transmission services subject to the Commission's jurisdiction?

6. Is the requirement of Market Behavior Rule 4 to report transaction information accurately, to the extent a seller reports such information to price index publishers, necessary in light of the proposed part 47 regulations?

7. Is there any aspect of Market Behavior Rule 6 that is not covered directly and explicitly by each seller's code of conduct as contained in tariff authorizations, or by the Standards of Conduct in part 358 of our regulations, or by the proposed part 47 regulations?

26. We encourage responses to the specific questions above as well as additional relevant comments regarding whether the Market Behavior Rules should be repealed.

27. The Commission invites interested persons to submit comments on the matters, issues, and specific questions identified in this order. Comments are due thirty (30) days from the date of publication of this order in the **Federal Register**, and reply comments are due fifteen (15) days from the date that initial comments are due. To facilitate the Commission's review of the comments, the Commission requests that commentors provide an executive summary of their position. In addition, the Commission requests that commentors identify each specific question addressed by their comments and use appropriate headings.

The Commission Orders

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 CFR Chapter I), the Commission proposes to revise all public utility sellers' market-based rate tariffs and authorizations as discussed in the body of this order.

(B) Interested entities may file comments and reply comments regarding the proposed prospective repeal of the Market Behavior Rules set forth herein. Initial comments will be due 30 days from the date this order is published in the **Federal Register**, and reply comments will be due 15 days from the date that initial comments are due to be filed.

(C) The Secretary shall promptly publish this order in the **Federal Register**.

By the Commission.

Magalie R. Salas,

Secretary.

[FR Doc. 05–23467 Filed 11–28–05; 8:45 am]

BILLING CODE 6717–01–P

[18] Fraud and collusion are often used interchangeably. *See, e.g., Martin* v. *Wilks*, 490 U.S. 755, 772 (1989). The Supreme Court long ago found fraud to be implicit in collusion. *Wheeler* v. *Denver*, 229 U.S. 342, 350 (1913) (''of course, the existence of collusion implies the existence of fraud''); *Dickerman* v. *Northern Trust Co.*, 176 U.S. 181, 190 (1900) (''Collusion * * * implies the existence of fraud of some kind, the employment of fraudulent means, or lawful means for the accomplishment of an unlawful purpose * * *.'').

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PL06–4–000]

Informal Staff Advice on Regulatory Requirements; Interpretive Order Regarding No-Action Letter Process

Issued November 18, 2005.

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

1. The Commission clarifies that section 388.104(a) of its regulations [1] may be used to obtain informal staff advice regarding certain matters. Specifically, this regulation may be used to request and obtain staff ''no-action'' letters, effective immediately, with respect to whether staff will recommend that the Commission take no enforcement action with respect to specific proposed transactions, practices or situations that may raise issues under the Commission's regulations relating to the Standards of Conduct for Transmission Providers,[2] Market Behavior Rules [3] and, when a final rule is effective, the Commission's proposed Prohibition of Energy Market

[1] 18 CFR 388.104(a) (2005).

[2] 18 CFR part 358 (2005).

[3] *Order Amending Market-Based Rate Tariffs and Authorizations*, 105 FERC ¶ 61,218 (2003) at Appendix A, *reh'g denied*, 107 FERC ¶ 61,175 (2004) (electric power); 18 CFR 284.288 and 284.403 (2005) (natural gas); appeal as to both electric power and natural gas Market Behavior Rules filed *sub nom. Cinergy Marketing & Trading, L.P.* v. *FERC*, Nos. 04–1168 *et al.* (DC Cir., appeal filed April 28, 2004).

Manipulation Rules.[4] This ''no-action letter'' process will make available informal, advance advice by staff on transactions that otherwise could lead to enforcement action.[5]

Background

2. In recent months, a number of industry participants have expressed concerns about the perceived ambiguity and vagueness of the Standards of Conduct and Market Behavior Rules and uncertainty about how they apply to the varied corporate structures, business operations and trading strategies of companies subject to the Commission's jurisdiction. There have been several suggestions that the Commission consider implementing a no-action letter process similar to those made available by the staffs of the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) to provide, in advance, increased certainty on whether particular transactions, practices or situations would be subject to agency enforcement action.

3. The potential risks of failure to comply with the Commission's regulatory requirements increased significantly on August 8, 2005, with the enactment of the Energy Policy Act of 2005 (EPAct 2005).[6] EPAct 2005 for the first time granted the Commission authority to assess civil penalties for violations of the Natural Gas Act (NGA) and rules, regulations, restrictions, conditions and orders thereunder, expanded the Commission's Federal Power Act (FPA) civil penalty authority to encompass violations of all provisions of FPA Part II and rules and orders thereunder, and established the maximum civil penalty the Commission could assess under the NGA, FPA Part II and the Natural Gas Policy Act of 1978 as $1 million per day per violation. EPAct 2005 also amended the NGA and FPA to make unlawful the use or employment of manipulative or deceptive devices or contrivances in connection with the purchase or sale of natural gas, electric energy, gas transportation or electric transmission subject to the Commission's jurisdiction in violation of regulations issued by the Commission. These statutory provisions grant the Commission new authority against manipulation in transactions in energy markets and enhance the Commission's ability to impose sanctions for violations. On October 20, 2005, we proposed rules to implement the new EPAct 2005 anti-manipulation authority.[7]

4. While we intend to exercise our expanded enforcement authorities diligently in a firm but fair manner, we seek to temper the need to use those powers by increasing regulatory certainty and providing notice to the regulated community of the factors we will consider in responding to violations.[8] More importantly, it is in the best interests of all segments of the energy industry that compliance with the statutes administered by the Commission and its orders and regulations should be emphasized. In announcing proposed rules to implement increased anti-manipulation authority under the FPA and NGA, we noted our intention to seek comments on whether to revise or repeal existing Market Behavior Rule 2 [9] because both it and the new anti-manipulation authority prohibit manipulative conduct.[10] Concurrently with this order, we are instituting proceedings in Docket Nos. EL06–16–000 and RM06–5–000 on this topic. On October 20, 2005, we issued a Policy Statement on Enforcement that provides guidance on how we intend to implement our enhanced enforcement powers to provide ''firm but fair enforcement of our rules and regulations.'' [11] In particular, we encouraged entities subject to our jurisdiction to take proactive steps to emphasize compliance.[12] It is entirely consistent with this objective for us to permit entities to inquire of Commission staff in advance of transactions, practices or situations that may raise compliance issues.

5. The SEC and CFTC both provide no-action letter processes whereby they permit their staffs to review certain types of proposed matters and provide informal advice on whether the staff will recommend enforcement action if a matter under review is put into effect as proposed.[13] Although this advice does not bind the agency, it is understood that agency staff who issue the no-action letters are themselves well-acquainted with the statutes, regulations, rules and orders the agency administers.[14]

Initial No-Action Letter Process and Procedures

6. After reviewing requests for a no-action letter process and studying efforts of other governmental agencies to maximize compliance with complicated statutory and regulatory schemes, we have concluded that we also can increase regulatory certainty and fairness by permitting entities to seek no-action letters similar to those issued by the SEC and CFTC staffs. We believe that a no-action letter process can yield significant benefits to the entities subject to the statutes, regulations, rules and orders administered by the Commission, particularly by reducing such entities' risk of failing to comply with our rules and regulations.

7. Our regulations already recognize the ability of our staff to provide informal advice on matters pertaining to regulatory requirements.[15] Staff spends a significant amount of time in these informal activities, such as conducting pre-filing meetings with persons who wish to submit an application to us. These activities are valuable, and we fully intend that staff continue its present efforts to render informal, non-binding advice. However, we also

[4] *Prohibition of Energy Market Manipulation*, 113 FERC ¶ 61,067 (2005).

[5] No public notice or comment on this order is necessary pursuant to section 4(b)(A) of the Administrative Procedure Act, 5 U.S.C. 553(b)(A) (2000), which exempts from such notice or comment ''interpretative rules, general statements of policy or rules of agency organization, procedure or practice.'' We herein establish procedures by which entities, if they choose to do so, may seek no-action letters as a form of staff informal advice that does not bind the Commission. *See James V. Hurson Associates, Inc.* v. *Glickman*, 229 F.3d 277, 280 (DC Cir. 2000) (The critical feature of agency actions that satisfy the section 553(b)(A) exception is that they do not themselves ''alter the rights or interests of parties,'' although they ''may alter the manner in which the parties present themselves or their viewpoints to the agency,'' quoting *Batterton* v. *Marshall*, 648 F.2d 694, 707 (DC Cir. 1980)).

[6] Energy Policy Act of 2005, Public Law No. 109–58, 119 Stat. 594 (2005).

[7] *Prohibition of Energy Market Manipulation*, 113 FERC ¶ 61,067 (2005).

[8] *Policy Statement on Enforcement*, 113 FERC ¶ 61,068 (2005).

[9] *Order Amending Market-Based Rate Tariffs and Authorizations*, 105 FERC ¶ 61,218 at 62,170 (Appendix A) (electric power); 18 CFR 284.288(a) and 284.403(a) (natural gas).

[10] *Prohibition of Energy Market Manipulation*, 113 FERC ¶ 61,067 at P 15.

[11] *Policy Statement on Enforcement*, 113 FERC ¶ 61,068 at P 1.

[12] *Id.* at PP 22–23.

[13] *See* 17 CFR 202.1(d) (2005) (SEC) and 17 CFR 140.99 (2005) (CFTC).

[14] For example, the SEC's regulations state: ''The informal procedures of the [SEC] are largely concerned with the rendering of advice and assistance by the [SEC's] staff to members of the public dealing with the [SEC]. While opinions expressed by members of the staff do not constitute an official expression of the [SEC's] views, they represent the views of persons who are continuously working with the provisions of the statute involved.'' 17 CFR 201.1(d) (2005).

[15] The first two sentences of section 388.104(a) of our regulations state, ''The Commission staff provides informal advice and assistance to the general public and to prospective applicants for licenses, certificates and other Commission authorizations. Opinions expressed by the staff do not represent the official views of the Commission, but are designed to aid the public and facilitate the accomplishment of the Commission's functions.'' These statements are functionally equivalent to the parallel sentences of the SEC's regulation recognizing its staff's ability to issue no-action letters.

believe that it is appropriate to allow entities to use the existing regulation as a means to obtain advance notice on whether staff will recommend enforcement action against a particular transaction, practice or situation. Therefore, we are implementing a no-action letter process, initially on a limited basis, as set forth below.

8. We will initially limit no-action inquiries to questions relating to whether particular transactions, practices, situations or other matters would violate the Standards of Conduct, the Market Behavior Rules, or, when issued, the final Prohibition of Energy Market Manipulation Rules. Based on concerns raised by industry participants, we recognize that these rules may present interpretive challenges and substantial exposure to potential enforcement actions. As we gain experience with the no-action letter process concerning these rules, in the future we may change the matters that may be the subject of requests for no-action letters. At some future time, we may need to adopt formal regulations governing the no-action letter process and possibly establish a filing fee for no-action letters. Initially, however, no fee will be charged.

9. The experience of the SEC and CFTC shows that it is important that no-action letters be issued by staff who are familiar with the regulations on which the no-action letter process is focused. Requests for no-action letters should initially be submitted on a non-public basis to the General Counsel. The regulated community should understand that staff experts in a number of Commission offices will be consulted as appropriate in responding to no-action letter requests, and that responses to such requests should be treated as a consensus view of the Commission staff.

10. An entity that seeks a no-action letter must describe in writing the proposed transaction, practice, situation or other matter in complete detail, including identifying to the extent possible each of the corporate entities, counterparties or other persons that would be involved, the purpose of the matter, the requester's role in the proposed matter and the regulatory issues that the matter poses. Although requesters may seek guidance on both existing practices and anticipated future practices or transactions, the General Counsel or designee will not respond to no-action letter requests that raise purely hypothetical inquiries. Instead, our no-action letter process is intended to assist regulated entities in seeking guidance on the real world application of our regulations and orders. To accomplish this objective, requesters must provide sufficient detail for staff adequately to address the factual and legal issues presented in the request. We also note that the General Counsel or designee will not respond to a request for a no-action letter that relates to the merits of an on-the-record proceeding currently before the Commission.

11. In addition, a no-action letter request must be accompanied by a statement that, to the best of the requester's personal information, knowledge and belief, the request is accurate and complete and does not contain any untrue statement of a material fact, that there is no omission of a material fact in the request, and that the request does not raise any issue that relates to the merits of an on-the-record proceeding currently before the Commission.

12. The issuance of a response to a no-action letter request is entirely within the discretion of the General Counsel or designee. If the information submitted with the no-action letter request is not sufficient, staff may request additional information or inform the requester that it will not respond to the request and give a reason. The timing of a response to a no-action letter request is also within the discretion of the General Counsel or designee.

13. In response to a request for a no-action letter, the General Counsel or designee may state that staff: (1) Will not recommend enforcement action if the matter is implemented as described in the request and in any additional information provided; (2) will not recommend enforcement action if the matter is implemented as so described only under conditions stated in the response, or as modified in the response; or (3) may recommend enforcement action if the matter is implemented as so described.

14. Until the date on which the General Counsel or designee issues a response to a request for a no-action letter, the Commission and its staff will treat the request and any other documents relating to it as non-public. However, the Commission believes that public disclosure of requests for no-action letters and responses is important to notify interested entities of staff's views with respect to regulatory matters at issue. Therefore, if the General Counsel or designee responds to a request for a no-action letter, we ordinarily intend to make public the request and the response at the time of the response. We note that this practice is consistent with that of the SEC and CFTC, both of which generally make public no-action letter requests and the agency staff's response after the response is issued.

15. We understand that in some circumstances a proposed matter that is the subject of a request for a no-action letter may be confidential or proprietary, at least until the matter is implemented or until sufficient time has passed for the requester to determine, after receiving a response, whether to implement the matter. Thus, in unusual cases a requester may seek non-public treatment of its request for a no-action letter and a staff response, at least to the extent that the request and response describe the proposed matter or matters that are under review, for a specified period of time not in excess of 120 days from the date of any response.

16. If our staff agrees with the period of non-public treatment the requester seeks, the Commission will not make the request and the response public until the expiration of the time period sought by the requester. If staff disagrees with the non-public period sought by the requester, it will so notify the requester, who may then withdraw the request within 30 days of the date of the staff notice. In that case, the General Counsel or designee will not respond to the request, and the Commission and staff will treat the request and the staff notice as non-public. If the request is not withdrawn after the requester receives a staff notice, the Commission will make public on the date of issuance of the response the request, any additional information provided by the requester and the response.[16]

17. As with other informal advice provided by our staff, responses by the General Counsel or designee to requests for no-action letters will not bind the Commission and will not operate as agency action that would be subject to rehearing or judicial review. Any person who seeks a binding Commission determination concerning a proposed transaction, practice, situation or other matter may file a petition for a declaratory order pursuant to section 385.207 of our regulations.[17]

By the Commission.

Magalie R. Salas,

Secretary.

[FR Doc. 05–23406 Filed 11–28–05; 8:45 am]

BILLING CODE 6717–01–P

[16] These processes are consistent with procedures used by the SEC and the CFTC in their no-action letter programs to address concerns about the treatment of assertedly confidential or proprietary information in requests for no-action letters. *See* 17 CFR 144.98(b) (2005) (CFTC) and 17 CFR 200.81(b) (2005) (SEC).

[17] 18 CFR 385.207 (2005).

DEPARTMENT OF ENERGY

National Nuclear Security Administration

Notice of Intent To Prepare an Environmental Impact Statement for the Operation of a Biosafety Level 3 Facility at Los Alamos National Laboratory, Los Alamos, NM

AGENCY: Department of Energy, National Nuclear Security Administration.

ACTION: Notice of intent.

SUMMARY: The National Nuclear Security Administration (NNSA), an agency within the U.S. Department of Energy (DOE), announces its intent to prepare an Environmental Impact Statement (EIS) to evaluate the operation of a Biosafety Level 3 Facility (BSL–3 Facility) at the Los Alamos National Laboratory (LANL) in Los Alamos, New Mexico. This EIS is being prepared and considered in accordance with requirements of the National Environmental Policy Act (NEPA) of 1969, regulations of the President's Council on Environmental Quality (40 CFR parts 1500 through 1508), and DOE's National Environmental Policy Act Implementing Procedures (10 CFR part 1021).

DATES: The public scoping period starts with the publication of this Notice in the **Federal Register** and will continue until December 29, 2005. DOE will consider all comments received or postmarked by that date in defining the scope of this EIS. Comments received or postmarked after that date will be considered to the extent practicable. Public scoping meetings will provide the public with an opportunity to present comments, ask questions, and discuss concerns regarding the EIS with NNSA officials. The locations, dates, and times for the public scoping meetings are as follows:

Tuesday, December 13, 2005, from 4 to 8 p.m., Fuller Lodge, 2132 Central Avenue, Los Alamos, New Mexico 87544.

Wednesday, December 14, 2005, from 4 to 8 p.m., Genoveva Chavez Community Center, 3221 Rodeo Road, Santa Fe, New Mexico 87505.

Thursday, December 15, 2005, from 4 to 8 p.m., Senior Stroke Center, 735 Vietnam Veterans Memorial Road, Española, New Mexico 87532.

NNSA will publish additional notices regarding the dates, times, and locations of the scoping meetings in local newspapers in advance of the scheduled meetings. Any necessary changes will be announced in the local media.

ADDRESSES: Written comments or suggestions concerning the scope of the BSL–3 Facility EIS or requests for more information on the EIS and public scoping process should be directed to: Lisa Cummings, EIS Document Manager, U.S. DOE, NNSA, Los Alamos Site Office, 528 35th Street, Los Alamos, New Mexico, 87544; facsimile at (505) 665–4873; or e-mail at *LANL_BSL-3_EIS@doeal.gov.* Ms. Cummings may also be reached by telephone at 1–866–506–2862.

FOR FURTHER INFORMATION CONTACT: For general information on the DOE NEPA process, please contact: Ms. Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance, EH–42, USDOE, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–4600, or leave a message at 1–800–472–2756. Additional information regarding DOE NEPA activities and access to many NEPA documents, including the 1999 LANL Site-wide EIS, are available on the Internet through the NEPA Web site at *http://www.eh.doe.gov/nepa.*

SUPPLEMENTARY INFORMATION: The United States has identified an emerging threat to homeland security posed by the possible use of biological weapons. As a result, research and development activities involving biological select agents have increased. Biological select agents are viruses, bacteria, rickettsia, fungi, and toxins whose possession, transfer, and use are controlled by the Department of Health and Human Services (HHS) Centers for Disease Control and Prevention (CDC) due to their capability to cause substantial harm to human health. ''Biosafety Levels'' is a system devised by the CDC of well-defined facilities, equipment, and procedures designed to minimize risk of exposure to potentially hazardous agents for laboratory workers and the outside environment. Several entities are interested in conducting such work at LANL, including the Department of Homeland Security (DHS). Additionally, other Federal agencies in the intelligence and security communities, as well as military organizations, have expressed interest in working with LANL in this regard. Other research for these organizations is conducted at LANL. This research seeks to reduce the threat from terrorism using biological weapons and to enhance the Nation's public health capabilities. Future work in this field would seek to develop scientific tools to address national health security issues and global concerns for emerging diseases. The research conducted at the BSL–3 Facility would be solely defensive in nature, serving to identify and mitigate the threats that may be used against the United States in a biological attack.

In response to the needs discussed above, NNSA decided to construct a BSL–3 Facility at LANL. Prior to constructing the facility, NNSA analyzed the project pursuant to NEPA and in early 2002 issued an environmental assessment (EA) and a Finding of No Significant Impact (FONSI) for the construction and operation of the facility. These documents can be found at *http://www.eh.doe.gov/nepa/ea/ea1364/tocindex.html* and *http://www.lanl.gov/orgs/pa/newsbulletin/2002/03/05/BSL-3%20EA%20Fonsi2.pdf.*

After completion of the NEPA process and facility construction, NNSA identified new information concerning the BSL–3 Facility. NNSA determined that it was necessary to conduct additional seismic analysis of the location of the building on fill material on the sloping side of a canyon. Therefore, in early 2004, NNSA withdrew the portion of the FONSI that dealt with the operation of the BSL–3 Facility, and announced that it would prepare a supplemental environmental assessment on its proposal to operate the facility.

In January 2005, NNSA published a Notice of Intent to prepare a Supplemental Site-wide Environmental Impact Statement (S–SWEIS) for the continued operation of LANL. The notice stated that if a FONSI for operation of the BSL–3 Facility could not be issued, the analyses of the potential impacts of operating this facility would be included in the S–SWEIS. NNSA has since decided to prepare a new Site-wide EIS for LANL (SWEIS) rather than to supplement the 1999 SWEIS. The release of the draft SWEIS is now planned for 2006.

NNSA has decided that preparation of an EIS is the appropriate level of NEPA analysis for operation of the BSL–3 Facility and that this analysis should be conducted separately from the new SWEIS. The global situation with regard to bioterrorism continues to evolve. The ability to provide cutting-edge technology and resources to address the situation grows more important, and increases the urgency to decide whether to operate this BSL–3 Facility.

The Federal government, and in particular the intelligence community, is concerned that any delays in the schedule for the SWEIS could further delay a decision on whether to operate this critical homeland security facility. During the scoping process for the S–SWEIS conducted in January 2005, NNSA received comments from several members of the public stating that

NNSA should prepare an EIS for the operation of the BSL–3 Facility. For these reasons, NNSA has decided to prepare a separate EIS for operation of the BSL–3 Facility. The SWEIS will evaluate all activities at LANL and will incorporate the results of related environmental impact analyses from other NEPA documents. The impacts identified in other NEPA documents will be combined with impact analyses performed specifically for the SWEIS. The impacts of the alternative selected by any decision regarding operation of the BSL–3 Facility would be included in the analysis of cumulative impacts prepared for the SWEIS.

The facility is a single-story, 3,200-square foot stucco building with a metal roof, housing a BSL–2 laboratory and two BSL–3 laboratories. Biosafety Level 2 is suitable for work involving agents of moderate potential hazard to personnel and the environment.

BSL Level 3 is required for clinical, diagnostic, teaching, research, or production facilities in which work is done with indigenous or exotic agents that may cause serious or potentially lethal disease as a result of exposure by inhalation. Laboratory personnel have specific training in handling pathogenic and potentially lethal agents, and are supervised by competent scientists who are experienced in working with these agents.

The facility is located on a site adjacent to Sigma Road and the paved parking area southwest of the Sigma Building north of the intersection of Pajarito Road and Diamond Drive. No operations of any type have been conducted in the facility.

Issues to be analyzed in the EIS include: Additional seismic analysis; safety of laboratory operations; public health and safety; handling, collection, treatment, and disposal of research wastes; other risks; pollution prevention; and potential impacts on air quality, biological resources, cultural resources, water resources, land use, and socioeconomic resources. The EIS will evaluate several alternatives: a ''Proposed Action Alternative'' analyzing operation of the BSL–3 Facility at LANL at the level permitted by CDC guidelines for a BSL–3 Facility; a ''BSL–2 Alternative'' analyzing operation of the facility at the level permitted for a BSL–2 Facility; and a ''No-Action Alternative,'' under which the constructed facility would not be operated. Additional alternatives, including potential facility modifications, may be identified during the scoping process.

Public Scoping Process: The scoping process is an opportunity for the public to assist NNSA in determining, among other things, reasonable alternatives and issues for analysis. The purpose of the scoping meetings is to receive oral and written comments from the public. The meetings will use a format to facilitate dialogue between NNSA and the public. NNSA welcomes specific comments or suggestions on the content of these alternatives, or on other alternatives that the public wishes NNSA to consider. The list of issues discussed above for consideration in the BSL–3 Facility EIS is tentative and intended to facilitate public comment on the scope of this EIS. It is not intended to be all-inclusive, nor does it imply any predetermination of potential impacts. The BSL–3 Facility EIS will analyze and describe the potential environmental impacts of the alternatives, using available data where possible and obtaining additional data where necessary. NNSA has invited the Department of Homeland Security to participate as a cooperating agency in the preparation of this EIS.

Copies of written comments and transcripts of oral comments will be made available at the following locations: the Los Alamos Outreach Center, 1350 Central Avenue, Suite 101, Los Alamos, New Mexico, 87544; and the Zimmerman Library, University of New Mexico, Albuquerque, New Mexico, 87131.

EIS Preparation Process: The process for preparing the BSL–3 Facility EIS begins with the publication of this Notice of Intent in the **Federal Register**. After the close of the public scoping comment period, NNSA will begin preparing the draft EIS. NNSA expects to issue a draft BSL–3 EIS for public review in the spring of 2006. Public comments on the draft will be accepted during a comment period of at least 45 days following publication of the Notice of Availability, by the United States Environmental Protection Agency. The Notice of Availability published in the **Federal Register** will provide the deadline for comments on the draft document. Other notices placed in local newspapers also identify dates and locations for public hearings on the draft BSL–3 Facility EIS. Issuance of the final BSL–3 Facility EIS is scheduled for late 2006.

Issued in Washington, DC, this 22 day of November, 2005.

Linton F. Brooks,

Administrator, National Nuclear Security Administration.

[FR Doc. 05–23455 Filed 11–28–05; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

National Nuclear Security Administration

Record of Decision: Final Site-wide Environmental Impact Statement for Continued Operation of Lawrence Livermore National Laboratory and Supplemental Stockpile Stewardship and Management Programmatic Environmental Impact Statement

AGENCY: National Nuclear Security Administration, Department of Energy.

ACTION: Record of decision.

SUMMARY: The U.S. Department of Energy (DOE), National Nuclear Security Administration (NNSA), is issuing this Record of Decision (ROD) regarding its plan for continued operation of the Lawrence Livermore National Laboratory located approximately 40 miles east of San Francisco in Alameda and San Joaquin Counties; and for use of plutonium, other fissile materials, fissionable materials and lithium hydride in experiments to be conducted at the National Ignition Facility (NIF). In making its decisions NNSA considered the ''Final Site-wide Environmental Impact Statement for Continued Operation of Lawrence Livermore National Laboratory (DOE/EIS–0348) and Supplemental Stockpile Stewardship and Management Programmatic Environmental Impact Statement (DOE/EIS–0236-S3) (LLNL SW/SPEIS)'' and other information, including programmatic mission needs and cost. NNSA has decided to implement the Proposed Action Alternative as described in the LLNL SW/SPEIS with the exception of the Energetic Materials Processing Center Replacement and High Explosives Development Center Project. This alternative includes the continued operation of LLNL; an increase in administrative and material-at-risk limits for plutonium and tritium; and the use of plutonium, other fissile materials, fissionable materials, and lithium hydride in experiments conducted at the NIF. NNSA's implementation of the individual components of the Proposed Action Alternative during the next decade is subject to its continuing assessment of its mission needs and of LLNL's role in meeting those needs.

FOR FURTHER INFORMATION CONTACT: For further information on the LLNL SW/SPEIS or the ROD, or to receive a copy of the LLNL SW/SPEIS or ROD, contact: Thomas Grim, Document Manager, U.S. Department of Energy, Livermore Site

Office NNSA, 7000 East Avenue, Livermore, CA 94550–9234, (925) 422–0704.

For information on the DOE National Environmental Policy Act (NEPA) process, contact: Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance (EH–42), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–4600, or leave a message at (800) 472–2756.

SUPPLEMENTARY INFORMATION:

Background

NNSA prepared this ROD pursuant to the regulations of the Council on Environmental Quality (CEQ) for implementing NEPA (40 CFR Parts 1500–1508) and DOE's NEPA Implementing Procedures (10 CFR Part 1021). In making its decisions NNSA considered the Final LLNL SW/SPEIS dated March 2005 and other information, including programmatic mission needs and cost.

LLNL consists of two sites: an 821-acre site in Livermore, California (Livermore Site), and a 7,000-acre experimental test site near Tracy, California (Site 300). Most LLNL operations are located at the Livermore Site, which is situated about 40 miles east of San Francisco in southeastern Alameda County. Site 300 is primarily a test site for explosives and non-nuclear weapons components; it is located about 15 miles southeast of Livermore in the hills of the Diablo Range. Most of Site 300 is located in San Joaquin County; the western edge of the site is in Alameda County.

The continued operation of LLNL is critical to NNSA's Stockpile Stewardship Program and to preventing the spread and use of nuclear weapons worldwide. LLNL maintains core competencies in activities associated with research, development, design, and surveillance of nuclear weapons, and with the assessment and certification of their safety and reliability. In response to the end of the Cold War and changes in the world's political regimes, the emphasis of the United States' nuclear weapons program has shifted from developing and producing new weapons designs to dismantling obsolete weapons and sustaining a smaller weapons stockpile. Programs at LLNL support a number of DOE and NNSA missions. These missions include nuclear weapons stewardship, nonproliferation, preventing the spread of weapons of mass destruction, energy security and meeting long-term energy needs, environmental assessment and management, bioscience, fundamental sciences, and developing applications for new technology. LLNL also supports other Federal agencies such as the Department of Defense, the Nuclear Regulatory Commission (NRC), the Environmental Protection Agency (EPA), and the Department of Homeland Security.

The LLNL SW/SPEIS evaluates the use of plutonium, other fissile materials, fissionable materials, and lithium hydride in experiments at the NIF and updates the analysis of the environmental impacts of operation of the NIF as described in the Final Programmatic Environmental Impact Statement for Stockpile Stewardship and Management (SSM PEIS) (DOE/EIS–0236).

NNSA expects to continue its support of new projects and facilities at LLNL subject to its continuing assessment of its mission and LLNL's role in that mission. Any new projects or facilities would be considered in programmatic or project-specific NEPA reviews as appropriate. Subsequent NEPA reviews for projects or activities at LLNL would make reference to, and be based on, the LLNL SW/SPEIS.

Alternatives Considered

The alternatives evaluated in the Final LLNL SW/SPEIS represent a range of operation from minimum levels that maintain core capabilities (Reduced Operation Alternative) to the highest reasonable activity levels that could be supported by current facilities, as well as the expansion and construction of new facilities for specifically identified future actions (Proposed Action). The No Action Alternative would continue operation of current LLNL programs in support of assigned missions, and includes approved interim actions and facility construction, expansion or modification, and decontamination and decommissioning for which NEPA analysis and documentation already exist. The Proposed Action includes operations evaluated in the No Action Alternative as well as construction of new facilities and expanded operations in support of future NNSA mission requirements. The Reduced Operation Alternative represents a 30 percent reduction of the Stockpile Stewardship Program as analyzed in the No Action Alternative. The Reduced Operation Alternative maintains full operational readiness for NNSA facilities and operations, but does not include the level of operation needed to perform tasks assigned to the Stockpile Stewardship Program at LLNL. NNSA identified the Proposed Action as the preferred alternative in the Final LLNL SW/SPEIS. A discussion of the alternatives is provided in the following sections.

No Action Alternative

The No Action Alternative was analyzed as required by CEQ's NEPA implementing regulations (40 CFR Parts 1500–1508) to provide a baseline against which the impacts of the Proposed Action and Reduced Operation Alternatives could be compared. Under the No Action Alternative, LLNL would continue to support major DOE and NNSA programs such as defense programs, environmental management, nuclear nonproliferation, and energy research. The No Action Alternative represents the level of operations that would occur in the absence of new decisions regarding activities at LLNL. The changes in facilities and operations, including those that are currently under construction or planned in the near future, are completion of NIF; the BioSafety Level 3 Facility; the Terascale Simulation Facility; the Container Security Testing Facility; facility modifications, upgrades and decontamination and decommissioning; and full implementation of Stockpile Stewardship Programs in the LLNL Plutonium and Tritium facilities.

As noted in the Final LLNL SW/SPEIS, NNSA decided to remove the Advanced Materials Program from this and other alternatives in response to public comments and a reassessment of program needs.

Proposed Action Alternative

The Proposed Action would result in an increase in LLNL operations to support reasonably foreseeable mission requirements. This includes the expansion or modification of current facilities and construction of new facilities, as well as those projects, activities, and facilities described in the No Action Alternative. The proposed changes in facilities and operations are:

(1) Conduct experiments at the NIF using plutonium, other fissile materials (such as uranium 235), fissionable materials (such as thorium 232), and lithium hydride.

(2) Construct and operate a neutron spectrometer as part of the NIF core facility diagnostics capability.

(3) Increase the administrative limit for plutonium to 1,400 kilograms from the existing 700 kilograms. The limit for enriched uranium would remain unchanged at 500 kilograms.

(4) Increase the plutonium material-at-risk limit from 20 to 40 kilograms of fuel-grade equivalent plutonium in each of two rooms of the Plutonium Facility.

(5) Increase the Tritium Facility administrative limit for tritium from 30

to 35 grams and the material-at-risk at a single workstation from 3.5 to 30 grams.

(6) Upgrade existing materials fabrication, characterization, and testing facilities supporting NNSA's national security mission as part of the Materials Science Modernization Project.

(7) Perform research and development activities on a variety of biodetector technologies in the Physics Facility and the Microfabrication Laboratory at the Livermore Site as part of the Chemical and Biological Nonproliferation Program Expansion.

(8) Install and operate a petawatt laser prototype in the Inertial Confinement Fusion Laser Facility.

(9) Physically consolidate security services to improve functionality, efficiency, and effectiveness of security operations as part of the Consolidated Security Facility.

(10) Change waste management activities to accommodate increased waste generation and improve overall operational methods.

(11) Accept 5 drums of mixed transuranic waste from the Lawrence Berkeley National Laboratory.

(12) Upgrade LLNL facilities to meet current seismic and utilities standards, and decontaminate and decommission other facilities at LLNL.

(13) Increase the highly enriched uranium administrative limit for the Radiography Facility from 25 to 50 kilograms to support Stockpile Stewardship Program activities.

As noted in the Final SW/SPEIS, NNSA decided to remove the Integrated Technology Program from this alternative in response to public comments and a reassessment of program need.

Reduced Operation Alternative

The Reduced Operation Alternative includes reductions in LLNL operations supporting the NNSA Stockpile Stewardship Program. This alternative represents a 30 percent reduction in operations for the Stockpile Stewardship Program as compared to the No Action Alternative. Under this alternative, NNSA would maintain full operational readiness of NNSA facilities and operations, but would not conduct operations at the level needed to fulfill all of the Stockpile Stewardship Program tasks assigned to LLNL. However, LLNL operations would not be reduced beyond those required to maintain safety and security activities, such as managing nuclear materials, explosives, and other hazardous materials safely.

This alternative considers and analyzes reasonable proposals for the reduction or cessation of specific operations to reduce potential adverse impacts. For this LLNL SW/SPEIS, NNSA did not analyze in detail the complete closure, decontamination, and decommissioning of the Livermore Site or Site 300 because the continued operation of these sites is critical to NNSA's Stockpile Stewardship Program and to prevention of the spread and use of nuclear weapons. Reductions include a decrease in the annual yield from NIF ignition experiments, fabrication of 50 percent fewer engineering demonstration units during pit surveillance activities, and fabrication of nearly 50 percent fewer subcritical assemblies. Other reductions include operation of the Terascale Simulation Facility computer at 60 percent capacity and conducting fewer experiments using tritium at Site 300.

Preferred Alternative

The preferred alternative is the alternative that NNSA believes would fulfill its statutory missions and responsibilities giving consideration to economic, budget, environmental, schedule, technical and other factors. In the Final LLNL SW/SPEIS, NNSA identified the Proposed Action as the preferred alternative for continued operations of LLNL.

Environmentally Preferable Alternative

After considering impacts to each resource area by alternative, NNSA has identified the Reduced Operation Alternative as the environmentally preferable alternative, which is the alternative with the lowest level of operations. The Reduced Operations Alternative has lower socioeconomic impacts because of the reduced number of workers, reduced hazardous and radioactive waste, and reduced radiological exposure to workers and the public.

Environmental Impacts of the Alternatives

The following section compares the potential impacts to environmental resources associated with the continued operation of LLNL under the No Action Alternative, the Proposed Action, and the Reduced Operation Alternative. The resource areas discussed below are listed in two sections: those with potentially major environmental impacts and those with minor impacts.

Resource Areas With Major Environmental Impacts

The major impacts occur in three areas; materials and waste management, human health and safety, and radiological accidents.

Materials and Waste Management

Waste generation for both routine and nonroutine wastes would be higher under the Proposed Action than under the No Action Alternative or Reduced Operation Alternative.

Differences in the amount of waste generated include routine low-level waste, which would increase from 170 cubic meters per year under current (2002) conditions to 200 cubic meters per year under the No Action Alternative. It would increase to 330 cubic meters per year under the Proposed Action Alternative, primarily due to differences in the operation of the NIF, and increase slightly to 180 cubic meters per year under the Reduced Operation Alternative. Routine transuranic waste would increase from 35 cubic meters per year to 50 cubic meters per year under the No Action Alternative and the Proposed Action, and increase to 45 cubic meters per year under the Reduced Operation Alternative.

Differences in nonroutine waste generation cover all major waste categories across the alternatives, with the highest waste generation under the Proposed Action and lowest under the Reduced Operation Alternative. Levels of waste generation are within the capacities for treatment, transportation, or storage either onsite or at waste repositories such as the Waste Isolation Pilot Plant (WIPP). In addition, LLNL is implementing cost effective pollution prevention techniques to reduce waste generation.

Human Health and Safety

Under the No Action Alternative, the occupational (involved) worker ionizing radiation dose would increase from 28 person-rem per year to 89 person-rem per year due to the increase in operations. These operations include increases in NIF and stockpile stewardship activities and the packaging of excess plutonium in the Plutonium Facility. The dose under the Proposed Action Alternative would increase to 93 person-rem per year, mostly from the use of proposed materials in experiments at the NIF. Under the Reduced Operation Alternative, worker dose would increase to 38 person-rem per year. Latent cancer fatalities (LCFs) calculated from these exposures would be 5.3×10^{-2}, 5.6×10^{-2}, and 2.3×10^{-2} per year of exposure under the No Action Alternative, Proposed Action, and Reduced Operation Alternative, respectively. Worker exposure will be maintained as low as reasonably achievable.

The ionizing radiation dose to the general public under all three alternatives would increase from 0.5 person-rem per year to 1.8 person-rem per year at the Livermore Site, and would increase from 2.5 person-rem per year to 9.8 person-rem per year at Site 300. The corresponding LCFs for all three alternatives would be 1.1×10^{-3} at the Livermore site, and 5.9×10^{-3} at Site 300. The projected dose at both sites is within the ranges of doses observed within the past 5 years.

The maximally exposed individual (MEI) dose at the Livermore Site from ionizing radiation would increase from 0.023 millirem per year (which yields 1.4×10^{-8} LCFs) to 0.30 millirem per year (which yields 1.8×10^{-7} LCFs) under the No Action Alternative. The MEI dose for the Proposed Action and the Reduced Operations Alternatives would be 0.33 millirem per year (which yields 2.0×10^{-7} LCFs) and 0.22 millirem per year (which yields 1.3×10^{-7} LCFs) respectively. The MEI dose at the Site 300 from ionizing radiation would increase from 0.021 millirem per year (which yields 1.3×10^{-8} LCFs), to 0.055 millirem per year (which yields 3.3×10^{-8} LCFs) for the No Action and the Proposed Action Alternatives. The dose under the Reduced Operations Alternative would be 0.054 millirem per year (which yields 3.3×10^{-8} LCFs).

Accidents

The LLNL SW/SPEIS analyzed potential accidents at all major facilities. Potential LCFs in the offsite population for median meteorological conditions were used to identify bounding radiological accidents for nuclear material handling and waste management operations.

In making thee decisions announced in this ROD, NNSA considered the accidents analyzed in the Final LLNL SW/SPEIS and reviewed the data and methodology used to identify bounding site accidents. This review found that all bounding site accidents were accurately identified; however, minor discrepancies were found in a few analyses of non-bounding site scenarios. Information concerning these discrepancies is available from Thomas Grim, the NNSA Document Manager for the LLNL SW/SPEIS, at the address and phone number included at the beginning of this ROD. These discrepancies are negligible and the LLNL SW/SPEIS adequately evaluates the potential impacts of the alternatives.

The bounding radiological accident for nuclear material handling under the Proposed Action is a fire involving radioactive material in the Plutonium Facility in which emissions are released without high-efficiency particulate air filtration. Such an accident would result in 0.112 LCFs in the offsite population. The exposure to noninvolved workers would result in 0.372 LCFs from this accident. The calculated annual frequency for this accident is 3.9×10^{-7}, which is less frequent than once in a million years. Under the No Action and the Reduced Operation Alternatives, the bounding accident for nuclear material handling in the Plutonium Facility is a small aircraft crashing into the building, which would result in 0.058 LCFs in the offsite population, and with a probability of 6.1×10^{-7} per year, which is also less than once in a million years.

The bounding radiological accident for waste management operations is a small aircraft crashing into the Radiological and Hazardous Waste Storage Facility, which would result in 1.21 LCFs in the offsite population under the Proposed Action. The exposure to noninvolved workers from such an accident would result in 0.055 LCFs. The estimate of LCFs for the same accident under the No Action and the Reduced Operation Alternatives is 0.397 LCF. The calculated annual frequency of an aircraft crashing into the building with subsequent gasoline pool fire is 6.1×10^{-7}, which is less frequent than once in a million years. The aircraft accident scenario evaluated at the Radiological and Hazardous Waste Storage Facility is very conservative in that it assumes the facility is loaded to its physical limit with containers of transuranic waste, each container holding its maximum allowable curie limit. Therefore, the consequences discussed above are calculated using what would be considered the maximum allowable inventory in the Radiological and Hazardous Waste Storage Facility under the facility's operational procedures. It is unlikely that the facility would ever contain this large of an inventory.

Bounding accident scenarios for chemical, explosive, and biological accidents are the same among all three alternatives and are unlikely to result in fatalities to the general public or workers except for the bounding explosives accident, which could result in 20 worker fatalities.

Resource Areas With Minor Environmental Impacts

The following resource areas have some small environmental impact differences among the alternatives or are of a particular concern to the public based on comments.

Socioeconomic Characteristics and Environmental Justice

The socioeconomic impacts from continued operations at LLNL would vary under the three alternatives, and would primarily affect Alameda and San Joaquin counties. For the No Action Alternative, LLNL employment would increase by 300 workers to 10,650 at the Livermore Site and increase by 10 workers to 250 at Site 300 compared to the 2002 employment levels. For the Proposed Action, the worker population would increase, over the No Action Alternative, by 500 workers to 11,150 at the Livermore Site and would remain at 250 workers at Site 300. For the Reduced Operation Alternative, worker population would decrease from the No Action Alternative by 880 workers to 9,770 at the Livermore Site and decrease by 20 workers to 230 at Site 300. The number of housing units affected would be proportional to the changes in worker population in both counties.

Community Services

The only notable impact for community services would be the generation and disposal of nonhazardous solid waste. For the No Action Alternative, it is estimated that 4,600 metric tons per year of nonhazardous solid waste would be generated at the Livermore Site. Under the Proposed Action, the Livermore Site would generate 4,900 metric tons per year of nonhazardous solid waste. Under the Reduced Operation Alternative, nonhazardous solid waste generation at the Livermore Site would be reduced to 4,200 metric tons per year. Nonhazardous waste generation at Site 300 would be 208 metric tons per year under both the No Action and Proposed Action alternatives and reduced to 191 metric tons per year for the Reduced Operation Alternative. The local Altamont Landfill is estimated to have sufficient capacity to receive waste until the year 2038. The current total daily permitted throughput is 11,150 tons per day.

Aesthetics and Scenic Resources

Changes to the offsite views of the Livermore Site would be similar under all alternatives. At Site 300, the Proposed Action would have little or no impact on aesthetics and scenic resources. The existing character of LLNL would not change at either site under any of the alternatives.

Biological Resources

NNSA completed a biological assessment (included as Appendix E of the LLNL SW/SPEIS) and has requested formal consultation with the U.S. Fish

and Wildlife Service pursuant to Section 7 of the Endangered Species Act. NNSA will implement any new or additional mitigation measures, and will carefully consider implementation of conservation recommendations contained in the Fish and Wildlife Service's Biological Opinion when it is issued.

The effects of the Proposed Action at the Livermore Site were considered on the California red-legged frog, a federally listed threatened species. The biological assessment concludes that construction related projects, facility maintenance, landscaping, grounds maintenance, herbicide application, and vehicular traffic may affect, but are not likely to adversely affect, this species. The frogs may be adversely affected during the Arroyo Las Positas Maintenance Project; however, the overall Proposed Action would have a near-term positive effect on the frog population and habitat. The demolition of facilities at the Livermore Site would result in a long-term indirect benefit to the California red-legged frog.

Although six federally listed threatened or endangered species occur or potentially occur at Site 300, based on habitat assessments, field studies, and distribution data, the California red-legged frog, Alameda whipsnake, and California tiger salamander were identified in the biological assessment as either having the potential to occur or as occurring at the project areas at Site 300 that would be affected by the Proposed Action. These areas include formerly designated critical habitat for the Alameda whipsnake and proposed critical habitat for the California red-legged frog. Appendix E concludes that the Proposed Action may affect, but is not likely to adversely affect, the California red-legged frog, Alameda whipsnake, and California tiger salamander.

Radiological Air Quality

There are differences among the alternatives regarding the potential radiological air quality impacts, all of which would be low both in relative and absolute terms. Once the NIF is operating, the MEI would be located due east of the NIF. The MEI doses for the Livermore Site would be 0.1, 0.13, and 0.09 millirem per year under the No Action, Proposed Action, and Reduced Operation Alternative, respectively. These doses are approximately two orders of magnitude below the EPA standard (40 CFR part 61.92), which requires that the maximally exposed member of the public not receive a dose exceeding 10 millirem per year. The population dose for the Livermore Site would be 1.8 person-rem per year under all three alternatives. At Site 300, the MEI would be west-southwest of Firing Table 851, the only outdoor firing facility that would use tritium. The MEI dose at Site 300 would be 0.055 millirem per year under the No Action Alternative and the Proposed Action, and 0.054 under the Reduced Operation Alternative, which are over two orders of magnitude under the EPA standard. The population dose for Site 300 would be 9.8 person-rem per year under all three alternatives. The potential impacts of these exposures are included in the results discussed in *Human Health and Safety* for each of the alternatives.

Traffic and Transportation

Traffic at the Livermore Site would be directly affected by changes in worker population under each alternative. Under the No Action Alternative, traffic would increase slightly as a result of the increase in worker population by 300 workers (22,600 total vehicle trips per day) compared to current (2002) conditions. Traffic volume would increase further under the Proposed Action due to the addition of 500 workers (23,700 total vehicle trips per day). Traffic volume would decrease under the Reduced Operation Alternative due to the loss of 880 workers (as compared to the No Action Alternative) at the Livermore Site (21,000 total vehicle trips per day). At Site 300, the impact to traffic due to changes in the number of workers would be negligible under any of the alternatives. Construction projects would result in temporary increases in commuter traffic and deliveries.

Transportation of radioactive materials offsite would increase under the No Action Alternative and Proposed Action. Under the No Action Alternative, offsite shipments would result in a collective dose of 7.4 person-rem per year. Under the Proposed Action, offsite shipments would result in a collective dose of 9.0 person-rem per year. This dose would decrease under the Reduced Operation Alternative to 1.7 person-rem per year. The potential cancer risk from shipments of radioactive materials from the Livermore Site would be low under all alternatives. The calculated potential LCFs under the No Action and the Proposed Action Alternatives would be 4×10^{-3} and 5×10^{-3}, respectively. Under the Reduced Operation Alternative, the LCF would fall to 1×10^{-3}. Under the Proposed Action, the amount of explosive materials transported to Site 300 would increase slightly from the No Action Alternative. Under the Reduced Operation Alternative, transportation of these materials would decrease.

Utilities and Energy

Under the No Action Alternative, the projected peak electrical demand at LLNL would be 82 megawatts and the annual total use would be 446 million kilowatt-hours. In 2004, the State of California projected the statewide peak demand to be 53,464 megawatts and projected a growth in peak demand of about 2.4 percent per year. LLNL's projected peak demand in 2004 was 0.1 percent of total demand in California. There would be virtually no change in the peak demand under the Proposed Action and the Reduced Operation Alternative. Annual electric use among the No Action, Proposed Action, and Reduced Operation Alternatives would be 446, 442, and 371 million kilowatt-hours, respectively. The decrease in electricity usage from the No Action Alternative to the Proposed Action is due to a cumulative reduction of LLNL floor space under the Proposed Action. For the same reason the Livermore Site would experience a decrease in water consumption and sewage discharges under the Proposed Action.

Site Contamination

Areas of soil and groundwater contamination exist at the Livermore Site and Site 300. These are primarily the result of past waste management practices, some of which took place during the 1940s when the Livermore Site was a naval air station. Although there is no immediate or long-term threat to human health from this contamination, there is localized degradation of groundwater. Remediation systems are currently operating to reduce the concentrations and extent of contamination. Appropriate cleanup measures implemented with the concurrence of regulators would continue regardless of the alternative selected.

Increased site activities under the No Action Alternative or Proposed Action could increase the likelihood of soil contamination with corresponding increases in the potential for accidental releases. However, minimal deposition of contaminants is expected because of spill prevention and control procedures. Under the Reduced Operation Alternative a lower likelihood of soil contamination would be expected.

Comments on the Final LLNL SW/SPEIS

NNSA received three letters concerning the Final LLNL SW/SPEIS after distributing approximately 500 copies of it to Congressional members and committees, the state of California,

other Federal agencies, American Indian tribal governments, local governments, nongovernmental organizations, and interested individuals. Tri-Valley CAREs (Communities Against a Radioactive Environment) submitted two letters and the EPA submitted one. The EPA indicated that it was pleased that the issues identified in its review of the Draft LLNL SW/SPEIS had been addressed in the final version of the document.

In an August 3, 2005 letter to NNSA, Tri-Valley CAREs asked why the Final LLNL SW/SPEIS does not contain any of the 36 attachments that Tri-Valley CAREs submitted with its 63-page letter of comments on May 27, 2004. It asserted that its ''attachments provided supporting material for many of the substantive comments that were included in our May 27, 2004 Comment Letter'', and that the omission of these attachments might violate NEPA. Volume IV of the Final LLNL SW/SPEIS includes all of the 63 pages of substantive comments in Tri-Valley CAREs' Comment Letter, as well as comment summaries, responses, and a detailed cross-reference between comments and summaries. NNSA did not include copies of the 36 attachments because NNSA included the entirety of the 63-page Comment Letter itself, which includes Tri-Valley CAREs' substantive comments. Although not included in the Final LLNL SW/SPEIS, NNSA reviewed the attachments and considered the relevant material in them during its preparation of the Final LLNL SW/SPEIS. The attachments are included in the administrative record for the LLNL SW/SPEIS as part of the comment letter.

A May 31, 2005, letter from Tri-Valley CAREs reiterated its comments on the Draft LLNL SW/SPEIS and provided additional information, including comments on the recent stand-down at the LLNL Plutonium Facility. The comments provided by Tri-Valley CAREs on the Final LLNL SW/SPEIS did not lead NNSA to conclude that it should change any of the analyses of the alternatives. NNSA responded to comments from Tri-Valley CAREs on the Draft LLNL SW/SPEIS in Volume IV, Chapter 3 of the Final LLNL SW/SPEIS. The following is a brief summary of the Tri-Valley CAREs' comments from the May 31, 2005, letter including the stand-down of the Plutonium Facility.

(1) The LLNL SW/SPEIS did not address comments from Tri-Valley CAREs and others that the purpose and need is critical to identifying the range of alternatives. Therefore, the range of alternatives analyzed in the LLNL SW/SPEIS is too narrow. NNSA should have analyzed a broader range of alternatives that included the reduction of nuclear weapons activities, many of which are duplications of programs at Los Alamos National Laboratory or limit nuclear weapons modernization programs.

Response: The range of reasonable alternatives is provided in Volume I, Chapter 3 of the LLNL SW/SPEIS. As described in Section 3.4, the range of alternatives analyzed in the LLNL SW/SPEIS is reasonable and appropriately responds to the programmatic purpose and need. Additional information is provided in Comment Responses 7.01, 8.01, 8.02 and 8.03. Comment Response 8.01 states that significant reductions or consolidations of the weapons laboratories beyond those analyzed in the Reduced Operations Alternative are unlikely and therefore not reasonable alternatives because they would not allow NNSA to maintain core competencies or to develop new technologies necessary to ensure continued high confidence in a safe and reliable nuclear weapons stockpile.

Alternatives that would cease work involving the use of nuclear materials and the eventual removal of all nuclear materials were considered. However, none of these alternatives would meet Presidential Decision Directives or comply with Congressional guidance, or national security policy, all of which require the continued viability of all three NNSA nuclear weapons laboratories.

(2) Adequate purpose and need were not provided for many program activities at LLNL such as producing tritium targets at the Tritium Facility and developing plutonium production technologies that will be used in a proposed modern pit facility.

Response: The purpose and need are provided in Volume I, Chapter 1 of the LLNL SW/SPEIS for the major programs and projects at LLNL. Chapter 3 provides additional information on specific projects at LLNL that support the Stockpile Stewardship Program (SSP) including the Tritium Facility Modernization Project and support for pit manufacturing. Chapter 3 of Volume IV, Comment Response 37.01, addresses comments on plutonium production technologies for pit manufacturing and Comment Response 34.01 addresses comments on tritium operations. Increased limits on the use of tritium will make it possible to fill targets for high-energy density physics experiments and to provide diagnostic systems for test readiness, which are required to fulfill the requirements of the Enhanced Test Readiness Program.

(3) DOE should not increase the plutonium limit in the Plutonium Facility because the facility is currently in a ''stand down'' mode due to safety problems.

Response: LLNL initiated a programmatic stand down of operations in the Plutonium Facility in order to resolve issues and findings from a January 6, 2005, report issued by the DOE Office of Independent Oversight and Performance Assurance. NNSA will verify the adequacy of corrective actions taken to resolve the issues prior to any increase of Plutonium Facility operations. Once the Plutonium Facility is fully operational, NNSA and DOE will continue to oversee and inspect its operations to ensure they are performed according to requirements.

To support SSP missions, NNSA has determined that it will need to increase the plutonium administrative limit from 700 kg to 1400 kg for the Plutonium Facility and increase the plutonium material-at-risk limit from 20 to 40 kilograms of fuel-grade equivalent plutonium in each of two rooms of the Plutonium Facility. Under the Proposed Action, NNSA will review and approve the appropriate documentation and procedures required to implement these new limits.

(4) The increase in the plutonium administrative limits in the Plutonium Facility creates storage, transportation, management, accident, and security concerns that were not adequately analyzed. Rather than analyzing an increase in the administrative limits the LLNL SW/SPEIS should have analyzed the removal of all special nuclear material from LLNL.

Response: Comment Response 33.01 provides information on the purpose and need for increasing the plutonium limits. NNSA continues to rely on LLNL to meet its SSP mission objectives, which require increasing the quantity of plutonium. NNSA continues to work on a solution for disposal of plutonium, but no pathway for LLNL to dispose of excess plutonium currently exists. The increase in plutonium administrative limits is analyzed in Volume I, Chapter 5. The impacts of transportation of radioactive materials, specifically plutonium, are analyzed in Section 5.3.11. Additional specific information on transportation of these materials is provided in Appendix J. Section 5.3.13 analyzes waste generated from plutonium operations and Section 5.3.14 analyzes exposure to workers and the public from these operations. Accidents involving the storage and use of plutonium are analyzed in Section 5.5. The impacts of security concerns are analyzed as part of the accident analysis in Section 5.5. Comment Response 25.01 provides specific

responses to many of the question raised concerning accidents involving the use of plutonium at LLNL.

(5) The former Secretary of Energy announced in 2004 that DOE would study removal of special nuclear material from LLNL. The omission of this and other information provided in attachments to the comments on the draft LLNL SW/SPEIS undermines the legal sufficiency of the EIS.

Response: As indicated in Comment Response 08.02, the removal and relocation of nuclear materials to another DOE/NNSA laboratory is not considered a reasonable alternative as it would not respond to the programmatic purpose and need for stockpile stewardship missions at LLNL. Section 3.5 of the LLNL SW/SPEIS explains why this alternative is unreasonable and was eliminated from detailed analysis. NNSA considers the storage and use of this material at LLNL to be safe and secure.

The Secretary of Energy did agree to conduct a comprehensive review of the nuclear weapons complex during testimony on March 11, 2004, to the House Appropriations Subcommittee on Energy and Water. The Nuclear Weapons Complex Infrastructure Task Force was asked to conduct this review and submitted its draft report titled *Recommendations for the Nuclear Weapons Complex of the Future* on July 13, 2005, to the Secretary of Energy Advisory Board (SEAB). The draft final report is currently undergoing public review. The full SEAB will meet in the fall of 2005 to review the comments and the draft final report; it will thereafter submit its recommendations, which may differ from those of the task force, to the Secretary of Energy.

(6) Accident analysis for the increase in the use and storage of plutonium is not given an adequate level of study. The accident scenarios did not evaluate the impacts of a commercial airliner hitting the laboratory; the document only considered impacts of planes originating from the Livermore Municipal Airport. The accident analysis did not use the correct leak path factor or consider other concerns for releases during an accident in the Plutonium Facility. Additionally, the unfiltered fire scenario does not address concerns such as alarms, security doors, emergency equipment and supply pressure for water.

Response: A discussion of Plutonium Facility accidents is provided in Chapter 5, Section 5.5 and in Appendix D, Section D.2.3. In addition, Comment Response 25.08 provides information on potential aircraft crash scenarios for LLNL facilities for all types of aircraft, including commercial aircraft. The methodology in DOE Standard 3014 ''Accident Analysis for Aircraft Crash into Hazardous Facilities'' was used for this evaluation. The calculated frequency of a commercial aircraft crashing into the LLNL Plutonium Facility is 1×10^{-8} per year. NNSA does not consider this accident to be reasonably foreseeable and thus it is not evaluated in detail in the LLNL SW/SPEIS.

As indicated in Comment Response 25.07, the values used in the accident analysis, such as the leak path factors, are based on careful consideration of the material present in the facility, potential initiating events and their probabilities, and potential pathways through which material could escape to the environment. The unfiltered fire scenario assumed that all of the radioactive material in the room was involved in the fire and the material was released using a leak path factor of 0.05 for this accident. Alarms, doors, emergency equipment and water pressure were not considered in the unfiltered fire scenario because the analysis assumes that the fire is of sufficient magnitude that all the radioactive material is engulfed in the fire, and that the fire burns long enough to release the material from storage containers to the glovebox, room, and the environment. Therefore, there are no reasonably foreseeable accidents with greater consequences.

(7) It is improper for NNSA to not fully incorporate the City of Livermore's General Plan into the LLNL SW/SPEIS. The city's plan rezones the land around LLNL as high density residential and this information was not considered in all sections of the LLNL SW/SPEIS. As a result DOE is not in full compliance with the NEPA directive to include written and actively pursued plans in an EIS. Additionally, the LLNL SW/SPEIS states that LLNL and much of the surrounding area is designated for industrial uses which is in direct conflict with figures in the other sections of the LLNL SW/SPEIS.

Response: Chapter 4, Section 4.2 of the LLNL SW/SPEIS, was changed to reflect the City of Livermore's General Plan. The city also submitted comments on the Draft LLNL SW/SPEIS. NNSA evaluated these comments and made appropriate changes in the Final LLNL SW/SPEIS as indicated in Comment Response 9.02. Based on comments from the City of Livermore, which reflect its current planning, Figures 4.2.1.1–1 and 4.2.2.1–1 were revised to indicate residential use consistent with the city's General Plan. The City of Livermore comments are addressed in Comment Responses 8.03, 9.01, 9.02, 9.03, 12.01, 17.02, 17.03, 20.03, 26.03, and 33.01.

(8) The radiation dose to involved workers does not account for releases due to minor accidents, decaying facilities, and workers encountering unexpected radiation sources in areas that were not properly recorded.

Response: Chapter 5, Section 5.3.14, analyzes the radiation dose to workers for the Proposed Action. Comment Response 23.05 provides information on the health impacts to workers and the public. Health impact analysis is performed using a broad range of available information and models developed by regulatory agencies and data drawn from experience. In the case of existing operations, worker doses are based on exposure records, which take into account all exposure pathways. In the case of new operations, worker doses are based on models that simulate exposure for the operations to be performed. Exposure from all accidents at LLNL is taken into consideration when developing worker exposure estimates. These exposures are bounded by the accident analysis provided in Chapter 5, Section 5.5 and Appendix D. Information on past accidents is also provided in Appendix C, Section 3.2.

(9) Information was not provided in the LLNL SW/SPEIS about what activities or programs are contained in facilities that are identified to have unacceptable seismic risks. Information was not provided to indicate what facilities were undergoing renovation or what facilities would remain operational after an earthquake. Updated information on California seismic risk provided by Tri-Valley CAREs was not considered.

Response: Chapter 4, Section 4.8, and Appendix H provide detailed analysis of the seismic faults in the Livermore Valley and their potential effect on LLNL facilities and operations. Comment Response 14.03 explains that all facilities at LLNL have been evaluated against modern seismic criteria, current and planned use, and building population and inventory. These evaluations allowed for ranking of the facilities by the amount of retrofit that could be required. This evaluation is used as part of the overall planning for LLNL to determine if buildings should be replaced, their use changed, or their structural integrity improved. Based on comments received, updated information was added in Appendix H on the seismic upgrades of Buildings 141, 151, 298, 321, and 511. It is not possible to determine what specific facilities would remain operational after an earthquake. This would depend on a

wide range of variables at the time of the earthquake. A seismic event at LLNL was analyzed in Appendix D of the LLNL SW/SPEIS and the impacts for all potentially affected buildings are included. Information provided by individuals was considered. However, as indicated in Comment Response 14.01, information from the U.S. Geological Survey on seismic risk for the San Andreas, Calaveras, and Greenville faults was used because its analyses represent the best knowledge currently available for the seismic risk associated with these faults.

(10) A declassified security analysis should be provided that includes a summation of the efforts that went into the security study and the account of how the conclusions drawn from the study were integrated into the LLNL SW/SPEIS analysis.

Response: Chapter 5, Section 5.5, and Appendix D provide detailed analysis on potential accidents that could occur at LLNL. Comment Response 30.01 provides information on security concerns and indicates that it is not possible to predict whether intentional attacks would occur at LLNL or at other critical facilities, or the nature of the types of attacks that might be made. Nevertheless, NNSA reevaluated scenarios involving malevolent, terrorist, or intentionally destructive acts at LLNL in an effort to assess potential vulnerabilities and identify improvements to security procedures and response measures in the aftermath of the attacks of September 11, 2001. Security at NNSA and DOE facilities is a critical priority for the Department, and it continues to identify and implement measures designed to defend against and deter attacks at its facilities. Substantive details of terrorist attack scenarios and security countermeasures cannot be released to the public, as disclosure of this information could be exploited by terrorists to plan attacks.

(11) The use of fissile and fissionable materials in NIF experiments would take NIF in a new direction that would give it increased applicability for weapons design, and this work was not analyzed. The 1995 NIF Non-Proliferation Study does not address the use of these materials and therefore is not adequate for determining if the use of these materials is in compliance with the Non-Proliferation Treaty.

Response: A review of the treaty obligations and proliferation aspects of NIF was conducted and new information provided in Chapter 1, Section 1.3.1. of the Final LLNL SW/SPEIS. As Comment Response 01.01 states, NIF is an integral part of the SSP and as such was considered during NNSA's review of compliance with treaty and proliferation aspects of the SSP. Appendix I of the SSM PEIS provided an evaluation of the construction and operation of the NIF. As indicated in Chapter 1 of Appendix I, one of the objectives of the SSP is ''Ensurance that the activities needed to maintain the Nation's nuclear deterrent are consistent with the Nation's arms control and nonproliferation objectives.'' Nonproliferation issues regarding NIF were evaluated in a December 19, 1995, study, *The National Ignition Facility and the Issue of Nonproliferation.* The study, prepared by the DOE Office of Nonproliferation and National Security and coordinated with the Arms Control and Disarmament Agency, Central Intelligence Agency, the Departments of Defense and State, concluded that (1) the technical proliferation concerns regarding NIF are manageable and therefore are acceptable, and (2) NIF can contribute positively to U.S. arms control and nonproliferation policy goals. As stated in Comment Response 01.01, NNSA has determined that the use of fissile material, fissionable material, and lithium hydride in NIF experiments is consistent with treaty obligations and the proliferation aspects of conducting these experiments are manageable.

(12) It is inappropriate to use a bounding accident scenario study for the BioSafety Level-3 (BSL–3) Facility that is out-of-date and based on a facility not at LLNL.

Response: Chapter 5, Section 5.5.4, and Appendix D, discuss the analysis of a biological accident. As indicated in Comment Response 25.04, for purposes of the LLNL SW/SPEIS, NNSA selected a representative facility accident that was previously analyzed by the U.S. Army in the *Final Programmatic Environmental Impact Statement Biological Defense Research Program* (April 1989). NNSA believes that this accident scenario is comparable to and bounds potential accident scenarios associated with the BSL–3 Facility at LLNL. NNSA reviewed more recent environmental impact statements, including the U. S. Army's *Chemical and Biological Defense Program Final Programmatic Environmental Impact Statement* (May 2004) and the U.S. Department of Homeland Security's *Final Environmental Impact Statement for Construction and Operation of the National Biodefense Analysis and Countermeasures Center (NBACC) Facility* (December 2004) and concluded that these EISs incorporate the same bounding accidents and identify the same environmental impacts as the U.S. Army's earlier EIS issued in 1989 (*i.e.*, the *Final Programmatic Environmental Impact Statement Biological Defense Research Program* [April 1989]).

(13) The impact analysis focused on LCFs in general rather than the population that is immune-suppressed as a result of LLNL operations. Additionally, radiological dispersal could result in measurable increases in cancer mortality for decades following an accident. Information was not provided on economic loss of farmland, loss of vineyards, and impacts on the local economy and property values.

Response: The human health effects on the general population around LLNL from radiation exposure in the Proposed Action are analyzed in Chapter 5, Section 5.4.14. As indicated in Comment Response 25.05, health effects other than LCFs could result from environmental and occupational exposures to radiation. These include nonfatal cancers among the exposed population and genetic effects in subsequent generations. Previous studies have concluded that these effects are less probable than fatal cancers as consequences of radiation exposure. Dose-to-risk conversion factors for nonfatal cancers and hereditary genetic effects (0.0001 per person-rem and 0.00013 per person-rem, respectively) are substantially lower than those for fatal cancers. The LLNL SW/SPEIS presents estimated effects of radiation in terms of LCFs because that is the major potential health effect from exposure to radiation. Any additional increases in cancer mortality or morbidity from exposure to residual environmental contamination from an accident would be minor considering that the increase in LCFs for the population exposed to the accident (highest concentrations) would only be 1.21 LCF under the bounding analysis. In addition, there is no evidence that the population surrounding LLNL is ''immune suppressed'' as a result of LLNL operations.

As indicated in Comment Response 25.06, NNSA focused the accident analysis on human health impacts among LLNL workers and the general public near LLNL. Secondary impacts could also result from the postulated facility accidents, such as loss of farm production, contamination, land usage, and ecological harm; however, they would not be significant within the 50-mile radius, which was analyzed in the LLNL SW/SPEIS. These secondary impacts were determined not to be a major discriminator among alternatives; therefore, they were not assessed in detail.

(14) The LLNL SW/SPEIS analysis does not address whether programs to modernize U.S. nuclear weapons are in compliance with international law. The LLNL SW/SPEIS should analyze all of the current and proposed activities at LLNL and their relationship to the NPT. The LLNL SW/SPEIS should analyze foreseeable plans for new nuclear weapons development including the Robust Nuclear Earth Penetrator, the Reliable Replacement Warhead program, the Modern Pit Facility, and Enhanced Test Readiness.

Response: A review of the treaty and nonproliferation aspects of LLNL operations was added to Chapter 1, Section 1.3.1. As indicated in Comment Response 02.01, it is the United States policy for DOE to develop and produce the nation's nuclear weapons and to ensure their safety and reliability. With the end of the Cold War, DOE has been developing strategies for appropriate adjustments to its missions and activities consistent with current national security policies that reflect post-Cold War realities and threats. Some of these adjustments reflect a smaller weapons stockpile. However, even after the—Cold War, threats remain and nuclear deterrence will continue to be a cornerstone of U.S. national security policy for the foreseeable future. The Proposed Action is consistent with the NNSA mission assigned to LLNL and does not adversely affect the United States' compliance with any international law.

(15) A nonproliferation study should be conducted to determine if biodefense work at LLNL could undermine the Biological Weapons Convention (BWC). Collocating bio-defense work at top-secret military labs could complicate negotiations of verification and enforcement protocols for the BWC. The LLNL SW/SPEIS does not respond to concerns that the BSL–3 Facility will be used to aerosolize and genetically modify biological agents and also have a large-capacity fermentor nearby.

Response: As stated in Comment Response 35.01, the United States is a signatory to the BWC, which prohibits the development and production of bioweapons. The BWC does not prohibit activities using biological agents that are for prophylactic, protective or other peaceful purposes. The operation of the BSL–3 facility would be consistent with the BWC as its activities will conform to treaty obligations. The facility is designed to accommodate work on detection and counterterrorism technologies, and will provide for environmentally safe and physically secure manipulation and storage of infectious microorganisms. Operations at this facility will not combine biological research and nuclear weapons activities. Verification requirements established by the Biological and Toxin Weapons Convention will be met with. The BSL–3 facility will be used for many operations with biological infectious agents; however, all biological agents would be managed in accordance with the *Centers for Disease Control and Prevention BioSafety in Microbiological and Biomedical Laboratories Guidelines.*

(16) An environmental analysis should be done on the manufacturing of tritium targets and on the Tritium Facility Modernization Project.

Response: The manufacture of tritium targets and the Tritium Facility Modernization Project were analyzed in preparation of the LLNL SW/SPEIS. Chapter 3, Section 3.3.5, provides information on the new activities that are considered under the Proposed Action such as the high-energy density physics target fill and the Test Readiness Program. Chapter 5, Section 5.3.8, provides an analysis of the increased use of tritium to support SSP activities in the Tritium Facility. Comment Response 34.01 provides information on the environmental analysis of proposed programs in the Tritium Facility including filling of tritium targets, the Test Readiness Program and the Tritium Facility Modernization Project. Comment Response 26.04 also provides information on high-energy density physics target fabrication at the Tritium Facility and includes the resulting environmental impacts. Comment Response 31.09 provides additional information on the Tritium Facility Modernization Project.

(17) Additional information should be provided on the likelihood and consequences of shifting from TRUPACT II to TRUPACT III containers for shipping transuranic waste. Analysis should be conducted on the increased rate of public exposure to transuranic waste, the heightened risk of transportation accidents, and the TRUPACT III Containers greater susceptibility to terrorist attacks.

Response: Chapter 3, Section 3.3.15 discusses the use of TRUPACT II containers for shipment of transuranic waste. As indicated in Comment Response 20.05, the proposed TRUPACT–III shipping package would be a Type B container as defined by Department of Transportation and the NRC. Accordingly, it will be required to meet the same stringent safety and performance standards as the TRUPACT–II. Should NRC certify this package and should DOE propose to use it for waste shipments from LLNL, the package would be used in compliance with its certification and safety analysis report. NNSA has not evaluated its use, and prior to the certification of the package, cannot state whether any LLNL transuranic waste would be shipped in a TRUPACT–III. The transuranic waste transportation accident analysis in the LLNL SW/SPEIS was performed under the assumption that a TRUPACT–II would be used. Given that the TRUPACT–III would also be required to meet all requirements for a Type B container, it is unlikely that results would change if NNSA were to use a TRUPACT–III container. Should DOE adopt the TRUPACT–III, DOE will ensure that its use remains within the safety envelope of previous analyses for the TRUPACT–II.

Mitigation Measures

CEQ's NEPA regulations require that an EIS include a discussion of means to mitigate adverse effects. As described in the LLNL SW/SPEIS, NNSA and LLNL operate under existing laws, programs, and controls, including regulations, policies, and contractual requirements; many of these requirements mandate actions that would mitigate potential adverse affects. Examples include the Environment, Safety and Health Manual, emergency plans, Integrated Safety Management System, pollution prevention/waste minimization program, several protected species programs, and energy and water conservation programs. To date, NNSA has not identified additional mitigation measures for resource areas evaluated in the LLNL SW/SPEIS. It will continue to implement existing procedures and controls, or appropriately updated ones, during implementation of the Proposed Action. For biological resources, NNSA will implement the reasonable and prudent measures necessary to avoid or minimize incidental taking of listed species and will carefully consider implementation of conservation recommendations determined as a result of consultation with the U.S. Fish and Wildlife Service. For cultural resources, NNSA will implement agreed-upon treatment strategies to preserve historic properties determined through consultation with the California State Historic Preservation Office.

Decisions

The impacts identified in the LLNL SW/SPEIS were based on conservative estimates and assumptions. In this regard, the analyses bound the impacts of the alternatives evaluated in the LLNL SW/SPEIS. The Proposed Action would result in an increase in LLNL

operations to support reasonably foreseeable mission requirements. This includes the expansion or modification of current facilities and construction of new facilities, as well as those projects, activities, and facilities described in the No Action Alternative. The LLNL SW/SPEIS and the analyses it contains may support additional programmatic or project decisions in the future. The implementation of these decisions and the schedules for implementation depend on funding levels and allocation of the DOE/NNSA budget.

NNSA's review of the data and methodologies used in accident analyses verified that the LLNL SW/SPEIS correctly identifies bounding site accidents and estimates their potential consequences. This review found a small number of minor discrepancies on non-bounding site accident scenarios. Information concerning these discrepancies is available from Thomas Grim, the NNSA Document Manager for the LLNL SW/SPEIS, at the address and phone number included at the beginning of this ROD. These discrepancies are negligible and the LLNL SW/SPEIS adequately evaluates the potential impacts of the alternatives.

NNSA has decided to implement the preferred alternative, the Proposed Action with the exception of the Energetic Materials Processing Center Replacement and High Explosives Development Center Project. With the issuance of this ROD, NNSA will begin to expand operations at LLNL critical to NNSA's Stockpile Stewardship Program. The major decisions are increasing the administrative and material-at-risk limits for plutonium in the Plutonium Facility and increasing the administrative and material-at-risk limits for tritium in the Tritium Facility. NNSA will review and approve the appropriate documentation and procedures required to implement the increase to a 1,400 kilogram administrative limit for plutonium and the 40 kilograms of fuel-grade equivalent plutonium material-at-risk limit for two rooms for the Plutonium Facility. NNSA will conduct experiments at the NIF using plutonium, other fissile materials, fissionable materials, and lithium hydride. These decisions are discussed in more detail in the following paragraphs.

NNSA continues to rely on LLNL to meet its Stockpile Stewardship Program objectives. These objectives include campaigns relating to pit manufacturing and certification, advanced radiography, dynamic materials properties, materials shelf life experiments, and enhanced surveillance research, which contribute to the need for long-term storage of plutonium. These campaigns and programs require increasing use of plutonium. NNSA continues to work on a solution for disposal of plutonium, but no pathway for disposal of the excess plutonium at LLNL currently exists, requiring an increase in the plutonium administrative limits. A July 2005 report issued by the Government Accountability Office, *Securing U.S. Nuclear Materials,* discusses some of the problems that need to be solved in order to develop a disposal path for excess plutonium. These problems have not yet been resolved and the amount of plutonium stored at LLNL will increase as NNSA continues to operate the Plutonium Facility. Therefore, NNSA has decided to increase the administrative limit for plutonium to 1,400 kilograms. The inventory will continue to be stored in robust vaults in the facility.

NNSA has decided to increase the plutonium material-at-risk limit from 20 to 40 kilograms of fuel-grade equivalent plutonium in each of two rooms of the Plutonium Facility. The material-at-risk limit for all other rooms would remain at 20 kilograms fuel grade equivalent plutonium. The increases are needed to meet future Stockpile Stewardship Program objectives such as the casting of plutonium parts. These activities support campaigns for advanced radiography, pit manufacturing, and certification.

NNSA has decided to increase the tritium administrative limit for the Tritium Facility from 30 to 35 grams and the material-at-risk at a single workstation from 3.5 to 30 grams. These increases are needed to support future planned Stockpile Stewardship Program activities such as the high-energy density physics target fill and the Test Readiness Program.

NNSA has decided to use plutonium, other fissile materials, fissionable materials, and lithium hydride in experiments at the NIF as evaluated in the LLNL SW/SPEIS. This decision is based on the need for a variety of experiments using fissionable and fissile material at the NIF. NIF will perform experiments with plutonium or highly enriched uranium without ignition to study the equation of state of these materials. Experiments will be conducted to measure fundamental nuclear physics properties using plutonium or highly enriched uranium that require ignition. Experiments will be conducted with lithium hydride, which is not a special nuclear material, with and without ignition. These are materials physics and equation of state experiments designed to address fundamental physical behavior of this material and to allow benchmarking of physical models of the material. Experiments will be performed with depleted uranium with ignition. These experiments require materials with high atomic numbers collocated on the ignition target to enhance the conversion of laser light to x-rays for inertial confinement fusion experiments.

In accordance with the provisions of NEPA, its implementing procedures and regulations, and DOE's NEPA regulations, I have considered the information contained in the LLNL SW/SPEIS and public comments received in response to the both the Draft and Final LLNL SW/SPEIS. Being fully apprised of the environmental consequences of the alternatives and other information relevant to these decisions, I have decided to continue operations at LLNL as described in the Proposed Action with the exception of the Energetic Materials Processing Center Replacement and High Explosives Development Center Project. This decision will help enable the Department to maintain the core intellectual and technical competencies of the United States in nuclear weapons, and maintain a safe and reliable nuclear weapons stockpile. In making this decision, all practicable means to avoid or minimize environmental harm from implementation of the Proposed Action will be adopted. NNSA will consider changes in its programmatic needs prior to implementing Proposed Action projects. The implementation of these decisions and the schedules for their implementation depend on funding levels and allocation of the DOE/NNSA budget. Their implementation also depends on the results of NNSA's continuing assessment of its mission needs and of LLNL's role in meeting those needs.

Issued in Washington, DC, on November 22, 2005.

Linton F. Brooks,

Administrator, National Nuclear Security Administration.

[FR Doc. 05–23457 Filed 11–28–05; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[OPPT–2003–0004; FRL–7751–6]

Access to Confidential Business Information by Chemical Abstract Services

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has authorized its contractor Chemical Abstract Services (CAS), of Columbus, Ohio, access to information which has been submitted to EPA under sections 5 and 8 of the Toxic Substances Control Act (TSCA). Some of the information may be claimed or determined to be Confidential Business Information (CBI).

DATES: Access to the confidential data will occur on November 30, 2005.

FOR FURTHER INFORMATION CONTACT: Colby Lintner, Regulatory Coordinator, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Notice Apply to Me?

This action is directed to the public in general. This action may, however, be of interest to those persons who are or may be required to conduct testing of chemical substances under TSCA. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Documents?

1. *Docket*. EPA has established an official public docket for this action under docket identification (ID) number OPPT–2003–0004. 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 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 EPA Docket Center, Rm. B102-Reading Room, EPA West, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The EPA Docket Center Reading Room telephone number is (202) 566–1744 and the telephone number for the OPPT Docket, which is located in EPA Docket Center, is (202) 566–0280.

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. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select ''search,'' then key in the appropriate docket ID number.

II. What Action is the Agency Taking?

Under Contract Number EP–W–06–011, CAS of 2540 Olentangy River Rd., P.O. Box 3012, Columbus, OH 43210, will assist EPA by providing technical assistance in developing and operating the TSCA Chemical Substance Inventory. This is a new contract that continues the work initiated under Contract Number 68–W–00–127.

In accordance with 40 CFR 2.306(j), EPA has determined that under Contract Number EP–W–06–011, CAS will require access to CBI submitted to EPA under sections 5 and 8 of TSCA, to perform successfully the duties specified under the contract.

CAS personnel will be given information submitted to EPA under sections 5 and 8 of TSCA. Some of the information may be claimed or determined to be CBI.

EPA is issuing this notice to inform all submitters of information under sections 5 and 8 of TSCA, that the Agency may provide CAS access to these CBI materials on a need-to-know basis only. All access to TSCA CBI under this contract will take place at EPA Headquarters and CAS' site located at 2540 Olentangy River Rd., Columbus, OH 43210.

Clearance for access to TSCA CBI under Contract Number EP–W–06–011 may continue until November 30, 2010. Access begins November 30, 2005.

CAS personnel have signed non-disclosure agreements and will be briefed on appropriate security procedures before they are permitted access to TSCA CBI.

List of Subjects

Environmental protection, Confidential business information.

Dated: November 23, 2005.

Vicki Simons,

Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 05–23437 Filed 11–28–05; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[ORD–2005–0031; FRL–8003–5]

Board of Scientific Counselors, Water Quality Subcommittee Meetings—Winter 2006

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meetings.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, the Environmental Protection Agency, Office of Research and Development (ORD), gives notice of three meetings of the Board of Scientific Counselors (BOSC) Water Quality Subcommittee.

DATES: Two conference call meetings will be held on: (1) Wednesday, December 21, 2005 from 10:30 a.m. to 12:30 p.m., and (2) Thursday, January 12, 2006 from 1:30 p.m. to 3:30 p.m. One face-to-face meeting will begin on Wednesday, January 25, 2006 (8:30 a.m. to 5 p.m.), continue on Thursday, January 26, 2006 (8:30 a.m. to 5 p.m.) and conclude on Friday, January 27, 2006 (8:30 a.m. to 5 p.m.). All times noted are eastern time. The meetings may adjourn early if all business is finished. Requests for the draft agendas or for making oral presentations at the conference calls or the face-to-face meeting will be accepted up to 1 business day before each conference call/meeting date.

ADDRESSES: *Conference Calls:* Participation in the conference calls will be by teleconference only—meeting rooms will not be used. Members of the public who wish to obtain the call-in number and access code to participate in a teleconference meeting may contact Bernice L. Smith, Designated Federal Officer, whose contact information is listed under the **FOR FURTHER INFORMATION CONTACT** section of this notice, at least four work days prior to each conference call. *Face-to-Face Meeting:* The meeting will be held at the Marriott Kingsgate Conference Hotel, 151 Goodman Drive, Cincinnati, Ohio 45219.

Document Availability

Any member of the public interested in receiving a draft agenda for, or

making a presentation at, one of the conference calls or the face-to-face meeting, may contact Bernice L. Smith, Designated Federal Officer, whose contact information is listed under the **FOR FURTHER INFORMATION CONTACT** section of this notice.

In general, each individual making an oral presentation will be limited to a total of three minutes. The draft agendas can also be viewed through EDOCKET, as provided in Unit I.A. of the **SUPPLEMENTARY INFORMATION** section.

Submitting Comments

Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I.B. of the **SUPPLEMENTARY INFORMATION** section. Written comments will be accepted up to 1 business day before the conference calls/meeting dates.

FOR FURTHER INFORMATION CONTACT: Bernice L. Smith, Designated Federal Officer, via telephone/voice mail at (202) 343–9766, via e-mail at *smith.bernicel@epa.gov*, or by mail at Environmental Protection Agency, Office of Research and Development, Mail Code 8723–F, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

I. General Information

Proposed agenda items for the conference calls include, but are not limited to: Charge questions, objective of program reviews, background on the Office of Research and Development's Water Quality research program, writing assignments, and planning for the face-to-face meeting. Proposed agenda items for the face-to-face meeting include, but are not limited to: Presentations by key EPA staff in the Water Quality research program, poster sessions, and development of the draft report. The conference calls and face-to-face meeting are open to the public.

Information on Services for Individuals with Disabilities: For information on access or services for individuals with disabilities, please contact Bernice L. Smith at (202) 343–9766 or *smith.bernicel@epa.gov*. To request accommodation of a disability, please contact Bernice L. Smith, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

A. How Can I Get Copies Of Related Information ?

1. Docket. EPA has established an official public docket for this action under Docket ID No. ORD–2005–0031. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Documents in the official public docket are listed in the index in EPA's electronic public docket and comment system, EDOCKET. Documents may be available either electronically or in hard copy. Electronic documents may be viewed through EDOCKET. Hard copies of the draft agendas may be viewed at the Board of Scientific Counselors, Water Quality Research Program Subcommittee—Winter 2006 Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the ORD Docket is (202) 566–1752.

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 EDOCKET. You may use EDOCKET 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 identification number.

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, confidential business information (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.

B. 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 identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period.

1. Electronically. If you submit an electronic comment as prescribed below, 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. EDOCKET. 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 EDOCKET at *http://www.epa.gov/edocket*, and follow the online instructions for submitting comments. To access EPA's electronic public docket from the EPA Internet Home Page, *http://www.epa.gov*, select ''Information Sources,'' ''Dockets,'' and ''EDOCKET.'' Once in the system, select ''search,'' and then key in Docket ID No. ORD–2005–0031. 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 electronic mail (e-mail) to *ORD.Docket@epa.gov*, Attention Docket ID No. ORD–2005–0031. 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.B.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: U.S. Environmental Protection Agency, ORD Docket, EPA Docket Center (EPA/DC), Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC, 20460, Attention Docket ID No. ORD–2005–0031.

3. By Hand Delivery or Courier. Deliver your comments to: EPA Docket Center (EPA/DC), Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. ORD–2005–0031. (note: this is not a mailing address). Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.A.1.

Dated: November 21, 2005.

Kevin Y. Teichman,

Director, Office of Science Policy.

[FR Doc. E5–6644 Filed 11–28–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8002–2]

Twelfth Meeting of the World Trade Center Expert Technical Review Panel To Continue Evaluation on Issues Relating to Impacts of the Collapse of the World Trade Center Towers

AGENCY: Environmental Protection Agency.

ACTION: Notice of meeting.

SUMMARY: The World Trade Center Expert Technical Review Panel will hold its twelfth meeting intended to provide for greater input from individuals on ongoing efforts to monitor the situation for New York residents and workers impacted by the collapse of the World Trade Center. The panel members will help guide the EPA's use of the available exposure and health surveillance databases and registries to characterize any remaining exposures and risks, identify unmet public health needs, and recommend any steps to further minimize the risks associated with the aftermath of the World Trade Center attacks. The panel has met 11 times and held one conference call since being formed in March 2004. Panel meetings are open to the public, except where the public interest requires otherwise. Information on the panel meeting agendas, documents (except where the public interest requires otherwise), and public registration to attend the meetings are available from an Internet Web site. EPA has established an official public docket for this action under Docket ID No. ORD–2004–0003.

DATES: The twelfth meeting of this panel will be held on December 13, 2005 beginning at 9, Eastern Standard Time. On-site registration will begin at 8:30 a.m. The agenda for the meeting will be posted on the panel Web site: *http://www.epa.gov/wtc/panel.*

ADDRESSES: The meeting will be held at the Alexander Hamilton U.S. Customs House, One Bowling Green, New York, NY in the Auditorium (basement level). A government-issued identification (*e.g.*, driver's license) is required for entry.

FOR FURTHER INFORMATION CONTACT: For meeting information, registration and logistics, please see the Web site *http://www.epa.gov/wtc/panel* or contact ERG at (781) 674–7374. The meeting agenda and logistical information will be posted on the Web site and will also be available in hard copy. For further information regarding the technical panel, contact Ms. Lisa Matthews, EPA Office of the Science Advisor, telephone (202) 564–6669 or e-mail: *matthews.lisa@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Meeting Information

Eastern Research Group, Inc., (ERG), an EPA contractor, will coordinate the meeting. To attend the meeting as an observer, please register by visiting the Web site at: *http://www.epa.gov/wtc/panel.* You may also register for the meeting by calling ERG's conference registration line between the hours of 9 a.m. and 5:30 p.m. e.s.t. at (781) 674–7374 or toll free at 1–800–803–2833, or by faxing a registration request to (781) 674–2906 (include full address and contact information). Pre-registration is strongly recommended as space is limited, and registrations are accepted on a first-come, first-served basis. The deadline for pre-registration is December 7, 2005. Registrations will continue to be accepted after this date, including on-site registration, if space allows. There will be a limited time at the meeting for oral comments from the public. Oral comments will be limited to five (5) minutes each. If you wish to make a statement during the observer comment period, please check the appropriate box when you register at the Web site. Please bring a copy of your comments to the meeting for the record or submit them electronically via e-mail to *meetings@erg.com,* subject line: WTC.

II. Background Information

Immediately following the September 11, 2001, terrorist attack on New York City's World Trade Center, many federal agencies, including the EPA, were called upon to focus their technical and scientific expertise on the national emergency. EPA, other federal agencies, New York City, and New York State public health and environmental authorities focused on numerous cleanup, dust collection and ambient air monitoring activities to ameliorate and better understand the human health impacts of the disaster. Detailed information concerning the environmental monitoring activities that were conducted as part of this response is available at the EPA Response to 9–11 Web site at *http://www.epa.gov/wtc/*.

In addition to environmental monitoring, EPA efforts also included toxicity testing of the dust, as well as the development of a human exposure and health risk assessment. This draft risk assessment document, Exposure and Human Health Evaluation of Airborne Pollution from the World Trade Center Disaster, is available on the Web at *http://www.epa.gov/ncea/wtc.htm*). Numerous additional studies by other Federal and State agencies, universities, and other organizations have documented impacts to both the outdoor and indoor environments, and to human health.

While these monitoring and assessment activities were ongoing, and the cleanup at Ground Zero itself was occurring, EPA began planning for a program to clean and monitor residential apartments. From June 2002 until December 2002, residents impacted by World Trade Center dust and debris in an area of about 1 mile by 1 mile south of Canal Street and west of Pike-Allen Streets were eligible to request either federally-funded cleaning and monitoring for airborne asbestos or monitoring of their residences. The cleanup continued into the summer of 2003, by which time the EPA had cleaned and monitored 3,400 apartments and monitored 800 apartments. Detailed information on this portion of the EPA response is also available at *http://www.epa.gov/wtc/.*

A critical component of understanding long-term human health

impacts is the establishment of health registries. The World Trade Center Health Registry is a comprehensive and confidential health survey of those most directly exposed to the contamination resulting from the collapse of the World Trade Center towers. It is intended to give health professionals a better picture of the health consequences of 9/11. It was established by the Agency for Toxic Substances and Disease Registry (ATSDR) and the New York City Department of Health and Mental Hygiene (NYCDHMH) in cooperation with a number of academic institutions, public agencies and community groups. Detailed information about the registry can be obtained from the registry Web site at: *http://www.nyc.gov/html/doh/html/wtc/index.html.*

In order to obtain individual advice on the effectiveness of these programs, unmet needs and data gaps, the EPA has convened a technical panel of experts who have been involved with World Trade Center assessment activities. Mr. E. Timothy Oppelt of EPA's Office of Research and Development is serving as the Interim Panel Chair. Dr. Paul Lioy, Professor of Environmental and Community Medicine at the Environmental and Occupational Health Sciences Institute of the Robert Wood Johnson Medical School-UMDNJ and Rutgers University, serves as Vice Chair. A full list of the panel members, a charge statement and operating principles for the panel are available from the panel Web site listed above. Panel members will provide individual advice on issues the panel addresses. These meetings will occur in New York City and nearby locations. All of the meetings will be announced on the Web site and by a **Federal Register** Notice, and they will be open to the public for attendance and brief oral comments.

The focus of the twelfth meeting of the WTC Expert Panel is on EPA's plan to test dust that may remain in lower Manhattan homes and commercial spaces from the collapse of the WTC towers, including program implementation and recruitment strategy. EPA welcomes input at the meeting and beyond about the most efficient and effective ways to obtain participation in the program. Further information on panel meetings can be found at the Web site identified earlier: *http://www.epa.gov/wtc/panel.*

III. How To Get Information on E–DOCKET

EPA has established an official public docket for this action under Docket ID No. ORD–2004–0003. 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 Office of Environmental Information (OEI) Docket in the Headquarters EPA Docket Center, (EPA/DC) EPA West Building, Room B102, 1301 Constitution Avenue, NW., Washington, DC 20460. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752; facsimile: (202) 566–1753; or e-mail: *ORD.Docket@epa.gov.*

An electronic version of the 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 identification number.

Dated: November 20, 2005.

William H. Farland,

Acting Deputy Assistant Administrator for Science, EPA Office of Research and Development.

[FR Doc. E5–6583 Filed 11–28–05; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK OF THE UNITED STATES

Notice of Open Special Meeting of the Advisory Committee of the Export-Import Bank of the United States (Ex-Im Bank)

Summary: The Advisory Committee was established by Public Law 98–181, November 30, 1983, to advise the Export-Import Bank on its programs and to provide comments for inclusion in the reports of the Export-Import Bank of the United States to Congress.

Time and Place: Tuesday, December 13, 2005, from 9:30 a.m. to 12 p.m. The meeting will be held at Ex-Im Bank in the Main Conference Room 1143, 811 Vermont Avenue, NW., Washington, DC 20571.

Agenda: Agenda items include a briefing of the Advisory Committee members on challenges for 2006, their roles and responsibilities and an ethics briefing.

Public Participation: The meeting will be open to public participation, and the last 10 minutes will be set aside for oral questions or comments. Members of the public may also file written statement(s) before or after the meeting. If you plan to attend, a photo ID must be presented, and you may contact Teri Stumpf to be placed on an attendee list. If any person wishes auxiliary aids (such as a sign language interpreter) or other special accommodations, please contact, prior to December 2, 2005, Teri Stumpf, Room 1203, 811 Vermont Avenue, NW., Washington, DC 20571, Voice: (202) 565–3502 or TDD (202) 565–3377.

Further Information: For further information, contact Teri Stumpf, Room 1203, 811 Vermont Ave., NW., Washington, DC 20571, (202) 565–3502.

Michael J. Discenza,

Chief Financial Officer.

[FR Doc. 05–23453 Filed 11–28–05; 8:45 am]

BILLING CODE 6690–01–M

EXPORT-IMPORT BANK OF THE UNITED STATES

Sunshine Act Meeting

ACTION: Notice of a partially open meeting of the Board of Directors of the Export-Import Bank of the United States.

TIME AND PLACE: Thursday, December 1, 2005, at 9:30 a.m. The meeting will be held at Ex-Im Bank in Room 1141, 811 Vermont Avenue, NW., Washington, DC 20571.

OPEN AGENDA ITEM: Ex-Im Bank Advisory Committee for 2006.

PUBLIC PARTICIPATION: The meeting will be open to public participation for Item No. 1 only.

FURTHER INFORMATION: For further information, contact: Office of the Secretary, 811 Vermont Avenue, NW., Washington, DC 20571 (Telephone No. 202–565–3957).

Michael J. Discenza,

Chief Financial Officer.

[FR Doc. 05–23478 Filed 11–23–05; 4:20 pm]

BILLING CODE 6690–01–M

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget

November 22, 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 December 29, 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: 3060–0093.

Title: Application for Renewal of Radio Station License for Experimental Radio Service, FCC Form 405.

Form Number: FCC Form 405.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; Not for profit institutions.

Number of Respondents: 243.

Estimated Time per Response: 2.25 hour.

Frequency of Response: On occasion and two year reporting requirements; Third party disclosure.

Total Annual Burden: 547 hours.

Total Annual Costs: $61,965.00.

Privacy Impact Assessment: No impact(s).

Needs and Uses: On June 10, 2004, the Commission adopted a *Report and Order* that transformed the rules governing the former Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS) in the 2495–2690 MHz band. Applicants in the Multipoint Distribution service now use the FCC Form 601.

FCC Form 405 is now being used *only* by the Experimental Radio Service to apply for renewal of radio stations licenses at the FCC. Section 307(c) of the Communications Act limits the term of radio licenses to ten years and requires that written applications be submitted for renewal. FCC Form 405 is required by 47 CFR part 5 of the Commission's rules.

The FCC Form 405 was previously shared by the Office of Engineering and Technology, the International Bureau and the Wireless Telecommunications Bureau. The Office of Engineering and Technology has made the following changes to FCC Form 405:

(1) On Page 1 the title was changed from ''Multipoint Distribution Service'' to ''Experimental Radio Service.'' The edition date was changed to July 2005.

(2) On Page 2 all references to the Multipoint Distribution Service and WTB were removed and replaced with statements only pertaining to the Experimental Radio Service and OET. A reference to FCC Form 159 was added. The addresses and mailing instructions were amended to those used by the Experimental Licensing Branch. The edition date was changed to July 2005.

(3) On Page 3 the title was changed from ''Multipoint Distribution Service ''Multipoint Distribution Service to ''Experimental Radio Service.'' Blocks 2 and 5 were deleted and the statement ''Note here any further exceptions not already covered in questions 4 and 5'' in block 6 was deleted. The blocks were then renumbered 1 through 5. The edition date was changed to July 2005.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

[FR Doc. 05–23462 Filed 11–28–05; 8:45 am]

BILLING CODE 6712–01–P

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–0250]

General Services Administration Acquisition Regulation; Information Collection; Zero Burden Information Collection Reports

AGENCY: Office of the Chief Acquisition Officer, GSA.

ACTION: Notice of request for comments regarding a renewal to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the General Services Administration has submitted to the Office of Management and Budget (OMB) a request to review and approve a renewal of a currently approved information collection requirement regarding zero burden information collection reports. A request for public comments was published at 70 FR 24043, May 6, 2005. No comments were received.

Public comments are particularly invited on: Whether this collection of information is necessary and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected.

DATES: Submit comments on or before: December 29, 2005.

FOR FURTHER INFORMATION CONTACT: Linda Nelson, Procurement Analyst, Contract Policy Division, at telephone (202) 501–1900 or via e-mail to *linda.nelson@gsa.gov.*

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Ms. Jeanette Thornton, GSA Desk Officer, OMB, Room 10236, NEOB, Washington, DC 20503, and a copy to the Regulatory Secretariat (VIR), General Services Administration, Room 4035, 1800 F Street, NW., Washington, DC 20405. Please cite OMB Control No. 3090–0250, Zero Burden Information Collection Reports, in all correspondence.

SUPPLEMENTARY INFORMATION:

A. Purpose

This information requirement consists of reports that do not impose collection burdens upon the public. These collections require information which is already available to the public at large or that is routinely exchanged by firms during the normal course of business. A general control number for these collections decreases the amount of paperwork generated by the approval process.

GSA has published rules in the **Federal Register** that fall under information collection 3090–0250. The rule that prescribed clause 552.238–70 ''Identification of Electronic Office Equipment Providing Accessibility for the Handicapped'' was published at 56 FR 29442, June 27, 1991, titled ''Implementation of Public Law 99–506'', with an effective date of July 8, 1991; and Clause 552.238–74 ''Industrial Funding Fee and Sales Reporting'' published at 68 FR 41286, July 11, 2003.

B. Annual Reporting Burden

None.

OBTAINING COPIES OF PROPOSALS: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW., Room 4035, Washington, DC 20405, telephone (202) 208–7312. Please cite OMB Control No. 3090–0250, Zero Burden Information Collection Reports, in all correspondence.

Dated: November 21, 2005.

Gerald Zaffos,

Director, Contract Policy Division.

[FR Doc. 05–23432 Filed 11–28–05; 8:45 am]

BILLING CODE 6820–61–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

[ATSDR–215]

Update on the Status of the Superfund Substance-Specific Applied Research Program

AGENCY: Agency for Toxic Substances and Disease Registry (ATSDR), U.S. Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: This Notice provides the status of ATSDR's Superfund-mandated Substance-Specific Applied Research Program (SSARP) which was last updated in a **Federal Register** notice in 2002 (67 FR 4836). Authorized by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA, also known as the Superfund statute), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) [42 U.S.C. 9604 (i)], this research program was initiated on October 17, 1991. At that time, a list of priority data needs for 38 priority hazardous substances frequently found at waste sites was announced in the **Federal Register** (56 FR 52178). The list was subsequently revised based on public comments and published in final form on November 16, 1992 (57 FR 54150).

The 38 substances, each of which is found on ATSDR's Priority List of Hazardous Substances (68 FR 63098, November 7, 2003), are aldrin/dieldrin, arsenic, benzene, beryllium, cadmium, carbon tetrachloride, chloroethane, chloroform, chromium, cyanide, p,p′-DDT,DDE,DDD, di(2-ethylhexyl) phthalate, lead, mercury, methylene chloride, nickel, polychlorinated biphenyl compounds (PCBs), polycyclic aromatic hydrocarbons (PAHs—includes 15 substances), selenium, tetrachloroethylene, toluene, trichloroethylene, vinyl chloride, and zinc.

On July 30, 1997, priority data needs for 12 additional hazardous substances frequently found at waste sites were determined and announced in the **Federal Register** (62 FR 40820). The 12 substances, each of which is included in ATSDR's Priority List of Hazardous Substances, are chlordane, 1,2-dibromo-3-chloropropane, di-n-butyl phthalate, disulfoton, endrin (includes endrin aldehyde), endosulfan (alpha-, beta-, and endosulfan sulfate), heptachlor (includes heptachlor epoxide), hexachlorobutadiene, hexachlorocyclohexane (alpha-, beta-, delta- and gamma-), manganese, methoxychlor, and toxaphene.

More recently, priority data needs for 10 additional hazardous substances frequently found at waste sites were determined and announced in the **Federal Register** (68 FR 22704). The ten substances, each of which is included in ATSDR's Priority List of Hazardous Substances, are asbestos, benzidine, chlorinated dibenzo-p-dioxins, 1,2-dibromoethane, 1,2-dichloroethane, 1,1-dichloroethene, ethylbenzene, pentachlorophenol, 1,1,2,2-tetrachloroethane, and total xylenes.

Currently, the priority data needs for acrolein and barium are being identified and will be reported in a future **Federal Register** notice.

To date, 270 priority data needs have been identified for the 60 hazardous substances, and 86 priority data needs have been filled (Table 1). ATSDR fills these research needs through U.S. Environmental Protection Agency (EPA) regulatory mechanisms (test rules), private-sector voluntarism, and the direct use of CERCLA funds. Additional priority data needs are being addressed through collaboration with the National Toxicology Program (NTP), by ATSDR's Great Lakes Human Health Effects Research Program, and other Agency programs. Priority data needs documents describing ATSDR's rationale for prioritizing research needs for each substance are available. See **ADDRESSES** section of this Notice.

This Notice also serves as a continuous call for voluntary research proposals. Private-sector organizations may volunteer to conduct research to address specific priority data needs identified in this Notice by indicating their interest through submission of a letter of intent to ATSDR (see **ADDRESSES** section of this Notice). A Tri-Agency Superfund Applied Research Committee (TASARC) composed of scientists from ATSDR, National Institute of Environmental Health Sciences (NIEHS)/NTP, and the EPA, will review all proposed voluntary research studies.

DATES: ATSDR provides updates on the status of its Substance-Specific Applied Research Program approximately every three years or sooner, as needed. ATSDR considers the voluntary research effort to be important to the continuing implementation of the SSARP. Therefore, the Agency strongly encourages private-sector organizations to volunteer at any time to conduct research to fill data needs until ATSDR announces that other research mechanisms are in place to address those specific data needs.

ADDRESSES: Private-sector organizations interested in volunteering to conduct research can write to Yee-Wan Stevens, M.S., Applied Toxicology Branch, Division of Toxicology and Environmental Medicine, ATSDR, 1600 Clifton Road, NE., Mailstop F–32, Atlanta, Georgia 30333, e-mail: *YStevens@cdc.gov.* Information about pertinent ongoing or completed research that may fill priority data needs cited in this Notice should be similarly addressed.

Other Requirements: Projects that involve the collection of information from ten or more individuals and funded by cooperative agreement will be subject to review by the Office of

Management and Budget (OMB) under the Paperwork Reduction Act.

FOR FURTHER INFORMATION CONTACT: Yee-Wan Stevens, M.S., Applied Toxicology Branch, Division of Toxicology and Environmental Medicine, ATSDR, 1600 Clifton Road, NE., Mailstop F–32, Atlanta, Georgia 30333, telephone: (770) 488–3325, fax: (770) 488–4178.

SUPPLEMENTARY INFORMATION:

Background

CERCLA as amended by SARA [42 U.S.C. 9604(i)] requires that ATSDR (1) jointly with the EPA, develop and prioritize a list of hazardous substances found at National Priorities List (NPL) sites, (2) prepare toxicological profiles for these substances, and (3) assure the initiation of a research program, in conjunction with NTP, to address identified data needs associated with the substances. Before starting such a program, ATSDR will consider recommendations of the InterAgency Testing Committee on the type of research that should be done. This committee was established under section 4(e) of the Toxic Substances Control Act of 1976 [15 U.S.C. 2604(e)](TSCA).

The major goals of the ATSDR SSARP are (1) to address the substance-specific information needs of the public and scientific community, and (2) to supply information necessary to improve the database used to conduct comprehensive public health assessments of populations living near hazardous waste sites. We anticipate that the information will help to establish linkages between levels of contaminants in the environment and levels in human tissue and organs associated with adverse health effects. Once such links have been established, strategies to mitigate potentially harmful exposures can be developed. This program will also provide data that can be generalized to other substances or areas of science, including risk assessment of chemicals, thus creating a scientific information base for addressing a broader range of data needs.

ATSDR encourages the use of *in vitro* assessment methods and other innovative tools for filling priority data needs. For example, the Agency believes that physiologically based pharmacokinetic (PBPK) modeling could serve as a valuable tool in predicting across route similarities (or differences) in toxicological responses to hazardous substances. Therefore, on a case-by-case basis, a priority data need can be filled using existing data and modeling. In addition, ATSDR is a member of NTP's InterAgency Coordinating Committee on the Validation of Alternative Methods (ICCVAM) and supports development, validation, and acceptance of alternative toxicological test methods that reduce, refine, and replace the use of animals, as appropriate.

CERCLA section 104(i)(5)(D) states that it is the sense of Congress that the costs for conducting this research program ''be borne by the manufacturers and processors of the hazardous substance in question,'' as required in TSCA and the Federal Insecticide, Fungicide, and Rodenticide Act of 1972 [7 U.S.C. 136 *et seq.*] (FIFRA), or by cost recovery from responsible parties under CERCLA. To execute this statutory intent, ATSDR developed a plan whereby parts of the SSARP are being conducted via the regulatory mechanisms referenced (TSCA/FIFRA), private-sector voluntarism, and the direct use of CERCLA funds.

The TASARC, composed of scientists from ATSDR, NIEHS/NTP, and EPA, has been set up to:

(1) Advise ATSDR on the assignment of priorities for mechanisms to address data needs,

(2) Coordinate knowledge of research activities to avoid duplication of research in other programs and under other authorities,

(3) Advise ATSDR on issues of science related to substance-specific data needs, and

(4) Maintain a scheduled forum that provides an overall review of the ATSDR SSARP.

TASARC has met 12 times since the initiation of the SSARP. It has guided referral of priority data needs to EPA and the associated development of test rules through TSCA. In addition, it has endorsed the proposals of several private-sector organizations to conduct voluntary research. Furthermore, TASARC has become a forum for other federal agencies to bring forth their research agendas. For example, it has coordinated research efforts on hazardous pollutants with the Office of Air and Radiation, EPA. TASARC has developed testing guidelines for immunotoxicity; and has endorsed the use of decision-support methodologies such as physiologically based pharmacokinetic (PBPK) modeling and benchmark-dose modeling, where appropriate.

Additional priority data needs are being addressed through collaborative research efforts with NTP, by ATSDR's Great Lakes Human Health Effects Research Program, and other Agency programs.

Criteria for Evaluating Status of Priority Data Needs

To update the activities covered under the SSARP, criteria for evaluating the status of the priority data needs were developed. Based on these criteria and the review of the current literature, a priority data need can be filled, or unchanged.

The criteria for evaluating the status of the priority data needs are described below.

General Criteria

A priority data need is filled:

- If it has been referred to one of the implementation mechanisms and research has been initiated (Exception: priority data needs referred to EPA [i.e., included in the EPA/ATSDR test rule] and/or ATSDR Voluntary Research Program remain as priority data needs until the studies have been completed, peer reviewed and accepted by ATSDR), or
- If an updated ATSDR toxicological profile contains relevant new studies, or if other relevant, peer-reviewed, and publicly available new studies (not included in the toxicological profile) have been identified since the finalization of the priority data needs document; and based on such studies, it is generally agreed that a priority data need has been filled.

Furthermore, in the event a priority data need is considered filled, it does not necessarily mean that the study has been completed and that ATSDR has accepted the data. It does, however, indicate that the Agency no longer considers it a priority to initiate additional studies at this time.

A priority data need remains unchanged:

- If no mechanism or information has been identified to address the priority data need, or
- If the priority data need is included in the ATSDR/EPA test rule under development and/or ATSDR Voluntary Research Program, or it is associated with a pilot substance in EPA's Voluntary Children's Chemical Evaluation Program.

Specific Criteria

Examples of specific criteria for two categories of priority data needs are described below.

- Epidemiologic studies—A priority data need is filled if multiple new studies assessing key health end points are available in ATSDR's updated toxicological profile and/or ongoing studies have been identified, e.g., human health studies supported by ATSDR's Great Lakes Human Health

Effects Research Program or the Minority Health Professions Foundation Research Program. In some cases, ATSDR indicates that it will continue to evaluate new data as they become available to determine whether additional studies are needed.

• Exposure levels in humans (adults and/or children)—A priority data need is *filled* if (a) there are current and adequate biomonitoring data for exposed populations associated with health effects (from published or ongoing studies), or (b) there are reference range data (e.g., the Centers for Disease Control and Prevention's Third National Report on Human Exposure to Environmental Chemicals, with data from a random sample of participants from the National Health and Nutrition Examination Survey [NHANES]) or generally agreed upon background population levels. In the latter case, ATSDR acknowledges that reference concentration data can support exposure and health assessments at waste sites, but the Agency also continues to recognize the importance of collecting additional data on uniquely exposed populations at waste sites. It should be noted that for some of the chemicals listed in the National Report, the measurements are reported as below the limit of detection (LOD) for those chemicals. However, the LODs for all the chemicals monitored are available in the Report, and therefore, these data can be considered as estimates of background exposure levels.

In updating the SSARP, the status of the priority data needs may change as new information becomes available. Further, during the literature review, new studies may be identified suggesting other effects of concern, such as those related to endocrine disruptors and children's health, which were not included in the original list of priority data needs. In such cases, additional priority data needs may be added to the research agenda. For example, in addressing issues relating to children's health, ATSDR considers it a priority to obtain data on exposure levels in children; therefore, when such information is available, it is used to fill this additional priority data need (e.g., cadmium, chlordane, chlorinated dibenzo-p-dioxins, DDT, lead, and pentachlorophenol, see Table 1).

In contrast, the Agency may consider a previously identified priority data need to no longer be a priority to fill at this time and thus be deleted from the list of priority data needs. However, it remains a data need for the Agency. For example, as a result of reevaluation of the database for di-n-butyl phthalate, two of its previously identified priority data needs, i.e., immunotoxicity and neurotoxicity studies via oral exposure are no longer considered to be priority data needs. This is due to the fact that the immune system does not appear to be a target for di-n-butyl phthalate toxicity and that additional neurotoxicity studies do not seem necessary because of the lack of effects seen in long-term neurotoxicity studies. In addition, under the Agency's Voluntary Research Program, the Halogenated Solvents Industry Alliance, Inc. (HSIA) proposed to fill a trichloroethylene priority data need (dose-response data for intermediate-duration, oral exposure) by conducting PBPK modeling to obtain the data for oral exposure using existing inhalation data. However, ATSDR is concerned that, based on the existing data for this exposure duration, it is not clear if the most sensitive end point for oral exposure is the same as that for inhalation exposure. Therefore, the Agency believes it is prudent not to consider it a priority to conduct a PBPK study to obtain the oral data at this time pending evaluation of additional information. This is reflected in Table 1 from which this priority data need has been deleted.

Update of Activities in the SSARP

An update of the activities associated with the mechanisms for implementing the ATSDR Substance-Specific Applied Research Program (SSARP) is discussed below.

A. TSCA/FIFRA

In developing and implementing the SSARP, ATSDR, NIEHS/NTP, and EPA have identified a subset of priority data needs for substances of mutual interest to the federal programs. These priority data needs are being addressed through a program of toxicological testing under TSCA according to established procedures and guidelines. On several occasions when ATSDR identified priority data needs for oral exposure, other agencies needed inhalation data. In response, ATSDR considers proposals to conduct inhalation studies in conjunction with physiologically based pharmacokinetic (PBPK) studies in lieu of oral studies. ATSDR expects that inhalation data derived from these studies can be used with PBPK modeling to address its oral toxicity priority data needs. Currently, an EPA/ATSDR test rule, under development, includes eight ATSDR substances, i.e., benzene, chloroethane, cyanide (hydrogen cyanide and sodium cyanide), methylene chloride, tetrachloroethylene, toluene and trichloroethylene, and addresses 13 ATSDR priority data needs (Table 2). The test rule is presently undergoing ATSDR and EPA final review and is anticipated to be available for public comment in Spring 2006.

At least seven metals included in the ATSDR's SSARP (arsenic, beryllium, chromium, manganese, mercury, nickel, and selenium, associated with 21 priority data needs) (Table 2) have been forwarded to EPA through TASARC for toxicity testing. The EPA is currently developing a risk assessment framework for metals. Once the framework has been adopted, the EPA will solicit testing proposals for these metals and pursue appropriate testing mechanisms at a later date.

B. Private-Sector Voluntarism

As part of the Substance-Specific Applied Research Program (SSARP), ATSDR announced a set of proposed procedures for conducting voluntary research in the **Federal Register** (57 FR 4758) on February 7, 1992. Revisions based on public comments were published on November 16, 1992 (57 FR 54160). Private-sector organizations are encouraged to volunteer to conduct research to fill specific priority data needs at no expense to ATSDR. All study protocols and final reports are subjected to ATSDR's external peer review, and ATSDR accepts the study results based on the peer reviewers' recommendation and the industry groups' satisfactory response to the reviewers' comments.

To date, ATSDR has established memoranda of understanding with four industry groups. Through the voluntary research efforts of these organizations, at least 15 research needs (12 priority data needs and 3 data needs) for methylene chloride, tetrachloroethylene (perchloroethylene), trichloroethylene, polychlorinated biphenyl compounds [PCBs], and vinyl chloride have been or are being filled (Table 2).

Industry groups which conducted studies under the Voluntary Research Program include:

The American Chemistry Council (ACC) [Formerly the Chemical Manufacturers Association (CMA)]

ATSDR accepted the ACC studies ''Vinyl chloride: Combined inhalation two-generation reproduction and developmental toxicity study in CD rats.''

General Electric Company (GE)

GE conducted studies on polychlorinated biphenyls including ''An assessment of the chronic toxicity and oncogenicity of Aroclors 1016,

1242, 1254, and 1260 administered in diet to rats,'' ''PCB congener analyses,'' and ''Metabolite detection as a tool for determining naturally occurring aerobic PCB biodegradation.'' Although these studies do not specifically address ATSDR's *priority* data needs for PCBs, they do address other Agency research needs for these substances.

Halogenated Solvents Industry Alliance, Inc. (HSIA)

To date, ATSDR has entered into five MOUs with HSIA to conduct studies to fill priority data needs for methylene chloride, tetrachloroethylene and trichloroethylene. In addition, in 2002, HSIA signed a letter of agreement with ATSDR stating that HSIA volunteers to conduct studies to fill ATSDR's remaining priority data needs for tetrachloroethylene (perchloroethylene) and trichloroethylene. These studies are being done in conjunction with the EPA/ATSDR test rule and EPA's Voluntary Children's Chemical Evaluation Program. In some cases, HSIA first conducted a study via inhalation which was followed by route extrapolation via PBPK modeling to obtain data for oral exposure. This is because, for specific chemicals, EPA requires inhalation data while ATSDR has determined that ingestion of contaminated environmental media is the primary exposure route at hazardous waste sites.

HSIA studies accepted by ATSDR include:

''Addressing priority data needs for methylene chloride with physiologically based pharmacokinetic modeling'' which evaluates acute- and subchronic-duration toxicity and developmental toxicity via oral exposure.

''Methylene chloride: 28 day inhalation toxicity study in the rat to assess potential immunotoxicity.''

''Immunotoxic potential of orally administered dichloromethane from immunotoxicity studies conducted by the inhalation route.'' (PBPK modeling)

''Trichloroethylene: Inhalation developmental toxicity study in CD rats.'' HSIA will conduct PBPK modeling to obtain data for oral exposure based on the inhalation data.

''Trichloroethylene (TCE): Immunotoxicity potential in CD rats following a 4-week vapor inhalation exposure.'' The final report of the study is undergoing ATSDR's external peer review. Pending ATSDR's acceptance of the inhalation study, HSIA will conduct PBPK modeling to obtain data for oral exposure based on the inhalation data.

''Perchloroethylene: Study of effects on embryo-fetal development in CD rats by inhalation administration.'' HSIA will conduct PBPK modeling to obtain data for oral exposure based on the inhalation data.

Electric Power Research Institute, Inc. (EPRI)

In addition to the substance-specific MOUs described above, ATSDR also signed an MOU with EPRI to conduct a study ''Validation of test methods for assessing neurodevelopment in children.'' In this particular case, ATSDR and three other federal agencies (the Food and Drug Administration, EPA, and NIEHS) were also funding partners.

C. CERCLA-Funded Research (Minority Health Professions Foundation Research Program)

During FY 1992, ATSDR announced a $4 million cooperative agreement program with the Minority Health Professions Foundation (MHPF) to support substance-specific investigations. A not-for-profit Internal Revenue Code 501(c)(3) organization, the MHPF comprises 11 minority health professions schools at historically black colleges and universities. The MHPF mission is to research health problems that disproportionately affect poor and minority citizens. The purpose of the cooperative agreement was to address substance-specific data needs for priority hazardous substances identified by ATSDR. In addition, the agreement strengthened the environmental health research opportunities for scientists and students at MHPF member institutions and enhanced existing disciplinary capacities to conduct research in toxicology and environmental health. The MHPF published a report, ''Environmental Health and Toxicology Research Program: Meeting Environmental Health Challenges Through Research, Education, and Service,'' that describes the research findings and other successes from the first 5 years of the program.

In the first five year project period that concluded during FY 1997, nine priority data needs for 21 priority hazardous substances and 22 other research needs for these and other substances were addressed. Research initiated in the second 5-year project period included studies to address 10 additional priority data needs for chlordane, di-n-butyl phthalate, lead, manganese, the polycylic aromatic hydrocarbons (PAHs), zinc, and eight other research needs. To date, 14 priority data needs have been filled through this cooperative agreement (Table 1).

During 2003, ATSDR announced a new five year cooperative agreement program with the MHPF. The purpose of the program is to apply findings from the previous ten year environmental health and Toxicology Research Program and to improve public health and environmental medicine in low-income and minority communities. The new program builds on earlier efforts and expands the Program's public environmental health impact on affected communities. Activities across the following four research and environmental public health focus areas were funded to initiate this new program: substance-specific toxicology research, environmental exposure assessment, community-based environmental health education, and environmental health education for primary-care providers. No additional priority data needs are being addressed under this new program.

To date, Program research findings and other activities have resulted in the publication of more than 50 manuscripts in peer-reviewed journals. The institutions which have received awards and their respective studies are listed in Table 2.

D. National Toxicology Program (NTP)

Section 104(i)(5) of CERCLA directs the administrator of ATSDR (in consultation with the administrator of EPA and agencies and programs of the Public Health Service) to assess whether adequate information on the health effects of priority hazardous substances found at NPL sites is available. Where adequate information is not available, ATSDR, in cooperation with the National Toxicology Program (NTP), is required to assure the initiation of a program of research designed to determine these health effects (and techniques for developing methods to determine such health effects).

ATSDR continues to collaborate with NTP to address priority data needs of mutual interest. Chemicals for which NTP has conducted studies (or is in the process of conducting studies) to fill ATSDR's priority data needs include carbon tetrachloride, 1,1-dichloroethene, di-n-butyl phthalate, disulfoton, and heptachlor (Table 2).

E. Great Lakes Human Health Effects Research Program

Some of the priority data needs identified in the SSARP have been independently identified as research needs through the ATSDR Great Lakes Human Health Effects Research Program, a separate research program.

In support of the Great Lakes Critical Programs Act of 1990, ATSDR announced in Fiscal Year 1992 the availability of $2 million for a grant

program to conduct research on the potential for short- and long-term adverse health effects from consumption of contaminated fish from the Great Lakes basin. Research undertaken through this program is intended to build on and amplify the results of past and ongoing fish consumption research in the Great Lakes basin. The ATSDR-supported research projects focus on known high-risk populations to define further the human health consequences of exposure to persistent toxic substances (PTSs) identified in the Great Lakes basin. These at-risk populations include sport anglers; African Americans, Asians and other non-English speaking populations; pregnant women; fetuses, nursing infants, and children of mothers who consume contaminated Great Lakes sport fish; the elderly, and the urban poor. To date, the research activities of the ATSDR Great Lakes Human Health Effects Research Program have resulted in 70 publications in peer-reviewed journals.

Currently, 14 priority data needs for 24 priority hazardous substances (including 15 PAHs) identified in the SSARP are being addressed through this program. The institutions which have received awards and their respective studies are listed in Table 2.

F. Other ATSDR Programs

In its role as a public health agency addressing environmental health, ATSDR may collect human data to validate substance-specific exposure and toxicity findings. The need for additional information on levels of contaminants in humans has been identified, and remains as a priority data need for 59 of the 60 priority substances (Table 1). In some cases, ATSDR anticipates obtaining this information through exposure and health effects studies, and through establishing and using substance-specific subregistries of people within the Agency's National Exposure Registry who have potentially been exposed to these substances. Regarding the priority data need for exposure subregistries, the list of the 60 priority hazardous substances in the SSARP was forwarded to ATSDR's Division of Health Studies for consideration as potential candidates for subregistries of exposed persons, based on criteria described in its 1994 document, ''National Exposure Registry: Policies and Procedures Manual (Revised),'' Agency for Toxic Substances and Disease Registry, Public Health Service, U.S. Department of Health and Human Services, Atlanta, Georgia, NTIS Publication No. PB95–154571. Currently, ATSDR has established exposure subregistries for benzene, dioxin, 1,1,1-trichloroethane (not included in the SSARP), trichloroethylene, and tremolite asbestos.

G. Conclusion

The results of the research conducted via the SSARP are expected to provide information necessary to improve the database used to conduct comprehensive public health assessments of populations living near hazardous waste sites. The information will enable the Agency to establish linkages between levels of contaminants in the environment and levels in human tissue and organs associated with adverse health effects, ultimately helping to determine methods for interdicting exposure and mitigating toxicity. This program will also provide data that can be generalized to other substances or areas of science, including risk assessment of chemicals, thus creating a scientific information base for addressing a broader range of data needs. The Agency plans to provide an update on the status of this research program approximately every three years or sooner, as needed.

Dated: November 17, 2005.

Kenneth Rose,

Acting Director, Office of Policy, Planning, and Evaluation, National Center for Environmental Health, Agency for Toxic Substances and Disease Registry.

TABLE 1.—ATSDR'S SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS FOR 60 PRIORITY HAZARDOUS SUBSTANCES

Substances	PDN ID [1]	PDN description	Program [2]	Status change [3]	Comments [4]
Aldrin/Dieldrin	1A	Dose-response data in animals for intermediate-duration oral exposure.		Filled	An MRL was derived in the 2000 updated ATSDR toxicological profile.
	1B	Bioavailability from soil.			
	1C	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.			This priority data need, previously addressed in a study in the Great Lakes Research Program, is no longer investigated in that study.
	1D	Potential candidate for subregistry of exposed persons.	ATSDR.		
Arsenic	2A	Comparative toxicokinetic studies to determine if an appropriate animal species can be identified.	EPA.		
	2B	Half-lives in surface water, groundwater.	EPA.		
	2C	Bioavailability from soil	EPA.		

TABLE 1.—ATSDR'S SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS FOR 60 PRIORITY HAZARDOUS SUBSTANCES—Continued

Substances	PDN ID [1]	PDN description	Program [2]	Status change [3]	Comments [4]
	2D	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	G. Lakes	Filled	In addition to the data from the Great Lakes Research Program, background level data are available in ATSDR's 1993 toxicological profile, and at least seven ATSDR studies that evaluated urine arsenic levels and potential adverse health effects are available. Also, additional studies are available in ATSDR's 2000 updated toxicological profile.
Asbestos	3A	Epidemiologic studies of individuals occupationally exposed to asbestos levels lower than those experienced before the institution of current occupational standards governing the use of asbestos, but higher than current levels in the general population. These studies should be performed in conjunction with the immunotoxicity studies.			
	3B	Immunotoxicity studies of individuals occupationally exposed to asbestos.			
	3C	Development of human and rat lung retention models to aid in extrapolating between rat and human data.			
	3D	Improved analytical methods for screening samples and determining the chemical structure of asbestos fibers. Also, techniques are needed to normalize studies in which different analytical methods were employed.			
	3E	Exposure levels, fiber size distribution, and asbestos fiber type in areas with natural geologic deposits of friable asbestos and at hazardous waste sites. Also, techniques for estimating air levels of asbestos from soil concentrations and activity scenarios.			
	3F	Exposure levels in humans living near hazardous waste sites and in other populations, such as humans living in areas with naturally high levels of friable asbestos.			
	3G	Potential candidate for subregistry of exposed persons.	ATSDR	Filled	ATSDR established registry to follow the health of people who were exposed to asbestos in Libby, Montana. The name of the registry is the Tremolite Asbestos Registry (TAR).
Benzene	4A	Dose-response data in animals for acute- and intermediate-duration oral exposure. The subchronic study should include an extended reproductive organ histopathology.	EPA	.....	Reproductive toxicity study is the only component of this PDN that is included in the EPA/ATSDR test rule.

TABLE 1.—ATSDR'S SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS FOR 60 PRIORITY HAZARDOUS SUBSTANCES—Continued

Substances	PDN ID [1]	PDN description	Program [2]	Status change [3]	Comments [4]
	4B	Prenatal developmental toxicity study via oral exposure.	EPA		Previously planned study in the MHPF Research Program to address this priority data need was canceled.
	4C	Neurotoxicology battery of tests via oral exposure.	EPA.		
	4D	Epidemiologic studies on the health effects of benzene (Special emphasis end points include immunotoxicity).		Filled	Based on an evaluation of the data in ATSDR's 1997 updated toxicological profile. ATSDR will continue to evaluate new data as they become available to determine if additional studies are needed.
	4E	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.		Filled	Reference range concentrations are available (Ashley et al. 1992, 1994; Needham et al. 1995), and at least one ATSDR study that evaluated blood benzene levels and potential adverse health effects is available. ATSDR acknowledges that reference concentration data can support exposure and health assessments at waste sites, but the Agency also continues to recognize the importance of collecting additional data on uniquely exposed populations at waste sites.
Benzidine	5A	Dose-response data for acute- and intermediate-duration exposure via the oral route (the study of intermediate-duration exposure should include evaluation of reproductive and endocrine organ histopathology, lymphoid tissues histopathology as well as examination of relevant blood components, and nervous system histopathology).			
	5B	Exposure levels in humans living near hazardous waste sites.			
	5C	Exposure levels in children.			
	5D	Potential candidate for subregistry of exposed persons.	ATSDR.		
Beryllium	6A	Dose-response data in animals for acute- and intermediate-duration inhalation exposures. The subchronic study should include extended reproductive organ histopathology.	EPA.		
	6B	Prenatal developmental toxicity study via inhalation exposure.	EPA.		
	6C	Environmental fate in air; factors affecting bioavailability in air.	EPA.		
	6D	Analytical methods to determine environmental speciation.		Filled	Based on an evaluation of the data in ATSDR's 2000 updated toxicological profile.
	6E	Immunotoxicology battery of tests following oral exposure.	EPA.		

TABLE 1.—ATSDR'S SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS FOR 60 PRIORITY HAZARDOUS SUBSTANCES—Continued

Substances	PDN ID [1]	PDN description	Program [2]	Status change [3]	Comments [4]
	6F	Exposure levels in humans (adults) living near hazardous waste sites and other populations, such as exposed workers.		Filled	Reference range concentrations in urine are available (Paschal et al. 1998, CDC 2005). ATSDR acknowledges that reference concentration data can support exposure and health assessments at waste sites, but the Agency also continues to recognize the importance of collecting additional data on uniquely exposed populations at waste sites.
	6G	Exposure levels in children		Filled	Reference range concentrations in urine are available (CDC 2005).
	6H	Potential candidate for subregistry of exposed persons.	ATSDR.		
Cadmium	7A	Analytical methods for biological tissues and fluids and environmental media.		Filled	Based on an evaluation of the data in ATSDR's 1999 updated toxicological profile.
	7B	Exposure levels in humans (adults) living near hazardous waste sites and other populations, such as exposed workers.	G. Lakes	Filled	In addition to the data from the Great Lakes Research Program, reference range concentrations in blood and urine are available (CDC 2005), and at least nine ATSDR studies that evaluated blood and urine cadmium levels and potential adverse health effects are available.
	7C	Exposure levels in children		Filled	Reference range concentrations in blood and urine are available (CDC 2005).
Carbon tetrachloride	8A	Dose-response data in animals for chronic oral exposure. The study should include extended reproductive organ and nervous tissue histopathology.			
	8B	Immunotoxicology battery of tests via oral exposure.	NTP	Filled	NTP dose-finding study and one study in ATSDR's 1994 updated toxicological profile addressed the priority data need.
	8C	Half-life in soil		Filled	One study in ATSDR's 1994 updated toxicological profile provided information on half-life in soil.
	8D	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.		Filled	Reference range concentrations in blood are available (Ashley et al. 1992, 1994; Needham et al. 1995). ATSDR acknowledges that reference concentration data can support exposure and health assessments at waste sites, but the Agency also continues to recognize the importance of collecting additional data on uniquely exposed populations at waste sites.
	8E	Potential candidate for subregistry of exposed persons.	ATSDR.		
Chlordane	9A	Oral multigenerational studies to evaluate reproductive toxicity.	MHPF	Filled	Availability of studies in the MHPF Research Program.
	9B	Bioavailability studies following ingestion of contaminated media.			

TABLE 1.—ATSDR'S SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS FOR 60 PRIORITY HAZARDOUS SUBSTANCES—Continued

Substances	PDN ID [1]	PDN description	Program [2]	Status change [3]	Comments [4]
	9C	Exposure levels in humans (adults) living near hazardous waste sites and other populations potentially exposed to chlordane.		Filled	Reference range concentrations in serum are available (CDC 2005). ATSDR acknowledges that reference concentration data can support exposure and health assessments at waste sites, but the Agency also continues to recognize the importance of collecting additional data on uniquely exposed populations at waste sites.
	9D	Exposure levels in children		Filled	Reference range concentrations in serum are available (CDC 2005).
	9E	Potential candidate for subregistry of exposed persons.	ATSDR.		
Chlorinated dibenzo-p-dioxins (CDDs).	10A	Studies via oral exposure designed to assess childhood susceptibility.			
	10B	Comparative toxicokinetic studies examining the relative absorption of CDDs across exposure routes and the relative contribution of each exposure route to total body burdens.			
	10C	Exposure levels in humans (adults) living near hazardous waste sites.		Filled	Reference range concentrations in serum are available (CDC 2005). ATSDR acknowledges that reference concentration data can support exposure and health assessments at waste sites, but the Agency also continues to recognize the importance of collecting additional data on uniquely exposed populations at waste sites.
	10D	Exposure levels in children		Filled	Reference range concentrations in serum are available (CDC 2005).
Chloroethane	11A	Dose-response data in animals for acute- and intermediate-duration or exposures. The subchronic study should include an evaluation of immune and nervous system tissues, and extended reproductive organ histopathology.	EPA.		
		Dose-response data in animals for chronic inhalation exposure.s The study should include an evaluation of nervous system tissues.	EPA.		
	11C	Potential candidate for subregistry of exposed persons.	ATSDR.		
Chloroform	12A	Dose-response data in animals for intermediate-duration oral exposure.		Filled	An MRL was derived in ATSDR's 1997 updated toxicological profile.
		Epidemiologic studies on the health effects of chloroform (Special emphasis end points include cancer, neurotoxicity, reproductive and developmental toxicity, hepatotoxicity, and renal toxicity).		Filled	Based on an evaluation of the data in ATSDR's 1997 updated toxicological profile. ATSDR will continue to evaluate new data as they become available to determined if additional studies are needed.

TABLE 1.—ATSDR'S SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS FOR 60 PRIORITY HAZARDOUS SUBSTANCES—Continued

Substances	PDN ID [1]	PDN description	Program [2]	Status change [3]	Comments [4]
	12C	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.		Filled	Reference range concentrations in blood are available (Ashley et al. 1992, 1994; and Needham et al. 1995). ATSDR acknowledges that reference concentration data can support exposure and health assessments at waste sites, but the Agency also continues to recognize the importance of collecting additional data on uniquely exposed populations at waste sites.
	12D	Potential candidate for subregistry of exposed persons.	ATSDR.		
Chromium	13A	Dose-response data in animals for acute-duration exposure to chromium (VI) and (III) via oral exposure and for intermediate-duration exposure to chromium (VI) via oral exposure.	EPA.		
	13B	Multigeneration reproductive toxicity study via oral exposure to chromium (III) and (VI).	EPA.		
	13C	Immunotoxicology battery of tests following oral exposure to chromium (III) and (VI).	EPA.		
	13D	Prenatal developmental toxicity study via oral exposure to chromium (III) and (VI).	EPA.		
	13E	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	G. Lakes	Filled	In addition to the data from the Great Lakes Research Program, reference range concentrations in urine are available (Paschal et al. 1998). Also, at least two STSDR studies that evaluated urine chromium levels and potential adverse health effects are available.
Cynaide	14A	Dose-response data in animals for acute- and intermediate-duration exposures via inhalation. The subchronic study should include extended reproductive organ histopathology and evaluation of neurobehavioral and neuropathological end points.	EPA.		
	14B	Prenatal developmental toxicity study via oral exposure.	EPA.		
	14C	Evaluation of the environmental fate of cyanide in soil.		Filled	A study addressing the priority data need was submitted by industry to EPA in response to EPA's solicitation for proposals for test rule making. Scientists from EPA and ATSDR reviewed the study and considered that this research need is no longer a priority.
	14D	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.			
	14E	Potential candidate for subregistry of exposed persons.	ATSDR.		
1,2-dibromo-3-chloropropane	15A	Dose-response data in animals for acute-duration exposure via the oral route (including reproductive organ histopathology).			

TABLE 1.—ATSDR'S SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS FOR 60 PRIORITY HAZARDOUS SUBSTANCES—Continued

Substances	PDN ID [1]	PDN description	Program [2]	Status change [3]	Comments [4]
	15B	Dose-response data in animals for chronic-duration exposure via the oral route (including reproductive organ histopathology).			
	15C	Prenatal developmental toxicity study via oral exposure.			
	15D	Immunotoxicology testing battery via oral exposure.	.....	.....	Previously planned study in the MHPF Research Program to address this priority data need was canceled.
	15E	Neurotoxicology testing battery via oral exposure.	.....	.....	Previously planned study in the MHPF Research Program to address this priority data need was canceled.
	15G	Potential candidate for subregistry of exposed persons.	ATSDR.		
1,2-Dibromoethane	16A	Dose-response data in animals for acute- and intermediate-duration exposure by the oral route (the study of intermediate-duration exposure should include evaluation of neuropathology and observation for overt signs of neurotoxicity).			
	16B	Multigeneration reproductive toxicity studies via oral exposure.			
	16C	Developmental toxicity studies via oral exposure.			
	16D	Immunotoxicity battery studies via oral exposure.			
	16E	Exposure levels in humans living near hazardous waste sites and in other populations, such as workers exposed to 1, 2-dibromoethane.			
	16F	Exposure levels in children.			
	16G	Potential candidate for subregistry of exposed persons.	ATSDR.		
1,2-Dichloroethane	17A	Dose-response data in animals for acute-duration (14-day) exposure by the inhalation route, including a comparison of young and adult animals.			
	17B	Dose-response data in animals for acute-duration (14-day) exposure by the oral route, including a comparison of young and adult animals.			
	17C	Dose-response data in animals for intermediate-duration exposure by the inhalation route (the study should be performed in conjunction with the neurotoxicology battery of tests).			
	17D	Neurotoxicology battery of tests following inhalation exposure.			
	17E	Neurotoxicology battery of tests following oral exposure.			
	17F	Dose-response data in animals for chronic-duration exposure by the oral route.			
	17G	Prenatal developmental toxicity data for inhalation exposure (assessment of developmental cardiotoxicity and neurotoxicity).			

TABLE 1.—ATSDR'S SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS FOR 60 PRIORITY HAZARDOUS SUBSTANCES—Continued

Substances	PDN ID [1]	PDN description	Program [2]	Status change [3]	Comments [4]
	17H	Prenatal developmental toxicity data for oral exposure (assessment of developmental cardiotoxicity and neurotoxicity).			
	17I	Additional analyses and studies for comparative toxicokinetics across species, ages, routes, and durations ≤.			
	17J	Children's susceptibility.			
	17K	Exposure levels in humans living near hazardous waste sites.			
	17L	Exposure levels in children.			
	17M	Potential candidate for subregistry of exposed persons.	ATSDR.		
1,1-Dichloroethene	18A	Dose-response data in animals for acute-duration exposure by the inhalation route.	NTP	Filled	Availability of ongoing NTP study.
	18B	Dose-response data in animals for chronic-duration exposure by the inhalation route.	NTP	Filled	Availability of ongoing NTP study.
	18C	Dose-response data in animals for acute- and intermediate-duration exposure by the oral route.			
	18D	Carcinogenicity studies in two species following inhalation exposure.			
	18E	Reproductive toxicity studies assessing male and female end points following inhalation exposure.			
	18F	Prenatal developmental toxicity studies following oral exposure.			
	18G	Immunotoxicology battery of tests following oral exposure.			
	18H	Battery of neurobehavioral tests following inhalation exposure.			
	18I	Children's susceptibility.			
	18J	Exposure levels in humans living near hazardous waste sites.			
	18K	Exposure levels in children.			
	18L	Potential candidate for subregistry of exposed persons.	ATSDR.		
DDT	19A	Dose-response data in animals for chronic-duration oral exposure.			
	19B	Comparative toxicokinetic study (across routes/species).			
	19C	Bioavailability and bioaccumulation from soil.			
	19D	Epidemiologic studies on the health of DDT, DDD, and DDE (Special emphasis end points include immunotoxicity, and reproductive and developmental toxicity).	G. Lakes	Filled	In addition to the data from the Great Lakes Research Program, multiple studies in ATSDR's 2000 updated toxicological profile are available.

TABLE 1.—ATSDR'S SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS FOR 60 PRIORITY HAZARDOUS SUBSTANCES—Continued

Substances	PDN ID [1]	PDN description	Program [2]	Status change [3]	Comments [4]
	19E	Exposure levels in humans (adults) living near hazardous waste sites and other populations, such as exposed workers.	G. Lakes	Filled	In addition to the data from the Great Lakes Research Program, reference range concentrations in serum are available (CDC 2005). ATSDR acknowledges that reference concentration data can support exposure and health assessments at waste sites, but the Agency also continues to recognize the importance of collecting additional data on uniquely exposed populations at waste sites.
	19F	Exposure levels in children		Filled	Reference range concentrations in serum are available (CDC 2005).
	19G	Potential candidate for subregistry of exposed persons.	ATSDR.		
Di (2-ethylhexyl) phthalate	20A	Epidemiologic studies on the health effects of DEHP (Special emphasis end points include cancer).			
	20B	Dose-response data in animals for acute- and intermediate-duration oral exposures. The subchronic study should include an extended histopathologic evaluation of the immunologic and neurologic systems.			This research need remains as a priority data need because the previously developed MRL for acute-duration (1993 toxicological profile) was withdrawn. However, a new MRL for intermediate-duration was derived in ATSDR's 2002 updated Toxicological Profile. Therefore, this priority data need is considered partially filled because additional adequate acute-duration data for deriving an MRL are still lacking.
	20C	Multigeneration reproductive toxicity study via oral exposure.			This research need is reassigned as a priority data need based on an evaluation of the data in ATSDR's 2002 updated toxicological profile. Also, the NTP Center for the Evaluation of Risks to Human Reproduction Expert Panel Report (October 2000) has identified critical data needs for reproductive toxicity.
	20D	Comparative toxicokinetic studies (Studies designed to examine how primates metabolize and distribute DEHP as compared with rodents via oral exposure).		Filled	The existing database provides adequate information to fill this priority data need based on ATSDR's reevaluation of the published data.
	20E	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.			
	20F	Potential candidate for subregistry of exposed persons..	ATSDR.		
Di-n-butyl phtalate	21A	Dose-response data in animals for acute-duration exposure via the oral route.	NTP	Filled	Availability of an NTP study.
	21B	Dose-response data in animals for chronic-duration exposure via the oral route.			
	21C	Carcinogenicity studies via oral exposure.			

TABLE 1.—ATSDR'S SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS FOR 60 PRIORITY HAZARDOUS SUBSTANCES—Continued

Substances	PDN ID [1]	PDN description	Program [2]	Status change [3]	Comments [4]
	21D	In vivo genotoxicity studies	MHPF	Filled	Availability of a study in the MHPF Research Program
	21E	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.			
	21F	Environmental fate of di-n-butyl phthalate in environmental media.			
	21G	Bioavailability in contaminated environmental media near hazardous waste sites.			
	21H	Potential candidate for subregistry of exposed persons..	ATSDR.		
Disulfoton	22A	Immunotoxicology testing battery following oral exposure.	NTP	Filled	Availability of ongoing NTP study.
	22B	Exposure levels of disulfoton in tissues/fluids for populations living near hazardous waste sites and other populations, such as exposed workers.			
	22C	Disulfoton should be considered as a potential candidate for a subregistry of exposed persons.	ATSDR.		
Endosulfan (α, β, and sulfate)	23A	Acute-duration oral exposure studies.			
	23B	Data on sensitive neurologic end point following oral exposure.			
	23C	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.			
	23D	Data on the bioavailability of endosulfan from soil.			
	23E	Potential candidate for subregistry of exposed persons.	ATSDR.		
Endrin/endrin aldehyde	24A	Dose-response animal data for acute oral exposure to endrin.			
	24B	Multigeneration reproductive toxicity studies via oral exposure to endrin.			
	24C	Accurately describe the toxicokinetics of endrin and its degradation products and identify the animal species to be used as the most appropriate model for human exposure.			
	24D	Exposure levels for endrin and its degradation products in humans living near hazardous waste sites.			
	24E	Accurately describe the environmental fate of endrin, including environmental breakdown products and rates, media half-lives, and chemical and physical properties of the breakdown products that help predict mobility and volatility.			
	24F	Potential candidate for subregistry of exposed persons.	ATSDR.		
Ethylbenzene	25A	Dose-response data for acute-duration exposure by the inhalation route.			
	25B	Dose-response data for chronic-duration exposure by the inhalation route.			

TABLE 1.—ATSDR'S SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS FOR 60 PRIORITY HAZARDOUS SUBSTANCES—Continued

Substances	PDN ID [1]	PDN description	Program [2]	Status change [3]	Comments [4]
	25C	Dose-response data for acute- and intermediate-duration exposure by the oral route; the study of intermediate-duration exposure should include an evaluation of clinical signs of neurotoxicity and histopathology of reproductive organs, endocrine glands, and nervous system.			
	25D	Multigeneration toxicity study examining reproductive end points and indicators of endocrine disruption following inhalation exposure.			
	25E	Prenatal developmental study with continued assessment of offspring during postnatal development following oral exposure.			
	25F	Studies for comparative toxicokinetics.			
	25G	Exposure levels in humans living near hazardous waste sites.			
	25H	Exposure levels in children.			
	25I	Potential candidate for subregistry of exposed persons.	ATSDR.		
Heptachlor/heptachlor epoxide	26A	Dose-response animal data for acute- and intermediate-duration oral exposures, including immunopathology.			
	26B	Multigeneration reproductive toxicity studies via the oral route of exposure.	NTP	Filled	Availability of publication ''The effects of perinatal/juvenile heptachlor exposure on adult immune and reproductive system function in rats'' by Smialowicz et al. (2001), Toxicological Sciences 61:164–175.
	26C	Prenatal developmental toxicity studies via the oral route of exposure.		Filled	Based on ATSDR's review of the literature, i.e., Smialowicz et al. (2001), Toxicological Sciences 61:164–175 and Moser et al. (2001) Toxicological Sciences 60 (2):315–326.
	26D	Exposure levels in humans (adults) living near hazardous waste sites and other populations, such as exposed workers.		Filled	Reference range concentrations in serum are available (CDC 2005). ATSDR acknowledges that reference concentration data can support exposure and health assessments at waste sites, but the Agency also continues to recognize the importance of collecting additional data on uniquely exposed populations at waste sites.
	26E	Exposure levels in children		Filled	Reference range concentrations in serum are available (CDC 2005).
	26F	Bioavailability from contaminated air, water, and soil and bioaccumulation potential.			
	26G	Potential candidate for subregistry of exposed persons.	ATSDR.		
Hexachlorobutadiene	27A	Dose-response data in animals for acute-duration exposure via the oral route.			

TABLE 1.—ATSDR'S SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS FOR 60 PRIORITY HAZARDOUS SUBSTANCES—Continued

Substances	PDN ID [1]	PDN description	Program [2]	Status change [3]	Comments [4]
	27B	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.			
	27C	Environmental fate studies that determine the extent to which hexachlorobutadiene volatilizes from soil, and studies that determine the reactions and rates which drive degradation in soil.			
	27D	Bioavailability studies in soil and plants.			
	27E	Potential candidate for subregistry of exposed persons.	ATSDR.		
Hexachlorocyclohexane (α, β and γ).	28A	Dose-response data for chronic-duration oral exposure.		Filled	An MRL was derived in ATSDR's 1999 updated toxicological profile.
	28B	Mechanistic studies on the neurotoxicity, hepatotoxicity, reproductive toxicity, and immunotoxicity of hexachlorocyclohexane.			
	28C	Exposure levels in humans (adults) living near hazardous waste sites and other populations, such as exposed workers.		Filled	Reference range concentrations in serum are available (CDC 2005). ATSDR acknowledges that reference concentration data can support exposure and health assessments at waste sites, but the Agency also continues to recognize the importance of collecting additional data on uniquely exposed populations at waste sites.
	28D	Exposure levels in children		Filled	Reference range concentrations in serum are available (CDC 2005).
	28E	Potential candidate for subregistry of exposed persons.	ATSDR.		
Lead	29A	Mechanistic studies on the neurotoxic effects of lead.	MHPF	Filled	Multiple studies (at least 13 publications from the MHPF Research Program + numerous studies in ATSDR's 1999 updated toxicological profile) are available.
	29B	Analytical methods for tissue levels.	MHPF	Filled	A publication from the MHPF Research Program and numerous studies in ATSDR's 1999 toxicological profile are available.
	29C	Exposure levels in humans (adults) near hazardous waste sites and other populations, such as exposed workers.	MHPF, G. Lakes.	Filled	In addition to the data from Great Lakes Research Program and MHPF Research Program, reference range concentrations in blood and urine are available (CDC 2005; Paschal *et al.* 1998), and at least 19 ATSDR studies that evaluated blood lead levels and potential adverse health effects are available.
	29D	Exposure levels in children		Filled	Reference range concentrations in blood and urine are available (CDC 2005).

TABLE 1.—ATSDR'S SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS FOR 60 PRIORITY HAZARDOUS SUBSTANCES—Continued

Substances	PDN ID [1]	PDN description	Program [2]	Status change [3]	Comments [4]
Manganese	30A	Dose-response data for acute- and intermediate-duration oral exposures (the subchronic study should include reproductive histopathology and an evaluation of immunologic parameters including manganese effects on plaque-forming cells (SRBC), surface markers (D4:D8 ratio), and delayed hypersensitivity reactions).	MHPF, EPA.	Filled	Availability of studies in the MHPF Research Program.
	30B	Toxicokinetic studies on animals to investigate uptake and absorption, relative uptake of differing manganese compounds, metabolism of manganese, and interaction of manganese with other substances following oral exposure.	MHPF, EPA.	Filled	Availability of studies in the MHPF Research Program.
	30C	Epidemiological studies on the health effects of manganese (Special emphasis end points include neurologic, reproductive, developmental, immunologic, and cancer).		Filled	Based on an evaluation of the data in ATSDR's 2000 updated toxicological profile. ATSDR will continue to evaluate new data as they become available to determine if additional studies are needed.
	30D	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.			
	30E	Relative bioavailability of different manganese compounds and bioavailability of manganese from soil.	EPA.		
Mercury	31A	Multigeneration reproductive toxicity study via oral exposure.	MHPF	Filled	Availability of publications from the MHPF Research Program.
	31B	Dose-response data in animals from chronic-duration oral exposure.		Filled	An MRL was derived in ATSDR's 1999 updated toxicological profile.
	31C	Immunotoxicology battery of tests via oral exposure.	EPA.		
	31D	Exposure levels in humans (adults) living near hazardous waste sites and other populations, such as exposed workers.	G. Lakes	Filled	In addition to the data from the Great Lakes Research Program, background levels data are available in ATSDR's 1997 updated toxicological profile, and multiple ATSDR studies that evaluated blood, urine, hair mercury levels and potential adverse health effects are available. Also, reference range concentrations in blood and urine are available (CDC 2005).
	31E	Exposure levels in children		Filled	Reference range concentrations in blood and urine are available (CDC 2005).
	31F	Potential candidate for subregistry of exposed persons.	ATSDR.		
Methoxychlor	32A	Evaluate neurologic effects after long-term, low-level oral exposure.		Filled	Based on an evaluation of the data in ATSDR's 2000 updated toxicological profile.
	32B	Exposure levels of methoxychlor and primary metabolites in humans living near hazardous waste sites and those individuals with the potential to ingest it..			

TABLE 1.—ATSDR'S SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS FOR 60 PRIORITY HAZARDOUS SUBSTANCES—Continued

Substances	PDN ID [1]	PDN description	Program [2]	Status change [3]	Comments [4]
	32C	Evaluate the fate, transport, and levels of the degradation products of methoxychlor in soil..			
	32D	Potential candidate for subregistry of exposed persons.	ATSDR.		
Methylene chloride	33A	Dose-response data in animals for acute- and intermediate-duration oral exposure. The subchronic study should include extended reproductive organ histopathology, neuropathology, and immunopathology.	EPA, Vol Res.	Filled	ATSDR accepted HSIA's toxicity study for acute- and intermediate-duration exposure duration in February 1997. Also, ATSDR accepted HSIA's immunotoxicity study via inhalation in November 2000 and the oral data obtained via PBPK modeling conducted by HSIA based on the immunotoxicity data from the inhalation study. Neurotoxicity screening battery testing remains in the ATSDR/EPA test rule under development.
	33B	Prenatal developmental toxicity study via the oral route.	Vol Res	Filled	ATSDR accepted HSIA's study in February 1997.
	33C	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.		Filled	Reference range concentrations in blood are available (Ashley et al. 1992, 1994; Needham et al. 1995). ATSDR acknowledges that reference concentration data can support exposure and health assessments at waste sites, but the Agency also continues to recognize the importance of collecting additional data on uniquely exposed populations at waste sites.
	33D	Potential candidate for subregistry of exposed persons.	ATSDR.		
Nickel	34A	Epidemilogic studies on the health effects of nickel (Special emphasis end points include reproductive toxicity).		Filled	Based on at least two relevant studies in ATSDR's 1997 updated toxicological profile. ATSDR will continue to evaluate new data as they become available to determine if additional studies are needed.
	34B	Prenatal development toxicity study via the oral route.	EPA	Filled	In ATSDR's 1997 updated toxicological profile, a study confirming the results of two previous studies is available.
	34C	Dose-response data in animals for acute- and intermediate-duration oral exposures.	EPA.		
	34D	Neurotoxicology battery of tests via oral exposure.	EPA.		
	34E	Bioavailability of nickel from soil	EPA.		
	34F	Exposure levels in humans (adults) living near hazardous waste sites and other populations, such as exposed workers.	G. Lakes	Filled	Based on availability of the data from the Great Lakes Research Program and an evaluation of ATSDR's 1997 updated toxicological profile.
	34G	Potential candidate for subregistry of exposed persons.	ATSDR.		
Pentachlorophenol	35A	Comparative toxicokinetic studies..			

TABLE 1.—ATSDR'S SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS FOR 60 PRIORITY HAZARDOUS SUBSTANCES—Continued

Substances	PDN ID [1]	PDN description	Program [2]	Status change [3]	Comments [4]
	35B	Exposure levels in humans (adults) living near hazardous waste sites.		Filled	Reference range concentrations in urine are available (CDC 2005. ATSDR acknowledges that reference concentration data can support exposure and health assessments at waste sites, but the Agency also continues to recognize the importance of collecting additional data on uniquely exposed populations at waste sites.
	35C	Exposure levels in children		Filled	Reference range concentrations in urine are available (CDC 2005).
	35D	Potential candidate for subregistry of exposed persons.	ATSDR.		
Polychlorinated biphenyls (PCBs)	36A	Dose-response data in animals for acute- and intermediate-duration oral exposure.	G. Lakes		Although an MRL for intermediate-exposure duration was derived in ATSDR's 2000 updated toxicological profile, an MRL for acute-exposure duration is still lacking.
	36B	Biodegradation of PCBs in water; bioavailability of PCBs in air, water, and soil.			
	36C	Dose-response data in animals for acute- and intermediate-duration inhalation exposures. The subchronic study should include extended reproductive organ histopathology.			
	36D	Epidemiologic studies on the health effects of PCBs (Special emphasis end points include immunotoxicity, gastrointestinal toxicity, liver toxicity, kidney toxicity, thyroid toxicity, and reproductive/developmental toxicity).	G. Lakes	Filled	In addition to the data from the Great Lakes Research Program, multiple studies in ATSDR's 2000 updated toxicological profile are available.
	36E	Exposure levels in humans (adults) living near hazardous waste sites and other populations, such as exposed workers.	G. Lakes	Filled	In addition to the data from the Great Lakes Research Program, background levels data are available (ATSDR's 1997 updated toxicological profile, Needham et al. 1996, and CDC 2005). Also, multiple ATSDR studies that evaluated blood and breast milk PCB levels and potential adverse health effects are available.
	36F	Exposure levels in children		Filled	Reference range concentrations in serum are available (CDC 2005).
	36G	Potential candidate for subregistry of exposed persons.	ATSDR.		
	36H[5]	Chronic toxicity and oncogenicity via oral exposure.	Vol Res	Filled	ATSDR accepted the final report of the GE study in October 1997.
	36I[5]	Aerobic PCB biodegradation in sediment.	Vol Res	Filled	ATSDR accepted the final report of the GE study in July 1999.
	36J[5]	PCB congener analysis	Vol Res, G. Lakes.	Filled	ATSDR accepted the final report of the GE study in October 1997. Also, data from the Great Lakes Research Program are available.

TABLE 1.—ATSDR'S SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS FOR 60 PRIORITY HAZARDOUS SUBSTANCES—Continued

Substances	PDN ID [1]	PDN description	Program [2]	Status change [3]	Comments [4]
Polycyclic aromatic hydrocarbons (PAHs) (Includes 15 substances).	37A	Dose-response data in animals for intermediate-duration oral exposures. The subchronic study should include extended reproductive organ histopathology and immunopathology.	MHPF	Filled	MRLs for four PAHs were derived in ATSDR's 1995 updated toxicological profile. A publication from the MHPF Research Program addressing this priority data need is available.
	37B	Prenatal developmental toxicity study via inhalation or oral exposure.	MHPF	Filled	Data from the MHPF Research Program including a publication are available.
	37C	Mechanistic studies on PAHs, on how mixtures of PAHs can influence the ultimate activation of PAHs, and on how PAHs affect rapidly proliferating tissues..	MHPF	Filled	In addition to publications from the MHPF Research Program, studies are available in ATSDR's 1995 updated toxicological profile.
	37D	Dose-response data in animals for acute- and intermediate-duration inhalation exposures. The subchronic study should include extended reproductive organ histopathology and immunopathology.	MHPF	Filled	Data from the MHPF Research Program including one publication are available.
	37E	Epidemiologic studies on the health effects of PAHs (Special emphasis end points include cancer, dermal, hemolymphatic, and hepatic toxicity).		Filled	Multiple studies in ATSDR's 1995 updated toxicological profile are available. ATSDR will continue to evaluate new data as they become available to determine if additional studies are needed.
	37F	Exposure levels in humans (adults) living near hazardous waste sites and other populations, such as exposed workers.	G. Lakes	Filled	Based on data from the Great Lakes Research Program and an evaluation of the ATSDR 1995 updated toxicological profile. Also, reference range concentrations in urine are available (CDC 2005). The Agency continues to recognize the importance of collecting additional data on uniquely exposed populations at waste sites.
	37G	Exposure levels in children		Filled	Reference range concentrations in urine are available (CDC 2005).
	37H	Potential candidate for subregistry of exposed persons.	ATSDR.		
Selenium	38A	Dose-response data in animals for EPA acute-duration oral exposure.	EPA.		
	38B	Immunotoxicology battery of tests via oral exposure.	EPA.		
	38C	Epidemiologic studies on the health effects of selenium (Special emphasis end points include cancer, reproductive and developmental toxicity, hepatotoxicity, and adverse skin effects).		Filled	Based on an evaluation of ATSDR's 2001 updated toxicological profile. ATSDR will continue to evaluate new data as they become available to determine if additional studies are needed.

TABLE 1.—ATSDR'S SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS FOR 60 PRIORITY HAZARDOUS SUBSTANCES—Continued

Substances	PDN ID [1]	PDN description	Program [2]	Status change [3]	Comments [4]
	38D	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	G. Lakes	Filled	In addition to the data from the Great Lakes Research Program, reference range concentrations in serum are available (NHANES III). ATSDR acknowledges that reference concentration data can support exposure and health assessments at waste sites, but the Agency also continues to recognize the importance of collecting additional data on uniquely exposed populations at waste sites.
	38E	Potential candidate for subregistry of exposed persons.	ATSDR.		
1,1,2,2-Tetrachloroethane	39A	Prenatal developmental toxicity study by the oral route.			
	39B	Immunotoxicity battery following oral exposure.			
	39C	Mammalian in vivo genotoxicity assays.			
	39D	Exposure levels in humans living near hazardous waste sites.			
	39E	Exposure levels in children.			
	39F	Potential candidate for subregistry of exposed persons.	ATSDR.		
Tetrachloroethylene	40A	Dose-response data in animals for acute-duration oral exposure, including neuropathology and demeanor, and immunopathology.		Filled	An MRL was derived in the ATSDR 1997 updated toxicological profile.
	40B	Multigeneration reproductive toxicity study via oral exposure.	Vol Res		HSIA's inhalation study was accepted by ATSDR and included in ATSDR's 1997 updated toxicological profile. However, ATSDR has identified ingestion of contaminated environmental media to be the primary exposure route for this chemical at waste sites. HSIA will obtain the oral data from the inhalation study by conducting PBPK modeling.
	40C	Dose-response data in animals for intermediate-duration oral exposure, including neuropathology, and immunopathology.	EPA, Vol Res.		HSIA will obtain oral data for intermediate-duration toxicity and neurotoxicity by PBPK modeling based on existing inhalation data. Also, it will conduct an inhalation immunotoxicity study, followed by PBPK modeling to obtain oral data.
	40D	Prenatal developmental toxicity study via oral exposure.	Vol Res		HSIA's developmental toxicity study via inhalation was accepted by ATSDR. However, ATSDR has identified ingestion of contaminated environmental media to be the primary exposure route for this chemical at waste sites. HSIA will obtain the oral data from the inhalation study by conducting PBPK modeling.
	40E	Developmental neurotoxicity study via oral exposure.	EPA, Vol Res.		

TABLE 1.—ATSDR'S SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS FOR 60 PRIORITY HAZARDOUS SUBSTANCES—Continued

Substances	PDN ID [1]	PDN description	Program [2]	Status change [3]	Comments [4]
	40F	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.		Filled	Reference range concentrations in blood are available (Ashley et al. 1992, 1994; Needham et al. 1995). ATSDR acknowledges that reference concentration data can support exposure and health assessments at waste sites, but the Agency also continues to recognize the importance of collecting additional data on uniquely exposed populations at waste sites.
	40G	Potential candidate for subregistry of exposed persons.	ATSDR.		
Toluene	41A	Dose-response data in animals for acute- and intermediate-duration oral exposures. The subchronic study should include an extended histopathologic evaluation of the immune system.		Filled	Availability of MRLs for acute- and intermediate- exposure durations in ATSDR's 2000 updated toxicological profile.
	41B	Comparative toxicokinetic studies (Characterization of absorption, distribution, and excretion via oral exposure).		Filled	Based on evaluation of the data in ATSDR's 2000 updated toxicological profile.
	41C	Neurotoxicology battery of tests via oral exposure.	EPA, MHPF.		A publication for acute exposure but not longer term exposure is available in the MHPF Research Program. Also, this priority data need is included in the EPA/ATSDR test rule.
	41D	Mechanism of toluene-induced neurotoxicity.		Filled	Multiple studies in ATSDR's 1994 and 2000 updated toxicological profiles are available.
	41E	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.		Filled	Reference range concentrations in blood are available (Ashley et al. 1992, 1994; Needham et al. 1995), and additional data in ATSDR's 2000 updated toxicological profile are available. ATSDR acknowledges that reference concentration data can support exposure and health assessments at waste sites, but the Agency also continues to recognize the importance of collecting additional data on uniquely exposed populations at waste sites.
	41F	Potential candidate for subregistry of exposed persons.	ATSDR.		
Toxaphene	42A	Identify the long-term health consequences of exposure to environmental toxaphene via oral exposure.			
	42B	Conduct additional immunotoxicity studies for chronic-duration via oral route of exposure.			
	42C	Conduct additional neurotoxicity studies for chronic-duration via oral route of exposure.			
	42D	Exposure levels in humans living in areas near hazardous waste sites with toxaphene and in those individuals with the potential to ingest it.			
	42E	Potential candidate for subregistry of exposed persons.	ATSDR.		

TABLE 1.—ATSDR'S SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS FOR 60 PRIORITY HAZARDOUS SUBSTANCES—Continued

Substances	PDN ID [1]	PDN description	Program [2]	Status change [3]	Comments [4]
Trichloroethylene	43A	Dose-response data in animals for acute-duration oral exposure.		Filled	An MRL was derived in ATSDR's 1997 updated toxicological profile.
	43B	Neurotoxicology battery of tests via the oral route.	EPA, MHPF, Vol Res.		A publication for acute exposure but not longer term exposure is available in the MHPF Research Program. Also, this priority data need is included in the EPA/ATSDR test rule and ATSDR's Voluntary Research Program.
	43C	Immunotoxicology battery of tests via oral route.	Vol Res		HSIA has completed an inhalation immunotoxicity study which is undergoing ATSDR peer review. HSIA will obtain oral data via PBPK modeling based on the inhalation data.
	43D	Prenatal developmental toxicity study via oral exposure.	Vol Res		ATSDR has accepted HSIA's final report for an inhalation developmental toxicity study. HSIA will use PBPK modeling to obtain data for oral exposure based on the results of its inhalation study.
	43E	Developmental neurotoxicity study via oral exposure.	EPA, Vol Res.		
	43F	Epidemiologic studies on the health effects of trichloroethylene (Special emphasis end points include cancer, hepatotoxicity, renal toxicity, developmental toxicity, and neurotoxicity).		Filled	Based on evaluation of the data in ATSDR's 1997 updated toxicological profile. ATSDR will continue to evaluate new data as they become available to determine if additional studies are needed.
	43G	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.		Filled	Reference range concentrations in blood are available (Ashley et al. 1992, 1994; Needham et al. 1995). ATSDR acknowledges that reference concentration data can support exposure and health assessments at waste sites, but the Agency also continues to recognize the importance of collecting additional data on uniquely exposed populations at waste sites.
Vinyl chloride	44A	Dose-response data in animals for acute-duration inhalation exposure.		Filled	An MRL was derived in ATSDR's 1997 updated toxicological profile.
	44B	Multigeneration reproductive toxicity study via inhalation.	Vol Res	Filled	ATSDR accepted the final report of ACC's study in November 2000.
	44C	Dose-response data in animals for chronic-duration inhalation exposure..			
	44D	Mitigation of vinyl chloride-induced toxicity.			
	44E	Prenatal developmental toxicity study via inhalation.	Vol Res	Filled	ATSDR accepted the final report of ACC's study in November 2000.
	44F	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers..			
	44G	Potential candidate for subregistry of exposed persons.	ATSDR.		

TABLE 1.—ATSDR'S SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS FOR 60 PRIORITY HAZARDOUS SUBSTANCES—Continued

Substances	PDN ID [1]	PDN description	Program [2]	Status change [3]	Comments [4]
Xylenes	45A	Dose-response data for chronic-duration exposure by the oral route. This study should be done in conjunction with the neurotoxicology battery of tests.			
	45B	Neurotoxicology battery of tests following oral exposure..			
	45C	Two-generation reproductive study following oral exposure..			
	45D	Developmental toxicity study that includes neurodevelopmental end points following oral exposure..			
	45E	Exposure levels in humans living near hazardous waste sites..			
	45F	Exposure levels in children..			
	45G	Potential candidate for subregistry of exposed persons.	ATSDR.		
Zinc	46A	Dose-response data in animals for acute- and intermediate-duration oral exposures. The subchronic study should include an extended histopathologic evaluation of the immunologic and neurologic systems.	MHPF	Filled	Availability of ongoing studies in the MHPF Research Program.
	46B	Multigeneration reproductive toxicity study via oral exposure.	MHPF	Filled	Availability of ongoing studies in the MHPF Research Program.
	46C	Carcinogenicity testing (2-year bioassay) via oral exposure..			
	46D	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.			This priority data need, previously anticipated to be addressed under the voluntary research program, is not being investigated under any of the ATSDR research programs.
	46E	Potential candidate for subregistry of exposed persons.	ATSDR.		

[1] Priority data need identification number.

[2] Programs addressing priority data needs. ATSDR = ATSDR's Division of Health Studies; EPA = U.S. Environmental Protection Agency; G. Lakes = Great Lakes Human Health Effects Research Program; MHPF = Minority Health Professions Foundation; NTP = National Toxicology Program; Vol Res = Voluntary research.

[3] PDN can be *filled* or remain unchanged based on reevaluation of the database using criteria developed by ATSDR.

[4] ACC = American Chemistry Council; Ashley *et al.* 1992 = Ashley DL, Bonin MA, Cardinali FL, *et al.* Anal Chem (1992) 64:1021–29; Ashley *et al.* 1994 = Ashley DL, Bonin MA, Cardinali FL *et al.*, Clin Chem (1994) 40/7:1401–4; ATSDR studies = Studies conducted by ATSDR's Division of Health Studies; GE = General Electric Company ; HSIA = Halogenated Solvents Industry Alliance, Inc.; MHPF = Minority Health Professions Foundation; MRL = Minimal Risk Level; CDC 2005 = The third National Report on Human Exposure to Environmental Chemicals, prepared by the National Center for Environmental Health, Centers for Disease Control and Prevention, Atlanta, GA; Needham *et al.* 1995 = Needham LL, Hill RH Jr, Ashley DL, Pirkle JL, and Sampson EJ. Environ Health Perspect 103(Suppl 3):89–94; Needham *et al.* 1996 = Needham LL, Patterson DG Jr, Burse VW, Paschal DC, Turner WE, and Hill VW Jr. Toxicol Ind Health 12:507–513; NHANES III = The Third National Health and Nutrition Examination Survey, conducted by the National Center for Health Statistics, Centers for Disease Control and Prevention, Atlanta, GA; NTP = National Toxicology Program; Paschal *et al.* 1998 = Paschal DC, Ting BC, Morrow JC, *et al.* Environ Res, Section A 76: 53–59; PBPK modeling = physiologically based pharmacokinetic modeling; Toxicological profile = ATSDR's toxicological profiles for the Agency's priority hazardous substances.

[5] Not a priority data need.

TABLE 2.—GROUPS WHICH ARE ADDRESSING/HAVE ADDRESSED ATSDR'S SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS (PDNS)

Program	Firm, institution, agency, or consortium	Substance	PDN ID
Voluntarism	American Chemistry Council	Vinyl Chloride	44B, 44E
	General Electric Company	PCBs	36H*, 36I*, 36J*
	Halogenated Solvents Industry Alliance, Inc..	Methylene chloride	33A, 33B
		Tetrachloroethylene	40B, 40C, 40D, 40E
		Trichloroethylene	43B, 43C, 43D, 43E
Minority Health Professions Foundation.	Florida A & M University	Lead	29A

TABLE 2.—GROUPS WHICH ARE ADDRESSING/HAVE ADDRESSED ATSDR'S SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS (PDNS)—Continued

Program	Firm, institution, agency, or consortium	Substance	PDN ID
	The King/Drew Medical Center of the Charles R. Drew University of Medicine and Science.	Lead	29B, 29C
	Meharry Medical College	PAHs	37A, 37B, 37C, 37D
	Morehouse School of Medicine	Lead	29C
	Texas Southern University	Di-n-butyl phthalate	21D
		Lead	29A
		Toluene	41C
		Trichloroethylene	43B
	Tuskegee University	Chlordane	9A
		Mercury	31A
		Zinc	46A, 46B
	Xavier University	Manganese	30A, 30B
		Zinc	46A
Great Lakes Human Health Effects Research Program.	Michigan State University	DDT/DDE	19D, 19E
		Lead	29C
		Mercury	31D
		PCBs	36D, 36E, 36J*
		Selenium	38D
	New York State Health Department	DDT/DDE	19E
		Lead	29C
		Mercury	31D
		PCBs	36D, 36E, 36J*
	State University of New York at Albany.	PCBs	36E
	State University of New York at Buffalo.	DDT/DDE	19D, 19E
		Lead	29C
		Mercury	31D
		PCBs	36D, 36E, 36J*
	State University of New York at Oswego.	DDT/DDE	19D, 19E
		Lead	29C
		Mercury	31D
		PCBs	36D, 36E, 36J*
	University of Illinois at Chicago	DDT/DDE	19D, 19E
		Lead	29C
		Mercury	31D
		PCBs	36D, 36E, 36J*
	University of Illinois at Urbana-Champaign.	DDT/DDE	19D, 19E
		Lead	29C
		Mercury	31D
		PCBs	36D, 36E, 36J*
	University of Wisconsin-Milwaukee	DDT/DDE	19D, 19E
		Lead	29C
		Mercury	31D
		PCBs	36A, 36D, 36E, 36J*
		Selenium	38D
	Wisconsin Department of Health and Social Services—5 State Consortium.	Arsenic	2D
		Cadmium	7B
		Chromium	13E
		DDT/DDE	19D, 19E
		Lead	29C
		Mercury	31D
		Nickel	34F
		PAHs	37F
		PCBs	36D, 36E, 36J*
Environmental Protection Agency TSCA/FIFRA.	EPA/ATSDR Test Rule	Benzene	4A, 4B, 4C
		Chloroethane	11A, 11B
		Cyanide (hydrogen cyanide and sodium cyanide).	14A, 14B
		Methylene chloride	33A
		Tetrachloroethylene	40C, 40E
		Toluene	41C
		Trichloroethylene	43B, 43E

TABLE 2.—GROUPS WHICH ARE ADDRESSING/HAVE ADDRESSED ATSDR'S SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS (PDNS)—Continued

Program	Firm, institution, agency, or consortium	Substance	PDN ID
	Metals Testing Task Force (TASARC)	Arsenic	2A, 2B, 2C
		Beryllium	6A, 6B, 6C, 6E
		Chromium	13A, 13B, 13C, 13D
		Manganese	30A, 30B, 30E
		Mercury	31C
		Nickel	34B, 34C, 34D, 34E
		Selenium	38A, 38B
National Toxicology Program	National Institute of Carbon Environmental Health Sciences.	Carbon tetrachloride	8B
		1,1-dichloroethene	18A, 18B
		Di-n-butyl phthalate	21A
		Disulfoton	22A
		Heptachlor	26B

* Not priority data needs.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration on Aging

2005 White House Conference on Aging

AGENCY: Administration on Aging, HHS.

ACTION: Notice of meeting and final Annotated Agenda.

SUMMARY: Pursuant to section 10(a) of the Federal Advisory Committee Act as amended (5 U.S.C. Appendix 2), notice is hereby given of the 2005 White House Conference on Aging (WHCoA) meeting in December 2005 and the final Annotated Agenda for the 2005 WHCoA. The Policy Committee approved this final Annotated Agenda during a meeting held by conference call on November 3, 2005. The Annotated Agenda covers six broad areas that reflect major issues facing older individuals now and for the next 10 years.

The 2005 WHCoA will be open to the public. Individuals who wish to attend should call or email the contact person listed below in advance of the meeting and inform her of the day they wish to attend; since space for the public is limited, attendance will be on a first come first-served basis. Individuals who need special assistance, such as sign language interpretation or other reasonable accommodations, should inform the contact person of the type of assistance that is desired.

DATES: The 2005 White House Conference on Aging will take place from Sunday, December 11, 2005 to Wednesday, December 14, 2005.

ADDRESSES: The 2005 White House Conference on Aging will be held at the Marriott Wardman Park Hotel, 2660 Woodley Road, NW., Washington, DC 20008.

FOR FURTHER INFORMATION CONTACT: Rada Spencer at (301) 443–2496, or e-mail at *Rada.Spencer@whcoa.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the Older Americans Act Amendments of 2000 (Pub. L. 106–501, November 2000), the President will convene the White House Conference on Aging (WHCoA) not later than December 31, 2005. Specifically, the statute requires that the WHCoA shall gather individuals representing the spectrum of thought and experience in the field of aging to develop not more than 50 recommendations to guide the President, Congress, and Federal agencies in serving older individuals. The 2005 WHCoA will be held at the Marriott Wardman Park Hotel in Washington, DC from Sunday, December 11, 2005 to Wednesday, December 14, 2005. During its open meeting on October 1, 2004, the Policy Committee approved a proposed broad agenda, with the knowledge that work would continue on the Annotated Agenda. The broad agenda focused on six areas: Planning for the Future, Employment, Our Community, Health and Long-Term Living, Social Engagement, and Marketplace, and it was placed on the WHCoA Web site at *http://www.whcoa.gov* for public comment. The Policy Committee received comments from testimony and reports submitted from over 400 Listening Sessions, Solutions Forums, Mini-Conferences, and Independent Aging Agenda Events held and attended by approximately 130,000 individuals, as well as from unsolicited public comments to refine the proposed Annotated Agenda. Section 202 (b)(1) of the statute requires that the agenda for the WHCoA shall be published in the **Federal Register** not later than 30 days after the agenda is approved by the Policy Committee. The Policy Committee approved the final Annotated Agenda, dated November 3, 2005, during a meeting held by conference call on November 3, 2005. The six broad areas have been refined to read: (1) Planning Along the Lifespan, (2) The Workplace of the Future, (3) Our Community, (4) Health and Long-Term Living, (5) Civic Engagement and Social Engagement and (6) Technology and Innovation in an Emerging Senior/Boomer Marketplace. The entire text of the final Annotated Agenda is published as an Appendix to this notice.

Dated: November 23, 2005.

Edwin L. Walker,

Deputy Assistant Secretary for Policy and Programs.

Appendix 1—2005 White House Conference on Aging Annotated Agenda** Final—November 3, 2005

I. Planning Along the Lifespan

Social Security, pensions, savings, and wages each serve an important role in ensuring financial security in retirement. A cornerstone of achieving financial security in retirement is planning throughout a lifetime. Effective savings incentives and financial education are essential planning tools. Starting to save for retirement as early as possible ensures the miracle of compound interest, and provides optimum leverage. However, accumulating savings by itself does not guarantee a secure retirement. Managing those assets through longer and longer lifespans is also a key component. Americans must plan and prepare for the risk of having assets depleted

because of a long term care episode or other financial crisis. Moreover, retirees must guard against becoming victims of financial fraud and exploitation. Enhanced financial literacy will help enable Americans to guard against risks and plan appropriately to achieve financial security in retirement.

A. Economic Incentives To Increase Retirement Savings

1. Individual savings; employer-based pension programs

B. Social Security Programs Now and for the Future

1. Principles to protect and strengthen Social Security

C. Protection from Catastrophic Loss

1. Long term care expenses, and ways to assist Baby Boomers and families in understanding the need to finance long-term care, through insurance and other options
2. Preventing financial fraud, abuse and exploitation: an integral part of elder and Boomer financial security

D. Financial Literacy Throughout the Life Cycle

1. Financial literacy to assist Americans in learning to start saving early and to manage assets to last through longer and longer retirements

II. The Workplace of the Future

For many decades, there has been a younger workforce on the heels of those planning to retire. With declining birthrates those demographics will change dramatically and will have a tremendous impact on the workplace of the future. In addition, Americans are living longer which means they will need more assets for longer retirements or will need to work longer so that retirement assets last a lifetime. These two factors mean the workforce of the future will have to be thought about differently. Because the workforce is shrinking, older workers will be valuable members of the job bank of the future and, older workers will need the income that working longer will provide in order to fund their retirements. To ensure that employers have the workforce they need and to provide workers with opportunities to stay in the workforce, incentives will be needed to encourage employers to retain older workers and to encourage workers to stay in the workforce. Phased retirement offered ad hoc to a few employees today must be encouraged for the benefit of the employer and employee. Strategies for overcoming current unintended barriers to reaching these goals will be an important aspect of this Agenda item. Assistive technologies are another important component of helping workers remain in the workforce.

A. Opportunities for Older Workers

1. Employer incentives for retaining older workers and current disincentives that prevent employers from retaining older workers
2. Worker incentives to remain in the workforce and current disincentives to working longer
3. Phased retirement as an opportunity for the employee who wants to retire gradually and for the employer who wants to retain older workers
4. Assistive technology to help workers remain in the workforce
5. Strategies to prevent ageism/age discrimination from affecting opportunities for older workers

III. Our Community

Safety, independence, access to a social network, and support by family and informal caregivers, as needed, are important components of a livable community and ''aging in place'' for older Americans. Aging in place means being able to grow older in the community of one's choosing with continued access to needed social and health support services. Many Baby Boomer parents left urban residences after World War II for suburban homes and now face living in an area where services are less accessible, especially to those who no longer drive. Some possible solutions include better coordination between public health, transportation, and aging networks, better information management systems, and helping older Americans drive safely longer, and providing additional transportation options for those who no longer can or wish to drive. Longer term solutions include building higher density neighborhoods which allow safe and convenient pedestrian access to services, better public transportation, and other transportation options. Additionally, resources and information must be readily obtainable especially during and after emergencies or disasters. Emergency preparedness and response must be given greater emphasis especially as it relates to those older individuals who face mobility challenges. Improved information management systems and coordination between health, social service, law enforcement, and other networks are especially critical in times of emergencies or disasters.

A. Coordinated Social and Health Services That Give the Elderly the Maximum Opportunity To Age in Place

1. Availability of community referral resources
2. Configuration of Senior Centers to appeal to the next generation of senior citizens
3. Coordination between health and aging networks
4. Accommodation of the differences between the Baby Boomer aging population and previous generations of the elderly
5. Emergency/disaster preparedness and response as it relates to older persons

B. Promote Support for Both Family and Informal Caregivers That Enables Adequate Quality and Supply of Services

1. Caregiver support: training, respite, information, referral, and needs assessment for family caregivers. Training and financial support for paid caregivers

C. Livable Communities That Enable the Elderly To Age in Place

1. Senior-friendly community and residential design
2. Protection from neglect and physical abuse
3. Senior-friendly roads designed to keep older drivers on the road, safely
4. Housing affordability and availability
5. Alternative modes of transportation
6. Expanded use of public transportation

IV. Health and Long Term Living

Americans are living longer. That ever increasing life span, combined with the significant increase in the population reaching age 65, as the Baby Boomers age, will be major factors in shaping health care policy for the next ten years and beyond. The entire spectrum of health care, physical and mental health, will be impacted by these two factors. Personal responsibility for life style choices and adherence to preventive care protocols are more important than ever in decreasing or eliminating the negative impact of preventable illnesses. When acute or chronic illnesses do occur, the issue of access to appropriate medical and mental health services will also need to address issues of coordination of care across multiple settings and continuity of care over time. Living longer while afflicted with chronic illnesses will also require attention to choices that maximize function, quality of life, and independence in the living environment of choice for the individual.

Research, particularly more focused on issues associated with aging, and the

widespread dissemination and adoption of the information that the research reveals, will be a major contributor to the quality of health care. Quality in health care includes addressing issues of health disparities, cultural competencies, language barriers, health literacy, and patient safety. The concept of health is not the sole responsibility of the individual and the formal health care system, but it also includes the support provided by the aging network, multiple community organizations, improved information management systems, and the opportunity for meaningful social engagement. Issues of health care education of the population, in order to be integrally involved in heath care decisions and a health care workforce, sufficient in numbers and appropriately trained to address the special needs of the population are necessary ingredients for the success of any policy that is adopted.

A. Access to Affordable, High Quality Services

1. Development of a comprehensive, coordinated long term care strategy across the continuum of care, including benefits, living wills, end-of-life care, and health measures (in conjunction with Planning Along the Lifespan long term care issues)
2. Connecting evidence-based and comparative-based research with delivery of care
3. Aligning payment policies with the continuum of care

B. Healthy Lifestyles, Prevention, and Disease Management

1. Prevention: Education and lifestyle modifications
2. Disease management programs
3. Appropriate treatment for and education on alcohol and substance abuse and mental health
4. Provider and consumer education about disease prevention and mental health

C. Delivery of Quality Care and Promotion of Maximum Independence for Individuals With Chronic Conditions

1. Ensuring existence of a reliable, adequately trained, and culturally competent workforce
2. Providing maximum independence and non-institutional care
3. Ensuring appropriate care for seniors with disabilities
4. Addressing the shortage of paid workers for elder care and services

D. Use of Information To Improve All Health Care Services

1. Resources to make informed health care decisions
2. Medical research on aging issues
3. Appropriate use of health information technology
4. Sharing client information across multiple management systems

E. Affordable, Defined Health Benefits, Including Mental Health Benefits, Through Medicare, Medicaid, and Other Federal and State Health Care Programs

1. Ensuring adequate access to State and Federal health care programs

V. Civic Engagement and Social Engagement

Social engagement is crucial to the physical and psychological well-being of elderly citizens. Being engaged in such activity is important for older persons in maintaining physical vigor and for getting the type of social interaction and mental stimulation necessary to continue living a full, robust life. It is an equally important way in which senior citizens can contribute to their communities. There are a wide range of available activities that may be helpful individually, to other citizens and more generally, to sustain the quality of civic life. There are opportunities for volunteers in hospitals, schools, and museums, and with religious and service organizations, as well as in many other non-institutional settings. Key questions to be addressed regarding Baby Boomers as they age are what will be their level of participation in volunteerism, what types of activities will attract them, and how to remove barriers that prevent older Americans from volunteering in their communities.

A. Integration of the Elderly With the Non-Elderly Community

1. Strategies for changing attitudes toward aging/intergenerational dynamics
2. Creation of Baby Boomer volunteer opportunities
3. Promoting expanded opportunities for companionship and leisure to reduce isolation and loneliness

B. Effective Individual Adaptation to the Conditions of Aging

1. Increasing physical activity among the elderly
2. Continuing higher education for the older learner, including computer literacy training

VI. Technology and Innovation in an Emerging Senior/Boomer Marketplace

There are an increasing number of new products and operational practices that intend to help the elderly cope with challenges that affect their mobility, independence, and quality of life. They include personal mobility and communication devices, housing and vehicle design, and pharmaceutical advances. Some of these are beginning to be marketed and others are in development. But some with potentially dramatic impacts on older persons, and the rest of the population, are completely unknown. For example, at the 1981 White House Conference, would it have been predicted that by 2005, cell phones, the Internet, or CDs and DVDs would be in such common use? Over the next 20 years as Baby Boomers comprise the large majority of the elderly population, the marketplace affecting them will change in ways that will make their lives easier but may in other ways, make their lives more complicated.

A. Promoting New Products, Technology and New Ways of Marketing That Will Be Helpful/Useful to the Older Consumer

1. Developing creative products to support independence
2. Creating awareness of available technologies
3. Designing technology products that assist the broadest range of consumers
4. Assure the innovative and competitive leadership of American technology to meet rapidly-increasing global demand for aging-related products and services
5. Establishing a public, private and intergovernmental partnership to harmonize the patchwork of different Federal, State, and local policies, rules, regulations, standards, and codes that complicate and sometimes impede demand for and distribution of technology products and services
6. Assuring rational technology policies that stimulate innovation and investment

***Cross cutting issues:* Issue development should include consideration of differences among the following variables: socio-economic, disability/non-disability, rural/urban, minority, cultural, linguistic competencies/literacy, age cohort (*e.g.*, 55–65, 65–75, 75–85, 85+), and global aging. It should also include consideration of strategies for changing attitudes toward aging. Research intending to increase the ability to cope with the conditions of aging and best practices should be identified.

Appendix 2—White House Conference on Aging Program Agenda

Saturday, December 10, 2005

6 p.m.–9 p.m. Conference Registration Location: Just off hotel lobby

Sunday, December 11, 2005

10 a.m.–10 p.m. Conference Registration

Location: Just off hotel lobby

Pre-Conference Events

10 a.m.–12:30 p.m.

Get Involved: A White House Conference on Aging Service Project

Organized by the Corporation for National and Community Service and the Washington, DC Jewish Community Center.

A service project to help repair and weatherize a Washington, DC building that serves Latino seniors.

All delegates are invited to participate, but space is limited. To register as a volunteer for the event, call Lavinia Balaci at 202.777.3246 or e-mail *lavinia@dcjj.org.* 1:30 p.m.–4 p.m.

Healthy Living Celebration!!

Coordinator: President's Council on Physical Fitness

Presenters:

- Melissa Johnson, Executive Director, President's Council on Physical Fitness and Sports
- Mollie Katzen, renowned healthy cookbook author, ''Moosewood Cookbook''
- Mark Zeug, Chairman, National Senior Games Association
- Dot Richardson, Olympian and Board Member, President's Council on Physical Fitness and Sports

Simultaneous Fitness Sessions:

- Ya-La Dancing
- Theraband
- Tai Chi
- Line Dancing

Fitness Recognition Ceremony

3:30 p.m.–5:30 p.m. BY INVITATION ONLY

Roundtable on Global Aging

Moderator: Richard Jackson, Ph.D. Director, Global Aging Initiative Center for Strategic and International Studies, Washington, DC

The 21st Century burgeons in a new era of global aging in industrialized and industrializing nations.

4 p.m.–6 p.m. Top 50 Resolution Voting

5:30 p.m.–6 p.m. Exhibition Hall Ribbon Cutting

Evening Welcoming Reception

Organized by the Corporation for National and Community Service

Monday, December 12, 2005

5:30 a.m.–7:30 a.m. Continental Breakfast Buffet

6 a.m.–Noon Conference Registration Location: Just off Hotel Lobby

9 a.m.–10:30 a.m. Opening Plenary

11 a.m.–1 p.m. Top 50 Resolution Voting

Noon–1 p.m. Box Lunch

1 p.m.–5 p.m.

Presentation & Discussion of Policy Tracks

- Health and Long Term Living: The Honorable Mark McClellan, M.D., Ph.D., Administrator, Centers for Medicare and Medicaid Services
- Planning Along the Lifespan: The Honorable Hal Daub, J.D.
- Workplace of the Future: Ken Dychtwald, Ph.D., President, Age Wave
- Civic Engagement and Social Engagement, David Eisner, CEO, Corporation for National and Community Service
- Our Community (confirmation pending)
- Technology and Innovation in an Emerging Senior/Boomer Marketplace (confirmation pending)

5 p.m.–6:30 p.m. Final Opportunity to Vote for Top 50 Resolutions

7 p.m.–9 p.m. Networking Receptions

Tuesday, December 13, 2005

6:30 a.m.–8 a.m. Continental Breakfast Buffet

8:30 a.m.–11 a.m.

Morning Resolution Implementation Strategy Sessions (Facilitated)

- Planning Along the Lifespan
- Workplace of the Future
- Our Community
- Health and Long Term Living
- Civic Engagement and Social Engagement
- Technology and Innovation in an Emerging Senior/Boomer Marketplace

11 a.m.–Noon Box Lunch

Noon–2:30 p.m.

Afternoon Resolution Implementation Strategy Sessions (Facilitated)

- Planning Along the Lifespan
- Workplace of the Future
- Our Community
- Health and Long Term Living
- Civic Engagement and Social Engagement
- Technology and Innovation in an Emerging Senior/Boomer Marketplace

3 p.m.–5:30 p.m.

Afternoon Resolution Implementation Strategy Sessions (Facilitated)

- Planning Along the Lifespan
- Workplace of the Future
- Our Community
- Health and Long Term Living
- Civic Engagement and Social Engagement
- Technology and Innovation in an Emerging Senior/Boomer Marketplace

Dinner Plans Being Finalized

Wednesday, December 14, 2005

6:30 a.m.–8 a.m. Continental Breakfast Buffet

8:30 a.m.–1:30 p.m. Closing Plenary Session and Luncheon

[FR Doc. 05–23434 Filed 11–28–05; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–06–0530]

Proposed Data Collections Submitted for Public Comment and Recommendations

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–4766 or send an e-mail to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project

Dose Reconstruction Telephone Interviews under the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA)—Revision—The National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

On October 30, 2000, the Energy Employees Occupational Illness Compensation Program Act of 2000 (Pub. L. 106–398) was enacted. This Act established a federal compensation program for employees of the Department of Energy (DOE) or certain of its contractors, subcontractors and vendors, who have suffered cancers and other designated illnesses as a result of exposures sustained in the production and testing of nuclear weapons.

Executive Order 13179 was issued on December 7, 2000; it delegated authorities assigned to ''the President'' under the Act to the Departments of Labor, Health and Human Services, Energy and Justice. The Department of Health and Human Services (DHHS) was delegated the responsibility of

establishing methods for estimating radiation doses received by eligible claimants with cancer applying for compensation. NIOSH is to apply these methods to estimate the radiation doses of such individuals applying for compensation. This process has been ongoing since 2001; the only changes to the package are a reduction in burden hours due to a moderately lower rate of claims submission than estimated by the Department of Labor and the ability of the claimant to fill out the OCAS 1 form electronically (September 2005).

In performance of its dose reconstruction responsibilities under the Act, NIOSH will interview claimants (or their survivors) individually and provide them with the opportunity, through a structured interview, to assist NIOSH in documenting the work history of the employee (characterizing the actual work tasks performed), identifying incidents that may have resulted in undocumented radiation exposures, characterizing radiologic protection and monitoring practices, and identifying co-workers and other witnesses as may be necessary to confirm undocumented information. In this process, NIOSH will use a computer assisted telephone interview (CATI) system, which will allow interviews to be conducted more efficiently and quickly than would be the case with a paper-based interview instrument.

NIOSH will use the data collected in this process to complete an individual dose reconstruction that estimates as fully as possible the radiation dose incurred by the employee in the line of duty for DOE nuclear weapons production programs. After dose reconstruction, NIOSH will also perform a brief final interview with the claimant to explain the results and to allow the claimant to confirm or question the records NIOSH compiled. This will also be the final opportunity for the claimant to supplement the dose reconstruction record.

At the conclusion of the dose reconstruction process, the claimant will need to submit a form (OCAS–1) to confirm that all the information available to the claimant has been provided. The form will notify the claimant that signing the form allows NIOSH to forward a dose reconstruction report to DOL and to the claimant, and closes the record on data used for the dose reconstruction. Signing this form does not necessarily indicate that the claimant agrees with the outcome of the dose reconstruction. The dose reconstruction results will be supplied to the claimant and to the DOL, which will factor them into its determination of whether the claimant is eligible for compensation under the Act.

This notice pertains to CDC's request for Paperwork Reduction Act clearance to permit NIOSH to continue conducting dose reconstruction activities. The estimated total annualized burden hours are 4,900. There is no cost to respondents other than their time.

ESTIMATE OF ANNUALIZED BURDEN HOURS

Data collection types	No. of respondents	No. of responses per respondent	Average burden per response (in hours)
Initial Interview	4,200	1	1
Conclusion Form	8,400	1	5/60

Dated: November 18, 2005.

Betsey Dunaway,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E5–6668 Filed 11–28–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–06–05AP]

Proposed Data Collections Submitted for Public Comment and Recommendations

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–4766 or send an e-mail to *omb@cdc.gov*. Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project

Spanish-language Folic Acid Communication Research and Creative Production—New—National Center on Birth Defects and Developmental Disabilities (NCBDDD), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Pregnancies and births affected by spina bifida or anencephaly have profound physical, emotional, and financial effects on families and communities. Recent data from the National Birth Defects Prevention Network surveillance system show that folic acid food fortification has resulted in an approximate overall 25% decline in Neural Tube Defect (NTD) affected pregnancies. Since food fortification in 1998, the number of babies born in the United States with these serious birth defects has declined. Before food fortification, CDC estimated that there were about 4,000 NTD-affected pregnancies each year. Since 1999, CDC has observed a decline so that the CDC National Center of Birth Defects and Developmental Disabilities now estimates that, annually, there are only about 3,000 NTD-affected pregnancies.

Despite these exciting developments, Hispanic women in the United States remain the most vulnerable for having an NTD-affected pregnancy. The specific reason for this increased risk remains a mystery. What we do know is that they have a higher risk than Caucasian and African American women in the United States. Surveys conducted by CDC in 1999 and 2000 also showed that Hispanic women had the lowest reported folic acid knowledge and consumption. In 1995 and 1996 during the pre-fortification period, the prevalence of spina bifida and anencephaly among Hispanic women was about 10 per 10,000 births or pregnancies compared to about 8 per 10,000 among Whites and almost 6 per 10,000 among Blacks. Because Hispanic women still have the highest rate among the 3 racial/ethnic groups, CDC continues to make reaching them its top priority.

CDC is interested in continuing to reach Spanish-speaking Hispanic women in the United States. Preliminary results from the Spanish Folic Acid Campaign Evaluation Survey

(SFACES) have shown that a strategy that combines local outreach efforts and paid/earned media efforts is effective. However, CDC does not anticipate budgetary increases that could make a national-level Spanish language campaign possible. Also, CDC is concerned that the SFACES campaign materials, which were developed in 1999, may be becoming ''dated.'' While CDC has no hard evidence that they are no longer effective, CDC does want to examine their effectiveness in a robust manner before decisions are made about whether to keep using them in outreach efforts in selected communities throughout the U.S. CDC is also interested in developing a deeper understanding of sub-groups of women within the Spanish-speaking Hispanic population and developing effective communication strategies for reaching them.

This project includes a systematic communication research and product development process involving, and ultimately serving, Spanish-speaking Hispanic women. These activities include:

a. Developing a multivariate audience-segmentation scheme using existing data from Spanish-speaking Hispanic women;

b. Assessing the effectiveness of current campaign materials with the identified audience segments;

c. Conducting qualitative research with audience segments;

d. Developing audience profiles for each audience segment;

e. Developing draft communication plans based on audience profiles that outlines potential outreach strategies;

f. Presenting the possibilities to key internal and external stakeholders to solicit input;

g. Developing and testing concepts, messages, and materials along with implementation plans for their use; and,

h. Producing master quality copies of each material in formats that CDC and partners can use for mass production and dissemination.

Since the 60 day **Federal Register** notice on this project was published, the first step—developing a multivariate audience-segmentation scheme using existing data from Spanish-speaking Hispanic women—has been completed. Three distinct audience groups of Spanish-speaking Hispanic women of childbearing age have been identified as needing extra outreach efforts, so they are the focus of this request. The three groups are:

(1) Unacculturated mothers (Spanish-speaking Hispanic women between the ages of 26–35 years old, who have less than a high school education and report having a child),

(2) Unacculturated young adults (Spanish-speaking Hispanic women between the ages of 18–25 years old who have less than a high school education and report NOT having a child), and

(3) Acculturated young adults (Acculturated young adults are Spanish-speaking Hispanic women between the ages of 18–24 who have a high school education and report not having any college education and not having any children).

The annual burden table has been updated to reflect research activities in all three of these important audience segments. There are no costs to the respondents other than their time. The total estimated annualized burden hours are 935.

ESTIMATED ANNUALIZED BURDEN TABLE

Respondents and data collection types	No. of respondents	No. of responses per respondent	Average burden per response (in hours)
Telephone contact	2200	1	5/60
Hispanic women, 18–35 (evaluate existing materials interviews)	90	1	30/60
Hispanic women, 18–35 (18 exploratory focus groups)	216	1	2
Hispanic women, 18–35 (9 concept testing focus groups)	108	1	2
Hispanic women, 18–35 (new materials pre-testing interviews)	90	1	30/60
Testing of new materials with distributors (brief interviews)	50	1	15/60

Dated: November 18, 2005.

Betsey S. Dunaway,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E5–6669 Filed 11–28–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–06–05BI]

Proposed Data Collections Submitted for Public Comment and Recommendations

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–4766 or send an e-mail to *omb@cdc.gov*. Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project

Surveys of Past HIV Prevention Technology Transfer Efforts—New—National Center for HIV, STD, and TB Prevention (NCHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The purpose of these surveys is to study the effectiveness of providing HIV prevention agencies with packages intervention, training, and technical assistance to ensure the agencies' maintenance of the intervention. CDC will use the results of the surveys to develop a national program for dissemination and support of packaged interventions that will increase the likelihood that agencies will conduct them with total fidelity for several years. The respondents are staff members of 16 prevention agencies that implemented one of five unique, packaged interventions between 1997 and 2000 as part of CDC's ongoing Replicating Effective Programs (REP) project.

A survey will be administered over the telephone to agency administrators of the 16 prevention agencies that implemented intervention packages by the REP project. Additional surveys will be administered in-person to one Intervention Supervisor and two Intervention Facilitators at agencies that are continuing to implement the REP-packaged intervention. The objectives of the surveys include, but are not limited

to (a) identification of factors associated with maintenance and termination of REP-packaged interventions; (b) determination of why and how agencies adapted the packaged interventions; (c) examination of the impact of elapsed time on maintenance of the intervention and fidelity to intervention protocols; (d) identification of any differences between the type of agency (*e.g.*, community-based organization or health department) on maintenance and fidelity; (e) identification of any difference between the type of original researcher (*e.g.*, academic or non-profit) on maintenance and fidelity; (f) identification of perceived and actual benefits as well as instrumental and conceptual utility of REP-packaged interventions that can be used in marketing the intervention packages to other HIV prevention providers. Researchers administering the in-person surveys will also assess fidelity to intervention protocols by observing facilitators delivering the intervention and by recording their observations on a checklist designed for the particular intervention being observed.

Survey questionnaire data will be collected once from each respondent (*i.e.*, agency administrator, intervention supervisor, intervention facilitator). CDC is requesting OMB approval to collect this data for one year. There are no costs to the respondents other than their time. Total burden hours for this data collection are 105 hours.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Agency Administrators (content review)	16	1	20/60
Agency Administrators (questionnaire)	16	1	1.5
Intervention Supervisors	15	1	1.5
Intervention Facilitators	30	1	1.75

Dated: November 18, 2005.

Betsey Dunaway,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E5–6670 Filed 11–28–05; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–06–05AO]

Proposed Data Collections Submitted for Public Comment and Recommendations

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–4766 or send an e-mail to *omb@cdc.gov*. Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project

Health Communication Planning, Implementation, and Evaluation for People with Disabilities—New—National Center on Birth Defects and Developmental Disabilities (NCBDDD), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The National Center on Birth Defects and Developmental Disabilities (NCBDDD) at CDC promotes the health of babies, children, and adults with disabilities. As part of these efforts the Center is actively involved in improving the health and wellness of people with disabilities. Of particular interest is how health information is communicated to people with disabilities. This project involves the conduct of an e-mail survey for an initiative evaluating the effectiveness of health communication materials and strategies developed for people with disabilities by North Carolina, New Mexico, and New York with the support of health promotion grants from CDC. The survey data will be analyzed to evaluate awareness of the state-developed materials among health care providers, human services providers and consumer advocates using these materials, their impressions of and satisfaction with the materials, the impact of the materials, and suggestions for improvement. Data will be collected using an on-line self-reporting survey distributed via e-mail and administered by linking to a web-based questionnaire. The results will be used to develop a training handbook to assist state agencies and public health officials in planning, developing, and implementing health communication materials for people with disabilities. There are no costs to respondents except their time to participate in the survey. The total estimated annualized burden hours are 45.

ESTIMATE OF ANNUALIZED BURDEN HOURS

Type of respondents	No. of respondents	No. of responses per respondent	Average burden per response (in hours)
Health Care Providers	50	1	18/60
Human Services Providers	50	1	18/60
Consumer Advocates	50	1	18/60

Dated: November 18, 2005.

Betsey Dunaway,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E5–6671 Filed 11–28–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Breast and Cervical Cancer Early Detection and Control Advisory Committee

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 committee meeting:

Name: Breast and Cervical Cancer Early Detection and Control Advisory Committee (BCCEDCAC).

Times and Dates: 8:30 a.m.–5 p.m., December 6, 2005. 8:30 a.m.–1 p.m., December 7, 2005.

Place: Embassy Suites Hotel, Centennial Olympic Park, 267 Marietta Street, Atlanta, Georgia 30313.

Phone: 1–404–223–2300.

Status: Open to the public, limited only by the space available.

Purpose: The committee is charged with advising the Secretary, Department of Health and Human Services, and the Director, CDC, regarding the early detection and control of breast and cervical cancer. The committee makes recommendations regarding national program goals and objectives; implementation strategies; and program priorities including surveillance, epidemiologic investigations, education and training, information dissemination, professional interactions and collaborations, and policy.

Matters to be Discussed: The agenda will include discussion and review of the vision for National Cancer Prevention and Control Program; strategies for Performance-Based Funding; Case Management; update of expert panel meetings; HPV Testing and the Breast and Cervical Program; and HPV Vaccine update.

Agenda items are subject to change as priorities dictate.

Contact Person for More Information: Debra Younginer, Executive Secretary, BCCEDCAC, Division of Cancer Prevention and Control, National Center for Chronic Disease Prevention and Health Promotion, CDC, 4770 Buford Highway, Mailstop K–57, Chamblee, Georgia 30316, Telephone: 770–488–1074.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both CDC and the Agency for Toxic Substances and Disease Registry.

Alvin Hall,

Director, Management Analysis and Services Office, Centers for Disease Control.

[FR Doc. 05–23425 Filed 11–28–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2005N–0374]

Nonprescription Drugs Advisory Committee and Pulmonary-Allergy Drugs Advisory Committee; Notice of Meeting and Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committees: Nonprescription Drugs Advisory Committee and the Pulmonary-Allergy Drugs Advisory Committee.

General Function of the Committees: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on January 24, 2006, from 8 a.m. to 5 p.m. Interested persons and organizations may submit written or electronic comments until January 6, 2006, to the Division of Dockets Management (see *Addresses*).

Addresses: Electronic comments should be submitted to *http://www.fda.gov/dockets/ecomments*. Select ''2005N–0374 Use of Ozone-Depleting Substance: Essential-Use Determination of Over-the-Counter (OTC) Epinephrine Metered Dose Inhalers'' and follow the prompts to submit your statement. Written comments should be submitted to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Location: Holiday Inn Select Bethesda, The Ballrooms, 8120 Wisconsin Ave., Bethesda, MD. The hotel telephone number is 301–652–2000.

Contact Person: Darrell Lyons, Center for Drug Evaluation and Research (HFD 21), Food and Drug Administration, 5600 Fishers Lane (for express delivery, 5630 Fishers Lane, rm. 1093) Rockville, MD 20857, (301–827–7001, FAX: 301–827–6776, e-mail: *lyonsd@cder.fda.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area) codes 3014512541 or 3014512545. Please call the Information Line for up to date information on this meeting.

Agenda: The committee will discuss the continued need for the designation of OTC epinephrine-metered dose inhalers for the treatment of asthma as an essential use of ozone-depleting substances (ODSs) under § 2.125 (21 CFR 2.125). ODSs are substances that deplete the stratospheric ozone, which include chlorofluorocarbons (CFCs). Once released, CFCs rise to the stratosphere. In the stratosphere, CFCs are gradually broken down by strong ultraviolet light, and they release chlorine atoms that then deplete stratospheric ozone. Depletion of stratospheric ozone by CFCs and other ODSs leads to higher ultraviolet B radiation levels, which in turn increase skin cancers and cataracts, as well as cause other significant environmental damage.

FDA is soliciting comments and data to support or refute an essential-use designation for OTC epinephrine metered-dose inhaler (MDI) drug products. These products include the only OTC drug available in an MDI dosage form for the treatment of asthma. The OTC epinephrine MDIs use CFCs as propellants. The OTC indication is ''for temporary relief of shortness of breath, tightness of chest, and wheezing due to bronchial asthma.'' In some instances, use of this product early during an asthma attack could avert a serious or life-threatening worsening of the attack. There are currently a limited number of marketed OTC drug products containing epinephrine in a MDI dosage form.

According to § 2.125(f)(1), the following are criteria for continued ODS essential-use designation:

(1) Substantial technical barriers exist to formulating the product without ODSs;

(2) The product will provide an otherwise unavailable important public health benefit; and

(3) Use of the product does not release cumulative significant amounts of ODSs into the atmosphere or the release is warranted in view of the high

probability of an unavailable important public health benefit.

Under section 610 of the Clean Air Act (42 U.S.C. 7671(i)), MDIs that are not the subject of an essential-use designation cannot be legally distributed in interstate commerce.

We particularly encourage comments on the second criterion in § 2.125(f)(i) regarding the public health benefit derived from the availability of these products in the OTC setting. Information that may aid in the Committee's discussion of essential use includes:

- Who currently uses OTC epinephrine MDIs?
- How many of these MDIs are used annually?
- What are the alternatives if these products are no longer available?
- From literature sources, what is the value of use of the product to the users, and why do they use it?
- What established treatment guidelines recommend the use of OTC epinephrine?
- How many people with asthma do not have ready access to prescription medication through healthcare professionals?

The background material will become available no later than the day before the meeting and will be posted under the Nonprescription Drugs Advisory Committee (NDAC) and the Pulmonary Drugs Advisory Committee (PADAC) on FDA's website at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*. (Click on the year 2006 and scroll down to NDAC or PADAC).

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committees. Written comments should be submitted by close of business January 6, 2006, to the Division of Dockets Management (see *Addresses*). Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Time allotted for each presentation may be limited. Those desiring to make formal oral presentations should notify the contact person by close of business January 6, 2006, and submit a brief statement of the general nature of the information they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Darrell Lyons (see *Contact Person*) at least 7 days in advance of the meeting.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: November 17, 2005.

Jason Brodsky,

Acting Associate Commissioner for External Relations.

[FR Doc. 05–23372 Filed 11–28–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Vaccines and Related Biological Products Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Vaccines and Related Biological Products Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on December 14, 2005, from 9 a.m. to 4:30 p.m. and on December 15, 2005, from 9 a.m. to 4:30 p.m.

Location: Holiday Inn Select, 8120 Wisconsin Ave., Bethesda, MD.

Contact Person: Christine Walsh or Denise Royster, Center for Biologics Evaluation and Research (HFM–71), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852, 301–827–0314, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512391. Please call the Information Line for up-to-date information on this meeting.

Agenda: On December 14, 2005, the committee will hear presentations and make recommendations on the safety and efficacy of a rotavirus vaccine manufactured by Merck. On December 15, 2005, the committee will hear presentations and make recommendations on the safety and efficacy of ZOSTAVAX (zoster vaccine live (Oka/Merck)) manufactured by Merck.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person by December 7, 2005. Oral presentations from the public will be scheduled between approximately 1:15 p.m. and 1:45 p.m. on December 14, 2005, and from approximately 1:30 p.m. and 2 p.m. on December 15, 2005. Time allotted for each presentation may be limited. Those desiring to make formal oral presentations should notify the contact person before December 7, 2005, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Christine Walsh or Denise Royster at least 7 days in advance of the meeting.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: November 17, 2005.

Jason Brodsky,

Acting Associate Commissioner for External Relations.

[FR Doc. 05–23373 Filed 11–28–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Federal Emergency Management Agency, 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 on hotels and motels and other places of public accommodations meeting the fire safety requirements as identified in Public Law 101–391, Hotel and Motel Fire Safety Act of 1990.

SUPPLEMENTARY INFORMATION: Public Law 101–391 requires FEMA to establish and maintain a National Master List (NML) of fire safe hotels, motels and other places of public accommodation (property). This public law was enacted as a result of a number of major life-loss fires occurring in the late 1970's and 1980's. The purpose of this public law is to assure the traveling public of fire safe accommodations. Under Public Law 101–391, Federal employees on official travel are required to stay in properties approved and listed on the NML.

Collection of Information

Title: Federal Hotel and Motel Fire Safety Declaration Form.

Type of Information Collection: Existing collection.

OMB Number: 1660–0068

Form Numbers: FF 75–13

Abstract: Public Law 101–391 requires FEMA to establish and maintain a National Master List (NML) of fire safe places of public accommodation. The information collected will be available electronically to the general public identifying properties meeting the specified level of fire safety equipment as required in the public law. It is also available to Federal employees required by Public Law 101–391 to stay at properties on the NML when on official travel.

Affected Public: Business or other for-profit, not-for-profit institutions, and the Federal Government.

Estimated Total Annual Burden Hours: 500.

ANNUAL BURDEN HOURS

Project/Activity (survey, form(s), focus group, worksheet,etc.)	No. of respondents (A)	Frequency of responses (B)	Burden hours per respondent (C)	Annual responses (A × B)	Total annual burden hours (A × B × C)
FF 75–13	2000	1	0.25	2,000	500
Total	2,000	1	0.25	2,000	500

Estimated Cost: $10,000 per year. Rate of first level manager at $20.00 × 0.25 hour × 2,000 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, Department of Homeland Security, 500 C Street, SW., Room 316, Washington, DC 20472.

FOR FURTHER INFORMATION CONTACT: Contact Timothy B. Ganley, Fire Program Specialist, Untied States Fire Administration, Department of Homeland Security at (301) 447–1358 for additional informaiton. You may contact the Records Management Branch for copies of the proposed collection of information at facsimile number (202) 646–3347 or email address: *FEMA-Information-Collections@dhs.gov*.

Dated: November 15, 2005.

Darcy Bingham,

Branch Chief, Information Resources Management Branch, Information Technology Services Division.

[FR Doc. E5–6664 Filed 11–28–05; 8:45 am]

BILLING CODE 9110–17–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1605–DR]

Alabama; Amendment No. 8 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Alabama (FEMA–1605–DR), dated August 29, 2005, and related determinations.

DATES: Effective November 16, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Acting Director, Department of Homeland Security, under Executive Order 12148, as amended, Michael Bolch, of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

This action terminates my appointment of Vice Admiral Thad Allen of the United States Coast Guard as Federal Coordinating Officer for this disaster.

(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 Director, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. E5–6647 Filed 11–28–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1609–DR]

Florida; Amendment No. 5 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Florida (FEMA–1609–DR), dated October 24, 2005, and related determinations.

DATES: Effective November 18, 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 the incident period for this disaster is closed effective November 18, 2005.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, 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 Director, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. E5–6658 Filed 11–28–05; 8:45 am]

BILLING CODE 6718–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1612–DR]

Indiana; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Indiana (FEMA–1612–DR), dated November 8, 2005, and related determinations.

DATES: Effective November 21, 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 Indiana is hereby amended to include the Public Assistance Program and the Hazard Mitigation Grant 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 November 8, 2005:

The counties of Vanderburgh and Warrick for Public Assistance (already designated for Individual Assistance.)

All counties in the State of Indiana are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program—Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Director, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. E5–6666 Filed 11–28–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1615–DR]

Kansas; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Kansas (FEMA–1615–DR), dated November 15, 2005, and related determinations.

DATES: Effective November 15, 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 November 15, 2005, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the damage in certain areas of the State of Kansas, resulting from severe storms and flooding from October 1–2, 2005, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). Therefore, I declare that such a major disaster exists in the State of Kansas.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act you may deem appropriate. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs. If Other Needs Assistance under Section 408 of the Stafford Act is later requested and warranted, Federal funding under that program will also be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Acting Director, under Executive Order 12148, as amended, Thomas J. Costello,

of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following areas of the State of Kansas to have been affected adversely by this declared major disaster: Atchison, Jackson, Jefferson, Leavenworth, and Shawnee Counties for Public Assistance.

All counties within the State of Kansas are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program—Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Director, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. E5–6657 Filed 11–28–05; 8:45 am]

BILLING CODE 6718–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1603–DR]

Louisiana; Amendment No. 8 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Louisiana (FEMA–1603–DR), dated August 29, 2005, and related determinations.

DATES: Effective November 16, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Acting Director, Department of Homeland Security, under Executive Order 12148, as amended, Alexander S. Wells, of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

This action terminates my appointment of Vice Admiral Thad Allen of the United States Coast Guard as Federal Coordinating Officer for this disaster.

(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 Director, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. E5–6651 Filed 11–28–05; 8:45 am]

BILLING CODE 6718–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1614–DR]

Massachusetts; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Massachusetts (FEMA–1614–DR), dated November 10, 2005, and related determinations.

DATES: Effective November 17, 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 Commonwealth of Massachusetts is hereby amended to include the following area among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of November 10, 2005:

Worcester County for Public Assistance (already designated for Individual 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 Director, Federal Emergency Management Agency.

[FR Doc. E5–6652 Filed 11–28–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1614–DR]

Massachusetts; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the Commonwealth of Massachusetts (FEMA–1614–DR), dated November 10, 2005, and related determinations.

DATES: Effective November 10, 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 November 10, 2005, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

''I have determined that the damage in certain areas of the Commonwealth of Massachusetts resulting from severe storms and flooding from October 7–16, 2005, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). Therefore, I declare that such a major disaster exists in the Commonwealth of Massachusetts.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance, Public Assistance, and Hazard

Mitigation in the designated areas. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and the Other Needs Assistance under Section 408 of the Stafford Act will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.''

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Acting Director, under Executive Order 12148, as amended, Peter J. Martinasco, of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following areas of the Commonwealth of Massachusetts to have been affected adversely by this declared major disaster: Berkshire, Bristol, Franklin, Hampden, Hampshire, Middlesex, Norfolk, Plymouth, and Worcester Counties for Individual Assistance.

Berkshire, Franklin, Hampden, and Hampshire Counties for Public Assistance

Berkshire, Bristol, Essex, Franklin, Hampden, Hampshire, Middlesex, Norfolk, Plymouth, Suffolk, and Worcester Counties are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program—Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Director, Federal Emergency Management Agency.

[FR Doc. E5–6654 Filed 11–28–05; 8:45 am]

BILLING CODE 6718–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1604–DR]

Mississippi; Amendment No. 10 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Mississippi (FEMA–1604–DR), dated August 29, 2005, and related determinations.

DATES: Effective November 16, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Acting Director, Department of Homeland Security, under Executive Order 12148, as amended, James N. Russo, of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

This action terminates my appointment of Vice Admiral Thad Allen of the United States Coast Guard as Federal Coordinating Officer for this disaster.

(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 Director, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. E5–6648 Filed 11–28–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1610–DR]

New Hampshire; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of New Hampshire (FEMA–1610–DR), dated October 26, 2005, and related determinations.

DATES: Effective November 17, 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 New Hampshire is hereby amended to include the following area among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of October 26, 2005:

Belknap County for Individual Assistance (already designated for Public 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 Director, Federal Emergency Management Agency.

[FR Doc. E5–6649 Filed 11–28–05; 8:45 am]

BILLING CODE 6718–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1613–DR]

Puerto Rico; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the Commonwealth of Puerto Rico (FEMA–1613–DR), dated November 10, 2005, and related determinations.

DATES: Effective November 10, 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 November 10, 2005, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the damage in certain areas of the Commonwealth of Puerto Rico resulting from severe storms, flooding, landslides, and mudslides on October 9–15, 2005, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). Therefore, I declare that such a major disaster exists in the Commonwealth of Puerto Rico.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas; Hazard Mitigation island-wide for the principal island of Puerto Rico within the Commonwealth of Puerto Rico; and any other forms of assistance under the Stafford Act you may deem appropriate. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation, will be limited to 75 percent of the total eligible costs. If Other Needs Assistance under Section 408 of the Stafford Act is later requested and warranted, Federal funding under that program will also be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Acting Director, under Executive Order 12148, as amended, Justo Hernandez, of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following areas of the Commonwealth of Puerto Rico to have been affected adversely by this declared major disaster:

The municipalities of Aibonito, Juana Díaz, Lares, Maricao, Peñuelas, Ponce, Salinas, Santa Isabel, Utuado, Villalba, Yabucoa, and Yauco for Public Assistance.

All municipalities in the principal island of Puerto Rico within the Commonwealth of Puerto Rico are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program—Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Director, Federal Emergency Management Agency.

[FR Doc. E5–6655 Filed 11–28–05; 8:45 am]

BILLING CODE 6718–P

DEPARTMENT OF HOMELAND SECURITY

Citizenship and Immigration Services

Agency Information Collection Activities: Extension of a Currently Approved Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection under Review; Request for Verification of Naturalization; Form N–25.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on September 28, 2005 at 70 FR 56733, allowing for a 60-day public comment period. No comments were received on this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until December 29, 2005. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Director, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, 3rd floor, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov*. When submitting comments by e-mail please make sure to add OMB Control Number 1615–0049 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

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

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

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

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

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Request for Verification of Naturalization.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form N–25. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or Households. This form is used to obtain information from the records of a clerk of court, which may be needed by a person applying for benefits under

various provisions of the Immigration and Nationality Act.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 1,000 responses at 15 minutes (.25) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 250 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please visit the USCIS Web site at: *http://uscis.gov/graphics/formsfee/forms/pra/index.htm*.

If additional information is required contact: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, 3rd Floor, Washington, DC 20529, (202) 272–8377.

Richard A. Sloan,

Director, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. 05–23377 Filed 11–28–05; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

Citizenship and Immigration Services

Agency Information Collection Activities: Extension of a Currently Approved Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection under Review: Petition by Entrepreneur to Remove Conditions; Form I–829.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on September 28, 2005, at 70 FR 56732. The notice allowed for a 60-day public comment period. No comments were received on this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until December 29, 2005. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Director, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, 3rd floor, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov*. When submitting comments by e-mail please make sure to add OMB Control Number 1615–0045 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

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

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

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

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

Overview of this information collection:

Type of Information Collection: Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Petition by Entrepreneur to Remove Conditions.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–829. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individual or households. This form is used by a conditional resident alien entrepreneur who obtained such status through a qualifying investment, to apply to remove the conditions on his or her conditional resident status.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 200 responses at 65 minutes (1.08 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 216 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please visit the USCIS Web site at: *http://uscis.gov/graphics/formsfee/forms/pra/index.htm*.

If additional information is required contact: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, 3rd Floor, Washington, DC 20529, (202) 272–8377.

Richard A. Sloan,

Director, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. 05–23378 Filed 11–28–05; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

Citizenship and Immigration Services

Agency Information Collection Activities: Extension of Existing Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review; Affidavit of Financial Support and Intent to Petition for Legal Custody for Public Law 97–359 Amerasian; Form I–361.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. This information collection was previously published in the **Federal Register** on September 28, 2005 at 70 FR 56731, allowing for a 60-day public comment period. No comments were received.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until December 29, 2005. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Director, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, 3rd floor, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at: *rfs.regs@dhs.gov*. When submitting comments by e-mail please include

OMB Control Number 1615–0057 in the subject box.

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

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

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

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

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

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Affidavit of Financial Support and Intent to Petition for Legal Custody for Public Law 97–359 Amerasian.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–361. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or Households. The form is used in support of Form I–360 to ensure financial support for Public Law 97–359 Amerasian. The affidavit is used only to sponsor individuals eligible for immigration under Public Law 97–359.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 50 responses at 30 minutes (.50) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 25 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please visit the USCIS Web site at: *http://uscis.gov/graphics/formsfee/forms/pra/index.htm*.

Richard A. Sloan,

Director, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. 05–23379 Filed 11–28–05; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4977–N–09]

Notice of Proposed Information Collection for Public Comment: The Evaluation of the Family Self-Sufficiency Program: Prospective Study

AGENCY: Office of Policy Development and Research, 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:* January 30, 2006.

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: Reports Liaison Officer, Office of Policy Development and Research, Department of Housing and Urban Development, 451 7th Street, SW., Room 8228, Washington, DC 20410–5000.

FOR FURTHER INFORMATION CONTACT: Jennifer Stoloff, Program Evaluation Division, Office of Policy Development and Research, Department of Housing and Urban Development, 451 7th Street, SW., Room 8140, Washington, DC 20410–5000. Telephone (202) 708–3700, extension 5723 for copies of the proposed forms and other available documents. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: This Notice informs the public that the Department of Housing and Urban Development (HUD) will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses).

This Notice also lists the following information:

Title of Proposal: Evaluation of the Family Self-Sufficiency Program: Prospective Study.

Description of the need for the information and proposed use: This request is for the clearance of a survey instrument designed to gather detailed information from twenty-five families about their experience in the Family Self-Sufficiency Program. The data collection will take the form of in-depth, semi-structural interviews. The families will be contacted three times in a three year period.

OMB Control Number: Pending.

Agency form numbers: None.

Members of Affected Public: Individuals.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: 25 individuals will be interviewed, there will be three interviews per respondent. The average time to complete each interview is 30 minutes. Total burden hours (with no attrition): 37.5.

	Number of respondents	×	Frequency of response	×	Hours per response	=	Burden hours
Reporting burden	25		3		.5		37.5

Status of the proposed information collection: Pending OMB approval.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: November 14, 2005.

Darlene F. Williams,

Assistant Secretary for Policy Development and Research.

[FR Doc. 05–23385 Filed 11–28–05; 8:45 am]

BILLING CODE 4210–62–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4977–N–08]

Notice of Proposed Information Collection for Public Comment: Notice of Funding Availability for the Universities Rebuilding America Partnerships: Community Design Program

AGENCY: Office of Policy Development and Research, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review and approval, as required by Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comment Due Date:* January 30, 2006.

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: Reports Liaison Officer, Office of Policy Development and Research, Department of Housing and Urban Development, 451 7th Street, SW., Room 8228, Washington, DC 20410.

FOR FURTHER INFORMATION CONTACT: Susan Brunson, 202–708–3061, ext. 3852 (this is not a toll-free number), for copies of the proposed forms and other available documents.

SUPPLEMENTARY INFORMATION: This Notice informs the public that the U.S. Department of Housing and Urban Development (HUD) will submit the proposed collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses).

This Notice also lists the following information:

Title of Proposal: Notice of Funding Availability for the Universities Rebuilding America Partnerships: Community Design Program.

OMB Control Number: Pending.

Description of the Need for the Information and Proposed Use: The information is being collected to select applicant for award in the competitive grant program and to monitor performance of grantees to ensure they meet statutory program goals and requirements.

Agency Form Numbers: SF–424, SF–424-Supplemental, HUD–424–CB, SF–LLL, HUD–27300, HUD–2880, and HUD–96010.

Members of the Affected Public: Public or private accredited nonprofit institutions of higher education granting associate degrees or higher in architecture, urban planning and design, or construction.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: Information subsequent to grant award will be submitted once a year. The following chart details the respondent burden on a semi-annual basis:

	Number of respondents	Total annual responses	Hours per response	Total hours
Applicants	20	20	80	1600
Semi-Annual Reports	10	10	16	160
Final Reports	10	10	16	160
Recordkeeping	10	10	16	160
Total			128	2080

Status of the proposed information collection: Pending OMB approval.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: November 14, 2005.

Darlene F. Williams,

Assistant Secretary for Policy Development and Research.

[FR Doc. 05–23386 Filed 11–28–05; 8:45 am]

BILLING CODE 4210–62–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5033–FA–01]

Announcement of Funding Awards for Fiscal Year 2005 for the Housing Choice Voucher Program

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Announcement of Fiscal Year 2005 awards.

SUMMARY: In accordance with Section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this document notifies the public of funding awards for Fiscal Year (FY) 2005 to housing agencies (HAs) under the Section 8 housing choice voucher program. The purpose of this notice is to publish the names, addresses, and the amount of the awards to HAs for non-competitive funding awards for housing conversion actions, public housing relocations and replacements, moderate rehabilitation replacements, and HOPE VI voucher awards.

FOR FURTHER INFORMATION CONTACT: David A. Vargas, Director, Office of Housing Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development,

451 Seventh Street, SW., Room 4226, Washington, DC 20410–5000, telephone (202) 708–2815. Hearing- or speech-impaired individuals may call HUD's TTY number at (800) 927–7589. (Only the ''800'' telephone number is toll-free.)

SUPPLEMENTARY INFORMATION: The regulations governing the housing choice voucher program are published at 24 CFR 982. The regulations for allocating housing assistance budget authority under Section 213(d) of the Housing and Community Development Act of 1974 are published at 24 CFR Part 791, Subpart D.

The purpose of this rental assistance program is to assist eligible families to pay the rent for decent, safe, and sanitary housing. The FY 2005 awardees announced in this notice were provided Section 8 funds on an as-needed, non-competitive basis, *i.e.*, not consistent with the provisions of a Notice of Funding Availability (NOFAs). Announcements of awards provided consistent with NOFAs for mainstream housing and designated housing programs will be published in a separate **Federal Register** notice.

Awards published under this notice were provided (1) To assist families living in HUD-owned properties that are being sold; (2) to assist families affected by the expiration or termination of their project-based Section 8 and moderate rehabilitation contracts; (3) to assist families in properties where the owner has prepaid the HUD mortgage; (4) to provide relocation and replacement housing in connection with the demolition of public housing; (5) to provide replacement housing assistance for single room occupancy (SRO) units that fail housing quality standards (HQS); and (6) to assist families in public housing developments that are scheduled for demolition in connection with a HUD-approved HOPE VI Revitalization or Demolition Grant. Administrative fees were added to each assignment for the administration of housing choice vouchers awarded under this notice. In addition, special housing fees were included for applicable Housing tenant protection awards.

A total of $202,680,883 in budget authority for 26,540 housing choice vouchers was awarded to recipients under all of the above-mentioned categories.

In accordance with Section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989 (103 Stat. 1987, 42 U.S.C. 3545), the Department is publishing the names, addresses, and amounts of those awards as shown in Appendix A.

Dated: November 15, 2005.

Paula O. Blunt,

General Deputy Assistant Secretary, Office of Public and Indian Housing.

APPENDIX A.—HOUSING CHOICE VOUCHER PROGRAM ANNOUNCEMENTS OF FUNDING AWARDS FOR FISCAL YEAR 2005

Housing agency	Address	Units	Award
Hope VI Vouchers			
HA TUSCALOOSA	P.O. BOX 2281, TUSCALOOSA, AL 35403	222	473,846
TUCSON HSG MANAGEMENT DIV	310 NORTH COMMERCE PARK LOOP, TUCSON, AZ 85726	35	107,352
CITY OF LOS ANGELES HA	2600 WILSHIRE BLVD, 3RD FL, LOS ANGELES, CA 90057	290	2,512,560
DENVER HA	777 GRANT ST, DENVER, CO 80203	151	1,500,336
STAMFORD HA	22 CLINTON AVE, STAMFORD, CT 06904	155	1,257,919
HA OF JACKSONVILLE	1300 BROAD ST, JACKSONVILLE, FL 32202	101	434,066
HA TAMPA	1514 UNION ST, TAMPA, FL 33607	260	1,657,607
HA FORT LAUDERDALE CITY	437 SW. 4TH AVE, FORT LAUDERDALE, FL 33315	78	661,752
HA DELAND	300 SUNFLOWER CIRCLE, DE LAND, FL 32724	200	1,308,000
HA ATLANTA GA	230 JOHN WESLEY DOBBS AVE, NE., ATLANTA, GA 30303	453	2,748,406
CHAMPAIGN COUNTY HA	205 WEST PARK AVE, CHAMPAIGN, IL 61820	96	648,576
HA OF COOK COUNTY	310 SOUTH MICHIGAN AVE, 15TH FL, CHICAGO, IL 60604	30	261,720
WINNEBAGO COUNTY HA	2901 SEARLES AVE, ROCKFORD, IL 61101	3	9,800
LOUISVILLE HA	420 SOUTH EIGHTH ST, LOUISVILLE, KY 40203	350	2,112,600
ALEXANDRIA HA	P.O. DRAWER 8219, ALEXANDRIA, LA 71306	247	1,058,148
BENTON HARBOR HSG COMM	721 NATEWELLS SR. DR, BENTON HARBOR, MI 49022	52	161,460
GREENSBORO HA	P.O. BOX 21287, GREENSBORO, NC 27420	145	885,660
JERSEY CITY HA	400 U.S. HIGHWAY #1, JERSEY CITY, NJ 07306	164	1,003,011
SPRINGFIELD MHA	437 EAST JOHN ST, SPRINGFIELD, OH 45505	139	306,979
TULSA HA	P.O. BOX 6369, TULSA, OK 74148	20	83,603
HA OF PORTLAND	135 SW., ASH ST, PORTLAND, OR 97204	81	794,124
ALLENTOWN HA	1339 ALLEN ST, ALLENTOWN, PA 18102	341	996,075
EL PASO HA	5300 PAISANO, EL PASO, TX 79905	250	697,485
BROWNSVILLE HA	P.O. BOX 4420, BROWNSVILLE, TX 78523	86	398,352
NORFOLK RHA	201 GRANBY ST, NORFOLK, VA 23501	636	2,588,724
VIRGIN ISLANDS HA	P.O. BOX 7668, ST. THOMAS, VI 00801	284	2,048,208
HA CITY OF SEATTLE	120 SIXTH AVE NORTH, SEATTLE, WA 98109	448	3,935,232
HA COUNTY OF KING	600 ANDOVER PARK WEST, SEATTLE, WA 98188	110	927,960
HA OF CITY OF MILWAUKEE	809 NORTH BROADWAY, MILWAUKEE, WI 53201	76	394,896
Total for Hope VI Vouchers		5,503	$31,974,457
Housing Tenant Protection			
AK HSG FINANCE CORP	P.O. BOX 101020, ANCHORAGE, AK 99510	35	289,772
HA OF BIRMINGHAM DIST	1826 3RD AVE SOUTH, BIRMINGHAM, AL 35233	0	173,036
MOBILE HOUSING BOARD	P.O. BOX 1345, MOBILE, AL 36633	13	72,129
HA CITY OF MONTGOMERY	1020 BELL ST, MONTGOMERY, AL 36104	186	1,107,185
HA OF CITY OF N LTL ROCK	P.O. BOX 516, NORTH LITTLE ROCK, AR 72115	59	320,335
WEST MEMPHIS HA	2820 HARRISON ST, WEST MEMPHIS, AR 72301	0	97,664
CITY OF PHOENIX	251 W. WASHINGTON ST, PHOENIX, AZ 85034	51	358,020
SCOTTSDALE HA	7515 E. FIRST ST, SCOTTSDALE, AZ 85251	35	303,616

APPENDIX A.—HOUSING CHOICE VOUCHER PROGRAM ANNOUNCEMENTS OF FUNDING AWARDS FOR FISCAL YEAR 2005—Continued

Housing agency	Address	Units	Award
SAN FRANCISCO HA	440 TURK ST, SAN FRANCISCO, CA 94102	0	50,250
LOS ANGELES COUNTY HA	2 CORAL CIRCLE, MONTEREY, CA 93907	18	162,240
OAKLAND HA	1619 HARRISON ST, OAKLAND, CA 94612	0	1,188
CITY OF LOS ANGELES HA	2600 WILSHIRE BLVD, 3RD FL, LOS ANGELES, CA 90057	81	765,912
CITY OF FRESNO HA	1331 FULTON MALL, FRESNO, CA 93776	5	35,458
SACRAMENTO HRA	P.O. BOX 1834, SACRAMENTO, CA 95812	6	644,232
KERN COUNTY HA	601 24TH ST, BAKERSFIELD, CA 93301	0	12,856
COUNTY OF SAN JOAQUIN HA	448 SOUTH CENTER ST, STOCKTON, CA 95203	0	2,592
RIVERSIDE COUNTY HA	5555 ARLINGTON AVE, RIVERSIDE, CA 92504	99	643,413
COUNTY OF SANTA CLARA HA	505 WEST JULIAN ST, SAN JOSE, CA 95110	44	646,193
CITY OF ALAMEDA HA	701 ATLANTIC AVE, ALAMEDA, CA 94501	50	613,722
SAN DIEGO HSG COMM	1625 NEWTON AVE, SAN DIEGO, CA 92113	120	857,452
CITY OF SANTA ROSA HA	90 SANTA ROSA AVE, SANTA ROSA, CA 95402	24	228,045
ANAHEIM HA	201 S. ANAHEIM BLVD, STE 203, ANAHEIM, CA 92805	40	373,297
GLENDALE HA	141 NORTH GLENDALE AVE, #202, GLENDALE, CA 91206	0	384
CO DIV OF HSG	1313 SHERMAN ST, R00M 518, DENVER, CO 80203	42	307,886
HA OF CITY OF NEW HAVEN	360 ORANGE ST, NEW HAVEN, CT 06511	28	257,156
WILLIMANTIC HA	49 WEST AVE, WILLIMANTIC, CT 06226	0	5,818
BRISTOL HA	31 QUAKER LANE, BRISTOL, CT 06010	141	994,896
CITY OF HARTFORD HA	10 PROSPECT ST, HARTFORD, CT 06103	260	2,011,957
CONN DEPT OF SOCIAL SERVICES	25 SIGOURNEY ST, 9TH FL, HARTFORD, CT 06105	0	17,500
DCHA	1133 NORTH CAPITOL ST NE, WASHINGTON, DC 20002	39	439,823
HA OF JACKSONVILLE	1300 BROAD ST, JACKSONVILLE, FL 32202	0	7,500
HA TAMPA	1514 UNION ST, TAMPA, FL 33607	0	5,568
HA WEST PALM BEACH GEN FUND	1715 DIVISION AVE, WEST PALM BEACH, FL 33407	89	698,511
BRADENTON HA	1307 5TH ST WEST, BRADENTON, FL 34205	0	4,800
CITY OF FORT MYERS HA	1700 MEDICAL LANE, FORT MYERS, FL 33907	0	1,440
HA SAVANNAH	200 EAST BROAD ST, SAVANNAH, GA 31402	68	452,412
HA COLUMBUS GA GEN FUND ACCT C.	P.O. BOX 630, COLUMBUS, GA 31902	54	271,328
HA ATLANTA GA	230 JOHN WESLEY DOBBS AVE NE, ATLANTA, GA 30303	264	2,695,153
HA MACON	P.O. BOX 4928, MACON, GA 31208	120	689,708
HA MARIETTA	P.O. DRAWER K, MARIETTA, GA 30061	0	12,000
HA JONESBORO	P.O. BOX 458, JONESBORO, GA 30237	161	1,324,933
HA DEKALB COUNTY	P.O. BOX 1627, DECATUR, GA 30031	40	407,478
DCA	60 EXECUTIVE PARK SOUTH, NE, STE 250, ATLANTA, GA 30329	90	597,470
COUNTY OF HAWAII	50 WAILUKU DR, HILO, HI 96720	0	1,250
EVANSDALE MUNICIPAL HA	119 MORRELL COURT, EVANSDALE, IA 50707	19	92,141
SPIRIT LAKE LOW RENT HSG AGENCY.	710 LAKE ST, SPIRIT LAKE, IA 51360	42	182,609
CENTRAL IOWA REG'L HOUSING	950 OFFICE PARK RD, STE 321, WEST DES MOINES, IA 50265	44	184,897
CHICAGO HA	626 WEST, JACKSON BLVD, CHICAGO, IL 60661	1,366	12,716,056
ROCKFORD HA	223 SOUTH WINNEBAGO ST, ROCKFORD, IL 61102	190	1,143,144
HA OF COOK COUNTY	310 SOUTH MICHIGAN AVE, 15TH FL, CHICAGO, IL 60604	1,049	9,046,222
HA OF COUNTY OF LAKE	33928 N ROUTE 45, GRAYSLAKE, IL 60030	20	178,290
MCHENRY COUNTY HA	1108 NORTH SEMINARY AVE, WOODSTOCK, IL 60098	0	4,800
INDIANAPOLIS HA	1919 N. MERIDIAN ST, INDIANAPOLIS, IN 46202	18	114,534
MICHIGAN CITY HA	621 EAST MICHIGAN BLVD, MICHIGAN, IN 46360	10	52,658
TERRE HAUTE HA	P.O. BOX 3086, TERRE HAUTE, IN 47803	0	19,500
UNION CITY HA	303 FLETCHER AVE, UNION CITY, IN 47390	0	30,794
INDIANA DEPT OF HUMAN SERVICES.	P.O. BOX 6116, INDIANAPOLIS, IN 46206	23	160,097
KANSAS CITY HA	1124 NORTH NINTH ST, KANSAS CITY, KS 66101	0	80,000
NEWTON HA	115 WEST 9TH ST, NEWTON, KS 67114	0	12,250
RILEY COUNTY HA	401 HOUSTON ST, MANHATTAN, KS 66502	0	35,250
NEK-CAP, INC	P.O. BOX 380, HIAWATHA, KS 66434	15	50,717
CITY OF RICHMOND SECTION 8 HSG.	P.O. BOX 250, RICHMOND, KY 40476	80	339,677
PADUCAH HA	300 SOUTH FIFTH ST, PADUCAH, KY	0	36,700
TAUNTON HA	30 OLNEY ST, STE B, TAUNTON, MA 02780	3	31,181
NORTHAMPTON HA	49 OLD SOUTH ST, NORTHAMPTON, MA 01060	0	55,250
SOMERVILLE HA	30 MEMORIAL RD, SOMERVILLE, MA 02145	0	103,407
COMM DEV PROG COMM OF MA.EOCD.	100 CAMBRIDGE ST, BOSTON, MA 02114	12	182,044
HA OF BALTIMORE CITY	417 EAST FAYETTE ST, BALTIMORE, MD 21201	46	403,935
HA OF CITY OF FREDERICK	209 MADISON ST, FREDERICK, MD 21701	22	234,597
WICOMICO COUNTY HA	911 BOOTH ST, SALISBURY, MD 21801	0	16,500
HA OF PRINCE GEORGE'S COUNTY	9400 PEPPERCORN PLACE, STE 200, LARGO, MD 20774	0	26,750
ANNE ARUNDEL COUNTY HA	7885 GORDON COURT, GLEN BURNIE, MD 21060	48	416,304
PORTLAND HA	14 BAXTER BLVD, PORTLAND, ME 04101	0	10,830
AUGUSTA HA	33 UNION ST, STE 3, AUGUSTA, ME 04330	0	252

APPENDIX A.—HOUSING CHOICE VOUCHER PROGRAM ANNOUNCEMENTS OF FUNDING AWARDS FOR FISCAL YEAR 2005—Continued

Housing agency	Address	Units	Award
PONTIAC HSG COMM	132 FRANKLIN BLVD, PONTIAC, MI 48341	0	1,200
INKSTER HSG COMM	4500 INKSTER RD, INKSTER, MI 48141	81	496,530
BATTLE CREEK HSG COMM	250 CHAMPION ST, BATTLE CREEK, MI 49017	0	43,750
EASTPOINTE HSG COMM	15701 EAST NINE MILE RD, EASTPOINTE, MI 48021	40	237,136
PLYMOUTH HSG COMM	1160 SHERIDAN, PLYMOUTH, MI 48170	72	553,597
LIVONIA HSG COMM	19300 PURLINGBROOK RD, LIVONIA, MI 48152	21	159,248
FERNDALE HSG COMM	415 WITHINGTON, FERNDALE, MI 48220	0	21,500
WESTLAND HSG COMM	32715 DORSEY RD, WESTLAND, MI 48186	0	65,750
MICHIGAN STATE HDA	P.O. BOX 30044, LANSING, MI 48909	502	3,378,965
ST. PAUL PHA	555 NORTH WABASHA, STE 400, ST. PAUL, MN 55102	0	261,534
ST. CLOUD HRA	1225 WEST ST. GERMAIN, ST. CLOUD, MN 56301	0	432
PLYMOUTH HRA	3400 PLYMOUTH BLVD, PLYMOUTH, MN 55447	48	411,530
LE SUEUR COUNTY HRA	464 RAINTREE RD, MANKATO, MN 56001	40	165,062
RICHFIELD HRA	6700 PORTLAND AVE SOUTH, RICHFIELD, MN 55423	5	35,711
ST. LOUIS HA	4100 LINDELL BLVD, ST. LOUIS, MO 63108	388	2,254,450
MEXICO HA	P.O. BOX 484, MEXICO, MO 65265	61	212,780
INDEPENDENCE HA	210 SOUTH PLEASANT, INDEPENDENCE, MO 64050	36	383,386
ST. CLAIR COUNTY HA	APPLETON CITY, MO 64724	60	300,785
ST. FRANCOIS COUNTY PHA	P.O. BOX N, PARK HILLS, MO 63601	0	31,250
HA MISSISSIPPI REGIONAL NO 5	P.O. BOX 419, NEWTON, MS 39345	0	2,016
MISS REGIONAL HA VIII	P.O. BOX 2347, GULFPORT, MS 39505	0	360
BILLINGS HA	2415 1ST AVE NORTH, BILLINGS, MT 59101	0	11,250
HELENA HA	812 ABBEY ST, HELENA, MT 59601	0	12,250
FAYETTEVILLE MHA	P.O. DRAWER 2349, FAYETTEVILLE, NC 28302	0	5,750
HA SANFORD	504 N FIRST ST, SANFORD, NC 27331	0	10,250
HA MONROE	504 HOUGH ST, MONROE, NC 28111	0	1,250
HA ROANOKE CHOWAN REG HSG	205 GASTON DR, GASTON, NC 27832	0	1,750
COLUMBUS CTY PHA	715 N LEGION RD, WHITEVILLE, NC 28472	0	750
CHOANOKE AREA DEV ASSN	P.O. BOX 530, RICH SQUARE, NC 27869	0	2,500
ECONOMIC IMPROV COUNCIL, INC	712 VIRGINIA RD, EDENTON, NC 27932	0	3,750
SANDHILLS COMM ACTION PROG INC.	103 SAUNDERS ST, CARTHAGE, NC 28327	0	500
FRANKLIN VANCE WARREN OPP'TY I.	P.O. BOX 1453, HENDERSON, NC 27536	0	1,250
MORTON COUNTY HA	1500 3RD AVE NW., MANDAN, ND 58554	0	23,489
MERCER COUNTY HA	1500 THIRD AVE NW., MANDAN, ND 58554	10	33,874
PERTH AMBOY HA	881 AMBOY AVE, PERTH AMBOY, NJ 08862	0	78,384
ATLANTIC CITY HA	227 VERMONT AVE, ATLANTIC CITY, NJ 08404	56	459,583
HOBOKEN HA	400 HARRISON ST, HOBOKEN, NJ 07030	14	135,453
MILLVILLE HA	P.O. BOX 803, MILLVILLE, NJ 08332	0	8,000
NJDCA	101 SOUTH BROAD ST, TRENTON, NJ 08625	7	65,406
LAS CRUCES HA	926 S SAN PEDRO, LAS CRUCES, NM 88001	0	29,750
BERNALILLO COUNTY HSG DEPT	1900 BRIDGE BLVD, SW., ALBUQUERQUE, NM 87105	0	24,250
COUNTY OF CLARK HA	5390 EASTFLAMINGO RD, LAS VEGAS, NV 89122	0	46,087
NEW YORK CITY HA	250 BROADWAY, NEW YORK, NY 10007	3,682	30,437,812
HA OF MECHANICVILLE	HARRIS AVE, MECHANICVILLE, NY 12118	26	106,429
HA OF ROME	205 ST PETER'S AVE, ROME, NY 13440	24	95,615
HA OF ROCHESTER	675 WESTMAIN ST, ROCHESTER, NY 14611	0	46,250
HA OF LOCKPORT	301 MICHIGAN ST, LOCKPORT, NY 14094	164	743,050
THE CITY OF NEW YORK	100 GOLD ST RM 5N, NEW YORK, NY 10007	0	2,353,774
CITY OF NORTH TONAWANDA	C/O BELMONT SHELTER, 1195 MAIN ST, BUFFALO, NY 14209	0	39,000
CITY OF BUFFALO	C/O RENTAL ASST CORP, 470 FRANKLIN ST, BUFFALO, NY 14202	0	30,250
CITY OF HUDSON	COMM DEV & PLANNING, 444 WARREN ST, HUDSON, NY 12534	25	141,256
NEW YORK STATE HFA	25 BEAVER ST, RM 674, NEW YORK, NY 10004	1,290	19,742,209
COLUMBUS MHA	880 EAST 11TH AVE, COLUMBUS, OH 43211	110	715,375
YOUNGSTOWN MHA	131 WEST BOARDMAN ST, YOUNGSTOWN, OH 44503	100	551,404
CUYAHOGA MHA	1441 WEST 25TH ST, CLEVELAND, OH 44113	13	114,010
CINCINNATI MHA	16 WEST CENTRAL PARKWAY, CINCINNATI, OH 45210	37	241,409
LUCAS MHA	435 NEBRASKA AVE, TOLEDO, OH 43602	64	359,816
AKRON MHA	100 W. CEDAR ST, AKRON, OH 44307	240	1,470,160
LORAIN MHA	1600 KANSAS AVE, LORAIN, OH 44052	24	154,553
MANSFIELD MHA	150 PARK AVE WEST, MANSFIELD, OH 44901	0	1,152
PORTAGE MHA	2832 STATE ROUTE 59, RAVENNA, OH 44266	115	707,221
HAMILTON COUNTY PHA	630 MAIN ST, 1ST FL, CINCINNATI, OH 45202	13	110,536
MIDDLETOWN PHA	1040 CENTRAL AVE, MIDDLETOWN, OH 45044	108	655,547
SENECA MHA	150 PARK AVE WEST, MANSFIELD, OH 44901	0	360
HANCOCK MHA	604 LIMA AVE, FINDLAY, OH 45840	0	5,250
HA CITY OF SALEM	P.O. BOX 808, SALEM, OR 97308	8	44,832
HA CITY OF PITTSBURG	200 ROSS ST, PITTSBURGH, PA 15219	182	966,384
PHILADELPHIA HA	12 SOUTH 23RD ST, PHILADELPHIA, PA 19103	14	148,662
ALLEGHENY COUNTY HA	625 STANWIX ST, 12TH FL, PITTSBURGH, PA 15222	46	274,828

APPENDIX A.—HOUSING CHOICE VOUCHER PROGRAM ANNOUNCEMENTS OF FUNDING AWARDS FOR FISCAL YEAR 2005—Continued

Housing agency	Address	Units	Award
HA OF COUNTY OF BUTLER	114 WOODY DR, BUTLER, PA 16001	0	1,872
SUNBURY HA	705 MARKET ST, SUNBURY, PA 17801	0	17,748
PROVIDENCE HA	100 BROAD ST, PROVIDENCE, RI 02903	5	34,900
MUNICIPALITY OF BAYAMON	P.O. BOX 1588, BAYAMON, PR 00960	272	1,854,642
MUNICIPALITY OF PENUELAS	P.O. BOX 10, PENUELAS, PR 00624	70	361,967
HA SOUTH CAROLINA REG NO 1	404 CHURCH ST, LAURENS, SC 29360	0	7,500
HA BEAUFORT	1009 PRINCE ST, BEAUFORT, SC 29901	20	106,567
HA FLORENCE	P.O. DRAWER 969, FLORENCE, SC 29503	92	431,502
ABERDEEN HA	2324 3RD AVE SE., ABERDEEN, SD 57401	0	14,861
PENNINGTON COUNTY HA	1805 WEST FULTON ST, RAPID CITY, SD 57702	0	3,000
CHATTANOOGA HA	P.O. BOX 1486, CHATTANOOGA, TN 37402	0	32,000
KINGSPORT HRA	P.O. BOX 44, KINGSPORT, TN 37662	0	936
EAST TN HRA	9111 CROSS PARK DR, STE D100, KNOXVILLE, TN 37923	78	363,431
TENNESSEE HDA	404 JAMES ROBERTSON PKWY, STE 1114, NASHVILLE, TN 37243	4	20,565
EL PASO HA	5300 PAISANO, EL PASO, TX 79905	61	349,152
FORT WORTH HA	1201 E. 13TH ST, FORT WORTH, TX 76101	0	23,250
CORPUS CHRISTI HA	3701 AYERS ST, CORPUS CHRISTI, TX 78415	0	3,204
BROWNWOOD HA	1500 TERRACE DR., BROWNWOOD, TX 76804	0	720
ABILENE HA	555 WALNUT, ABILENE, TX 79604	0	11,246
DENTON HA	1225 WILSON ST, DENTON, TX 76205	30	246,584
TARRANT COUNTY HA	2100 CIRCLE DR, STE 200, FORT WORTH, TX 76119	6	73,326
ARLINGTON HA	501 W. SANFORD, STE 20, ARLINGTON, TX 76011	40	302,200
GRAND PRAIRIE HA	P201 NW 2ND ST, STE 150, GRAND PRAIRIE, TX 75053	40	353,602
SAN ANGELO HA	106 SOUTH CHADBOURNE, SAN ANGELO, TX 76903	4	18,470
SOUTH PLAINS HA	P.O. BOX 610, LEVELLAND, TX 79336	75	521,128
MONTGOMERY COUNTY HA	1022 MCCALL AVE, CONROE, TX 77301	23	167,621
SALT LAKE COUNTY HA	3595 S. MAIN ST, SALT LAKE CITY, UT 84115	6	42,475
PORTSMOUTH RHA	801 WATER ST, STE 200, PORTSMOUTH, VA 23705	240	1,563,840
LYNCHBURG RHA	918 COMMERCE ST, LYNCHBURG, VA 24505	0	5,250
FAIRFAX CO RHA	3700 PENDER DR, STE 300, FAIRFAX, VA 22030	36	406,237
SUFFOLK RHA	530 EAST PINNER ST, SUFFOLK, VA 23434	128	795,136
CITY OF VIRGINIA BEACH HA	2424 COURTHOUSE DR., VIRGINIA BEACH, VA 23456	24	164,394
VIRGINIA HDA	601 SOUTH BELVIDERE ST, RICHMOND, VA 23220	56	348,211
VIRGIN ISLANDS HA	P.O. BOX 7668, ST. THOMAS, VI 00801	12	89,989
HA CITY OF YAKIMA	810 N 6TH AVE, YAKIMA, WA 98902	0	1,080
HA OF THURSTON COUNTY	503 WEST FOURTH AVE, OLYMPIA, WA 98501	48	300,501
PIERCE COUNTY HA	603 S POLK, TACOMA, WA 98445	26	173,214
HA CITY OF SPOKANE	WEST 55 MISSION ST, STE 104, SPOKANE, WA 99201	21	107,506
RACINE COUNTY HA	837 MAIN ST, RACINE, WI 53403	96	473,971
PLATTEVILLE HA	75 NORTH BONSON ST, PLATTEVILLE, WI 53818	0	8,000
JANESVILLE CDA	18 NORTH JACKSON ST, JANESVILLE, WI 53547	0	840
MARINETTE CO HA	926 MAIN ST, WAUSAUKEE, WI 54177	0	660
WISCONSIN HEDA	P.O. BOX 1728, MADISON, WI 53701	0	1,584
CHEYENNE HA	3304 SHERIDAN AVE, CHEYENNE, WY 82009	0	15,750
Total for Housing Tenant Protection.		14,508	$124,975,238
Mod Rehab Replacements and Fees			
HA SELMA	P.O. BOX 950, SELMA, AL 36702	1	1,541
LOS ANGELES COUNTY HA	2 CORAL CIRCLE, MONTEREY, CA 91755	124	986,078
CITY OF LOS ANGELES HA	2600 WILSHIRE BLVD, 3RD FL, LOS ANGELES, CA 90057	0	37,906
CITY OF FRESNO HA	1331 FULTON MALL, FRESNO, CA 93776	0	22,043
SACRAMENTO HRA	P.O. BOX 1834, SACRAMENTO, CA 95812	0	35,629
KERN COUNTY HA	601 24TH ST, BAKERSFIELD, CA 93301	7	32,945
COUNTY OF STANISLAUS HA	1701 ROBERTSON RD, MODESTO, CA 95358	11	27,561
RIVERSIDE COUNTY HA	5555 ARLINGTON AVE, RIVERSIDE, CA 92504	155	1,221,845
TULARE COUNTY HA	5140 W. CYPRESS AVE, VISALIA, CA 93279	5	50,793
OXNARD HA	435 SOUTH D ST, OXNARD, CA 93030	7	38,253
SAN DIEGO HSG COMM	1625 NEWTON AVE, SAN DIEGO, CA 92113	21	228,811
MENDOCINO COUNTY CDHC	1076 NORTH STATE ST, UKIAH, CA 95482	16	82,143
GARDEN GROVE HA	11277 GARDEN GROVE BLVD, STE 101C, GARDEN, CA 92842	103	938,350
CITY OF REDDING HA	777 CYPRESS AVE, REDDING, CA 96049	2	4,573
CALIFORNIA DHCD	P.O. BOX 952054, SACRAMENTO, CA 94252	16	53,162
AURORA HA	10745 E KENTUCKY AVE, AURORA, CO 80012	3 1	9,628
NORWALK HA	24½ MONROE ST, SOUTH NORWALK, CT 06854	1	3,382
WILLIMANTIC HA	49 WEST AVE, WILLIMANTIC, CT 06226	0	6,702
CITY OF HARTFORD HA	10 PROSPECT ST, HARTFORD, CT 06103	3	40,210
DCHA	1133 NORTH CAPITOL ST., NE., WASHINGTON, DC 20002	20	111,110
HA OF JACKSONVILLE	1300 BROAD ST, JACKSONVILLE, FL 32202	1	19,913

APPENDIX A.—HOUSING CHOICE VOUCHER PROGRAM ANNOUNCEMENTS OF FUNDING AWARDS FOR FISCAL YEAR 2005—Continued

Housing agency	Address	Units	Award
MIAMI DADE HA	1401 NW 7TH ST, MIAMI, FL 33125	263	754,651
HA WEST PALM BEACH GEN FUND	1715 DIVISION AVE, WEST PALM BEACH, FL 33407	10	73,118
HA OCALA	P.O. BOX 2468, OCALA, FL 34478	30	58,080
HA HOLLYWOOD	7300 N. DAVIE RD EXTENSION, HOLLYWOOD, FL 33024	6	24,477
HA MACON	P.O. BOX 4928, MACON, GA 31208	0	84,243
HA MARIETTA	P.O. DRAWER K, MARIETTA, GA 30061	0	31,496
HA DEKALB COUNTY	P.O. BOX 1627, DECATUR, GA 30031	7	23,147
DES MOINES MUNICIPAL HA	100 EAST EUCLID, STE 101, DES MOINES, IA 50313	4	19,725
DUBUQUE DEPT OF HUMAN RIGHTS.	1805 CENTRAL AVE, DUBUQUE, IA 52001	12	32,394
CITY OF AMES DEPT OF PLANNING	515 CLARK AVE, AMES, IA 50010	20	48,018
CHICAGO HA	626 WEST JACKSON BLVD, CHICAGO, IL 60661	232	2,081,866
PEORIA HA	100 SOUTH SHERIDAN RD, PEORIA, IL 61605	2	24,844
TERRE HAUTE HA	P.O. BOX 3086, TERRE HAUTE, IN 47803	0	40,619
KANSAS CITY HA	1124 NORTH NINTH ST, KANSAS CITY, KS 66101	0	157,977
NEWTON HA	115 WEST 9TH ST, NEWTON, KS 67114	0	16,294
RILEY COUNTY HA	401 HOUSTON ST, MANHATTAN, KS 66502	0	84,041
PADUCAH HA	300 SOUTH FIFTH ST, PADUCAH, KY 42002	0	18,200
NEW ORLEANS HA	4100 TOURO ST, NEW ORLEANS, LA 70122	91	672,725
SULPHUR HA	P.O. BOX 271, SULPHUR, LA 70664	3	3,631
BOSTON HA	52 CHAUNCY ST, BOSTON, MA 02111	24	215,114
NORTHAMPTON HA	49 OLD SOUTH ST, NORTHAMPTON, MA 01060	0	115,446
COMM DEV PROG COMM OF MA.E.O.D.	100 CAMBRIDGE ST, BOSTON, MA 02114	19	278,162
HA OF BALTIMORE CITY	417 EAST FAYETTE ST, BALTIMORE, MD 21201	1	7,598
MONTGOMERY CO HA	10400 DETRICK AVE, KENSINGTON, MD 20895	7	96,632
WICOMICO COUNTY HA	911 BOOTH ST, SALISBURY, MD 21801	0	37,169
MD DEPT OF HCD	100 COMMUNITY PL, CROWNSVILLE, MD 21032	1	7,203
PORTLAND HA	14 BAXTER BLVD, PORTLAND, ME 04101	0	21,467
MAINE STATE HA	353 WATER ST, AUGUSTA, ME 04330	5	6,902
BATTLE CREEK HSG COMM	250 CHAMPION ST, BATTLE CREEK, MI 49017	0	86,163
EASTPOINTE HSG COMM	15701 EAST NINE MILE RD, EASTPOINTE, MI 48021	0	21,850
FERNDALE HSG COMM	415 WITHINGTON, FERNDALE, MI 48220	0	46,977
WESTLAND HSG COMM	32715 DORSEY RD, WESTLAND, MI 48186	0	142,809
MICHIGAN STATE HDA	P.O. BOX 30044, LANSING, MI 48909	29	611,968
MINNEAPOLIS PHA	1001 WASHINGTON AVE NO, MINNEAPOLIS, MN 55401	2	12,121
LE SUEUR COUNTY HRA	464 RAINTREE RD, MANKATO, MN 56001	0	18,902
INDEPENDENCE HA	210 SOUTH PLEASANT, INDEPENDENCE, MO 64050	0	347,844
ST. FRANCOIS COUNTY PHA	P.O. BOX N, PARK HILLS, MO 63601	0	57,030
MISS REGIONAL HA VI	P.O. DRAWER 8746, JACKSON, MS 39284	9	49,191
BILLINGS HA	2415 1ST AVE NORTH, BILLINGS, MT 59101	0	30,132
HELENA HA	812 ABBEY ST, HELENA, MT 59601	0	30,782
MDOC	836 FRONT ST, HELENA, MT 59620	5	15,869
RALEIGH HA	P.O. BOX 28007, RALEIGH, NC 27611	6	33,035
KINSTON HA	608 N QUEEN ST, KINSTON, NC 28502	8	12,369
FAYETTEVILLE MHA	P.O. DRAWER 2349, FAYETTEVILLE, NC 28302	0	12,564
HA SANFORD	504 N FIRST ST, SANFORD, NC 27331	0	37,485
HA MONROE	504 HOUGH ST, MONROE, NC 28111	0	4,341
HA ROANOKE CHOWAN REG HSG	205 GASTON DR, GASTON, NC 27832	0	5,351
COLUMBUS CTY PHA	715 N LEGION RD, WHITEVILLE, NC 28472	0	5,448
CHOANOKE AREA DEV ASSN	P.O. BOX 530, RICH SQUARE, NC 27869	0	5,448
ECONOMIC IMPROV COUNCIL, INC	712 VIRGINIA RD, EDENTON, NC 27932	0	8,085
SANDHILLS COMM ACTION PROG INC.	103 SAUNDERS ST, CARTHAGE, NC 28327	0	1,486
FRANKLIN VANCE WARREN OPP'TY I.	P.O. BOX 1453, HENDERSON, NC 27536	0	4,734
OMAHA HA	540 SOUTH 27TH ST, OMAHA, NE 68105	49	199,910
NEW HAMPSHIRE HFA	P.O. BOX 5087, MANCHESTER, NH 03108	15	116,695
MILLVILLE HA	P.O. BOX 803, MILLVILLE, NJ 08332	0	23,063
LAS CRUCES HA	926 S SAN PEDRO, LAS CRUCES, NM 88001	0	59,866
BERNALILLO COUNTY HSG DEPT	1900 BRIDGE BLVD, SW., ALBUQUERQUE, NM 87105	0	67,271
CITY OF RENO HA	1525 EAST NINTH ST, RENO, NV 89512	7	14,847
NEW YORK CITY HA	250 BROADWAY, NEW YORK, NY 10007	0	2,242,249
HA OF MECHANICVILLE	HARRIS AVE, MECHANICVILLE, NY 12118	0	15,619
HA OF ROCHESTER	675 WEST MAIN ST, ROCHESTER, NY 14611	0	110,045
HA OF AMSTERDAM	52 DIVISION ST, AMSTERDAM, NY 12010	5	72,683
TOWN OF AMHERST	C/O BELMONT SHELTER, 1195 MAIN ST, BUFFALO, NY 14209	0	2,301
THE CITY OF NEW YORK	100 GOLD ST ROOM 5N, NEW YORK, NY 10004	144	3,689,521
CITY OF NEW ROCHELLE	515 NORTH AVE, NEW ROCHELLE, NY 10801	4	16,278
TOWN OF SOUTHAMPTON	116 HAMPTON RD, SOUTHAMPTON, NY 11968	12	41,697
CITY OF NORTH TONAWANDA	C/O BELMONT SHELTER, 1195 MAIN ST, BUFFALO, NY 14209	0	83,709

APPENDIX A.—HOUSING CHOICE VOUCHER PROGRAM ANNOUNCEMENTS OF FUNDING AWARDS FOR FISCAL YEAR 2005—Continued

Housing agency	Address	Units	Award
CITY OF BUFFALO	C/O RENTAL ASST CORP, 470 FRANKLIN ST, BUFFALO, NY 14202	0	67,217
NEW YORK STATE HFA	25 BEAVER ST, RM 674, NEW YORK, NY 10004	8	1,539,959
COLUMBUS MHA	880 EAST 11TH AVE, COLUMBUS, OH 43211	39	115,504
CUYAHOGA MHA	1441 WEST 25TH ST, CLEVELAND, OH 44113	64	417,405
CINCINNATI MHA	16 WEST CENTRAL PARKWAY, CINCINNATI, OH 45210	22	124,985
HANCOCK MHA	604 LIMA AVE, FINDLAY, OH 45840	0	16,087
HA & COMM SVCS AGENCY LANE CO.	177 DAY ISLAND RD, EUGENE, OR 97401	10	44,254
HA OF YAMHILL COUNTY	135 NE. DUNN PL, MCMINNVILLE, OR 97128	1	5,735
COOS-CURRY HA	1700 MONROE, NORTH BEND, OR 97459	21	57,539
HA CITY OF PITTSBURG	200 ROSS ST, PITTSBURGH, PA	1	4,647
PHILADELPHIA HA	12 SOUTH 23RD ST, PHILADELPHIA, PA 19103	201	1,355,452
ALLEGHENY COUNTY HA	625 STANWIX ST, 12TH FL, PITTSBURGH, PA 15222	4	54,481
CHESTER HA	1010 MADISON ST, CHESTER, PA 19016	1	1,484
WESTMORELAND COUNTY HA	223 SOUTH GREENGATE RD, GREENSBURG, PA 15601	6	14,723
DAUPHIN COUNTY HA	501 MOHN ST, STEELTON, PA 17113	9	22,649
NORTHAMPTON COUNTY HA	15 S. WOOD ST, NAZARETH, PA 18064	3	8,930
HA OF UNION COUNTY	1610 INDUSTRIAL BLVD, STE 400, LEWISBURG, PA 17837	12	18,118
MUNICIPALITY OF TRUJILLO ALTO	P.O. BOX 1869, TRUJILLO ALTO, PR 00977	2	2,267
MUNICIPALITY HUMACAO	P.O. BOX 178, HUMACAO, PR 00792	9	61,752
PUERTO RICO HSG FIN CO	CALL BOX 71361–GPO, SAN JUAN, PR 00936	58	220,781
HA SOUTH CAROLINA REG NO 1	404 CHURCH ST, LAURENS, SC 29360	0	14,173
HA SUMTER	P.O. BOX 1030, SUMTER, SC 29151	24	61,391
S C STATE HSG FIN & DEV	300–C OUTLET POINTE BLVD, COLUMBIA, SC 29210	11	8,940
PENNINGTON COUNTY HA	1805 WEST FULTON ST, RAPID CITY, SD 57702	0	5,568
KNOXVILLE COMM DEV CORP	P.O. BOX 3550, KNOXVILLE, TN 37927	32	105,385
CHATTANOOGA HA	P.O. BOX 1486, CHATTANOOGA, TN 37402	0	62,131
METROPOLITAN DEV & HSG	701 SOUTH SIXTH ST, NASHVILLE, TN 37202	6	11,978
LAREDO HA	2000 SAN FRANCISCO AVE, LAREDO, TX 78040	3	1,725
RICHMOND RHA	P.O. BOX 26887, RICHMOND, VA 23261	62	541,254
ROANOKE RHA	2624 SALEM TRNPK, NW, ROANOKE, VA 24017	14	60,597
LYNCHBURG RHA	918 COMMERCE ST, LYNCHBURG, VA 24505	0	15,523
STAUNTON RHA	P.O. BOX 1369, STAUNTON, VA 24402	26	125,832
LOUDOUN COUNTY HSG SERVICES.	102 HERITAGE WAY NE, STE 202, LEESBURG, VA 20176	1	9,406
COUNTY OF ALBEMARLE	1600 5TH ST, STE B, CHARLOTTESVILLE, VA 22902	1	2,357
VIRGINIA HDA	601 SOUTH BELVIDERE ST, RICHMOND, VA 23220	6	79,340
HA CITY OF VANCOUVER	2500 MAIN ST, #200, VANCOUVER, WA 98660	19	117,607
HA OF THURSTON COUNTY	503 WEST FOURTH AVE, OLYMPIA, WA 98501	4	12,017
PIERCE COUNTY HA	603 S POLK, TACOMA, WA 98445	1	4,809
RACINE COUNTY HA	837 MAIN ST, RACINE, WI 53403	0	47,140
PLATTEVILLE HA	75 NORTH BONSON ST, PLATTEVILLE, WI 53818	0	14,799
WHEELING HA	11 COMMUNITY ST, WHEELING, WV 26003	1	717
HA OF CITY OF BECKLEY	P.O. BOX 1780, BECKLEY, WV 25802	26	95,438
RANDOLPH COUNTY HA	P.O. BOX 1579, ELKINS, WV 26241	1	2,198
CHEYENNE HA	3304 SHERIDAN AVE, CHEYENNE, WY 82009	0	31,235
Total for Mod Rehab Replacements and Fees.		2,237	$22,941,084
Public Housing Relocations and Replacements			
HA CITY OF MONTGOMERY	1020 BELL ST, MONTGOMERY, AL 36104	180	986,202
TUCSON HSG MANAGEMENT DIV	310 NORTH COMMERCE PARK LOOP, TUCSON, AZ 85726	12	67,470
HA OF CITY OF NEW HAVEN	360 ORANGE ST, NEW HAVEN, CT 06511	30	180,295
MERIDEN HA	22 CHURCH ST, MERIDEN, CT 06450	45	153,443
ST. PETERSBURG HA	3250 5TH AVENUE NORTH, ST. PETERSBURG, FL 33713	300	1,028,718
HA AVON PARK	P.O. BOX 1327, AVON PARK, FL 33826	18	83,376
HA FORT PIERCE	707 NORTH 7TH ST, FORT PIERCE, FL 34950	86	529,416
HA RIVIERA BEACH	2014 WEST, 17TH COURT, RIVIERA BEACH, FL 33404	90	719,280
BROWARD COUNTY HA	1773 NORTH STATE ROAD 7, LAUDERHILL, FL 33313	190	1,776,120
HA SAVANNAH	200 EAST, BROAD ST, SAVANNAH, GA 31402	303	959,959
HA ATLANTA GA	230 JOHN WESLEY DOBBS AVE, NE, ATLANTA, GA 30303	14	121,784
DES MOINES MUNICIPAL HA	100 EAST EUCLID, DES MOINES, IA 50313	244	427,644
HA OF CITY OF EAST ST. LOUIS	700 NORTH 20TH ST, EAST ST. LOUIS, IL 62205	0	9,632
CHICAGO HA	626 WEST JACKSON BLVD, CHICAGO, IL 60661	878	5,875,576
PEORIA HA	100 SOUTH SHERIDAN RD, PEORIA, IL 61605	0	101,376
HA CITY OF ROCK ISLAND	111 20TH ST, ROCK ISLAND, IL 61201	63	300,888
BOSTON HA	52 CHAUNCY ST, BOSTON, MA 02111	64	912,384
HA OF BALTIMORE CITY	417 EAST, FAYETTE ST, BALTIMORE, MD 21201	656	1,533,570
MISS REGIONAL HA VIII	P.O. BOX 2347, GULFPORT, MS 39505	85	420,240

APPENDIX A.—HOUSING CHOICE VOUCHER PROGRAM ANNOUNCEMENTS OF FUNDING AWARDS FOR FISCAL YEAR 2005—Continued

Housing agency	Address	Units	Award
NEWARK HA	57 SUSSEX AVE, NEWARK, NJ 07103	20	75,400
PERTH AMBOY HA	881 AMBOY AVE, PERTH AMBOY, NJ 08862	224	2,008,138
NJDCA	101 SOUTH BROAD ST, TRENTON, NJ 08625	57	518,335
COLUMBUS METRO. HA	880 EAST, 11TH AVE, COLUMBUS, OH 43211	165	1,005,840
OKLAHOMA CITY	1700 N E FOURTH ST, OKLAHOMA CITY, OK 73117	62	316,372
TULSA HA	P.O. BOX 6369, TULSA, OK 74148	40	204,400
HA CITY OF PITTSBURG	200 ROSS ST, PITTSBURGH, PA 15219	43	220,332
FAYETTE COUNTY HA	624 PITTSBURGH RD, UNIONTOWN, PA 15401	144	641,088
WASHINGTON COUNTY HA	100 CRUMRINE TOWER FRANKLIN ST, WASHINGTON, PA 15301	0	24,320
LACKAWANNA COUNTY HA	2019 WESTPINE ST, DUNMORE, PA 18512	75	299,700
BROWNSVILLE HA	P.O. BOX 4420, BROWNSVILLE, TX 78523	60	234,528
MIDLAND COUNTY HA	1710 EDWARDS, MIDLAND, TX 79701	0	15,750
VIRGIN ISLANDS HA	P.O. BOX 7668, ST. THOMAS, VI 00801	144	1,038,528
Total for Public Housing Relocations and Replacements.		4,292	$22,790,104
Grand Total		26,540	$202,680,883

[FR Doc. E5–6621 Filed 11–28–05; 8:45 am]
BILLING CODE 4210–27–P

DEPARTMENT OF THE INTERIOR

Fish And Wildlife Service

Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: The public is invited to comment on the following applications to conduct certain activities with endangered species and/or marine mammals.

DATES: Written data, comments or requests must be received by December 29, 2005.

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 30 days of the date of publication of this notice to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203; fax 703/358–2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone 703/358–2104.

SUPPLEMENTARY INFORMATION:

Endangered Species

The public is invited to comment on the following application(s) for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). Written data, comments, or requests for copies of these complete applications should be submitted to the Director (address above).

Applicant: U.S. Fish and Wildlife Service, Mexican Wolf Reintroduction Project, Region 2, Albuquerque, NM, PRT–104074 The applicant requests amendment of a permit that currently authorizes export and re-export of live Mexican or lobo wolves *(Canis lupus baileyi)* for breeding and reintroduction. The applicant would like to add export and re-export of blood, hair and tissue samples of captive and wild origin *(Canis lupus baileyi)* for the purpose of breeding, conservation education, and genetic studies for the enhancement of the propagation or survival of the species. This notification covers activities to be conducted by the applicant over a five-year period.

Marine Mammals

The public is invited to comment on the following applications for a permit to conduct certain activities with marine mammals. The applications were submitted to satisfy requirements of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and the regulations governing marine mammals (50 CFR part 18). Written data, comments, or requests for copies of the complete applications or requests for a public hearing on these applications should be submitted to the Director (address above). Anyone requesting a hearing should give specific reasons why a hearing would be appropriate. The holding of such a hearing is at the discretion of the Director.

Applicant: Robert F. Bobbitt, Flagstaff, AZ, PRT–107419

The applicant requests a permit to import a polar bear *(Ursus maritimus)* sport hunted from the Lancaster Sound polar bear population in Canada for personal, noncommercial use.

Applicant: William S. Havens, Farmington, NM, PRT–110609 .

The applicant requests a permit to import a polar bear *(Ursus maritimus)* sport hunted from the Lancaster Sound polar bear population in Canada for personal, noncommercial use.

Dated: November 4, 2005.

Michael L. Carpenter,

Senior Permit Biologist, Branch of Permits, Division of Management Authority.

[FR Doc. E5–6628 Filed 11–28–05; 8:45 am]
BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–921–06–1320–EL–P; NDM 95104]

Notice of Coal Lease Application—NDM 95104—BNI COAL

AGENCY: Bureau of Land Management, Department of the Interior.

ACTION: Notice.

SUMMARY: BNI Coal Company's Coal Lease Application NDM 95104 for certain coal resources within the Fort Union Coal Region. The land included in Coal Lease Application NDM 95104 is located in Oliver County, North Dakota, and is described as follows:

T. 142 N., R. 84 W., 5th P. M.
Sec. 28: W½

The 320.00 acre tract contains an estimated 3.6 million tons of recoverable coal reserves.

The application will be processed in accordance with the provisions of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 181, *et seq.*), and the implementing regulations at 43 CFR 3400. A decision to allow leasing of the coal reserves in said tract will result in a competitive lease sale to be held at a time and place to be announced through publication pursuant to 43 CFR Part 3422.

SUPPLEMENTARY INFORMATION: BNI Coal is the lessee and operator of the Center Mine. The entire area included within this lease application lies within the Center Mine BNCR–9702 permit area.

The area applied for would be mined as an extension of the Center Mine and would utilize the same methods as those currently being used. The lease being applied for can extend the life of the mine by about 10 months. And enable recovery of coal that might never be mined if not mined as a logical extension of current pits.

Notice of Availability: The application is available for review between the hours of 9 a.m. and 4 p.m. at the Bureau of Land Management, Montana State Office, 5001 Southgate Drive, Billings, Montana 59101, and at the Bureau of Land Management, Dakotas District Office, whose address is 2033 Third Avenue West, Dickinson, North Dakota 58601–2619, between the hours of 8 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Rebecca Spurgin, Coal Coordinator, at telephone 406–896–5080, Bureau of Land Management, Montana State Office, 5001 Southgate Drive, P.O. Box 36800, Billings, Montana 59107–6800.

Dated: November 17, 2005.

Edward L. Hughes,

Acting Chief, Branch of Solid Minerals.

[FR Doc. E5–6643 Filed 11–28–05; 8:45 am]

BILLING CODE 4310–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID–400–1010–MU]

Notice of Public Meeting, Coeur d'Alene District Resource Advisory Council Meeting; Idaho

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) Coeur d'Alene District Resource Advisory Council (RAC) will meet as indicated below.

DATES: December 14, 2005. The meeting will start at 10:30 a.m. and end by 5 p.m. The public comment period will be from 1 p.m. to 2 p.m. The meeting will be held in the conference room at the Idaho Labor and Commerce Career Center office located at 1350 Troy Road in Moscow, Idaho.

FOR FURTHER INFORMATION CONTACT: Stephanie Snook, RAC Coordinator, BLM Coeur d'Alene District, 1808 N. Third Street, Coeur d'Alene, Idaho 83814 or telephone (208) 769–5004.

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 Idaho. The agenda for the December 14th meeting will include: Welcoming the new RAC members; updates on the Resource Management Plans being prepared for the Cottonwood and Coeur d'Alene Field Offices; the proposed extension of the Lower Salmon River mineral withdrawal; and election of officers.

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 receiving 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 above.

Dated: November 21, 2005.

Lewis M. Brown,

District Manager.

[FR Doc. 05–23423 Filed 11–28–05; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA–310–0777–XX]

Notice of Public Meeting: Northeast California Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act of 1976 (FLPMA), and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Northeast California Resource Advisory Council will meet as indicated below.

DATES: The meeting will be held Thursday and Friday, Jan. 5 and 6, 2006, in the Conference Room of the Bureau of Land Management Alturas Field Office, 708 W. 12 St., Alturas, CA. The meeting runs from 1 to 5 p.m. Jan. 5 and from 8 a.m. to noon on Jan. 6. Time for public comment is reserved on Friday, Jan. 6.

FOR FURTHER INFORMATION CONTACT: Tim Burke, BLM Alturas Field Office manager, (530) 233–4666; or BLM Public Affairs Officer Joseph J. Fontana, (530) 252–5332.

SUPPLEMENTARY INFORMATION: The 15-member council advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with public land management in Northeast California and the northwest corner of Nevada. At this meeting, agenda topics will include an update on draft resource management plans for the Alturas, Eagle Lake and Surprise field offices, a status report on development of the Sagebrush Steppe Ecosystem Restoration Plan and information on the Sierra Nevada Conservancy. All meetings are open to the public. Members of the public may present written comments to the council. Each formal council meeting will have time allocated for public comments. Depending on the number of persons wishing to speak, and the time available, the time for individual comments may be limited. Members of the public are welcome on field tours, but they must provide their own transportation and lunch. Individuals who plan to attend and need special assistance, such as sign language interpretation and other reasonable accommodations, should contact the BLM as provided above.

Dated: November 22, 2005.

Joseph J. Fontana,

Public Affairs Officer.

[FR Doc. 05–23452 Filed 11–28–05; 8:45 am]

BILLING CODE 4310–40–M

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Availability of the Draft General Management Plan and Draft Environmental Impact Statement for Pea Ridge National Military Park, AR

AGENCY: National Park Service.

SUMMARY: Pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969, the National Park Service (NPS) announces the availability of the draft general management plan and environmental impact statement (GMP/EIS) for Pea Ridge National Military Park (Park).

DATES: The GMP/EIS will remain available for public review for 60 days following the publishing of the notice of availability in the **Federal Register** by the Environmental Protection Agency. Public meetings will be held at the Park visitor center, Arkansas. Meeting places and times will be announced through the local media and on the Park Web site at: *http://www.nps.gov.gov/peri.*

ADDRESSES: Copies of the GMP/EIS are available by request by writing to the superintendent at Pea Ridge National Military Park, 15930 Highway 62, Garfield, Arkansas, 72732. The document is also available to be reviewed in person at park headquarters with an appointment, which can be scheduled at 479–451–8122. Finally, the document can be found on the Internet at: *http://parkplanning.nps.gov/.* This Web site allows the public to review and comment directly on this document.

FOR FURTHER INFORMATION CONTACT: Superintendent, Pea Ridge National Military Park, 15930 Highway 62, Garfield, Arkansas, 72732.

SUPPLEMENTARY INFORMATION: The Park is a unit of the national park system and was established to commemorate the national significance of the Battle of Pea Ridge, the largest Civil War battle fought west of the Mississippi. The Park protects and preserves nearly 90 percent of the actual battlefield.

The draft GMP/EIS describes and analyzes the environmental impacts of the proposed management action (preferred alternative) and two other action alternatives for the future management direction of the Park, including the impacts of the boundary modifications. A no-action management alternative is also evaluated.

Persons wishing to comment may do so by any one of several methods. They may attend the public meetings noted above. They may mail comments to the Pea Ridge Planning Team, National Park Service, Denver Service Center, P.O. Box 25287, Denver, Colorado 80225. They also may comment via the Internet at *http://parkplanning.nps.gov/.* Finally, they may hand-deliver comments to the Pea Ridge National Military Park headquarters at 15930 Highway 62, Garfield, Arkansas, 72732.

Our practice is to make comments, including names and home addresses of respondents, available for public review. Individual respondents may request that we withhold their home address from the record, which we will honor to the extent allowable by law. There may also be circumstances where we would withhold from the record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials or organizations or businesses, available for public inspection in their entirety.

The responsible official is Ernest Quintana, Regional Director, Midwest Region.

Dated: October 20, 2005.

Ernest Quintana,

Regional Director, Midwest Region.

[FR Doc. 05–23382 Filed 11–28–05; 8:45 am]

BILLING CODE 4312–BY–P

DEPARTMENT OF THE INTERIOR

National Park Service

Final Supplemental Environmental Impact Statement; Elwha River Ecosystem Restoration Implementation; Olympic National Park, Clallam County, WA; Notice of Approval of Record of Decision

Summary: Pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(c)) and the regulations promulgated by the Council on Environmental Quality (40 CFR Part 1505.2), the Department of the Interior, National Park Service has prepared and approved a Record of Decision for the Final Supplemental Environmental Impact Statement (Final SEIS) for Elwha River ecosystem restoration at Olympic National Park. The Final SEIS supplements the 1996 implementation EIS, and will serve as a blueprint in guiding implementation of the Elwhat River ecosystem restoration initiative as called for in the 1992 Elwha River Ecosystem and Fisheries Restoration Act. The Environmental Protection Agency's **Federal Register** published notification of the filing of the Final EIS on September 2, 2005.

Decision: As soon as practical Olympic National Park will begin to implement the restoration strategies, mitigations, and projects identified and analyzed as the Preferred Alternative contained in the Final SEIS. This course of action and alternative options were addressed in the Final and Draft SEIS (the availability of the latter for public review was announced in the **Federal Register** on November 16, 2004). The full range of foreseeable environmental consequences were assessed, and appropriate mitigation measures identified. Both a No Action alternative and ''environmentally preferred'' options were identified and analyzed.

Copies: Interested parties desiring to review the Record of Decision may obtain a copy by contacting the Superintendent, Olympic National Park, 600 East Park Ave., Port Angeles, WA 98362; or via telephone request at (360) 565–3000.

Dated: October 21, 2005.

Jonathan B. Jarvis,

Regional Director, Pacific West Region.

[FR Doc. 05–23398 Filed 11–28–05; 8:45 am]

BILLING CODE 4312–KS–M

DEPARTMENT OF THE INTERIOR

National Park Service

Chesapeake and Ohio Canal National Historical Park Advisory Commission; Notice of Public Meeting

Notice is hereby given in accordance with the Federal Advisory Committee Act that a meeting of the Chesapeake and Ohio Canal National Historical Park Advisory Commission will be held at 9:30 a.m. on Friday, January 20, 2006, at park headquarters, 1850 Dual Highway, Hagerstown, Maryland.

The Commission was established by Public Law 91–664 to meet and consult with the Secretary of the Interior on general policies and specific matters related to the administration and development of the Chesapeake and Ohio Canal National Historical Park.

The members of the Commission are as follows:

Mrs. Sheila Rabb Weidenfeld, Chairman.
Mr. Charles J. Weir.
Mr. Barry A. Passett.
Mr. Terry W. Hepburn.
Ms. JoAnn M. Spevacek.
Mrs. Mary E. Woodward.
Mrs. Donna Printz.
Mrs. Ferial S. Bishop.
Ms. Nancy C. Long.
Mrs. Reynolds.
Dr. James H. Gilford.
Brother James Kirkpatrick.

Topics that will be presented during the meeting include:

1. Update on park operations.
2. Update on major construction/development projects.
3. Update on partnership projects.

The meeting will be open to the public. Any member of the public may

file with the Commission a written statement concerning the matters to be discussed. Persons wishing further information concerning this meeting, or who wish to submit written Statements, may contact Kevin Brandt, Superintendent, C&O Canal National Historic Park, 1850 Dual Highway, Suite 100, Hagerstown, Maryland 21740.

Minutes of the meeting will be available for public inspection six weeks after the meeting at park headquarters, Hagerstown, Maryland.

Dated: October 31, 2005.

Kevin D. Brandt,

Superintendent, Chesapeake and Ohio Canal National Historical Park.

[FR Doc. 05–23383 Filed 11–28–05; 8:45 am]

BILLING CODE 4312–52–M

DEPARTMENT OF THE INTERIOR

National Park Service

Schedule of Wekiva River System Advisory Management Committee Meetings

AGENCY: National Park Service, Department of the Interior.

ACTION: Notice of upcoming scheduled meetings.

SUMMARY: This notice announces a schedule of upcoming meetings for the Wekiva River System Advisory Management Committee.

DATES: The meetings are scheduled for: December 6, 2005, February 8, 2006, April 4, 2006, June 7, 2006, August 8, 2006, October 4, 2006 and December 5, 2006.

Time: All scheduled meetings will begin at 6 p.m.

ADDRESSES: All scheduled meetings will be held at Sylvan Lake Park, 845 Lake Markham Rd., Sanford, FL 32771. Sylvan Lake Park is located off Interstate 4 at Exit 51 (SR 46). Take SR 46 West to Lake Markham Rd. Turn left on Lake Markham Rd and continue one mile to Sylvan Lake Park on the left. Call (407) 322–6567 or visit *http://www.seminolecountyfl.gov/lls/parks/parkInfo.asp?id=20* for additional information on this facility.

FOR FURTHER INFORMATION CONTACT: Jamie Fosburgh, Rivers Program Manager, Northeast Region—Boston, 15 State Street, Boston, MA 02109, telephone number (617) 223–5191.

SUPPLEMENTARY INFORMATION: The scheduled meetings will be open to the public. Each scheduled meeting will result in decisions and steps that advance the Wekiva River System Advisory Management Committee towards its objective of developing a comprehensive General Management Plan for the Wekiva Wild and Scenic River. Any member of the public may file with the Committee a written statement concerning any issues relating to the development of the General Management Plan for the Wekiva Wild and Scenic River. The statement should be addressed to the Wekiva River System Advisory Management Committee, National Park Service, 15 State Street, Boston, MA 02109.

The Wekiva River System Advisory Management Committee was established by Public Law 106–299 to assist in the development of the comprehensive management plan for the Wekiva River System and provide advice to the Secretary in carrying out management responsibilities of the Secretary under the Wild and Scenic Rivers Act (16 U.S.C. 1274).

Dated: November 2, 2005.

Jamie Fosburgh,

Rivers Program Manager.

[FR Doc. 05–23384 Filed 11–28–05; 8:45 am]

BILLING CODE 4312–52–M

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Extension of Comment Period for Draft National Park Service Management Policies

AGENCY: National Park Service, Interior.

ACTION: Notice of extension of comment period.

SUMMARY: The National Park Service (NPS) is proposing to update the policies that guide the management of the National Park System. Original notice of availability of the draft updated ''Management Policies'' was published in the **Federal Register** on October 19, 2005 [70 FR 60852, October 19, 2005]. That notice stated that comments would be accepted through January 19, 2006. This notice extends the comment period an additional 30 days, through February 18, 2006.

DATES: Written comments will be accepted until February 18, 2006.

ADDRESSES: The draft ''Management Policies'' document is available on the Internet at *http://parkplanning.nps.gov/waso*. Hard copies may be reviewed in the Department of the Interior library (at the C Street entrance of the Main Interior Building, Washington, DC); at NPS regional offices in Philadelphia, PA; Oakland, CA; Washington, DC; Atlanta, GA; Denver, CO; Omaha, NE; and Anchorage, AK; and at most units of the National Park System around the country. A limited number of single hard copies of the draft may be obtained by calling 202–208–7456. Comments can be submitted in the following ways:

1. Via the Web page at *http://parkplanning.nps.gov/waso*. This is the preferred way.
2. Via e-mail to *waso_policy@nps.gov*. Or,
3. Via surface mail to Bernard Fagan, National Park Service, Office of Policy, Room 7252, Main Interior Building, 1849 C Street, NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Bernard Fagan at (202) 208–7456, or via e-mail at *waso_policy@nps.gov.*

SUPPLEMENTARY INFORMATION: The policies that guide the management of the National Park System are compiled in a book called ''Management Policies,'' last published in 2001. Park superintendents, planners, and other NPS employees use ''Management Policies'' as a reference source when making decisions that will affect units of the National Park System. The NPS has completed a comprehensive revision of the book and is now providing an additional 30 days for public review and comment on the draft. All those who are concerned about the future of the National Park System are urged to read the draft in its entirety and offer ideas on how it can be improved.

All comments will be reviewed and appropriate suggestions will be incorporated into the revised final version of ''Management Policies.'' The final document will be available for public review via the Internet and in printed form. A notice of availability of the final document, and an explanation of how comments were addressed, will appear in the **Federal Register**.

Dated: November 9, 2005.

Loran G. Fraser,

Chief, Office of Policy, National Park Service.

[FR Doc. E5–6616 Filed 11–28–05; 8:45 am]

BILLING CODE 4310–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 751–TA–28–29]

Certain Frozen Warmwater Shrimp and Prawns From India and Thailand

Determinations

On the basis of the record [1] developed in the subject investigations, the United

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

States International Trade Commission (Commission) determines, pursuant to section 751(b) of the Tariff Act of 1930 (19 U.S.C. 1675d(b)) (the Act), that revocation of the antidumping duty orders covering certain frozen warmwater shrimp and prawns from India and Thailand would be likely to lead to continuation or recurrence of material injury to an industry in the United States. Certain frozen warmwater shrimp and prawns from India and Thailand are provided for in subheadings 0306.13.00 and 1605.20.10 of the Harmonized Tariff Schedule of the United States.

Background

On December 17, 2004, the Department of Commerce determined that imports of certain frozen and canned warmwater shrimp and prawns from India and Thailand are being sold in the United States at less than fair value (LTFV) within the meaning of section 731 of the Act (19 U.S.C. 1673) (69 FR 76916, 76918, December 23, 2004); and on January 6, 2005 the Commission determined, pursuant to section 735(b)(1) of the Act (19 U.S.C. 1673d(b)(1)), that an industry in the United States was materially injured by reason of imports of such LTFV merchandise. Accordingly, Commerce ordered that antidumping duties be imposed on such imports (70 FR 5143, February 1, 2005).

On January 6, 2005, when the Commission conducted its vote in the original investigations, it stated that it was concerned about the possible impact of the December 26, 2004, tsunami on the shrimp industries of India and Thailand. The tsunami occurred prior to the closing of the record in the original investigations on December 27, 2004. At the time the record closed, however, factual information as to any impact of the tsunami on the ability of producers in India or Thailand to produce and export shrimp was not available. On February 8, 2005, the Commission published a **Federal Register** notice (70 FR 6728) inviting comments from the public on whether changed circumstances exist sufficient to warrant the institution of changed circumstances reviews of the Commission's affirmative determinations concerning certain frozen warmwater shrimp and prawns from India and Thailand.

The Commission instituted the subject investigations (investigation Nos. 751–TA–28–29), effective May 5, 2005, after having reviewed the comments it received in response to that request, and having determined that it had received information which showed changed circumstances sufficient to warrant instituting review investigations and that there was good cause for instituting such review investigations within two years after publication of the orders. Notice of the scheduling of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of May 5, 2005 (70 FR 23884). The hearing was held in Washington, DC, on September 14, 2005, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on November 21, 2005. The views of the Commission are contained in USITC Publication 3813 (November 2005), entitled *Certain Frozen Warmwater Shrimp and Prawns from India and Thailand: Investigation Nos. 751–TA–28–29.*

Issued: November 21, 2005.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E5–6593 Filed 11–28–05; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to Section 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on March 3, 2005, American Radiolabeled Chemicals, Inc., 101 Arc Drive, St. Louis, Missouri 63146, made application by renewal to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed in Schedules I and II:

Drug	Schedule
Gamma hydroxybutyric acid (2010).	I
Dimethyltryptamine (7435)	I
Dihydromorphine (9145)	I
Amphetamine (1100)	II
Methamphetamine (1105)	II
Lysergic acid diethylamide (7315).	II
Phencyclidine (7471)	II
Phenylacetone (8501)	II
Cocaine (9041)	II
Codeine (9050)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Benzoylecgonine (9180)	II
Ecgonine (9180)	II
Meperidine (9230)	II
Metazocine (9240)	II
Morphine (9300)	II
Thebaine (9333)	II
Oxymorphone (9652)	II

The company plans to manufacture in bulk, small quantities of the listed controlled substances as radiolabeled compounds.

Any other such applicant and any person who is presently registered with DEA to manufacture such a substance may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections being sent via regular mail may be addressed, in quintuplicate, to the Acting Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537, Attention: DEA Federal Register Representative, Liaison and Policy Section (ODL); or any being sent via express mail should be sent to DEA Headquarters, Attention: DEA Federal Register Representative/ODL, 2401 Jefferson Davis Highway, Alexandria, Virginia 22301; and must be filed no later than January 30, 2006.

Joseph T. Rannazzisi,

Acting Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E5–6609 Filed 11–28–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to section 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on May 6, 2005, Chemic Laboratories, Inc., 480 Neponset Street, Building 7C, Canton, Massachusetts 02021, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of Cocaine (9041), a basic class of controlled substance listed in Schedule II.

The company plans to manufacture small quantities of a cocaine derivative for distribution to its customers for the purpose of research.

Any other such applicant and any person who is presently registered with DEA to manufacture such a substance

may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections being sent via regular mail may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537, Attention: DEA Federal Register Representative, Liaison and Policy Section (ODL); or any being sent via express mail should be sent to DEA Headquarters, Attention: DEA Federal Register Representative/ODL, 2401 Jefferson Davis Highway, Alexandria, Virginia 22301; and must be filed no later than January 30, 2006.

Dated: November 18, 2005.

Joseph T. Rannazzisi,

Acting Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E5–6602 Filed 11–28–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to Section 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on April 18, 2005, Dade Behring Inc., 100 GBE Drive, MS514, Post Office Box 6101, Attention: RA/QS, Newark, Delaware 19714–6101, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed in Schedules I and II:

Drug	Schedule
Tetrahydrocannabionols (7370)	I
Benzoylecgonine (9180)	II
Morphine (9300)	II

The company plans to produce the listed controlled substances in bulk to be used in the manufacture of reagents and drug calibrator/controls for DEA exempt products.

Any other such applicant and any person who is presently registered with DEA to manufacture such a substance may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections being sent via regular mail may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537, Attention: DEA Federal Register Representative, Liaison and Policy Section (ODL); or any being sent via express mail should be sent to DEA Headquarters,

Attention: DEA Federal Register Representative/ODL, 2401 Jefferson Davis Highway, Alexandria, Virginia 22301; and must be filed no later than January 30, 2006.

Dated: November 18, 2005.

Joseph T. Rannazzisi,

Acting Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E5–6603 Filed 11–28–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to Section 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on May 13, 2005, Dade Behring, Inc., Regulatory Affairs, Quality Systems, 20400 Mariani Avenue, Cupertino, California 95014, made application by renewal to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed in Schedule I and II:

Drug	Schedule
Tetrahydrocannabionols (7370)	I
Benzoylecgonine (9180)	II
Morphine (9300)	II

The company plans to produce the listed controlled substances in bulk to be used in the manufacture of reagents and drug calibrator/controls for DEA exempt products.

Any other such applicant and any person who is presently registered with DEA to manufacture such a substance may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections being sent via regular mail may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537, Attention: DEA Federal Register Representative, Liaison and Policy Section (ODL); or any being sent via express mail should be sent to DEA Headquarters, Attention: DEA Federal Register Representative/ODL, 2401 Jefferson Davis Highway, Alexandria, Virginia 22301; and must be filed no later than January 30, 2006.

Dated: November 18, 2005.

Joseph T. Rannazzisi,

Acting Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E5–6605 Filed 11–28–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to Section 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on August 10, 2005, ISP, Freetown Fine Chemicals, Inc., 238 South Main Street, Assonet, Massachusetts 02702, made application by renewal to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed in Schedules I and II:

Drug	Schedule
2,5-Dimethoxyamphetamine (7396).	I
Amphetamine (1100)	II
Phenylacetone (8501)	II

The company plans to manufacture phenylacetone to be used in the manufacture of amphetamine for distribution to its customers. The bulk 2,5-dimethoxyamphetamine will be used for conversion into non-controlled substances.

Any other such applicant and any person who is presently registered with DEA to manufacture such a substance may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections being sent via regular mail may be addressed, in quintuplicate, to the Acting Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537, Attention: DEA Federal Register Representative, Liaison and Policy Section (ODL); or any being sent via express mail should be sent to DEA Headquarters, Attention: DEA Federal Register Representative/ODL, 2401 Jefferson Davis Highway, Alexandria, Virginia 22301; and must be filed no later than January 30, 2006.

Dated: November 21, 2005.

Joseph T. Rannazzisi,

Acting Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E5–6608 Filed 11–28–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration

By Notice dated March 29, 2005 and published in the **Federal Register** on April 6, 2005, (70 FR 17472–17473), Penick Corporation, 158 Mount Olivet Avenue, Newark, New Jersey 07114, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the basic class of controlled substances listed in Schedule II.

Drug	Schedule
Coca Leaves (9040)	II
Raw Opium (9600)	II
Poppy Straw (9650)	II
Concentrate of Poppy Straw (9670).	II

The company plans to import the listed controlled substances to manufacturer bulk controlled substances and non-controlled substance flavor extracts.

Following the Notice of Application publication on April 6, 2005, (70 FR 17472–17473), Penick Corporation, 158 Mount Olivet Avenue, Newark, New Jersey 07114, relocated its operations to 33 Industrial Park Road, Pennsville, New Jersey 08070 on May 18, 2005. DEA conducted a full investigation and inspection of the company's security which was found to be in compliance with all required regulations.

One comment was received; however, the comment was outside of the required 60-day comment and objection period.

DEA has considered the factors in 21 U.S.C. 823(a) and 952(a) and determined that the registration of Penick Corporation to import the basic class of controlled substances is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971, at this time. DEA has investigated Penick Corporation to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic class of controlled substances listed.

Dated: November 18, 2005.

Joseph T. Rannazzisi,

Acting Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E5–6606 Filed 11–28–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated April 14, 2005, and published in the **Federal Register** on April 25, 2005 (70 FR 10683), Penick Corporation, Inc., 158 Mount Olivet Avenue, Newark, New Jersey, 07114, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic class of controlled substances listed in Schedule II:

Drug	Schedule
Cocaine (9041)	II
Codeine (9050)	II
Dihydrocodeine (9120)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Ecgonine (9180)	II
Hydrocodone (9193)	II
Morphine (9300)	II
Thebaine (9333)	II
Oxymorphone (9652)	II

The company plans to manufacture the listed bulk controlled substances in bulk for distribution to its customers.

Following the Notice of Application publication on April 25, 2005, (70 FR 17472–17473), Penick Corporation, 158 Mount Olivet Avenue, Newark, New Jersey 07114, relocated its operations to 33 Industrial Park Road, Pennsville, New Jersey 08070 on May 18, 2005. DEA conducted a full investigation and inspection of the company's security which was found to be in compliance with all required regulations.

One comment was received; however, the comment was not relevant to the company's current activities as a manufacturer of Schedule II controlled substances.

DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Penick Corporation to manufacture the listed basic class of controlled substances is consistent with the public interest at this time. DEA has investigated Penick Corporation to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic class of controlled substances listed.

Dated: November 18, 2005.

Joseph T. Rannazzisi,

Acting Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E5–6607 Filed 11–28–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated June 2, 2005, and published in the **Federal Register** on June 10, 2005, (70 FR 33923), Research Triangle Institute, Kenneth H. Davis Jr., Herman Building, P.O. Box 12194, East Institute Drive, Research Triangle Park, North Carolina 27709, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed in Schedules I and II:

Drug	Schedule
Marihuana (7360)	I
Cocaine (9041)	II

The Institute will manufacture small quantities of cocaine and marihuana derivatives for use by their customers primarily in analytical kits, reagents and reference standards.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Research Triangle Institute to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Research Triangle Institute to ensure that the company's registration is consistent with the public interest. The investigation has included

inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: November 21, 2005.

Joseph T. Rannazzisi,

Acting Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E5–6592 Filed 11–28–05; 8:45 am]

BILLING CODE 4410–09–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. Emerald Coal Resources, LP

[Docket No. M–2005–072–C]

Emerald Coal Resources, LP, Three Gateway Center, 401 Liberty Avenue, Suite 1340, Pittsburgh, Pennsylvania 15222 has filed a petition to modify the application of 30 CFR 75.364(b)(1) (Weekly examination) to its Emerald No. 1 Mine (MSHA I.D. No. 36–05466) located in Greene County, Pennsylvania. The petitioner requests a modification of the existing standard to permit the use of air monitoring stations to monitor the longwall tailgate airflow in lieu of traveling the entry in its entirety. The petitioner asserts that due to deteriorating roof conditions, traveling the entry in its entirety would be unsafe. 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 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 December 29, 2005. Copies of these petitions are available for inspection at that address.

Dated at Arlington, Virginia this 22nd day of November 2005.

Rebecca J. Smith,

Acting Director, Office of Standards, Regulations, and Variances.

[FR Doc. E5–6674 Filed 11–28–05; 8:45 am]

BILLING CODE 4510–43–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–498 and 50–499]

STP Nuclear Operating Company, et al.; South Texas Project, Units 1 and 2; Notice of Consideration of Approval of Application Regarding Proposed Corporate Restructuring and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering the issuance of an order under section 50.80 of Title 10 of the Code of Federal Regulations (10 CFR) approving the indirect transfer of Facility Operating License No. NPF–76 and Facility Operating License No. NPF–80 for the South Texas Project, Units 1 and 2 (STP), respectively, to the extent currently held by Texas Genco, LP (Texas Genco). The City Public Service Board of San Antonio, and the City of Austin, Texas, co-own the units with Texas Genco but are not involved in this proposed action. STP Nuclear Operating Company (STPNOC) is authorized to act for the owners, and has exclusive responsibility and control over the physical construction, operation, and maintenance of STP.

STP Nuclear Operating Company, acting on behalf of Texas Genco and NRG Energy, Inc. (NRG Energy), has requested that the Commission consent to the indirect transfer of control of Texas Genco's 44 percent interest in STP. NRG Energy and Texas Genco LLC have entered into a definitive agreement for NRG Energy to acquire all of the outstanding equity of Texas Genco LLC, which indirectly owns 100 percent of Texas Genco. Texas Genco and NRG Energy seek NRC consent to the indirect transfer of control of the licenses to the extent held by Texas Genco that will result from NRG Energy's acquisition of Texas Genco LLC.

In addition to its 44 percent undivided ownership interests in STP, Texas Genco holds a corresponding interest in STPNOC, a not-for-profit Texas corporation, which is the licensed operator of STP. Approval of the indirect transfer of control of the licenses to the extent held by STPNOC is also requested to the extent such approval is necessary. No physical changes to STP or operational changes are being proposed in the application.

Pursuant to 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. The Commission will approve an application for the transfer of a license, if the Commission determines that the proposed transferee is qualified to hold the license and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

Before issuance of the proposed conforming license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

The filing of requests for hearing and petitions for leave to intervene, and written comments with regard to the license transfer application, are discussed below.

Within 20 days from the date of publication of this notice, any person whose interest may be affected by the Commission's action on the application may request a hearing and, if not the applicant, may petition for leave to intervene in a hearing proceeding on the Commission's action. Requests for a hearing and petitions for leave to intervene should be filed in accordance with the Commission's rules of practice set forth in Subpart C ''Rules of General Applicability: Hearing Requests, Petitions to Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for NRC Adjudicatory Hearings,'' of 10 CFR Part 2. In particular, such requests and petitions must comply with the requirements set forth in 10 CFR 2.309. Untimely requests and petitions may be denied, as provided in 10 CFR 2.309(c)(1), unless good cause for failure to file on time is established. In addition, an untimely request or petition should address the factors that the Commission will also consider, in reviewing untimely requests or petitions, set forth in 10 CFR 2.309(c)(1)(i)–(viii).

Requests for a hearing and petitions for leave to intervene should be served upon counsel for STPNOC, Mr. John E. Matthews at Morgan, Lewis & Bockius, LLP, 1111 Pennsylvania Avenue, NW., Washington, DC 20004 (tel: 202–739–5524; fax: 202–739–3001; e-mail: *jmatthews@morganlewis.com*); counsel

for NRG Energy, Dr. William R. Hollaway at Skadden, Arps, Slate, Meagher & Flom LLP, 1440 New York Avenue, Washington, DC 20005 (tel: 202–371–7819; fax: 202–371–7939; e-mail: *whollawa@skadden.com*); and counsel for Texas Genco, Mr. Nicholas S. Reynolds at Winston and Strawn, LLP, 1700 K Street, NW., Washington, DC 20006–3817 (tel: 202–282–5717; fax: 202–282–5100; e-mail: *nreynolds@winston.com*); the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001 (e-mail address for filings regarding license transfer cases only: *OGCLT@NRC.gov*); and the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications staff, in accordance with 10 CFR 2.302 and 2.305.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

As an alternative to requests for hearing and petitions to intervene, within 30 days from the date of publication of this notice, persons may submit written comments regarding the license transfer application, as provided for in 10 CFR 2.1305. The Commission will consider and, if appropriate, respond to these comments, but such comments will not otherwise constitute part of the decisional record. Comments should be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications staff, and should cite the publication date and page number of this **Federal Register** notice.

For further details with respect to this action, see the application dated October 14, 2005, available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov.*

Dated at Rockville, Maryland this 21st day of November 2005.

For The Nuclear Regulatory Commission.

Mohan C. Thadani,

Senior Project Manager, Plant Licensing Branch IV , Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E5–6634 Filed 11–28–05; 8:45 am]

BILLING CODE 7590–01–P

PENSION BENEFIT GUARANTY CORPORATION

Approval of Amendment to Special Withdrawal Liability Rules for Service Employees International Union Local 25 and Participating Employers Pension Trust

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of approval.

SUMMARY: The Service Employees International Union Local 25 and Participating Employers Pension Trust requested the Pension Benefit Guaranty Corporation (''PBGC'') to approve a plan amendment providing for special withdrawal liability rules for employers that maintain the Plan. PBGC published a Notice of Pendency of the Request for Approval of the amendment on July 6, 2005 (70 FR 38983) (''Notice of Pendency''). In accordance with the provisions of the Employee Retirement Income Security Act of 1974, as amended (''ERISA''), PBGC is now advising the public that the agency has approved the requested amendment.

FOR FURTHER INFORMATION CONTACT: Frank Anderson, Attorney, Office of the Chief Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026; Telephone 202–326–4020 (For TTY/TDD users, call the Federal Relay Service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4020).

SUPPLEMENTARY INFORMATION:

Background

Under section 4201 of ERISA, an employer who completely or partially withdraws from a defined benefit multiemployer pension plan becomes liable for a proportional share of the plan's unfunded vested benefits. The statute specifies that a ''complete withdrawal'' occurs whenever an employer either permanently (1) ceases to have an obligation to contribute to the plan, or (2) ceases all operations covered under the plan. See ERISA section 4203(a). Under the second test, therefore, an employer who closes or sells its operations will incur withdrawal liability. Under the first test, an employer who remains in business but who no longer has an obligation to contribute to the plan also is liable. The ''partial withdrawal'' provisions of sections 4205 and 4206 impose a lesser measure of liability upon employers who greatly reduce, but do not eliminate, the operations that generate contributions to the plan. The withdrawal liability provisions of ERISA are a critical factor in maintaining the solvency of these pension plans and reducing claims made on the multiemployer plan guaranty fund maintained by PBGC. Without withdrawal liability rules, an employer who participates in an underfunded multiemployer plan would have a powerful economic incentive to reduce expenses by withdrawing from the plan.

Congress nevertheless allowed for the possibility that, in certain industries, the fact that particular employers go out of business (or cease operations in a specific geographic region) might not result in permanent damage to the pension plan's contribution base. In the construction industry, for example, the work must necessarily take place at the construction site; if that work generates contributions to the pension plan, it does not much matter which employer does the work. Put another way, if a construction employer goes out of business, or stops operations in a geographic area, pension plan contributions will not diminish if a second employer who contributes to the plan fills the void. The plan's contribution base is damaged, therefore, only if the employer stops contributing to the plan but continues to perform construction work in the jurisdiction of the collective bargaining agreement.

This reasoning led Congress to adopt a special definition of the term ''withdrawal'' for construction industry plans. Section 4203(b)(2) of ERISA provides that a complete withdrawal occurs only if an employer ceases to have an obligation to contribute under a plan, but the employer nevertheless performs previously covered work in the jurisdiction of the collective bargaining agreement anytime within five years after the employer ceased its contributions.[1] There is a parallel rule

[1] Section 4203(c)(1) of ERISA applies a similar definition of complete withdrawal to the entertainment industry, except that the pertinent jurisdiction is the jurisdiction of the plan rather than the jurisdiction of the collective bargaining agreement. No plan has ever requested PBGC to

for partial withdrawals from construction plans. Under section 4208(d)(1) of ERISA, ''[a]n employer to whom section 4203(b) (relating to the building and construction industry) applies is liable for a partial withdrawal only if the employer's obligation to contribute under the plan is continued for no more than an insubstantial portion of its work in the craft and area jurisdiction of the collective bargaining agreement of the type for which contributions are required.''

Section 4203(f) of ERISA provides that PBGC may prescribe regulations under which plans that are not in the construction industry may be amended to use special withdrawal liability rules similar to those that apply to construction plans. Under the statute, the regulations ''shall permit the use of special withdrawal liability rules * * * only in industries'' that PBGC determines share the characteristics of the construction industry. In addition, each plan application must show that the special rule ''will not pose a significant risk to the [PBGC] insurance system.'' Section 4208(e)(3) of ERISA provides for parallel treatment of partial withdrawal liability rules.

The regulation on Extension of Special Withdrawal Liability Rules (29 CFR part 4203), prescribes the procedures a multiemployer plan must follow to request PBGC approval of a plan amendment that establishes special complete or partial withdrawal liability rules. Under 29 CFR 4203.3(a), a complete withdrawal rule must be similar to the statutory provision that applies to construction industry plans under section 4203(b) of ERISA. Any special rule for partial withdrawals must be consistent with the construction industry partial withdrawal provisions.

Each request for approval of a plan amendment establishing special withdrawal liability rules must provide PBGC with detailed financial and actuarial data about the plan. In addition, the applicant must provide PBGC with information about the effects of withdrawals on the plan's contribution base. As a practical matter, the plan must show that the characteristics of employment and labor relations in its industry are sufficiently similar to those in the construction industry that use of the construction rule would be appropriate. Relevant factors include the mobility of the employees, the intermittent nature of the employment, the project-by-project nature of the work, extreme fluctuations in the level of an employer's covered work under the plan, the existence of a consistent pattern of entry and withdrawal by employers, and the local nature of the work performed. PBGC will approve a special withdrawal liability rule only if a review of the record shows that:

(1) The industry has characteristics that would make use of the special construction withdrawal rules appropriate; and

(2) The adoption of the special rule would not aversely affect the plan. After review of the application and all public comments, PBGC may approve the amendment in the form proposed by the plan, approve the application subject to conditions or revisions, or deny the application.

Request

On July 6, 2005, PBGC published a notice soliciting public comment on a request on behalf of the Service Employees International Union Local 25 and Participating Employers Pension Trust (''Plan'') for approval of an amendment prescribing special withdrawal liability rules that, if approved by PBGC, would be effective as of September 30, 2002. PBGC received no comments on the notice.

The plan is a multiemployer plan covering the commercial building cleaning and security industry in Chicago, Illinois. It is maintained pursuant to collective bargaining agreements with the Building Owners and Managers Association of Chicago and independent cleaning contractors. As of October 1, 2003, it had approximately 10,000 active participants and was paying approximately $14.4 million in benefits to 4,157 pensioners and survivors.

The plan had 173 contributing employers as of October 1, 2002, and contributions for the year ending September 30, 2003, were $10.7 million. The number of contributing employers has remained stable from 1996–2002, with a small increase in 2001 when employees of independent contractors who clean Chicago public school and police stations became participants in the plan. Between 1996 and 2002, the number of active participants increased by almost 67%.

Contributions have increased at a faster rate than benefit payments, with increases occurring as new groups were added to the plan; in 1997, benefits were 248% of contributions and in 2003 they were 134% of contributions. The contribution rate was $12 per employee per week from 1981 until 2003, when it was increased to $18 per employee per week.

Since October 1, 2001, the monthly benefit has been $27 for each year of credited service after December 1, 1968, plus $10 per year of credited service before December 1, 1968. Total service is limited to 25 years. (In 1999, the rate was $25 and in 2000, it was $26.) In addition, the plan has increased the pensions of retirees by 4.87% in 1998 and by 1.00% in 2000.

SUMMARY OF ACTUARIAL VALUATION RESULTS, 2000–2003

Item	Valuation Date (October 1)			
	2003	2002	2001	2000
Active participants	10,297	10,061	7,995	7,182
Retirees	4,157	4,088	4,146	4,070
Monthly benefit accrual rate	27	27	27	26
Max. monthly benefit	675	675	675	650
Contributions	10,739	7,804	6,579	5,340
Benefits (000)	14,424	13,786	13,258	12,839
Accrued liability (000)	229,508	217,770	210,172	196,940
Market value of assets (000)	195,336	174,021	189,389	219,731
Net min. funding charge w/o credit bal. (000)	14,039	12,822	9,338	6,974
Normal cost (000)	8,888	8,674	6,719	5,585
Unfunded accrued liability* (000)	34,172	43,749	20,783	(22,791)
Present value of vested benefits (000)	206,284	198,020	192,041	183,588

determine that it shares the characteristics of an entertainment plan.

SUMMARY OF ACTUARIAL VALUATION RESULTS, 2000–2003—Continued

Item	Valuation Date (October 1)			
	2003	2002	2001	2000
Unfunded liability, vested benefits* (000)	10,948	23,999	2,652	(36,143)
Valuation interest rate (%)	7.5	7.5	7.5	7.5

* Using market value of assets

Decision on the Proposed Amendment

The statute and the implementing regulation state that PBGC must make two factual determinations before it approves a request for an amendment that adopts a special withdrawal liability rule. ERISA section 4203(f); 29 CFR 4203.4(a). First, on the basis of a showing by the plan, PBGC must determine that the amendment will apply to an industry that has characteristics that would make use of the special rules appropriate. Second, PBGC must determine that the plan amendment will not pose a significant risk to the insurance system. PBGC's discussion on each of those issues follows. After review of the record submitted by the Plan, and having received no public comments, PBGC has entered the following determinations.

1. What Is the Nature of the Industry?

In determining whether an industry has the characteristics that would make an amendment to special rules appropriate, an important line of inquiry is the extent to which the Plan's contribution base resembles that found in the construction industry. This threshold question requires consideration of the effect of employer withdrawals on the Plan's contribution base.

Work covered by this plan must be performed at the office building located in Chicago. Thus, the work is local in nature; it generally will continue to be covered by the Plan. An employer ceases contributing when work is outsourced, the contractor loses a cleaning or security contract with a building owner, bankruptcy, closeout of a business as a result of retirement, or business relocation. Over the past ten years, cessation of contributions by any individual employer has not had an adverse impact on the Plan's contribution base. Most employers that have ceased to contribute have been replaced by another employer who begins contributing for the same work.

2. What Is the Exposure and Risk of Loss to PBGC and Participants?

Exposure. The bargaining parties have increased benefits for active workers by just over 25% since 1999. For a participant who retires with 25 years of service (the maximum) the monthly benefit has risen from $538 to $675. Thus, benefit liabilities will rise because recent retirees will have higher benefits.

Risk of loss. The record shows that the Plan presented a low risk of loss to PBGC guaranty funds. The Plan's active participant population is increasing. Plan assets increased from 1997 to 2000, and dipped slightly after that. While no longer fully funded for accrued or vested benefits, underfunding decreased in 2003. The Plan and the covered industry have unique characteristics that suggest that the Plan's contribution base is likely to remain stable. Contributions to the Plan are made with respect to Chicago commercial office buildings. Consequently, the Plan's contribution base is secure and the departure of one employer from the Plan is not likely to have an adverse effect on the contribution base so long as the number of buildings covered does not decline.

Conclusion

Based on the facts of this case and the representations and statements made in connection with the request for approval, PBGC has determined that the plan amendment modifying special withdrawal liability rules (1) will apply only to an industry that has characteristics that would make the use of special withdrawal liability rules appropriate, and (2) will not pose a significant risk to the insurance system. Therefore, PBGC hereby grants the Plan's request for approval of a plan amendment modifying special withdrawal liability rules, as set forth herein. Should the Plan wish to amend these rules at any time, PBGC approval of the amendment will be required.

Issued at Washington, DC, on this 17th day of November, 2005.

Bradley D. Belt,

Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. E5–6625 Filed 11–28–05; 8:45 am]

BILLING CODE 7708–01–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 1–31816]

Issuer Delisting; Notice of Application of Centennial Specialty Foods Corporation To Withdraw Its Common Stock, $.0001 Par Value, From Listing and Registration on the Boston Stock Exchange, Inc.

November 22, 2005.

On November 4, 2005, Centennial Specialty Foods Corporation, a Delaware corporation (''Issuer''), filed an application with the Securities and Exchange Commission (''Commission''), pursuant to Section 12(d) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 12d2–2(d) thereunder,[2] to withdraw its common stock, $.0001 par value (''Security''), from listing and registration on the Boston Stock Exchange, Inc. (''BSE'').

On November 1, 2004, the Board of Directors (''Board'') of the Issuer approved resolutions on November 1, 2005 to withdraw the Security from listing on BSE. The Issuer stated that the following reason factored into the Board's decision to withdraw the Security from BSE: (1) The Issuer was recently delisted from the Nasdaq Stock Market, and as a result, BSE suspended trading in the Security on October 26, 2005; (2) the Issuer does not believe it will be able to comply with BSE's requirement to have an audit committee composed of at least three independent board members; and (3) in order to reduce costs, the Issuer expects to terminate its obligations to file reports with the Commission or otherwise be subjected to the Act through filing of Form 15 with the Commission.

The Issuer stated in its application that it has complied with Rule 12d–2–2(d) under the Act [3] by complying with all applicable laws in the State of Delaware, the state in which the Issuer is incorporated, and by providing BSE with the required documents governing the withdrawal of securities from listing and registration on BSE. The Issuer's

[1] 15 U.S.C. 78*l*(d).

[2] 17 CFR 240.12d2–2(d).

[3] *See id.*

application relates solely to the withdrawal of the Security from listing on BSE and shall not affect its obligation to be registered under Section 12(b) of the Act.[4]

Any interested person may, on or before December 15, 2005 comment on the facts bearing upon whether the application has been made in accordance with the rules of BSE, and what terms, if any, should be imposed by the Commission for the protection of investors. All comment letters may be submitted by either of the following methods:

Electronic Comments

• Send an e-mail to *rule-comments@sec.gov*. Please include the File Number 1–31816 or;

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 1–31816. This file number should be included on the subject line if e-mail is used. To help us 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/delist.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–6662 Filed 11–28–05; 8:45 am]

BILLING CODE 8010–01–P

[4] 15 U.S.C. 78*l*(b).

[5] 17 CFR 200.30–3(a)(1).

SECURITIES AND EXCHANGE COMMISSION

[File No. 1–32657]

Issuer Delisting; Notice of Application of Nabors Industries Ltd. To Withdraw Its Common Shares, $.001 Par Value, From Listing and Registration on the American Stock Exchange LLC

November 22, 2005.

On November 3, 2005, Nabors Industries Ltd., a Bermuda exempted company (''Issuer''), filed an application with the Securities and Exchange Commission (''Commission''), pursuant to Section 12(d) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 12d2–2(d) thereunder,[2] to withdraw its common shares, $.001 par value (''Security''), from listing and registration on the American Stock Exchange LLC (''Amex'').

On the Board of Directors (''Board'') of the Issuer unanimously approved a resolution on May 6, 2005, to withdraw the Security from listing on Amex and to list the Security on the New York Stock Exchange, Inc. (''NYSE''). The Issuer stated that the Board's reason to withdraw the Security from Amex and list the Security on NYSE was to avoid direct and indirect costs and the division of the market resulting from dual listing on Amex and NYSE.

The Issuer stated in its application that it has met the requirements of Amex Rule 18 by complying with all applicable laws in effect in Bermuda, in which it is incorporated, and providing written notice of withdrawal to Amex.

The Issuer's application relates solely to the withdrawal of the Security from listing on Amex, and shall not affect its continued listing on NYSE or its obligation to be registered under Section 12(b) of the Act.[3]

Any interested person may, on or before December 15, 2005, comment on the facts bearing upon whether the application has been made in accordance with the rules of Amex, and what terms, if any, should be imposed by the Commission for the protection of investors. All comment letters may be submitted by either of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/delist.shtml*); or

• Send an e-mail to *rule-comments@sec.gov*. Please include the File Number 1–32657 or;

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 1–32657. This file number should be included on the subject line if e-mail is used. To help us 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/delist.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–6663 Filed 11–28–05; 8:45 am]

BILLING CODE 8010–01–P

[1] 15 U.S.C. 78*l*(d).

[2] 17 CFR 240.12d2–2(d).

[3] 15 U.S.C. 78*l*(b).

[4] 17 CFR 200.30–3(a)(1).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52823; File No. SR–CBOE–2005–90]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change To Adopt a Simple Auction Liaison System To Auction Qualifying Marketable Orders for Potential Price Improvement

November 22, 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 October 26, 2005, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

prepared by CBOE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its rules to adopt a Simple Auction Liaison (''SAL'') system to auction qualifying inbound orders for potential price improvement. Below is the text of the proposed rule change. Proposed new language is in *italics*.

Chicago Board Options Exchange, Incorporated

Rules

* * * * *

Rule 6.13. CBOE Hybrid System's Automatic Execution Feature

(a) No change.

(b) Automatic Execution

(i) Eligibility: Orders eligible for automatic execution through the CBOE Hybrid System may be automatically executed in accordance with the provisions of this Rule *or in accordance with Rule 6.13A for classes that have been designated for auction price improvement*. This section governs automatic executions and split-price automatic executions. The automatic execution and allocation of orders or quotes submitted by market participants also is governed by Rules 6.45A(c) and (d).

(ii)–(iv) No change.

(c)–(e) No change.

* * * * *

Rule 6.13A Simple Auction Liaison (SAL)

This Rule governs the operation of the SAL system. SAL is a feature within the Hybrid System that auctions marketable orders for price improvement over the NBBO.

(a) SAL Eligibility. The Exchange, with input from the appropriate Floor Procedure Committee, shall designate the eligible order size, eligible order type, eligible order origin code (i.e. public customer orders, non-market maker broker-dealer orders, and market maker broker-dealer orders), and classes in which SAL shall be activated. For such classes, SAL shall automatically initiate an auction process for any order that is eligible for automatic execution by the Hybrid System pursuant to Rule 6.13 (''Agency Order''), except when the Exchange's disseminated quotation contains one or more resting limit orders and does not contain sufficient Market-Maker quotation size to satisfy the entire Agency Order.

(b) SAL Auction. Prior to commencing the auction, SAL shall stop the Agency Order at the NBBO against Market-Maker quotations displayed at the NBBO on the opposite side of the market as the Agency Order. SAL will not allow such quotations to move to an inferior price or size throughout the duration of the auction. The auction will last for a period of time not to exceed two (2) seconds as determined by the Exchange on a class-by-class basis. Auction responses may be submitted by Market-Makers with an appointment in the relevant option class and Members acting as agent for orders resting at the top of the Exchange's book opposite the Agency Order. With respect to responses, the following shall apply:

(i) Responses shall not be visible to other auction participants and shall not be disseminated to OPRA.

(ii) Responses may be submitted in one-cent increments.

(iii) Multiple responses are allowed.

(iv) Responses may be cancelled.

(v) Responses cannot cross the Exchange's disseminated quotation on the opposite side of the market.

(c) Allocation of Agency Orders. Agency Orders may be executed at multiple prices and shall be executed in two rounds per price point as follows:

(i) First Round Allocation. The Agency Order shall first be allocated at the prevailing price (the ''First Allocation Round'') between all parties that represented the Exchange's NBBO quotation at the time the auction commenced (''Original Quoters'') up to the size of such quotation. During the First Allocation Round, the following shall apply:

(1) the Agency Order shall be allocated pursuant to the matching algorithm in effect for the class pursuant to Rules 6.45A or 6.45B as appropriate;

(2) An Original Quoter may only participate in a First Round Allocation at each execution price up to its size at the NBBO at the time the auction commenced; and

(3) If the applicable matching algorithm includes a participation entitlement, then Market-Makers that qualify for a participation entitlement at the NBBO price will receive a participation entitlement if they match the executing auction price(s).

(ii) Second Allocation Round. If an Agency Order is not fully executed during the First Allocation Round at a particular price point, then a Second Allocation Round shall occur. During this round, all responses received during the auction at the prevailing auction price that were not eligible for the First Allocation Round shall participate in accordance with the matching algorithm in effect for the class, and the size of such responses shall be capped to the size of the Agency Order for allocation purposes. There shall be no participation right during the Second Allocation Round.

(d) Early Termination of Auction. The auction will terminate early under the following circumstances:

(i) If the Hybrid System receives an unrelated non-marketable limit order on the opposite side of the market from the Agency Order that improves any auction responses, the unrelated order will trade (after any responses that were priced better than the unrelated order have traded) to the fullest extent possible at the midpoint of the best remaining auction response and the unrelated order's limit price (rounded towards the unrelated order's limit price when necessary).

(ii) If the Hybrid System receives an unrelated market or marketable limit order on the opposite side of the market from the Agency Order, such unrelated order will trade to the fullest extent possible at the midpoint of the best auction response and the NBBO on the opposite side of the market from the auction responses (rounded towards the disseminated quote when necessary).

(iii) If the Hybrid System receives an unrelated order on the same side of the market as the Agency Order that is marketable against the NBBO, then the auction shall conclude and the Agency Order shall trade against the prevailing responses in accordance with subparagraph (c) above.

(iv) Any time there is a quote lock on the Exchange pursuant to Rule 6.45A(d).

(v) Any time a response matches the Exchange's disseminated quote on the opposite side of the market from the response.

. . . Interpretations and Policies

.01 A pattern or practice of submitting unrelated orders that cause an exposure period to conclude early will be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 4.1 and other Exchange Rules.

.02 Disseminating information regarding auctioned orders to third parties will be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 4.1 and other Exchange Rules.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE included statements concerning

the purpose of and basis for the proposal and discussed any comments it received on the proposal. The text of these statements may be examined at the places specified in Item IV below. 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 purpose of the proposed rule change is to implement SAL, a price improvement auction system for qualifying inbound orders. SAL is a feature within CBOE's Hybrid System that auctions marketable orders for price improvement over the National Best Bid or Offer (''NBBO''). Thus, orders that would otherwise be automatically executed at CBOE's NBBO market will be exposed to a brief auction in penny increments for potential price improvement. SAL would not auction an order if CBOE were not the NBBO market at the time the order was received. As proposed, the Exchange would designate the eligible order size (*e.g.*, all orders under 100 contracts), eligible order type (*e.g.*, non-contingency orders), eligible order origin code (*e.g.*, public customer orders, non-market maker broker-dealer orders, and market maker broker-dealer orders), and classes in which SAL shall be activated.

For eligible classes, SAL shall automatically initiate an auction process for any qualifying order (''Agency Order'') that is eligible for automatic execution by the Hybrid System except when the Exchange's disseminated quotation contains one or more resting limit orders and does not contain sufficient quotation size from CBOE Market-Makers to satisfy the entire Agency Order. The reason SAL requires sufficient Market-Maker quote size in the NBBO quote to initiate a SAL auction is because SAL stops the Agency Order against the Market-Maker quotes. If CBOE's NBBO price consisted only of resting limit orders, SAL could not stop the Agency Order against such limit orders because the limit orders might be cancelled prior to the conclusion of the auction.

As mentioned above, SAL stops the Agency Order at the NBBO against Market-Maker quotations displayed at the NBBO on the opposite side of the market as the Agency Order. In connection with this stop, SAL will not allow such quotations to move to an inferior price or size throughout the duration of the auction. The auction will last for a period of time not to exceed two (2) seconds as determined by the Exchange. Auction responses may be submitted by Market-Makers with an appointment in the relevant option class and by CBOE Members acting as agent for orders resting at the top of the Exchange's book opposite the Agency Order. With respect to responses, the following shall apply: (i) Responses shall not be visible to other auction participants and shall not be disseminated to the Options Price Reporting Authority; (ii) responses may be submitted in one-cent increments (and not less than one-cent increments); (iii) multiple responses are allowed; (iv) responses may be cancelled prior to the conclusion of the auction; and (v) responses cannot cross the Exchange's disseminated quotation on the opposite side of the market.

At the conclusion of the auction period, the Agency Order will be executed at the best auction response prices and may be executed at multiple prices if necessary. The allocation of the execution of the Agency Order shall occur in two rounds at each price point. Participation in the first round (the ''First Allocation Round'') is limited to those that constituted the Exchange's NBBO quote (on the side of the market opposite the Agency Order) at the time the SAL auction commenced (''Original Quoters''). This is to encourage aggressive quoting and reward those that set the NBBO market. During the First Allocation Round, the following shall apply: (i) The Agency Order shall be allocated pursuant to the matching algorithm in effect for the class under Rules 6.45A or 6.45B as appropriate; (ii) Original Quoters may only participate in a First Allocation Round at each execution price up to their respective size at the NBBO at the time the auction commenced; and (iii) if the applicable matching algorithm includes a participation entitlement, then Market-Makers that qualified for a participation entitlement at the NBBO price will receive a participation entitlement in a First Allocation Round if they match the execution price for that round.

If an Agency Order is not fully executed during the First Allocation Round, then a second round (''Second Allocation Round'') shall occur. During this round, all responses received during the auction at the execution price of the immediately preceding First Allocation Round that were not eligible for that preceding round shall participate in accordance with the matching algorithm in effect for the class. The size of such responses shall be limited to the size of the Agency Order for allocation purposes. There is no participation right during the Second Allocation Round.

The following is an example of a SAL auction: The CBOE market of 1.00–1.10 is the NBBO. The 1.10 offer is for 300 contracts and is comprised of Market-Maker A for 100 contracts, Market-Maker B for 100 contracts and Market-Maker C for 100 contracts. A qualifying order is received to buy 100 contracts at 1.10. Instead of automatically executing the order at 1.10, SAL will auction the order. Assume the auction timer is set to one second. At the conclusion of the one-second auction, the following responses were received: Market-Maker A at 1.07 for 10 contracts and at 1.08 for 40 contracts; Market-Maker B at 1.08 for 40 contracts and at 1.09 for 100 contracts; and Market-Maker X at 1.07 for 10 contracts and at 1.08 for 100 contracts. The execution of the Agency order will proceed as follows: 10 contracts get filled at 1.07 against Market-Maker A, who is an Original Quoter; 10 contracts get filled at 1.07 against Market-Maker X, who is not an Original Quoter; and the remaining 80 contracts get filled against Market-Makers A and B (40 each) at 1.08. Market-Maker X does not participate at 1.08 since it is not an Original Quoter.

The following situations will cause the auction to conclude early. First, if the Hybrid System receives an unrelated non-marketable limit order on the opposite side of the market from the Agency Order that improves any auction responses, the auction will conclude and the unrelated order will trade (after any responses that were priced better than the unrelated order have traded) to the fullest extent possible at the midpoint of the best remaining auction response and the unrelated order's limit price (rounded towards the unrelated order's limit price when necessary). This will allow both the unrelated order and the Agency Order to obtain price improvement. Second, if the Hybrid System receives an unrelated market or marketable limit order on the opposite side of the market from the Agency Order, the auction will conclude and the unrelated order will trade to the fullest extent possible at the midpoint of the best auction response and the NBBO on the opposite side of the market from the auction responses (rounded towards the disseminated quote when necessary). This also provides price improvement to both orders. Third, if the Hybrid System receives an unrelated order on the same side of the market as the Agency Order that is marketable against the NBBO, then the auction will conclude and the Agency Order will

trade against the responses at the highest price points. Fourth, the auction will conclude early any time there is a quote lock on the Exchange pursuant to Rule 6.45A(d). Fifth, the auction will conclude early any time a response matches the Exchange's disseminated quote on the opposite side of the market from the response.

Lastly, the Exchange seeks to adopt provisions providing that a pattern or practice of submitting unrelated orders that cause an auction to conclude early and disseminating information regarding such orders to third parties will be deemed conduct inconsistent with just and equitable principles of trade and a violation of CBOE Rule 4.1 and, potentially, other Exchange Rules.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with section 6(b) of the Act [3] in general and furthers the objectives of section 6(b)(5) [4] in particular in that by swiftly providing potential price improvement over the NBBO to qualifying inbound orders, it should promote just and equitable principles of trade, serve to remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would 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 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2005–90 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–2005–90. 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 CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CBOE–2005–90 and should be submitted on or before December 20, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–6656 Filed 11–28–05; 8:45 am]

BILLING CODE 8010–01–P

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(5).

[5] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52818; File No. SR–CBOE–2005–91]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change and Amendment No. 1 Thereto Relating to Its Marketing Fee Program

November 22, 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 November 2, 2005, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On November 17, 2005, the CBOE submitted Amendment No. 1 to the proposed rule change.[3] The CBOE has designated this proposal as one changing a fee imposed by the CBOE under Section 19(b)(3)(A)(ii) of the Act [4] and Rule 19b–4(f)(2) thereunder,[5] which renders the proposal, as amended, effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CBOE proposes to amend its Fees Schedule and its marketing fee program in a number of respects, including to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Partial Amendment No. 1 (''Amendment No. 1''): (1) Amended the effective date of the proposal from November 1, 2005 to November 2, 2005; (2) amended the purpose section of the filing to clarify that the Preferred Market-Maker Program is a pilot program set to expire on June 2, 2006; (3) amended the rule text to specify that the marketing fee program will expire on June 2, 2006, the date the Preferred Market-Maker Program is set to expire; and (4) made a technical correction to a footnote.

[4] 15 U.S.C. 78s(b)(3)(A)(ii).

[5] 17 CFR 240.19b–4(f)(2).

permit a ''Preferred Market-Maker'' to direct the Exchange to disburse funds generated by the marketing fee where an order provider sends an order to the Exchange designating a Preferred Market-Maker. These changes to the marketing fee program would be effective November 2, 2005 and remain in effect until June 2, 2006, which is the date that CBOE's pilot program establishing its Preferred Market-Maker program is scheduled to expire, unless extended through a rule filing submitted to and approved by the Commission.[6]

Below is the text of the proposed rule change, as amended. Proposed new language is in *italic*; proposed deletions are in [brackets].[7]

CHICAGO BOARD OPTIONS EXCHANGE, INC.

FEES SCHEDULE

[October 25] November 2, 2005

1. No Change.
2. MARKETING FEE (6)(16)—$.22
3.–4. No Change.

FOOTNOTES:

(1)–(5) No Change.

(6) The Marketing Fee will be assessed only on transactions of Market-Makers, RMMs, e-DPMs, DPMs, and LMMs at the rate of $.22 per contract on all classes of equity options, options on HOLDRs, options on SPDRs, and options on DIA. The fee will not apply to Market-Maker-to-Market-Maker transactions. This fee shall not apply to index options and options on ETFs (other than options on SPDRs and options on DIA). *If less than 80% of the marketing fee funds are paid out by the DPM or LMM in a given month, then* [Should any surplus of the marketing fees at the end of each month occur,] the Exchange would [then] refund such surplus at the end of the month[, if any,] on a pro rata basis based upon contributions made by the Market-Makers, RMMs, e-DPMs, DPMs and LMMs. *However, if 80% or more of the accumulated funds in a given month are paid out by the DPM or LMM, there will not be a rebate for that month and the funds will carry over and will be included in the pool of funds to be used by the DPM or LMM the following month. At the end of each quarter, the Exchange would then refund any surplus, if any, on a pro rata basis based upon contributions made by the Market-Makers, RMMs, DPMs, e-DPMs and LMMs. CBOE's marketing fee program as described above will be in effect until June 2, 2006.*

* * * * *

[6] *See* Amendment No. 1, *supra* note 3.

[7] *Id.*

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, as amended, and discussed any comments it received on the proposed rule change, as amended. 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 states that on October 29, 2004, it amended its marketing fee program.[8] The current marketing fee is assessed upon Designated Primary Market-Makers (''DPMs''), Electronic DPMs (''e-DPMs''), Remote Market-Makers (''RMMs''), Lead Market-Makers (''LMMs''), and Market-Makers at a rate of $0.22 for every contract they enter into on the Exchange other than Market-Maker-to-Market-Maker transactions (which includes all transactions between any combination of DPMs, e-DPMs, RMMs, LMMs, and Market-Makers). The marketing fee is assessed in all equity option classes and options on HOLDRs®[9], options on SPDRs®[10] and options on DIA.[11] The Exchange represents that the purpose of the marketing fee program is to provide the members of the Exchange with the ability to compete for the opportunity to trade with those orders that may otherwise be routed to other exchanges.

The Exchange states that under the current program, all funds generated by the marketing fee are collected by the Exchange and recorded according to the DPM or LMM, as applicable, station and class where the options subject to the fee are traded. The money collected is disbursed by the Exchange according to the instructions of the DPM or LMM. Those funds are made available to the DPM or LMM solely for those trading crowds where the fee was assessed and may only be used by that DPM or LMM to attract orders in the classes of options for which the fee was assessed.

CBOE recently obtained approval of a rule filing adopting a Preferred Market-Maker program.[12] Under that program, order providers can send an order to the Exchange designating any CBOE Market-Maker (including any DPM, e-DPM, LMM, RMM, and Market-Maker) as a Preferred Market-Maker. If the Preferred Market-Maker is quoting at the NBBO at the time the order is received on CBOE, the Preferred Market-Maker is entitled to a participation entitlement of 50% when there is one Market-Maker also quoting at the best bid/offer on the Exchange and 40% when there are two or more Market-Makers quoting at the best bid/offer on the Exchange.

CBOE proposes to amend its marketing fee program in a number of respects in light of the recent adoption of its Preferred Market-Maker program. These changes to the marketing fee program would be effective November 2, 2005 and expire on June 2, 2006, which is the date that CBOE's pilot program establishing its Preferred Market-Maker program is scheduled to expire, unless extended through a rule filing submitted to and approved by the Commission.[13] In particular, CBOE proposes to amend its marketing fee program to provide that a Market-Maker would have access to the marketing fee funds generated by orders sent to the Exchange designating that Market-Maker as a ''Preferred Market-Maker.''

The following is a description of the three-step process by which the entire pool of funds generated by the marketing fee would be apportioned between the DPM or LMM, and Preferred Market-Makers. First, consistent with the current program, each month all funds generated by the marketing fee would be collected by the Exchange and recorded according to the DPM or LMM, as applicable, station and class where the option classes subject to the fee are traded. If a Market-Maker (including any DPM, e-DPM, LMM, and RMM) is designated as a Preferred Market-Maker on an order from a payment accepting firm (''PAF''), the Market-Maker would be given access to the marketing fee funds generated from that order, even if the Preferred Market-Maker did not participate in the

[8] For a description of CBOE's marketing fee program, *see* Securities Exchange Act Release No. 50736 (November 24, 2004), 69 FR 69966 (December 1, 2004) (SR–CBOE–2004–68).

[9] HOLDRs are trust-issued receipts that represent an investor's beneficial ownership of a specified group of stocks. *See* Interpretation .07 to CBOE Rule 5.3.

[10] *See*, Securities Exchange Act Release No. 51052 (January 18, 2005), 70 FR 3757 (January 26, 2005) (SR–CBOE–2005–05).

[11] *See*, Securities Exchange Act Release No. 52474 (September 20, 2005), 70 FR 56520 (September 27, 2005) (SR–CBOE–2005–72).

[12] *See* Securities Exchange Act Release No. 52506 (September 23, 2005), 70 FR 57340 (September 30, 2005) (SR–CBOE–2005–58).

[13] *See* Amendment No. 1, *supra* note 3.

execution of the order because the Market-Maker was not quoting at the NBBO at the time the order was received on CBOE.[14] The Exchange believes that it is appropriate to give Preferred Market-Makers access to all of the funds generated by the marketing fee for any order as to which they were designated the Preferred Market-Maker because the Preferred Market-Maker negotiated with a PAF to send their order flow to CBOE and to designate a particular Market-Maker as the Preferred Market-Maker. Second, the DPM or LMM, as applicable, would be given access to the marketing fee funds generated from all other orders from PAFs in its appointed classes in a particular trading station. Third, the marketing fee funds generated by orders from non-PAFs, if any, would be apportioned monthly among the DPM or LMM, and Preferred Market-Makers on a on a pro-rata basis, based on the percentage of contracts traded by each DPM or LMM and Preferred Market-Maker against orders from PAFs during the month in the option classes located at a particular trading station.

The following is an example of how funds generated from CBOE's marketing fee program would be allocated to Preferred Market-Makers, DPMs, and LMMs pursuant to the preceding three steps. As noted above, each month all funds generated by the marketing fee are collected by the Exchange and recorded according to the DPM or LMM, as applicable, station and class where the option classes subject to the fee are traded. Thus, assuming 45,455 contracts traded in a particular month at Station 1 on the trading floor, $10,000 (45,455 contracts × $.22) would be generated as a result of the marketing fee to be used to attract order flow to CBOE.

Pursuant to Step 1, assuming the DPM and two other Market-Makers were designated as Preferred Market-Makers for orders executed in option classes at Station 1, they would be allocated the following funds:

	Contracts	Funds Allocated
DPM	5,000	$1,100 ($.22 * 5,000)
Preferred Market-Maker #1	2,500	$550 ($.22 * 2,500)
Preferred Market-Maker #2	3,500	$770 ($.22 * 3,500)
Total	11,000	$2,420 ($.22 * 11,000)

Pursuant to Step 2, the Exchange would determine the amount of funds generated from orders from PAFs that were executed in option classes at Station 1, and these funds would be allocated to the DPM to attract order flow to CBOE. Assuming orders from PAFs representing 10,000 contracts were executed with Market-Makers (including the DPM or LMM, e-DPM(s), and RMM(s)), at Station 1, $2,200 (10,000*$.22) in funds would be generated and allocated to the DPM.

As a result of Steps 1 and 2 above, the original pool of funds generated by the marketing fee at Station ($10,000), would have been depleted in Step 1 by $2,420, and in Step 2 by $2,200. Assuming remaining number of contracts executed at Station 1, *i.e.*, 24,455 contracts,[15] were from orders from non-PAFs, a total of $5,380 (24,455 * $.22) would be the remaining balance of funds. Pursuant to Step 3, these funds would be apportioned monthly among the DPM (or LMM) and Preferred Market-Makers on a pro-rata basis, based on the percentage of contracts traded by each DPM (or LMM) and Preferred Market-Maker against orders from PAFs. Assuming the DPM and the two Preferred Market-Makers executed the following percentage of contracts from orders from PAFs at Station 1, they would be allocated the following funds:

	% of PAF contracts (percent)	Funds allocated (percent)
DPM	65	$3,497 (65 * $5,380)
Preferred Market-Maker #1	15	807 (15 * $5,380)
Preferred Market-Maker #2	20	1,076 (20 * $5,380)

The funds generated by the marketing fee would continue to be collected by the Exchange and recorded according to the applicable trading station and class where the options subject to the fee are traded. The money collected would be disbursed by the Exchange according to the instructions of the DPM, LMM or the Preferred Market-Maker. These funds shall only be used to attract order flow to CBOE from PAF, and the funds made available to the DPM or LMM may only be used to attract orders in the option classes located at the trading station where the fee was assessed. Thus, a member organization appointed as the DPM at a particular trading station on the trading floor cannot use the funds from that trading station to attract order flow to another trading station on the trading floor where that member serves as the DPM.

Additionally, the Exchange does not intend to continue to require that the funds collected from e-DPMs and RMMs can only be used to attract order flow for the classes in which the e-DPM or RMM is appointed. The Exchange does not believe such a restriction is necessary or reasonable in light of manner in which firms negotiate with PAFs to direct their order flow to the Exchange. Specifically, the Exchange notes that many DPMs or LMMs negotiate with PAFs to route their order flow to the Exchange for all of the classes located at a particular trading station, and not necessarily on a class-by-class basis. Additionally, any use of the marketing fees by the DPM outside of an RMM's or an e-DPM's appointment may still benefit the RMM or e-DPM because e-DPMs and RMMs are permitted under Exchange rules to enter orders in option classes traded on the Exchange that are not included within their appointment. Therefore, the Exchange believes that there is an equitable allocation of use of the fees by the DPM because the order flow from a PAF can be accessed by an RMM or eDPM, outside their appointments, through ''M'' orders.

In the event a Preferred Market-Maker does not disburse all of the funds generated by the marketing fee in a given month, then the funds the Preferred Market-Maker does not disburse would be made available to the DPM or LMM, as applicable, for the following month to attract orders in the classes of options where the DPM or LMM is appointed.

Finally, the Exchange proposes to amend the program with respect to the manner in which surplus funds are refunded to Market-Makers, RMMs, DPMs, e-DPMs, and LMMs. Currently, the Exchange refunds any surplus at the end of the month on a pro rata basis based upon contributions made by the Market-Makers, RMMs, DPMs, e-DPMs, and LMMs. Going forward, if 80% or more of the accumulated funds in a given month are paid out by the DPM or LMM, there would not be a rebate for that month and the funds would carry over and would be included in the pool

[14] For example, assume a Market-Maker is designated as a Preferred Market-Maker on an order for 50 contracts which is executed on CBOE. Under this first step, the Preferred Market-Maker would be given access to a total of $11 (50 contracts × $.22), whether or not the Preferred Market-Maker traded with the order or not.

[15] 45,455 less 11,000 contracts (see Step 1) and 10,000 contracts (see Step 2).

of funds to be used by the DPM or LMM in the following month. If less than 80% of the funds is paid out, Market-Maker rebates would continue to be made on a monthly basis. At the end of each quarter, the Exchange would then refund any surplus, if any, on a pro rata basis based upon contributions made by the Market-Makers, RMMs, DPMs, e-DPMs, and LMMs.

In the foregoing example, the DPM and Preferred Market-Maker #1 and Preferred Market-Maker #2 were allocated the following amounts:

	Total allocated
DPM	$6,797 ($1,100 + 2,200 + 3,497)
Preferred Market-Maker #1	1,357 ($550 + 807)
Preferred Market-Maker #2	1,846 ($770 + 1076)

If the DPM only paid out a total of $6,150 of the $6,797 allocated to it in a given month (or 90% of its funds), then $647 would carry over for the DPM to use to attract order in the following month. If Preferred Market-Maker #1 paid out a total of $1,200 of the $1,357 allocated to it in a given month, then $157 would be made available to the DPM (or LMM) for the following month to attract orders in the classes of options where the DPM (or LMM) is appointed. If Preferred Market-Maker #2 paid out a total of $1,846 allocated to it in a given month, then none of Preferred Market-Maker #2's funds would carry over to the DPM (or LMM) for the following month.

As in the current marketing fee program, the Exchange would not be involved in the determination of the terms governing the orders that qualify for payment with any PAF or the amount of any such payment. The Exchange would provide administrative support for the program in such matters as maintaining the funds, keeping track of the number of qualified orders each firm directs to the Exchange, and making the necessary debits and credits to the accounts of the traders and the PAFs to reflect the payments that are made. Exchange Market-Makers, RMMs, DPMs, e-DPMs, and LMMs would have no way of identifying prior to execution whether a particular order is from a PAF or a non-PAF.

2. Statutory Basis

The Exchange believes that its proposal, as amended, is consistent with Section 6(b) of the Act[16] in general, and furthers the objectives of Section 6(b)(4) of the Act[17] in particular, in that it is an equitable allocation of reasonable dues, fees, and other charges among CBOE members and other persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, will impose any inappropriate burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change, as amended, has been designated as a fee change pursuant to Section 19(b)(3)(A)(ii) of the Act[18] and Rule 19b–4(f)(2)[19] thereunder, because it establishes or changes a due, fee, or other charge imposed by the Exchange. Accordingly, the proposal will took effect upon filing with the Commission. At any time within 60 days of the filing of such proposed rule change, as amended, 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.[20]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2005–91 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–2005–91. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change, as amended, between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2005–91 and should be submitted on or before December 20, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[21]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–6659 Filed 11–28–05; 8:45 am]

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[16] 15 U.S.C. 78f(b).

[17] 15 U.S.C. 78f(b)(4).

[18] 15 U.S.C. 78s(b)(3)(A)(ii).

[19] 17 CFR 240.19b–4(f)(2).

[20] The effective date of the original proposed rule change is November 2, 2005, the effective date of Amendment No. 1 is November 17, 2005. For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposal, the Commission considers the period to commence on November 17, 2005, the date on which the Exchange submitted Amendment No. 1.

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52815; File No. SR–CHX–2005–31]

Self-Regulatory Organizations; Chicago Stock Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto Relating to Participant Fees and Credits

November 21, 2005.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 24, 2005, the Chicago Stock Exchange, Inc. (''CHX'' 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 CHX. On November 7, 2005, the Exchange filed Amendment No. 1 to the proposed rule change.[3] The Exchange filed the proposed rule change pursuant section 19(b)(3)(A) of the Act[4] and Rule 19b–4(f)(2)[5] thereunder, which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CHX proposes to amend its Participant Fee Schedule (''Fee Schedule'') to modify the trading permit fee due the Exchange from a participant if the participant's trading permit is cancelled intrayear and to establish a fee associated with a participant's change of name or corporate form.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the CHX included statements concerning the purpose of, and basis for, the proposed rule changes and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The CHX has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule to modify the trading permit fee due the Exchange from a participant if the trading permit is cancelled intrayear and to establish a fee associated with a participant's change of name or corporate form. The provisions of the Fee Schedule relating to trading permits are relatively new provisions that were added when the Exchange demutualized on February 9, 2005 and issued trading permits upon demutualization and thereafter. Although from a financial perspective, the amount of the trading permit fee ($6,000 per year) is equivalent to pre-demutualization member dues, in fact, trading permits operate much differently than seats on the Exchange. With very limited exceptions, a trading permit cannot be sold, leased, or transferred, and cannot be retained by a participant if the participant is not using the trading permit to trade on the Exchange.

As originally drafted, the Fee Schedule contemplated that each participant would be obligated to pay the entire $6,000 annual trading permit fee, regardless of when the trading permit was cancelled during the year. The Exchange believes that it is appropriate to amend the Fee Schedule to provide for some fee relief for participants whose trading permits are cancelled intrayear. The Exchange also believes that it is necessary for the Exchange to have an adequate basis on which to budget and project annual revenues. Accordingly, the Exchange is proposing a change that would provide for the participant to pay, upon intrayear cancellation, the lesser of $2,000 or the then-outstanding balance of the annual fee. This compromise ensures that the Exchange can budget for at least $2,000 in annual revenue per trading permit, while affording a participant a reduction in the annual trading permit fee if the permit is cancelled early in the year.

The Exchange also proposes to establish a $200 fee per trading permit that a participant would be charged if the participant firm changed its name or its corporate form. This fee would be charged, for example, if a participant firm changed its name from ''XYZ Corporation'' to ''XY Corporation'' or if the participant firm changed its corporate form from a corporation to a limited liability company. Although trading permits generally are not transferable, the Exchange believes it would work a hardship on participants if they were required to obtain new trading permits (and to pay the permit fee on the existing permit, as described above) whenever participant firms changed names or corporate forms.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b)(4) of the Act[6] in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, would 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 either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change, as amended, establishes or changes a due, fee, or other charge imposed by the Exchange and therefore has become effective pursuant to section 19(b)(3)(A) of the Act[7] and subparagraph (f)(2) of Rule 19b–4 thereunder.[8] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purpose of the Act.[9]

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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 replaced the original filing in its entirety.

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 17 CFR 240.19b–4(f)(2).

[6] 15 U.S.C. 78(f)(b)(4).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(2).

[9] For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under section 19(b)(3)(C) of the Act, the Commission considers that period to commence on November 7, 2005, the date the Exchange filed Amendment No. 1 to the proposed rule change. *See* 15 U.S.C. 78s(b)(3)(C).

the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CHX–2005–31 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–CHX–2005–31. 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 offices of the CHX. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CHX–2005–31 and should be submitted on or before December 20, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–6661 Filed 11–28–05; 8:45 am]

BILLING CODE 8010–01–P

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52799; File No. SR–NASD–2005–084]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Relating to Amendments to the Rule Regarding Supervisory Control Systems, Rule 3012, To Require Notification of Reliance on ''Limited Size and Resources'' Exception

November 18, 2005.

I. Introduction

On June 23, 2005, the National Association of Securities Dealers, Inc. (''NASD'') filed with the Securities and Exchange Commission (''SEC'' or ''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 amending the rule regarding supervisory control systems, Rule 3012, to require members relying on the ''limited size and resources'' exception to Rule 3012's general supervisory requirement for conducting producing managers' supervisory reviews to report electronically to NASD their reliance on the exception. On July 8, 2005, NASD submitted Amendment No. 1 to the proposed rule change.[3] On July 27, 2005, NASD submitted Amendment No. 2.[4] The proposed rule change, as amended, was published for comment in the **Federal Register** on August 9, 2005.[5] The Commission received one comment on the proposal. For the reasons discussed below, the Commission is approving the proposed rule change, as amended.

II. Description of the Proposed Rule Change

A. Description of the Proposal

Rule 3012 (Supervisory Control System) requires members to have a system of supervisory control policies and procedures that tests and verifies that a member's supervisory procedures are reasonably designed with respect to the activities of the member and its registered representatives and associated persons to achieve compliance with applicable securities laws and regulations, and with applicable NASD rules, and to amend those supervisory procedures when the testing and verification demonstrate a need to do so. Rule 3012 also requires that a member's supervisory control policies and procedures include, among other things, procedures that are reasonably designed to review and supervise the customer account activity conducted by a member's producing managers.

Generally, only a person senior to or ''otherwise independent'' of a producing manager may conduct the producing manager's reviews. However, Rule 3012 provides a limited exception for any member firm that is so limited in size and resources (the ''limited size and resources'' exception) that the member does not have independent associated persons who can conduct the required supervisory reviews. In such situations, a principal who is sufficiently knowledgeable of the member's supervisory control procedures may conduct the required supervisory reviews.

In its Order approving Rule 3012, the SEC specified that NASD must notify the SEC of those members that elect to rely on Rule 3012's ''limited size and resources'' exception.[6] To fulfill this obligation, NASD will need to identify those members relying on the exception. Accordingly, NASD is filing this rule change requiring firms that rely on the ''limited size and resources'' exception to notify NASD of their reliance on the exception. In *Notice to Members 04–71* (October 2004), the *Notice* announcing the SEC's approval of the Supervisory Control Amendments, NASD advised its members of its intent to file this rule change.

The proposed rule change will require a member that has determined that it must rely on the ''limited size and resources'' exception to Rule 3012 to conduct any of its producing managers' supervisory reviews, to notify NASD electronically (or through any other process prescribed by NASD) within thirty (30) days of the date on which the member first relies on the exception.[7]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 clarified the rule's text.

[4] Amendment No. 2 replaced and superseded Amendment No. 1. Amendment No. 2 further clarified the rule's text.

[5] *See* Exchange Act Release No. 52195 (Aug. 3, 2005), 70 FR 46242 (Aug. 9, 2005) (the ''Notice'').

[6] *See* Exchange Act Release No. 50477 (Sept. 30, 2004), 69 FR 59972 (Oct. 6, 2004) (SR–NASD–2004–116).

[7] Because the ''limited size and resources'' exception became effective on January 31, 2005, a member may already be relying on the exception prior to the effective date of the proposed rule change and, consequently, will be unable to comply with the rule change's requirement that NASD be notified within thirty (30) days of the date on which the member first relies on the exception. In such instance, the proposed rule change would require the member to notify NASD within thirty (30) days of the rule change's effective date.

Afterwards, the member will need to notify NASD of its continued reliance on the exception on an annual basis. Members must ensure that each ensuing annual notification is effected no later than on the anniversary date of the previous year's notification. If a member determines that it no longer needs to rely on the ''limited size and resources'' exception to Rule 3012 to conduct any of its producing managers' supervisory reviews, the member must notify NASD electronically (or through any other process prescribed by NASD) within thirty (30) days of ceasing to rely on the exception.

NASD has recently designed an electronic reporting system that will enable members to notify NASD of their reliance on the exception. Members will be able to access this reporting system on the effective date of this proposed rule change.

NASD will announce the effective date of the proposed rule change in a *Notice to Members* to be published no later than 60 days following Commission approval. The effective date will be 30 days following publication of the *Notice to Members* announcing Commission approval.

B. Comment Summary

The proposal was published for comment in the **Federal Register** on August 9, 2005.[8] We received one comment on the proposal. The commenter, Lincoln Investment Planning, Inc. (''Lincoln''), expressed concern that the proposed annual notification requirement for members that rely on Rule 3012's ''Limited Size and Resources'' exception would impose an undue burden on members to remember the anniversary date of the initial notification.[9] Instead, Lincoln stated that this burden could be reduced by requiring members relying on this exception to only provide an initial notification of their reliance and a second notification when they cease to rely on it. Alternatively, Lincoln also suggested that NASD consider making the notification requirement a part of the quarterly updated NASD Control System.[10]

In response to the Lincoln letter, NASD stated that ''[t]he annual notification requirement helps NASD to provide the SEC with the most accurate information possible. To aid members in completing their annual notification requirement, the electronic reporting system that NASD has designed for members to use, records and displays the date of the member's previous notification.'' [11] Furthermore, to mitigate any concerns regarding a member's obligation to remember the anniversary date of its reliance of the exception, NASD stated that it ''expects to provide members with reminders, electronic or otherwise, in advance of the members' anniversary date for notification of continued reliance on the exception.'' [12]

III. Discussion and Findings

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the provisions of Section 15A(b)(6) [13] of the Act, which require, among other things, NASD's rules to be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

Rule 3012 requires independent supervisory reviews of producing managers. It is designed to prevent fraudulent and manipulative practices and to protect investors. In approving the rule, the Commission said it expected that Rule 3012

> will reduce potential conflicts of interests in situations where the producing branch manager is responsible for generating substantial revenues for the benefit of his supervisor. The Commission believes that such heightened supervisory procedures should help address the potential conflicts of interest with sufficient flexibility so as not to create undue burdens and costs on members.[14]

The rule recognizes, however, that certain firms may conduct their business with significant limitation in size and resources, and accounted for this limitation by approving a ''Limited Size and Resources'' exception. The Commission concluded that the ''Limited Size and Resources'' exception was consistent with Section 15A(b)(6) because it accommodated the smallest NASD members that lack the resources to implement a full scale program to conduct supervisory reviews.[15] However, in approving this exception, the Commission expected NASD to monitor closely the use of this exception to prevent its abuse or use by members other than those for which it was intended.[16]

NASD proposed this amendment to Rule 3012 to provide an efficient measure for monitoring the use of the exception. The Commission believes that this proposed rule change, as amended, accomplishes the goals of Section 15(A)(b)(6) by enabling NASD and the Commission to efficiently monitor members that rely on the ''Limited Size and Resources'' exception in Rule 3012.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act [17] that the proposed rule change, as amended (SR–NASD–2005–084), be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[18]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–6627 Filed 11–28–05; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52816; File No. SR–NYSE–2005–70]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating to iShares ® MSCI Index Funds

November 21, 2005.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 6, 2005, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is approving the proposal on an accelerated basis.

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[8] *See* Notice, *supra* note 3.

[9] *See* e-mail to *rule-comments@sec.gov* from Deidre B. Koerick, Lincoln Investment Planning, Inc., dated Aug. 30, 2005.

[10] *Id.*

[11] *See* letter from Patricia M. Albrecht, Assistant General Counsel, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated Oct. 4, 2005.

[12] *Id.*

[13] 15 U.S.C. 78o–3(b)(6).

[14] *See* Exchange Act Release No 49883 (June 17, 2004).

[15] *See* Exchange Act Release No. 50477 (Sept. 30, 2004).

[16] *Id.*

[17] 15 U.S.C. 78s(b)(2).

[18] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade the following iShares® Index Funds, which are Investment Company Units (''ICUs'') under section 703.16 of the Exchange Listed Company Manual: iShares MSCI SM Belgium Index Fund, iShares MSCI France Index Fund, iShares MSCI Italy Index Fund, iShares MSCI Netherlands Index Fund, iShares MSCI Spain Index Fund, iShares MSCI Sweden Index Fund, and iShares MSCI Switzerland Index Fund.[3]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange has adopted listing standards applicable to ICUs, which are consistent with the listing criteria currently used by other exchanges, and trading standards pursuant to which the Exchange may trade ICUs on the Exchange, including on an unlisted trading privileges (''UTP'') basis.[4] The Exchange now proposes to list the following iShares Index Funds (''Funds''), which are ICUs under section 703.16 of the Exchange Listed Company Manual: iShares MSCI SM Belgium Index Fund, iShares MSCI France Index Fund, iShares MSCI Italy Index Fund, iShares MSCI Netherlands Index Fund, iShares MSCI Spain Index Fund, iShares MSCI Sweden Index Fund, and iShares MSCI Switzerland Index Fund.[5]

The Funds are currently listed and traded on the American Stock Exchange (''Amex'')[6] and the issuer of the Funds, iShares, Inc., intends to move the listing of the Funds to the NYSE. The Funds also trade on other securities exchanges[7] and in the over-the-counter market. The Exchange stated that the information below is intended to provide a description of how the Funds were created and are traded.[8]

The shares of the Funds are issued by iShares, Inc., an open-ended management investment company. Barclays Global Fund Advisors (''BGFA''), a subsidiary of Barclays Global Investors, N.A. (''BGI''), is the investment advisor (''Advisor'') for each Fund.[9] BGI is a wholly owned indirect subsidiary of Barclays Bank PLC of the United Kingdom. BGFA and its affiliates are not affiliated with the index provider (MSCI). Investors Bank and Trust Company (''IBT'') serves as administrator, custodian, and transfer agent for the Funds, and SEI Investments Distribution Co. is distributor for the Funds. The distributor is not affiliated with the Exchange or BGFA.

The underlying indexes are compiled by Morgan Stanley Capital International (''MSCI''). MSCI is a partially-owned subsidiary of Morgan Stanley. MSCI and Morgan Stanley do not share any employees that are directly involved in the index compilation. MSCI employees directly involved in the index compilation do not report directly to any Morgan Stanley personnel. MSCI has established policies and procedures for the handling and monitoring the dissemination of confidential, non-public information relating to the MSCI indices. These policies and procedures include specific ''firewall'' procedures regulating the flow of information between MSCI and Morgan Stanley personnel. BGI and its affiliates have no involvement in selection of component stocks in the underlying indexes.

Operation of the Fund

Each Fund seeks investment results that correspond generally to the price and yield performance, before fees and expenses, of the applicable underlying index (''Underlying Index''). Each Fund intends to qualify as a Regulated Investment Company (''RIC'') under the Internal Revenue Code (the ''Code''). The Funds utilize representative sampling to invest in a representative sample of securities in the applicable underlying index.

Each Fund seeks to achieve its objective by investing primarily in securities issued by companies that comprise the relevant Underlying Index. Each Fund operates as an index fund and will not be actively managed. Adverse performance of a security in a Fund's portfolio will ordinarily not result in the elimination of the security from a Fund's portfolio.

Each Fund engages in representative sampling, which is investing in a representative sample of securities in the Underlying Index, selected by BGFA to have a similar investment profile as the Underlying Index. Securities selected have aggregate investment

[3] MSCI and MSCI Indices are registered service marks of Morgan Stanley & Co., Incorporated.

[4] In 1996, the Commission approved Section 703.16 of the Exchange Listed Company Manual (the ''Manual''), which sets forth the rules related to the listing of ICUs. *See* Securities Exchange Act Release No. 36923 (March 5, 1996), 61 FR 10410 (March 13, 1996) (SR–NYSE–95–23). In 2000, the Commission also approved the Exchange's ''generic'' listing standards pursuant to Rule 19b–4(e) of the Act for the listing and trading, or the trading pursuant to UTP, of ICUs under Section 703.16 of the Manual and Exchange Rule 1100. *See* Securities Exchange Act Release No. 43679 (December 5, 2000), 65 FR 77949 (December 13, 2000) (SR–NYSE–00–46).

[5] iShares, Inc. is registered under the Investment Company Act of 1940 (15 U.S.C. 80a) (the ''Investment Company Act''). The current registration statement for iShares, Inc. (the ''Registration Statement'') was filed with the Commission on Form N–1A on December 29, 2004. Telephone conversation between David Hsu, Special Counsel, Division of Market Regulation (''Division''), Commission, and Michael Cavalier, Assistant General Counsel, NYSE, on October 20, 2005.

[6] The Funds were formerly known as World Equity Benchmark Shares or WEBS, and an initial series of WEBS, including the Funds that are the subject of the instant filing were initially approved for listing and trading on the Amex in 1996. *See* Securities Exchange Act Release No. 36947 (March 8, 1996), 61 FR 10606 (March 14, 1996) (SR–Amex–95–43). The Commission has previously approved trading on the NYSE on an UTP basis of the iShares MSCI Japan Index Fund. *See* Securities Exchange Act Release No. 46298 (August 1, 2002), 67 FR 51614 (August 8, 2002) (SR–NYSE–2002–27). The Commission also has approved trading on the NYSE of the following iShares Funds on a UTP basis: iShares MSCI EAFE; iShares S&P Europe 350; iShares MSCI Taiwan; iShares MSCI Pacific ex-Japan; iShares MSCI Brazil; iShares MSCI United Kingdom; iShares MSCI South Korea; iShares MSCI Singapore; iShares MSCI Germany; iShares MSCI Australia; iShares MSCI Mexico; iShares MSCI Hong Kong; iShares MSCI South Africa; iShares MSCI Emerging Markets Free; and iShares MSCI Malaysia. *See* Securities Exchange Act Release No. 50142 (August 3, 2004), 69 FR 48539 (August 10, 2004) (SR–NYSE–2004–27).

[7] *See, e.g.*, Securities Exchange Act Release No. 39117 (September 22, 1997), 62 FR 50973 (September 29, 1997) (SR–CHX–96–14) (approving the UTP trading of WEBS).

[8] Much of the information in this filing was taken from the Prospectus of iShares, Inc., dated January 1, 2005, as revised on September 23, 2005, and the Statement of Additional Information (''SAI'') of iShares, Inc., dated January 1, 2005, as revised on September 23, 2005, and from the iShares Web site (*http://www.iShares.com*). Fund information relating to the net asset value (''NAV''), returns, dividends, component stock holdings and other information is updated on a daily basis on the iShares Web site.

[9] While the Advisor would manage the Funds, the Funds' Board of Directors would have overall responsibility for the Funds' operations. The composition of the Board is, and would be, in compliance with the requirements of section 10 of the Investment Company Act (15 U.S.C. 80a–10). The Funds are subject to and must comply with section 303A.06 of the Manual, which requires that the Funds have an audit committee that complies with Commission Rule 10A–3.

characteristics (based on market capitalization and industry weightings), fundamental characteristics (such as return variability, earnings valuation, and yield) and liquidity measures similar to those of the relevant Underlying Index. Funds that use representative sampling generally do not hold all of the securities that are included in the relevant underlying index.

From time to time, adjustments may be made in the portfolio of a Fund in accordance with changes in the composition of the underlying index or to maintain compliance with requirements applicable to a RIC under the Code.[10] For example, if at the end of a calendar quarter a Fund would not comply with the RIC diversification tests, the Advisor would make adjustments to the portfolio to ensure continued RIC status.

The iShares MSCI France Fund will at all times invest at least 90% of its assets in the securities of the Underlying Index and ADRs representing the component securities in the Underlying Index. Each of the iShares Belgium, Italy, Netherlands, Spain, Sweden, and Switzerland Funds will at all times invest at least 80% of its assets in securities of the applicable Underlying Index and ADRs based on the component securities of its Underlying Index, and at least 90% of its assets in the securities and ADRs based on such securities of its Underlying Index or in securities or ADRs included in the relevant market, but not in its Underlying Index.[11] Therefore, each of the Funds will invest not more than 10% of fund assets in ADRs and other securities,[12] which are not included in or based on the component securities of its Underlying Index and are also not included in the relevant market. Each of the ADRs in which these Funds will invest shall be listed on a national securities exchange or the Nasdaq Stock Market.

Index Descriptions and Methodology

Weighting. According to the Funds' SAI effective May 31, 2002, all single-country MSCI Indices are free float weighted, *i.e.*, companies are included in the indices at the value of their free public float (free float, multiplied by price). MSCI defines ''free float'' as total shares excluding shares held by strategic investors such as governments, corporations, controlling shareholders and management, and shares subject to foreign ownership restrictions. In other words, the free float of a security is the proportion of shares outstanding that are deemed to be available for purchase in the public equity markets by international investors. In practice, limitations on free float available to international investors include: (i) Strategic and other shareholdings not considered part of available free float; and (ii) limits on share ownership for foreigners. Under MSCI's free float-adjustment methodology, a constituent ''Inclusion Factor'' is equal to its estimated free float rounded-up to the closest 5% for constituents with free float equal to or exceeding 15%. For example, a constituent security with a free float of 23.2% will be included in the index at 25% of its market capitalization. For securities with a free float of less than 15% that are included on an exceptional basis, the estimated free float is adjusted to the nearest 1%.

MSCI's standard equity indices generally seek to have 85% of the free float-adjusted market capitalization of a country's stock market reflected in the MSCI Index for such country. Market capitalization weighting, combined with a consistent target of 85% of free float-adjusted market capitalization, helps ensure that each country's weight in regional and international indices approximates its weight in the total universe of developing and emerging markets.

Selection Criteria. MSCI undertakes an index construction process, which involves: (i) Defining the equity universe; (ii) adjusting the total market capitalization of all securities in the universe for free float available to foreign investors; (iii) classifying the universe of securities under the Global Industry Classification Standard (the ''GICS''); and (iv) selecting securities for inclusion according to MSCI's index construction rules and guidelines.

The index construction process starts at the country level, with the identification of all listed securities for that country. MSCI classifies each company and its securities in only one country. This allows securities to be sorted distinctly by their respective countries. In general, companies and their respective securities are classified as belonging to the country in which they are incorporated. All listed equity securities, or listed securities that exhibit characteristics of equity securities, except investment trusts, mutual funds and equity derivatives, are eligible for inclusion in the universe. Shares of non-domiciled companies generally are not eligible for inclusion in the universe.

After identifying the universe of securities, MSCI calculates the free float-adjusted market capitalization of each security in that universe using publicly available information. The process of free float adjusting market capitalization involves (i) defining and estimating the free float available to foreign investors for each security, using MSCI's definition of free float; (ii) assigning a free float-adjustment factor to each security; and (iii) calculating the free float-adjusted market capitalization of each security.

Classifying Securities Under the GICS. In addition to the free float-adjustment of market capitalization, all securities in the universe are assigned to an industry-based hierarchy that describes their business activities. To this end, MSCI has designed, in conjunction with Standard & Poor's, the GICS. This comprehensive classification scheme provides a universal approach to industries worldwide and forms the basis for achieving MSCI's objective of reflecting broad and fair industry representation in its indices.

Selecting Securities for Index Inclusion. In an attempt to ensure a broad and fair representation in the indices of the diversity of business activities in the universe, MSCI follows a ''bottom-up'' approach to index construction, building indices up to the industry group level. The bottom-up approach to index construction requires a thorough analysis and understanding of the characteristics of the universe. This analysis drives the individual security selection decisions, which aim to reflect the overall features of the universe in the country index. MSCI targets an 85% free float-adjusted market representation level within each industry group, within each country. The security selection process within each industry group is based on the careful analysis of: (i) Each company's business activities and the diversification that its securities would bring to the index; (ii) the size (based on free float-adjusted market capitalization)

[10] In order for the Fund to qualify for tax treatment as a RIC, it must meet several requirements under the Code. Among these is a requirement that, at the close of each quarter of the Fund's taxable year, (1) at least 50% of the market value of the Fund's total assets must be represented by cash items, U.S. government securities, securities of other RICs and other securities, with such other securities limited for the purpose of this calculation with respect to any one issuer to an amount not greater than 5% of the value of the Fund's assets and not greater than 10% of the outstanding voting securities of such issuer; and (2) not more than 25% of the value of its total assets may be invested in securities of any one issuer, or two or more issuers that are controlled by the Fund (within the meaning of section 851(b)(4)(B) of the Code) and that are engaged in the same or similar trades or business (other than U.S. government securities of other RICs).

[11] Telephone conversation between Florence Harmon, Senior Special Counsel, Division, and Michael Cavalier, Assistant General Counsel, NYSE, on November 15, 2005.

[12] *Id.*

and liquidity of securities;[13] (iii) the estimated free float for the company and its individual share classes. Only securities of companies with estimated free float greater than 15% are, in general, considered for inclusion. Exceptions to this general rule are made only in significant cases, where not including a security of a large company would compromise the index's ability to fully and fairly represent the characteristics of the underlying market.

Exchange Rates. The prices used to calculate the MSCI Indices are the official exchange closing prices or those figure accepted as such. MSCI reserves the right to use an alternative pricing source on any given day.

For the MSCI Indices, MSCI uses the foreign currency exchange rates published by WM Reuters at 4 p.m. London time. MSCI uses WM Reuters rates for all developed and emerging markets. Exchange rates are taken daily at 4 p.m. London time by the WM Company and are sourced whenever possible from multi-contributor quotes on Reuters. Representative currency exchange rates are selected for each currency based on a number of ''snapshots'' of the latest contributed quotations taken from the Reuters service at short intervals around 4 p.m. London time. WM Reuters provides closing bid and offer rates. MSCI uses these to calculate the mid-point to five decimal places.

MSCI continues to monitor currency exchange rates independently and may, under exceptional circumstances, elect to use an alternative currency exchange rate if the WM Reuters rate is believed not to be representative for a given currency on a particular day.

Changes to the Indices. According to the Registration Statement, the MSCI Indices are maintained with the objective of reflecting, on a timely basis, the evolution of the underlying equity markets. In maintaining the MSCI Indices, emphasis is also placed on continuity, replicability, and minimizing turnover in the Indices. Maintaining the MSCI Indices involves many aspects, including additions to and deletions from the Indices and changes in number of shares and changes in Foreign Inclusion Factors (''FIFs'') as a result of updated free float estimates.

Potential additions are analyzed not only with respect to their industry group, but also with respect to their industry or sub-industry group, in order to represent a wide range of economic and business activities. All additions are considered in the context of MSCI's methodology, including the index constituent eligibility rules and guidelines.

In assessing deletions, it is important to emphasize that indices must represent the full-investment cycle, including bull as well as bear markets. Out-of-favor industries and their securities may exhibit declining prices, declining market capitalization, and/or declining liquidity, and yet are not deleted because they continue to be good representatives of their industry group.

As a general policy, changes in number of shares are coordinated with changes in FIFs to accurately reflect the investability of the underlying securities. In addition, MSCI continuously strives to improve the quality of its free float estimates and the related FIFs. Additional shareholder information may come from better disclosure by companies or more stringent disclosure requirements by a country's authorities. It may also come from MSCI's ongoing examination of new information sources for the purpose of further enhancing free float estimates and better understanding shareholder structures. When MSCI identifies useful additional sources of information, it seeks to incorporate them into its free float analysis.

Overall, index maintenance can be described by three broad categories of implementation of changes:

- Annual full country index reviews that systematically re-assess the various dimensions of the equity universe for all countries and are conducted on a fixed annual timetable;
- Quarterly index reviews, aimed at promptly reflecting other significant market events; and
- Ongoing event-related changes, such as mergers and acquisitions, which are generally implemented in the indices rapidly as they occur.

Potential changes in the status of countries (stand-alone, emerging, developed) follow their own separate timetables. These changes are normally implemented in one or more phases at the regular annual full country index review and quarterly index review dates.

The annual full country index review for all the MSCI Standard Country Indices is carried out once every 12 months and implemented as of the close of the last business day of May. The implementation of changes resulting from a quarterly index review occurs on only three dates throughout the year, as of the close of the last business day of February, August, and November. Any country indices may be impacted at the quarterly index review. MSCI Index additions and deletions due to quarterly index rebalancings are announced at least two weeks in advance.

Index Holdings as of May 31, 2005. As of May 31, 2005, the iShares MSCI Belgium Index's top three holdings were Fortis, KBC Groupe, and Dexia. The Index's top three industries were Financials, Consumer Staples, and Utilities. The Index components had a total market capitalization of approximately $120.2 billion. The average total market capitalization was approximately $5.7 billion. The ten largest constituents represented approximately 87% of the Index weight. The five highest weighted stocks, which represented 66% of the Index weight, had an average daily trading volume in excess of 7.3 million shares during the past two months. All of the component stocks traded at least 55,000 shares in each of the previous six months.

As of May 31, 2005, the iShares MSCI France Index's top three holdings were Total, Sanofi-Aventis, and BNP Paribas. The Index's top three industries were Financials, Energy, and Consumer Discretionary. The Index components had a total market capitalization of approximately $829.2 billion. The average total market capitalization was approximately $39.5 billion. The ten largest constituents represented approximately 58% of the Index weight. The five highest weighted stocks, which represented 42% of the Index weight, had an average daily trading volume in excess of 52.3 million shares during the past two months. All of the component stocks traded at least 475,000 shares in each of the previous six months.

As of May 31, 2005, the iShares MSCI Italy Index's top three holdings were ENI, ENEL, and Assicurazioni Generali. The Index's top three industries were Financials, Energy, and Telecommunication Services. The Index components had a total market capitalization of approximately $348.8 billion. The average total market capitalization was approximately $16.6 billion. The ten largest constituents represented approximately 69% of the index weight. The five highest weighted stocks, which represented 51% of the Index weight, had an average daily trading volume in excess of 512.2 million shares during the past two months. All of the component stocks traded at least four million shares in each of the previous six months.

As of May 31, 2005, the iShares MSCI Netherlands Index's top three holdings were Royal Dutch Petroleum Co., ING

[13] All else being equal, MSCI targets for inclusion the most sizable and liquid securities in an industry group. In addition, securities that do not meet the minimum size guidelines discussed below and/or securities with inadequate liquidity are not considered for inclusion.

Groep, and ABN AMRO Holding. The Index's top three industries were Energy, Financials, and Consumer Staples. The Index components had a total market capitalization of approximately $419.4 billion. The average total market capitalization was approximately $20.0 billion. The ten largest constituents represented approximately 84% of the index weight. The five highest weighted stocks, which represented 68% of the Index weight, had an average daily trading volume in excess of 66.3 million shares during the past two months. All of the component stocks traded at least 950,000 shares in each of the previous six months.

As of May 31, 2005, the iShares MSCI Spain Index's top three holdings were the Telefonica, BSCH BCO Santander Centr, and BBVA. Index's top three industries were Financials, Telecommunication Services, and Utilities. The Index components had a total market capitalization of approximately $345.4 billion. The average total market capitalization was approximately $16.4 billion. The ten largest constituents represented approximately 85% of the index weight. The five highest weighted stocks, which represented 69% of the Index weight, had an average daily trading volume in excess of 283.6 million shares during the past two months. All of the component stocks traded at least 2.1 million shares in each of the previous six months.

As of May 31, 2005, the iShares MSCI Sweden Index's top three holdings were Ericsson (LM) B, Nordea Bank, and Hennes & Mauritz B. The Index's top three industries were Industrials, Financials, and Information Technology. The Index components had a total market capitalization of approximately $215.0 billion. The average total market capitalization was approximately $10.2 billion. The ten largest constituents represented approximately 61% of the index weight. The five highest weighted stocks, which represented 48% of the Index weight, had an average daily trading volume in excess of 312.9 million shares during the past two months. All of the component stocks traded at least 750,000 shares in each of the previous six months.

As of May 31, 2005, the iShares MSCI Switzerland Index's top three holdings were Novartis, Nestle, and Roche Holding Genuss. The Index's top three industries were Health Care, Financials, and Consumer Staples. The Index components had a total market capitalization of approximately $602.3 billion. The average total market capitalization was approximately $28.7 billion. The ten largest constituents represented approximately 87% of the Index weight. The five highest weighted stocks, which represented 73% of the Index weight, had an average daily trading volume in excess of 41.4 million shares during the past two months. All of the component stocks traded at least 100,000 shares in each of the previous six months.

Correlation

According to the Funds' prospectus, BGFA expects that over time, the correlation between each Fund's performance and that of its underlying index, before fees and expenses, will be 95% or better. A figure of 100% would indicate perfect correlation. Any correlation of less than 100% is called ''tracking error.'' A fund using a representative sampling strategy (which all of the Funds utilize) can be expected to have a greater tracking error than a fund using a replication strategy. Replication is a strategy in which a fund invests in substantially all of the securities in its underlying index in approximately the same proportions as in the underlying index.

The Funds have chosen to pursue a representative sampling strategy that, by its very nature, entails some risk of tracking error. (It should also be noted that Fund expenses, the timing of cash flows, and other factors all contribute to tracking error.) The Web site for the Funds, *http://www.iShares.com,* contains detailed information on the performance and the tracking error for each Fund.[14]

The Funds investment objectives, policies, and investment strategies will be fully disclosed in the prospectus.[15] The Funds' Board of Directors will review the tracking error of the Funds on a quarterly basis and based its review will consider whether any action may be appropriate.[16]

Industry Concentration Policy

As disclosed in the Funds' prospectus, each of the Underlying Indexes for the Funds will not concentrate its investments (*i.e.*, hold 25% or more of its total assets in the stocks of a particular industry or group of industries), except that, to the extent practicable, each Fund will concentrate to approximately the same extent that its underlying index concentrates in the stocks of such particular industry or group of industries.

Each Fund intends to maintain regulated investment company compliance, which requires, among other things, that, at the close of each quarter of the Fund's taxable year, not more than 25% of its total assets may be invested in the securities of any one issuer.

The Exchange believes that these requirements and policies prevent any Fund from being excessively weighted in any single security or small group of securities and significantly reduce concerns that trading in an Index Fund could become a surrogate for trading in a single or a few unregistered securities.

Issuance of Creation Units

iShares, Inc. will issue and redeem the shares of the Funds only in aggregations (each aggregation a ''Creation Unit'') of substantial size, which varies for the various Funds. The size of a Creation Unit for each Fund and estimated value of a Creation Unit for each Fund as of September 28, 2005 is as follows.[17]

	Shares per creation unit	Price per share	Est. value per creation unit
iShares MSCI Belgium	40,000	$19.17	$766,800
iShares MSCI France	200,000	26.12	5,224,000
iShares MSCI Italy	150,000	26.38	3,957,000
iShares MSCI Netherlands	50,000	19.15	957,500

[14] The price at which the Funds' shares trade should be disciplined by arbitrage opportunities created by the ability to purchase or redeem shares of the Funds in Creation Unit (defined below) aggregations throughout the trading day. This should help ensure that the Funds' shares will not trade at a material discount or premium to their net asset value or redemption value.

[15] Telephone conversation between David Hsu, Special Counsel, Division, and Michael Cavalier, Assistant General Counsel, NYSE, on October 20, 2005.

[16] *Id.*

[17] As noted, the MSCI Index methodology generally seeks to have represented 85% of the free float-adjusted market capitalization of a country's stock market or regional market, which also makes it unlikely that the Funds will become a surrogate for trading a single or a few unregistered stocks. Electronic mail exchange between Florence Harmon, Senior Special Counsel, Division, John Carey, Assistant General Counsel, NYSE, on November 9, 2005.

	Shares per creation unit	Price per share	Est. value per creation unit
iShares MSCI Spain	75,000	37.50	2,812,500
iShares MSCI Sweden	75,000	22.10	1,657,500
iShares MSCI Switzerland	125,000	18.07	2,258,750

The number of shares of each Fund outstanding as of September 28, 2005 was 2.48 million (Belgium); 3.20 million (France); 1.65 million (Italy); 3.35 million (Netherlands); 1.88 million (Spain); 2.93 million (Sweden); and 4.50 million (Switzerland). These numbers exceed the minimum number of shares to be issued in connection with initial listing of the Funds on the Amex in 1996.[18] A minimum of two Creation Units of the Funds were required to be outstanding at the time of initial listing on the Amex.

These number of shares outstanding also exceeds the 100,000 minimum number of shares required to be outstanding in connection with listing of ICUs Investment Company Units under Rule 19b–4(e) under the Act pursuant to the Exchange's generic listing standards in Section 703.16 of the Manual. In addition, the Exchange has required a minimum number of 100,000 shares of ICUs to be outstanding in connection with initial listing of iShares FTSE/Xinhua China 25 Index Fund, which the Commission noted is comparable to requirements previously applied to listed series of ICUs.[19]

The consideration for purchase of a Creation Unit of shares of a Fund generally consists of the in-kind deposit of a designated portfolio of equity securities (the ''Deposit Securities'') constituting an optimized representation of the Fund's benchmark foreign securities index and an amount of cash computed as described below (the ''Cash Component''). Together, the Deposit Securities and the Cash Component constitute the ''Portfolio Deposit,'' which represents the minimum initial and subsequent investment amount for shares of a Fund. The Cash Component is an amount equal to the Dividend Equivalent Payment (as defined below), plus or minus, as the case may be, a Balancing Amount (as defined below). The deposit of the requisite Deposit Securities and the Balancing Amount are collectively referred to herein as a ''Fund Deposit.'' The ''Dividend Equivalent Payment'' enables iShares, Inc. to make a complete distribution of dividends on the next dividend payment date, and is an amount equal, on a per Creation Unit basis, to the dividends on all the Securities held by the relevant Fund with ex-dividend dates within the accumulation period for such distribution (the ''Accumulation Period''), net of expenses and liabilities for such period, as if all of the Portfolio Securities had been held by iShares, Inc. for the entire Accumulation Period. The ''Balancing Amount'' is an amount equal to the difference between (x) the NAV (per Creation Unit) of the Fund and (y) the sum of (i) the Dividend Equivalent Payment and (ii) the market value (per Creation Unit) of the securities deposited with iShares, Inc. (the sum of (i) and (ii) is referred to as the ''Deposit Amount''). The Balancing Amount serves the function of compensating for any differences between the net asset value per Creation Unit and the Deposit Amount.

BGFA makes available through the National Securities Clearing Corporation (''NSCC'') on each Business Day, prior to the opening of business on the NYSE (currently 9:30 a.m., Eastern time),[20] the list of the names and the required number of shares of each Deposit Security to be included in the current Portfolio Deposit (based on information at the end of the previous Business Day) for each Fund. Such Portfolio Deposit is applicable, subject to any adjustments as described below, in order to effect purchases of Creation Units of iShares of a given Fund until such time as the next announced Portfolio Deposit composition is made available.

The identity and number of shares of the Deposit Securities required for a Portfolio Deposit for each Fund changes as rebalancing adjustments and corporate action events are reflected from time to time by BGFA with a view to the investment objective of the Fund. The composition of the Deposit Securities may also change in response to adjustments to the weighting or composition of the securities constituting the relevant securities index.

In addition, iShares, Inc. reserves the right to permit or require the substitution of an amount of cash (*i.e.*, a ''cash in lieu'' amount) to be added to the Cash Component to replace any Deposit Security which may not be available in sufficient quantity for delivery or for other similar reasons. The adjustments described above will reflect changes, known to BGFA on the date of announcement to be in effect by the time of delivery of the Portfolio Deposit, in the composition of the subject index being tracked by the relevant Fund, or resulting from stock splits and other corporate actions. Thus, in addition to the list of names and numbers of securities constituting the current Deposit Securities of a Portfolio Deposit, on each Business Day prior to the opening of the market, NSCC will make available the estimated Cash Component effective through and including the previous Business Day, per outstanding iShares of each Fund.

Creation Units of shares may be purchased only by or through a Depository Trust Company (''DTC'') Participant that has entered into an Authorized Participant agreement with the Distributor (''Authorized Participant''). Authorized Participants must submit an irrevocable Creation Unit request before 4 p.m. (Eastern time) on any business day in order to receive that business day's NAV (and applicable Cash Component). Such Authorized Participant will agree pursuant to the terms of such Authorized Participant Agreement on behalf of itself or any investor on whose behalf it will act, as the case may be, to certain conditions, including that such Authorized Participant will make available in advance of each purchase of iShares an amount of cash sufficient to pay the Cash Component, once the net asset value of a Creation Unit is next determined after receipt of the purchase order in proper form, together with the transaction fee. A purchase transaction fee payable to iShares, Inc. is imposed to compensate iShares, Inc. for the transfer and other transaction costs of a Fund associated with the issuance of Creation Units. The fee ranges from $700 to $2,900 for the Funds.

[18] *See* Securities Exchange Act Release No. 36947 (March 8, 1996) 61 FR 10606 (March 14, 1996) (SR–Amex–95–43).

[19] *See* Securities Exchange Act Release No. 50505 (October 8, 2004), 69 FR 61280 (October 15, 2004) (SR–NYSE–2004–55), note 51.

[20] Usually, NSCC disseminates the estimated Portfolio Securities and Cash Amount (see below) between 6 p.m. and 8 p.m. (Eastern time) on the prior business day for both creation and redemption requests placed the following day. Telephone conversation between Florence Harmon, Senior Special Counsel, Division, and Michael Cavalier, Assistant General Counsel, NYSE, on November 20, 2005.

Redemption of Creation Units

Shares of a Fund may be redeemed only in Creation Units at their net asset value, NAV, next determined after receipt of a redemption request in proper form by the Distributor.

With respect to each Fund, BGFA makes available through the NSCC immediately prior to the opening of business on the NYSE (currently 9:30 a.m., Eastern time) on each business day, the Portfolio Securities that will be applicable (subject to possible amendment or correction) to redemption requests received in proper form on that day. Unless cash redemptions are available or specified for a Fund, the redemption proceeds for a Creation Unit generally consist of Deposit Securities as announced by BGFA through the NSCC on the Business Day of the request for redemption, plus cash in an amount equal to the difference between the NAV of the shares being redeemed, as next determined after a receipt of a request in proper form, and the value of the Deposit Securities, less the redemption transaction fee. The redemption transaction fee is deducted from such redemption proceeds. A redemption transaction fee payable to iShares, Inc. is imposed to offset transfer and other transaction costs that may be incurred by the relevant Fund, including market impact expenses relating to disposing of portfolio securities. This fee ranges from $700 to $2,900 for the Funds.

Redemption requests in respect of Creation Units of any Fund must be submitted to the Distributor by or through an Authorized Participant. For most Funds, an Authorized Participant must submit an irrevocable redemption request before 4 p.m. (Eastern time) on any business day in order to receive that business day's NAV (and applicable Cash Component).

Owners of iShares may sell them in the secondary market, but, in order to redeem the shares through the Funds, an owner must accumulate enough shares to constitute a creation unit.[21]

Availability of Information Regarding iShares and the Underlying Indexes

The MSCI Indexes are calculated by MSCI for each trading day in the applicable foreign exchange markets based on official closing prices in such exchange markets.[22] For each trading day, MSCI publicly disseminates the Index values for the previous day's close. The Index values are reported periodically in major financial publications and also are available through vendors of financial information. For all of the Funds, MSCI or third-party major market data vendors now makes available at least every 60 seconds an updated index value for the Indexes when foreign trading market hours overlap with the NYSE trading hours of 9:30 a.m. to 4:15 p.m. Eastern Time. Otherwise, when the foreign market is closed during NYSE trading hours, the Funds provide closing index values on *http://www.ishares.com.* [23]

iShares, Inc. will cause to be made available daily the names and required number of shares of each of the securities to be deposited in connection with the issuance of the Funds' shares in Creation Unit size aggregations for the Funds, as well as information relating to the required cash payment representing, in part, the amount of accrued dividends for the Funds. This information will be made available to the Funds' Advisor and to any NSCC participant requesting such information. In addition, other investors can request such information directly from the Funds' distributor. The NAV for the Funds is calculated directly by the Fund administrator (IBT) once a day, generally at 4 p.m., Eastern Time.[24] The NAV will also be available to the public on *http://www.iShares.com*, from the Fund distributor by means of a toll-free number, and to NSCC participants through data made available from the NSCC.

To provide current pricing information for the Funds, there will be disseminated through the facilities of the Consolidated Tape Association (''CTA'') an amount per iShare representing the sum of the estimated Balancing Amount effective through and including the previous business day plus the current value of the Deposit Securities in U.S. Dollars, on a per iShare basis. This amount is referred to herein as the ''indicative optimized portfolio value'' (the ''IOPV'') and will be calculated by an independent third party such as Bloomberg L.P. The IOPV will be disseminated every 15 seconds during regular NYSE trading hours of 9:30 a.m. to 4:15 p.m. (New York time). Because the Funds utilize a representative sampling strategy, the IOPV likely will not reflect the value of all securities included in the applicable indexes. In addition, the IOPV will not necessarily reflect the precise composition of the current portfolio of securities held by the Funds at a particular moment. The IOPV disseminated during NYSE trading hours should not be viewed as a real-time update of the NAV of the Funds, which is calculated only once a day. It is expected, however, that during the trading day the IOPV will closely approximate the value per share of the portfolio of securities for the Funds except under unusual circumstances.

For each of the Funds, there is an overlap in trading hours between the foreign and U.S. markets. Therefore, the IOPV calculator will update the applicable IOPV every 15 seconds to reflect price changes in the applicable foreign market or markets, and convert such prices into U.S. dollars based on the currency exchange rate. When the foreign market or markets are closed but U.S. markets are open, the IOPV will be updated every 15 seconds to reflect changes in currency exchange rates after the foreign market closes. The IOPV will also include the applicable cash component for each Fund.

There will also be disseminated a variety of data with respect to the Fund on a daily basis by means of CTA and CQ High Speed Lines, which will be made available prior to the opening of trading on the Exchange. Information with respect to recent NAV, shares outstanding, estimated cash amount and total cash amount per Creation Unit Aggregation will be made available prior to the opening of the Exchange. In addition, the Web site for the Funds, which will be publicly accessible at no charge, will contain the following information, on a per iShare basis, for the Funds: (i) The prior business day's NAV and the mid-point of the bid-ask price at the time of calculation of such

[21] Telephone conversation between David Hsu, Special Counsel, Division, and Michael Cavalier, Assistant General Counsel, NYSE, on October 20, 2005.

[22] As the Commission has previously stated, when a broker-dealer, or a broker-dealer's affiliate such as MSCI, is involved in the development and maintenance of a stock index upon which a product such as iShares is based, the broker-dealer or its affiliate should have procedures designed specifically to address the improper sharing of information. *See*, Securities Exchange Act Release No. 52178, July 29, 2005; 70 FR 46244, August 8, 2005; (SR–NYSE–2005–41). The Exchange notes that MSCI has implemented procedures to prevent the misuse of material, non-public information regarding changes to component stocks in the MSCI Indexes. The Commission has stated that it believes that the information barrier procedures put in place by MSCI address the unauthorized transfer and misuse of material, non-public information. Electronic mail exchange between Florence Harmon, Senior Special Counsel, Division, John Carey, Assistant General Counsel, NYSE, on November 9, 2005.

[23] Electronic mail exchange between Florence Harmon, Senior Special Counsel, Division, John Carey, Assistant General Counsel, NYSE, on November 9, 2005.

[24] Electronic mail exchange between Florence Harmon, Senior Special Counsel, Division, John Carey, Assistant General Counsel, NYSE, on November 9, 2005.

NAV (''Bid/Ask Price'')[25] and a calculation of the premium or discount of such price against such NAV; and (ii) data in chart format displaying the frequency distribution of discounts and premiums of the Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters.

The closing prices of the Funds' Deposit Securities are readily available from, as applicable, the relevant exchanges, automated quotation systems, published or other public sources in the relevant country, or online information services such as Bloomberg or Reuters. The exchange rate information required to convert such information into U.S. dollars is also readily available in newspapers and other publications and from a variety of on-line services. The Exchange believes that dissemination of the IOPV based on the Deposit Securities provides additional information regarding the Funds that is not otherwise available to the public and is useful to professionals and investors in connection with trading shares of the Funds on the Exchange or the creation or redemption of Fund shares.

Dividends and Distributions

Dividends from net investment income, including any net foreign currency gains, are accrued and declared and paid at least annually and any net realized securities gains are distributed at least annually. In order to improve tracking error or comply with distribution requirements of the Code, dividends may be declared more frequently than annually for certain Funds. The final dividend amount is also disseminated by the Funds to Bloomberg and other sources. The Funds will not make the DTC book-entry Dividend Reinvestment Service (the ''Service'') available for use by beneficial owners for reinvestment of their cash proceeds but certain individual brokers may make the Service available to their clients.

Beneficial owners of iShares will receive all of the statements, notices, and reports required under the Investment Company Act and other applicable laws. They will receive, for example, annual and semi-annual reports, written statements accompanying dividend payments, proxy statements, annual notifications detailing the tax status of distributions, Internal Revenue Service Form 1099–DIVs, etc. Because iShares Inc.'s records reflect ownership of iShares by DTC only, iShares, Inc. will make available applicable statements, notices, and reports to the DTC Participants who, in turn, will be responsible for distributing them to the beneficial owners.

Other Issues

Information Memo. The Exchange will distribute an Information Memo (''Information Memo'') to its members in connection with the trading of the Funds. The Information Memo will discuss the special characteristics and risks of trading this type of security. Specifically, the Information Memo, among other things, will discuss what the Funds are, how they are created and redeemed, requirements regarding delivery of a prospectus or Product Description by members and member firms to investors purchasing shares of the Fund prior to or concurrently with the confirmation of a transaction, applicable Exchange rules, dissemination information, trading information and the applicability of suitability rules (including NYSE Rule 405). The Information Memo will also discuss exemptive, no-action and interpretive relief granted by the Commission from section 11(d)(1) and certain rules under the Act, including Rule 10a–1, Rule 10b–10, Rule 14e–5, Rule 10b–17, Rule 11d1–2, Rules 15c1–5 and 15c1–6, and Rules 101 and 102 of Regulation M under the Act.

Purchases and Redemptions in Creation Unit Size. In the Information Memo referenced above, members and member organizations will be informed that procedures for purchases and redemptions of iShares in Creation Unit size are described in the Fund prospectus and SAI, and that iShares are not individually redeemable but are redeemable only in Creation Unit size aggregations or multiples thereof.

Original and Annual Listing Fees. The original listing fee applicable to each Fund for listing on the Exchange is $5,000, and the continuing fee would be $2,000 for each Fund, paid annually.

Stop and Stop Limit Orders. Commentary .30 to Exchange Rule 13 provides that stop and stop limit orders in an ICU shall be elected by a quotation, but specifies that if the electing bid or an offer is more than 0.10 points away from the last sale and is for the specialist's dealer account, prior Floor Official approval is required for the election to be effective. This rule applies to ICUs generally.

Exchange Rule 460.10. Exchange Rule 460.10 generally precludes certain business relationships between an issuer and the specialist (or its affiliate) in the issuer's securities. Exceptions in Exchange Rule 460.10 permit specialists in Fund shares to enter into Creation Unit transactions through the Distributor to facilitate the maintenance of a fair and orderly market. A specialist Creation Unit transaction may only be effected on the same terms and conditions as any other investor, and only based on the net asset value of the Fund shares. A specialist (or its affiliate) may acquire a position in excess of 10% of the outstanding issue of the Fund shares, provided, however, that a specialist registered in a security issued by an investment company may purchase and redeem the investment company unit or securities that can be subdivided or converted into such unit, from the investment company as appropriate to facilitate the maintenance of a fair and orderly market in the subject security.

Trading Hours and Trading Increment. The trading hours for the Funds on the Exchange will be 9:30 a.m. to 4:15 p.m. The minimum trading increment is $0.01.

Due Diligence/Suitability. The Exchange represents that the Memo to members will note, for example, Exchange responsibilities including that before an Exchange member, member organization, or employee thereof recommends a transaction in the Funds, a determination must be made that the recommendation is in compliance with all applicable Exchange and Federal rules and regulations, including due diligence obligations under Exchange Rule 405 (Diligence as to Accounts).

Trading Halts. In order to halt the trading of the Fund, the Exchange may consider, among other things, factors such as the extent to which trading is not occurring in underlying security(s) and whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. In addition, trading in Fund shares is subject to trading halts caused by extraordinary market volatility pursuant to Exchange Rule 80B. The Exchange will halt trading in a Fund if the Index value or IOPV applicable to such Fund is no longer calculated or disseminated.[26]

Prospectus or Product Description Delivery. The Commission has granted iShares, Inc. an exemption from certain

[25] The Bid-Ask Price of the Funds is determined using the highest bid and lowest offer on the Exchange as of the time of calculation of the Funds' NAV.

[26] In the event an Index value or IOPV is no longer calculated or disseminated, the Exchange would immediately contact the Commission to discuss appropriate measures that may be appropriate under the circumstances. Telephone conversation between Florence Harmon, Senior Special Counsel, Division, and Michael Cavalier, Assistant General Counsel, NYSE, on November 20, 2005.

prospectus delivery requirements under section 24(d)[27] of the Investment Company Act.[28] Any product description used in reliance on a section 24(d) exemptive order will comply with all representations made therein and all conditions thereto. The Exchange, in a information memo to Exchange members and member organizations, will inform members and member organizations, prior to commencement of trading, of the prospectus or product description delivery requirements applicable to the Funds and will refer members and member organizations to Exchange Rule 1100(b). The information memo will also advise members and member organizations that delivery of a prospectus to customers in lieu of a product description would satisfy the requirements of Exchange Rule 1100(b).

Surveillance Procedures

The Exchange will utilize its existing surveillance procedures applicable to ICUs to monitor trading in the Funds. The Exchange believes that these procedures are adequate to monitor Exchange trading of the Funds.

Exchange surveillance procedures applicable to trading in iShares are comparable to those applicable to other ICUs currently trading on the Exchange. The Exchange's surveillance procedures, which the Exchange has filed with the Commission, are adequate to properly monitor the trading of the Funds. The Exchange's current trading surveillances focus on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations. The Exchange is able to obtain information regarding trading in both the Fund shares and the component securities through NYSE members in connection with such members' proprietary or customer trades that they effect on any relevant market. In addition, the Exchange may obtain trading information via the Intermarket Surveillance Group (''ISG'') from other exchanges who are members or affiliates of the ISG.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b)(5) of the Act[29] requiring that an exchange have rules that are designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the 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

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR-NYSE–2005–70 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–NYSE–2005–70. 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–NYSE–2005–70 and should be submitted on or before December 20, 2005.

IV. Commission Findings

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.[30] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act[31] and will promote just and equitable principles of trade, and facilitate transactions in securities, and, in general, protect investors and the public interest. The Commission believes that the Exchange's listing standards, trading rules, suitability and disclosure rules for the Funds are consistent with the Act. The Commission also believes that the proposed rule change raises no issues that have not been previously considered by the Commission. The Commission notes that it previously approved the original listing and trading of the Funds on the Amex.[32] Further, with respect to each of the following key issues, the Commission believes that the Funds satisfy established standards.

A. Surveillance

The Commission notes that the Underlying Indexes are broad-based and are composed of securities having significant trading volumes and market capitalization, thus impeding improper trading practices in the Shares, the ability to use the Shares to manipulate the underlying securities, and the ability to use the Shares as a surrogate to trade one or a few unregistered securities. Nevertheless, the NYSE represents that its surveillance procedures applicable to trading in the proposed iShares are adequate to properly monitor the trading of the Funds. The Exchange also is able to obtain information regarding

[27] 15 U.S.C. 80a–24(d).

[28] *See In the Matter of iShares, Inc., et al.*, Investment Company Act Release No. 25623 (June 25, 2002).

[29] 15 U.S.C. 78f(b)(5).

[30] In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[31] 15 U.S.C. 78f(b)(5).

[32] *See* Securities Exchange Act Release No. 36947 (March 8, 1996), 61 FR 10606 (March 14, 1996) (SR-Amex-95–43).

trading in both the Fund shares and the Component Securities by its members on any relevant market; in addition, the Exchange may obtain trading information via the ISG from other exchanges who are members or affiliates of the ISG.

As stated, when a broker-dealer, or a broker-dealer's affiliate such as MSCI, is involved in the development and maintenance of a stock index upon which a product such as iShares is based, the broker-dealer or its affiliate should have procedures designed specifically to address the improper sharing of information. The Commission notes that the Exchange has represented that MSCI has implemented procedures to prevent the misuse of material, non-public information regarding changes to component stocks in the MSCI Indices.

B. Dissemination of Information about the Shares

In approving the Funds for listing and trading on the NYSE, the Commission notes that the Underlying Indexes are broad-based indexes. If there is an overlap between the foreign jurisdiction and the NYSE trading hours, these index values are disseminated through various main market data vendors at least every 60 seconds during such overlap in trading hours. Otherwise, the Funds provide the Index closing value at *http://www.iShares.com.* Additionally, the Commission notes that the Exchange will disseminate through the facilities of CTA during NYSE trading hours at least every 15 seconds a calculation of the IOPV (which will reflect price changes in the applicable foreign market and changes in currency exchange rates), along with an updated market value of the Shares. Comparing these two figures will help investors to determine whether, and to what extent, the Shares may be selling at a premium or discount to NAV and thus will facilitate arbitrage of the Shares in relation to the Index component securities.

The Commission also notes that the Web site for the Funds *(http://www.iShares.com)*, which is and will be publicly accessible at no charge, will contain the Shares' prior business day NAV, the reported closing price, and a calculation of the premium or discount of such price in relation to the closing NAV.

C. Listing and Trading

The Commission finds that the Exchange's rules and procedures for the proposed listing and trading of the Funds are consistent with the Act. Shares of the Funds will trade as equity securities subject to NYSE rules including, among others, rules governing trading halts, specialist activities, stop and stop limit orders, prospectus delivery, and customer suitability requirements. In addition, the Funds will be subject to NYSE listing and delisting/halt rules and procedures governing the trading of Index Fund Shares on the Exchange. The Commission believes that listing and delisting criteria for the Shares should help to maintain a minimum level of liquidity and therefore minimize the potential for manipulation of the Shares. Finally, the Commission believes that the Information Memo the Exchange will distribute will inform members and member organizations about the terms, characteristics, and risks in trading the Shares, including suitability and prospectus delivery requirements.

D. Accelerated Approval

The Commission finds good cause, pursuant to section 19(b)(2) of the Act,[33] for approving the proposed rule change prior to the thirtieth day after the date of publication of notice in the **Federal Register**. The Commission notes that the proposal is consistent with the listing and trading standards in NYSE Rule 703.16 (ICUs), and the Commission has previously approved the listing of these securities on the Amex.[34] In addition, the Commission finds that this proposal is similar to several instruments currently listed and traded on the exchange.[35] Therefore, the Commission does not believe that the proposed rule change raises issues that have not been previously considered by the Commission.

V. Conclusion

It Is Therefore Ordered, pursuant to section 19(b)(2) of the Act,[36] that the proposed rule change (SR–NYSE–2005–70), is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[37]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–6626 Filed 11–28–05; 8:45 am]

BILLING CODE 8010–01–P

[33] 15 U.S.C. 78s(b)(2).

[34] *See* Securities Exchange Act Release No. 36947 (March 8, 1996), 61 FR 10606 (March 14, 1996) (approving the listing and trading of the ICUs for trading on the Amex).

[35] *See, e.g.*, Securities Exchange Act Release No. 52178 (July 29, 2005), 70 FR 46244, (August 9, 2005) (SR–NYSE–2005–41).

[36] 15 U.S.C. 78s(b)(2).

[37] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52822; File No. SR–NYSE–2005–02]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Approving Proposed Rule Change and Amendments Nos. 1, 2 and 3 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 4 to the Proposed Rule Change Relating to Exchange Rule 607

November 22, 2005.

I. Introduction

On January 4, 2005, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change amending Exchange Rule 607 concerning the procedures for the appointment of arbitrators to arbitration cases administered by the NYSE. On May 12, 2005, the NYSE filed Amendment No. 1 to the proposed rule change (''Amendment No. 1'').[3] On May 13, 2005, the NYSE filed Amendment No. 2 to the proposed rule change (''Amendment No. 2).[4] On June 16, 2005, the NYSE filed Amendment No. 3 to the proposed rule change (Amendment No. 3).[5] The proposed rule change was published for comment in the **Federal Register** on June 23, 2005.[6] The Commission received four comments on the proposal, as amended.[7] On November 10, 2005, the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 was filed and withdrawn by the NYSE on May 12, 2005.

[4] *See* Amendment No. 2. Amendment No. 2 supplemented the initial filing.

[5] *See* Amendment No. 3. Amendment No. 3 supplemented the initial filing and modified certain statements in Amendment No. 2.

[6] *See* Exchange Act Release No. 51863 (June 16, 2005), 70 FR 36451 (June 23, 2005) (the ''Notice'').

[7] *See* Letters from Robert S. Clemente, Of Counsel, Liddle and Robinson, to Jonathan G. Katz, dated February 3, 2005 and July 7, 2005 (''Clemente Letters''); Letter from Rosemary J. Shockman, President, Public Investors Arbitration Bar Association, to Jonathan G. Katz, dated July 14, 2005 (''Shockman Letter''); and Letter from Richard P. Ryder, President, Securities Arbitration Commentator, Inc. to Jonathan G. Katz, dated July 15, 2005 (''Ryder Letter''). Mr. Clemente filed two letters in response to the filing, the first of which was received after filing of the proposed rule change but before publication in the **Federal Register**. Mr. Clemente submitted a second letter, similar to the first, after the proposed rule change was noticed in the **Federal Register**, and attached the first letter to the second.

Exchange filed Amendment No. 4 to the proposed rule change (''Amendment No. 4''),[8] and on November 14, 2005, the Exchange filed a response to the comment letters.[9] This order approves the proposed rule change, as amended by Amendments Nos. 1, 2 and 3, grants accelerated approval to Amendment No. 4 to the proposed rule change, and solicits comments from interested persons on Amendment No. 4.

II. Description of the Proposed Rule Change

A. Description of the Proposal

The NYSE currently has several methods by which arbitrators are assigned to cases, including the traditional method pursuant to NYSE Rule 607 where NYSE staff appoints arbitrators to cases.

a. The Pilot Program

On August 1, 2000, the NYSE implemented a two-year pilot program to allow parties, on a voluntary basis, to select arbitrators under three alternative methods (in addition to the traditional method).[10] Upon expiration of the two-year pilot, the NYSE renewed the pilot for an additional two years, ending on July 31, 2004.[11] The pilot was subsequently extended again until January 31, 2005,[12] then July 31, 2005,[13] and ultimately was extended until November 30, 2005.[14]

The first alternative under the pilot program is the Random List Selection method, by which the parties are provided randomly-generated (as described below) lists of public- and securities-classified arbitrators. The parties have ten days to strike and rank the names on the lists. Based on mutual ranking of the lists, the highest-ranking arbitrators are invited to serve on the case. If a panel cannot be chosen from the first list, a second list is generated, with three potential arbitrators for each vacancy, and one peremptory challenge available to each party for each vacancy. Under the pilot program, if vacancies remain after the second list has been processed, arbitrators are then randomly assigned to serve, subject only to challenges for cause.

The second alternative method under the pilot program is the Enhanced List Selection method, in which six public- and three securities-classified arbitrators are selected by NYSE staff, based on their qualifications and expertise. The lists are then sent to the parties. The parties have three strikes to use and are required to rank the arbitrators not stricken. Based on mutual ranking of the lists, the highest-ranking arbitrators are invited to serve on the case.

Lastly, the pilot program permits parties, pursuant to mutual agreement, to choose arbitrators through any alternative method.

Under the pilot program, the parties must all agree to use either the Random List Selection method, the Enhanced List Selection method or an ''alternative method.'' Absent such agreement, under the pilot program, the traditional method is used.

b. The Proposed Rule Change

The proposed amendments to Rule 607 retain the traditional method of staff appointment of arbitrators as an option in the event a full panel cannot be appointed under Random List Selection or in the event that the customer or non-member does not elect to use the Random List Selection method. In addition, the proposed rule change modifies and makes permanent the Random List Selection method by specifying the number of arbitrators on each list (ten public arbitrators and five industry arbitrators) and limiting the number of strikes (four against the public arbitrators and two against the industry arbitrators). The proposed rule change also eliminates the second list of arbitrators. According to the NYSE, this will simplify and shorten the appointment process. The proposed rule change also specifies that for simplified arbitrations, the randomly generated list will contain the names of five arbitrators, against which each party will have two strikes. Further, the proposed rule change gives the customer or non-member the choice of using Random List Selection as the method to appoint arbitrators. If a claim includes a customer or a non-member, the election of the customer or non-member controls, and all parties' agreement to use list selection would no longer be required. Finally, because parties rarely requested Enhanced List Selection, the proposed rule change eliminates Enhanced List Selection as a method for selecting arbitrators, but permits parties to choose alternate methods of arbitrator selection pursuant to mutual agreement.

The proposed rule change provides that a party can request an arbitrator's last three NYSE arbitration decisions, if any (the pilot program had provided that these decisions would be sent automatically). The proposed rule change also provides that any request for additional information must be made within the ten business days in which the parties must return the lists, and that this time period is applicable to all requests for additional information under NYSE Rule 607 as well as NYSE Rule 608, which governs notice of selection of arbitrators and requires, among other things, the Director of Arbitration to provide the parties with the names and employment histories of the arbitrators for the past ten years, and permits a party to request additional information concerning an arbitrator's background. Lastly, the proposed rule change provides that the NYSE will send lists of arbitrators to parties approximately thirty days after the last answer is filed with the Exchange.[15]

c. Comparison to SICA Rules

The proposed amendments resemble the Uniform Code of Arbitration (''UCA'') developed by the Securities Industry Conference on Arbitration (''SICA'').[16] Aside from word choice and punctuation, the principal differences between the NYSE's proposed rules and the SICA-developed UCA are:

- The NYSE retains the traditional method of staff appointment.
- The NYSE specifies the number of arbitrators on the lists.
- The NYSE limits the number of peremptory challenges.
- The NYSE eliminates a second list containing three names for each vacancy under the Random List Selection method.
- The NYSE does not send the two lists of public and industry arbitrators under the Random List Selection method unless and until the customer or non-member requests in writing the use of the Random List Selection method within 45 days from the date of filing of the statement of claim.
- The NYSE sets a ten business day period for the parties to return the lists to the director of arbitration.
- The NYSE sets a ten business day period for the parties to request

[8] In Amendment No. 4, which supplemented the original filing, the Exchange amended the proposed rule text to respond to one of the commenters' concerns.

[9] *See* letter from Mary Yeager, Assistant Secretary, NYSE, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated Nov. 14, 2005.

[10] The pilot program was implemented originally for a two-year period. Exchange Act Release No. 43214 (August 28, 2000), 65 FR 53247 (September 1, 2000) (SR–NYSE–2000–34).

[11] *See* Exchange Act Release No. 46372 (August 16, 2002), 67 FR 54521 (August 22, 2002) (SR–NYSE–2002–30).

[12] *See* Exchange Act Release No. 49915 (June 25, 2004), 69 FR 39993 (July 1, 2004).

[13] *See* Exchange Act Release No. 51085 (Jan. 27, 2005), 70 FR 5716 (Feb. 3, 2005), corrected at 70 FR 7143 (Feb. 10, 2005).

[14] *See* Exchange Act Release No. 52155 (Jul. 28, 2005), 70 FR 44712 (Aug. 3, 2005) (SR–NYSE–2005–52).

[15] *See* Amendment No. 4.

[16] The NASD also has a rule that provides for the appointment of arbitrators by list selection. *See* NASD Rule 10308.

additional information about a potential arbitrator.

• The NYSE permits the parties to agree to extend the time period in which to return the lists.

B. Comment Summary and NYSE's Response

a. Comments Received

The proposal was published for comment in the **Federal Register** on June 23, 2005.[17]

We received four comments on the proposal.[18] One commenter believed that the NYSE should withdraw or amend the proposal and that, in light of other amendments to Rule 607, the NYSE's proposed merger with Archipelago, and the NYSE's shift from a private to a public company, the NYSE should not submit any other amendments to its arbitration rules.[19] One of the commenters stated that NYSE's arbitration system had many advantages over NASD's, including lower expenses and greater NYSE staff involvement, but was concerned that NYSE was not presently a reasonable alternative to NASD's arbitration system.[20] This commenter believed that in order to improve the NYSE's system, the NYSE needed to (i) ''[e]mbrace list selection;'' (ii) ''[p]rovide Arbitrator Award histories;'' (iii) ''[a]ppoint the Panel earlier in the case;'' [21] and (iv) ''[g]ive equal encouragement to claims outside NYC.'' In this commenter's view, these changes would make the NYSE a more competitive arbitration forum.[22]

Two commenters, although they approved of certain aspects of the filing, such as the elimination of mutuality for list selection, generally criticized the proposed rule change.[23] They expressed concern that the NYSE was not committed to creating a viable arbitration forum or an alternative to the NASD's arbitration system,[24] that the Exchange limited the number of strikes against potential arbitrators on the list, and that the proposed rule change, including its diversion from SICA rules, was not adequately described.[25] One commenter approved of the filing, but believed that the definition of a ''public arbitrator'' in the rule should be carefully examined to ensure that public arbitrators do not have ties to the securities industry.[26] Another commenter also stated that the Exchange should address the classification of public arbitrators.[27] One commenter was concerned about the procedures for informing parties of the disclosures that arbitrators were required to make on the grounds that these disclosures would not be made before the parties would have to exercise strikes. In this commenter's view, the parties might not learn potentially critical information about the arbitrators until after the arbitrators are appointed (at which time strikes are limited to ''for cause'').[28]

In response to the Commission's specific request for comment on whether the Exchange should automatically send parties a potential arbitrator's prior three arbitration decisions, as provided in the pilot program, whether it should only send such decisions upon a party's request, and whether the Exchange should inform parties that prior arbitration decisions are available on its Web site, two commenters believed that the NYSE should list arbitrator awards on its Web site.[29] One commenter believed that the administrative burden of sending the last three decisions was too high but believed that the NYSE should develop reports from its docket records that are similar to the NASD's reports.[30] The other commenter believed that the Exchange should send the last three arbitration awards to the parties automatically.[31]

b. NYSE's Response to Comments

The NYSE responded to the commenters' concerns by filing an amendment to the proposed rule text to require the Exchange to send out the lists of arbitrators to all parties approximately 30 days after the last answer is due.[32] This addressed the concern that arbitrators should become involved in the process earlier, in order to allow the panel of arbitrators, rather than the NYSE staff, to administer the proceedings.[33]

The Exchange also submitted a letter response to the commenters. The Exchange stated that even though arbitrators still may be appointed pursuant to administrative appointment, it has ''embraced list selection'' [34] by giving the public customer/non-member the ability to elect list selection without requiring the agreement of the member firm. The Exchange also indicated that it retained the traditional method of arbitrator selection as a convenience to public customers.

In addition, the NYSE observed that during the pilot program, it found that parties often struck all names on the first list, requiring distribution of a second list and delaying the process. The Exchange also found that the parties often exercised peremptory challenges on the arbitrators on the second list. The Exchange maintained that the limited number of strikes will result in careful review and ranking of potential arbitrators, leading to a streamlined list selection process. In response to concerns that the ''enhanced list'' method of arbitrator appointment was to be eliminated, the Exchange noted that the parties' ability under the proposed rule change to select any reasonable method of arbitrator appointment would allow them to use enhanced list selection. If the parties agree to use enhanced list selection, arbitrators would be appointed to a panel in the same manner as under the pilot program.

In response to the question of whether the Exchange should provide parties with the ability to access arbitrators' awards and with hard copies of the arbitrators' last three awards, the Exchange noted that parties are advised that the arbitrators' awards are available on its Web site in the cover letter sent to the parties with the proposed names of the arbitrators. The Exchange also noted that the arbitrators' profiles provide information through which the parties can access all awards for each arbitrator on the NYSE Web site. The Exchange opined that it was inefficient to send out the last three awards automatically, and that the availability of the awards on the Web site would be sufficient to satisfy the parties' need for the awards. The Exchange also noted that it will continue to send out the last three awards to the extent that the parties request them, and that the Exchange will inform the parties of that option in the cover letter sent with the lists of arbitrators.

In response to commenters' concerns with the classification of public arbitrators, the Exchange noted that it had filed a separate proposed rule change, NYSE–2005–43,[35] addressing the question of when arbitrators should be classified as ''public.'' In response to

[17] *See* note 6, *supra.*

[18] *See* note 7, *supra.*

[19] Clemente Letters.

[20] *See* Ryder Letter.

[21] The commenter favorably cited the NASD's system of involving arbitrators at the pleading stage in his comments. *See* Ryder Letter.

[22] Ryder Letter.

[23] Ryder Letter, Clemente Letters.

[24] Ryder Letter.

[25] Clemente Letters.

[26] Shockman Letter.

[27] Clemente Letters.

[28] Clemente Letters.

[29] Clemente Letters, Ryder Letter.

[30] Ryder Letter.

[31] Clemente Letters.

[32] *See* Amendment No. 4.

[33] *See* Ryder Letter.

[34] *See supra* note 22.

[35] *See* Exchange Act Rel. No. 52314 (Aug. 22, 2005), 70 FR 51104 (Aug. 29, 2005) (SR–NYSE–2005–43).

one commenter's concern with the timing of the disclosure of arbitrator conflicts, the Exchange noted that an arbitrator's duty to disclose conflicts pursuant to Rule 610 is a continuing duty, and additional information received by the Exchange pursuant to Rule 610 is immediately forwarded to the parties.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 4, including whether Amendment No. 4 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2005–02 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–NYSE–2005–02. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro/shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2005–02 and should be submitted on or before December 20, 2005.

IV. Discussion and Findings

After careful review, the Commission finds that the proposed rule change is consistent with section 6(b) [36] of the Act in general and section 6(b)(5) of the Act [37] in particular, which require that the rules of the Exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade and, in general, to protect investors and the public interest.[38] The proposed rule change makes permanent the pilot program allowing for list selection of arbitrators, but does so with modifications that make it easier for customers to opt for list selection, while retaining the method of traditional arbitrator appointment as an alternative for parties. The proposed rule change institutes a system of selecting arbitrators that is comparable to the SICA's UCA and that of the NASD. Although commenters expressed concerns with various of the modifications between the pilot program and the amendments to NYSE Rule 607 put forth in the proposed rule change, including the elimination of the second list and the limitations on preemptive strikes, the Exchange described the way these provisions had operated during the Exchange's administration of the pilot program, and explained the ways in which these provisions had appeared to the Exchange to delay the arbitration process. In light of the Exchange's experience with the pilot program, the Exchange's decision to eliminate these provisions of the pilot program appears reasonable. The Exchange also explained that arbitrator's past awards are readily available to parties, and that the last three arbitrator award decisions will be sent to parties should they request it. The NYSE also amended its Rule 607 in order to provide for a time period in which the lists of arbitrators should be sent to the parties that is the same as the NASD's requirement, creating consistency between the two systems.

We believe that the proposed amendments to NYSE Rule 607 will provide the NYSE with a list selection mechanism for selecting arbitrators comparable to that of the NASD and SICA's UCA, and that the list selection process will give customers increased involvement in the selection of the arbitrators who will hear their claims, leading to increased investor confidence in the NYSE's arbitral selection system.

Accelerated Approval of Amendment No. 4

The Commission finds good cause for approving Amendment No. 4 to the proposed rule change prior to the thirtieth day after the amendment is published for comment in the **Federal Register** pursuant to section 19(b)(2) of the Act.[39] Amendment No. 4 provided a time period in which the NYSE would be required to provide the parties with lists of arbitrators. Setting a specific time for sending the lists of arbitrators to the parties will create consistency across the arbitration system in place at the NYSE. Further, the timing of the NYSE's sending of the lists to parties is identical to that of the NASD, thereby creating consistency between the two arbitration systems. The Commission finds that, given the benefits of having the Exchange set a specific time for sending out the lists of arbitrators, it is appropriate for the Exchange to amend the proposed rule text to reflect consistency in the involvement of arbitrators in the process. Accordingly, the Commission believes that accelerated approval of Amendment No. 4 is appropriate.

V. Conclusion

It Is Therefore Ordered, pursuant to section 19(b)(2) of the Act [40] that the proposed rule change (SR–NYSE–2005–02) be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[41]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–6653 Filed 11–28–05; 8:45 am]

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[36] 15 U.S.C. 78f(b).

[37] 15 U.S.C. 78f(b)(5).

[38] 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).

[39] 15 U.S.C. 78s(b)(2).

[40] 15 U.S.C. 78s(b)(2).

[41] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52790; File No. SR–OCC–2005–13]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Clearing Fees for Certain Transactions Executed on OneChicago, LLC

November 17, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

(''Act''),[1] notice is hereby given that on September 29, 2005, The Options Clearing Corporation (''OCC'') 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 primarily by OCC. OCC filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii) of the Act,[2] and Rule 19b–4(f)(2) thereunder,[3] 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 purpose of the proposed rule change is to charge clearing fees to OneChicago, LLC (''ONE'') for cleared trades where an OCC clearing member is on one or both sides of the trade based on OCC's standard rebate-eligible fee schedule (''Standard Fee Schedule''), rather than under the alternate rebate-ineligible fee schedule (''Alternate Fee Schedule'') adopted when OCC and ONE entered into the Security Futures Agreement for Clearing and Settlement Services (''ONE Clearing Agreement'').

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC 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. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.[4]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Under the Standard Fee Schedule, OCC clearing members pay OCC's standard clearing fees and are eligible to receive rebates of excess clearing fees when and as determined by OCC's Board of Directors. When negotiating its clearing agreement with OCC, ONE preferred to pay OCC's clearing fees itself rather than have OCC charge those fees to clearing members.[5] Because ONE wanted to plan on set fees and avoid the uncertainty of a rebate that might be less than expected, OCC agreed to an Alternate Fee Schedule which provides for the following fees:

- 7¢ per side for trades of 1 to 500 contracts.
- 6¢ per side for trades of 501 to 1,000 contracts.
- 5¢ per side for trades of 1,001 to 2,000 contracts, and
- $85 for trades larger than 2,000 contracts.[6]

The Alternate Fee Schedule also includes certain new product discounts.[7] Under the terms of the ONE Clearing Agreement, the Alternate Fee Schedule expired on November 8, 2005.

Since the adoption of the Alternate Fee Schedule, OCC has both reduced and discounted its Standard Fee Schedule.[8] The current discounted Standard Fee Schedule is:

- 5¢ per contract for trades of 1 to 500 contracts.
- 4¢ per contract for trades of 501 to 1,000 contracts.
- 3¢ per contract for trades of 1,001 to 2,000 contracts, and
- $55 for trades larger than 2,000 contracts.

This discounted fee structure remains in effect until further action by OCC's Board of Directors.

In response to a request by ONE, OCC has agreed to charge fees to ONE under the Standard Fee Schedule including standard new product fee discounts[9] for trades where at least one side is cleared by an OCC clearing member. OCC is willing to provide ONE with the benefit of the Standard Fee Schedule for such trades before the date the Alternate Fee Structure for ONE is set to expire. Accordingly, effective October 1, 2005, OCC charged ONE clearing fees based on the Standard Fee Schedule. Any refund of clearing fees charged under the Standard Schedule will be paid to ONE.

OCC believes that the proposed change is consistent with Section 17A of the Act because it provides the benefit of a discounted, rebate-eligible clearing fee schedule for certain trades to a market for which OCC provides clearance and settlement services. The proposed rule change is not inconsistent with the existing rules of OCC, including any other rules proposed to be amended.

(B) Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change would impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were not and are not intended to be solicited with respect to the proposed rule change, and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[10] and Rule 19b–4(f)(2)[11] thereunder because it establishes or changes a due, fee, or other charge. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78s(b)(3)(A)(ii).

[3] 17 CFR 240.19b–4(f)(2).

[4] The Commission has modified parts of these statements.

[5] At that time, clearing fees under OCC's Standard Fee Schedule were:

- 9¢ per side for trades of 1 to 500 contracts.
- 7¢ per side for trades of 501 to 1,000 contracts.
- 6¢ per side for trades of 1,001 to 2,000 contracts, and
- $110 for trades larger than 2,000 contracts.

[6] Securities Exchange Act Release No. 47196 (January 15, 2003), 68 FR 3922 (January 27, 2003) [File No. SR–OCC–2002–20]. Pursuant to the ONE Clearing Agreement, the CME has been designated as an associated clearinghouse (''ACH'') for ONE. Under the Alternate Fee Schedule, different fees are charged where the ACH is on one or both sides of a trade. Those fees are not being changed by this filing.

[7] Securities Exchange Act Release No. 47196. The ''new securities future product'' discounts are as follows:

- First month traded: No fee.
- Second month traded: 2.5¢ regardless of size.
- Third month traded: The lesser of the total at 5¢ or $85.
- Fourth month traded: Reverts to Alternate Fee Schedule.

[8] *See* Securities Exchange Act Release Nos. 49436 (March 17, 2004), 69 FR 13932 (March 24, 2004) [File No. SR–OCC–2004–01], 50080 (July 26, 2004), 69 FR 45873 (July 30, 2004) [File No. SR–OCC–2004–12], 50951 (December 30, 2004), 70 FR 1489 (January 7, 2005) [File No. SR–OCC–2004–22], and 52034 (July 14, 2005), 70 FR 42134 (July 21, 2005) [File No. SR–OCC–2005–08].

[9] The ''new products'' discounts under the Standard Schedule are as follows:

- First month traded: No fee.
- Second month traded: For trades with contracts of:

  1–4,400—1 cent/side.

  > 4,400—$40.
- Third month traded: For trades with contracts of:

  1–2,200—2 cents/side.

  > 2,200—$40.
- Fourth month traded: Reverts to Standard Fee Schedule.

[10] 15 U.S.C. 78s(b)(3)(A)(ii).

[11] 17 CFR 240.19b–4(f)(2).

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–OCC–2005–13 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–OCC–2005–13. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of OCC and on OCC's Web site at *http://www.optionsclearing.com.*

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–OCC–2005–13 and should be submitted on or before December 20, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–6618 Filed 11–28–05; 8:45 am]

BILLING CODE 8010–01–P

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52789; File No. SR–OCC–2005–14]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Position Sub-Accounts

November 17, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on September 29, 2005, The Options Clearing Corporation (''OCC'') 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 primarily by OCC. OCC filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act,[2] and Rule 19b–4(f)(4) thereunder,[3] 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 proposed rule change sets forth certain interpretations as to the treatment of position sub-accounts maintained with respect to one or more account types established by a clearing member under a particular clearing member number[4] in the event of the clearing member's liquidation.[5]

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78s(b)(3)(A)(iii).

[3] 17 CFR 240.19b–4(f)(4).

[4] Clearing member numbers are used to identify clearing members within OCC's system. For a variety of reasons, a clearing member may use more than one clearing member number. *See* Securities Exchange Act Release No. 47194 (January 15, 2003), 68 FR 3923 (January 27, 2003) [File No. SR–OCC–2002–26].

[5] The proposed change to Article VI, Section 3, Interpretation and Policy .02 is conforming in nature and reflects the Commission's recent approval of the proposed rule change in Securities Exchange Act Release No. 52030 (July 14, 2005), 70 FR 42405 (July 22, 2005) [File No. SR–OCC–2003–04].

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC 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. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.[6]

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

OCC's clearing systems have historically contained functionality that identifies the positions of each market maker participating in a combined market makers' account.[7] Position sub-accounting in a combined market makers' account is accomplished by using each participating market maker's unique acronym to identify the market maker's trades for clearance and settlement, including position reporting. Because of the large number of transactions effected by market makers, reporting their positions on a sub-account basis facilitates clearing member reconciliation and balancing processes. Position sub-accounting also avoids the need for firms carrying a combined market makers' account to allocate assignments to particular market makers because OCC assigns exercise notices directly to market maker sub-accounts.[8]

OCC's new clearing system, ENCORE, was designed to extend position sub-accounting to other account types that a clearing member may maintain with OCC although this functionality has not yet been offered to clearing members. Once OCC completes a system and clearing member readiness assessment, OCC intends to gradually roll out position sub-accounting for these other account types to interested clearing members. OCC expects the roll-out to commence in or about the second quarter of 2006. OCC anticipates that

[6] The Commission has modified parts of these statements.

[7] A combined market makers' account is confined to the exchange transactions of the market makers for which it was established. OCC also permits sub-accounting within a clearing member's segregated futures professional account. All positions carried within each of these account types are maintained on sub-account basis.

[8] Securities Exchange Act Release No. 46735 (October 28, 2002), 67 FR 67434 (November 5, 2002) [File No. SR–OCC–2002–19].

interested clearing members will initially limit their use of the new sub-accounts to large-volume customers such as institutions and foreign affiliates in order to further improve the efficiency of their reconciliation processes.

Like the process used to provide position sub-accounting for market makers, unique identifying acronyms will be assigned for use by clearing members in creating position sub-accounts with respect to other accounts maintained under a given clearing member number. Exchange transactions may be directly cleared into a sub-account by submitting the applicable assigned acronym in the matching trade information. Alternatively, a clearing member would be permitted to effect a post-trade instruction in OCC's systems to transfer the position to a sub-account. As in the case of market maker sub-accounts, OCC will assign exercise notices directly to applicable position sub-accounts.[9]

The potential increase in the number of sub-accounts that may be carried on OCC's books, coupled with the fact that sub-accounts would now be permitted to be maintained in accounts in which positions also are carried on an omnibus basis, has led OCC to conclude that it would be advisable to formalize existing interpretations regarding the treatment of position sub-accounts in the event of a clearing member liquidation. For such purposes, market-maker sub-accounts always have been treated as a single account. The proposed rule change codifies this existing interpretation and extends it to the sub-accounts that will now be permitted to be carried in other account types. In order to provide for a controlled implementation of position sub-accounting with respect to other account types, a further interpretation has been added which permits OCC to limit, for systemic or operational reasons, the overall number of sub-accounts that a clearing member may maintain with respect to particular account types. As is the case today, OCC would not limit the number of market professional sub-accounts a clearing member could carry in recognition of their role in providing market liquidity.

OCC believes that the proposed change is consistent with Section 17A of Act because by clarifying the application of OCC's liquidation rules to position sub-accounts carried by clearing members it better enables OCC to safeguard the securities and funds in its possession or for which it is responsible. The proposed rule change is not inconsistent with the existing rules of OCC, including any other rules proposed to be amended.

B. Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change would impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were not and are not intended to be solicited with respect to the proposed rule change, and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[10] and Rule 19b–4(f)(4)[11] promulgated thereunder because the proposal effects a change in an existing service of OCC that (A) does not adversely affect the safeguarding of securities or funds in the custody or control of OCC or for which it is responsible and (B) does not significantly affect the respective rights or obligations of OCC or persons using the service. At any time within sixty days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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–OCC–2005–14 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–OCC–2005–14. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of OCC and on OCC's Web site at *http://www.optionsclearing.com.*

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–OCC–2005–14 and should be submitted on or before December 20, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–6623 Filed 11–28–05; 8:45 am]

BILLING CODE 8010–01–P

[9] Exchange rules require member firms to establish fixed procedures for allocating assignments to customers and to inform their customers of the method used and how it works. *See, e.g.*, CBOE Rule 11.2. OCC will require clearing members that establish customer sub-accounts to give each customer for which a sub-account is opened a notice disclosing that OCC will assign exercises directly to the sub-account.

[10] 15 U.S.C. 78s(b)(3)(A)(iii).

[11] 17 CFR 240.19b–4(f)(4).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52809; File No. SR–PCX–2005–108]

Self-Regulatory Organizations; Pacific Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating to Listing Standards for Investment Company Units and Dissemination of Intraday Optimized Portfolio Value

November 18, 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 26, 2005, the Pacific Exchange, Inc. (''PCX'' or ''Exchange''), through its wholly owned subsidiary PCX Equities, Inc. (''PCXE'' or ''Corporation''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposal from interested persons and also approving the proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange, through its wholly-owned subsidiary PCXE, proposes to amend its rules governing the Archipelago Exchange (''ArcaEx''), the equities trading facility of PCXE. With this filing, the Exchange proposes to amend its listing standards for Investment Company Units (''ICUs'') to provide that PCXE may approve a series of ICUs for trading if one or more major market data vendors disseminates for each series of ICUs listed on ArcaEx an estimate of the value of a share of each series of ICUs, sometimes referred to as the Intraday Optimized Portfolio Value (''IOPV''), at least every 15 seconds during the time these ICUs trade on ArcaEx. The text of the proposed rule change is available on the Exchange's Internet Web site *(http://www.pacificex.com),* at the Exchange'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 these statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

PCXE Rule 5.2(j)(3), Commentary .01, provides listing standards for ICUs to permit listing and trading of these securities pursuant to Rule 19b–4(e) under the Act.[3] Rule 19b–4(e) provides that the listing and trading of a new derivative securities product by a self-regulatory organization (''SRO'') shall not be deemed a proposed rule change, pursuant to paragraph (c)(1) of Rule 19b–4, if the Commission has approved, pursuant to Section 19(b) of the Act, the SRO's trading rules, procedures and listing standards for the product class that would include the new derivative securities product, and the SRO has a surveillance program for the product class.[4]

The Exchange rules for ICUs currently provide that the Reporting Authority[5] will disseminate for each series of ICUs (in the case of PCXE Rule 5.2(j)(3)) an estimate, updated every 15 seconds, of the value of a share of the series. The IOPV may be based, for example, upon current information regarding the required deposit of securities and cash amount to permit creation of new shares of the series or upon the index value.[6] The Exchange believes that, rather than identifying specifically in its rules the Reporting Authority as the dissemination service, it is preferable to reflect in the rules a requirement for wide dissemination of the IOPV. This proposed rule change would make clear that the IOPV must be widely disseminated by a reputable dissemination service, such as the Consolidated Tape Association, Reuters, or Bloomberg. The Exchange believes that naming the Reporting Authority as the dissemination service is not necessary and that the purpose of the rule would be achieved as long as the service used for dissemination is reputable, accepted in the investment community, and effects appropriately wide dissemination of the IOPV relating to a particular series of ICUs.

The Exchange therefore proposes to change the listing standards for ICUs to provide that PCXE may approve a series of ICUs for trading if one or more major market data vendors disseminates for each series of ICUs listed on ArcaEx the IOPV every 15 seconds during the time that these ICUs trade on ArcaEx.

2. 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, because it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments and perfect the mechanisms of a free and open market, 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

Written comments on the proposed rule change were neither solicited nor received.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(e).

[4] *See* Securities Exchange Act Release No. 40761 (December 8, 1998), 63 FR 70952 (December 22, 1998).

[5] PCXE Rule 5.1(b)(16) provides that the term ''Reporting Authority'' in respect of a particular series of ICUs means the Corporation, a subsidiary of the Corporation, or an institution or reporting service designated by the Corporation or its subsidiary as the official source for calculating and reporting information relating to such series, including, but not limited to, any current index or portfolio value; the current value of the portfolio of any securities required to be deposited in connection with issuance of ICUs; the amount of any dividend equivalent payment or cash distribution to holders of ICUs, net asset value, or other information relating to the issuance, redemption or trading of ICUs. The rule further states that: (i) Nothing in PCXE Rule 5.2(j)(3) implies that an institution or reporting service that is the source for calculating and reporting information relating to ICUs must be designated by the Corporation and (ii) the term ''Reporting Authority'' shall not refer to an institution or reporting service not so designated.

[6] PCXE Rule 5.2(j)(3), Commentary .01(c).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

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–2005–108 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–2005–108. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web 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 offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PCX–2005–108 and should be submitted on or before December 20, 2005.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful consideration, 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.[9] In particular, the Commission believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,[10] which requires, among other things, that the rules of the Exchange be 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.

Under the proposed rule change, the Exchange would modify its ''generic'' listing standards under PCXE Rule 5.2(j)(3) applicable to ICUs to remove the requirement that the Reporting Authority disseminate estimated values for each series every 15 seconds. Instead, the proposal would impose a requirement to have one or more major market vendors to disseminate such information during the time that ICUs trade on ArcaEx. For the purposes of this rule, the Exchange notes that its definition of major market data vendor includes the Consolidated Tape and services such as Reuters and Bloomberg.

The Exchange has requested that the Commission find good cause for approving the proposed rule change prior to the thirtieth day after publication of notice thereof in the **Federal Register**. The Commission notes that it previously approved a similar rule change for the New York Stock Exchange, Inc. (''NYSE'').[11]

The Commission believes that granting accelerated approval of the proposal will allow the Exchange to implement, without undue delay, these listing standards for dissemination of the estimated values for ICUs. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[12] for approving this proposal before the thirtieth day after the publication of notice thereof in the **Federal Register**.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[13] that the proposed rule change (SR–PCX–2005–108) is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–6619 Filed 11–28–05; 8:45 am]

BILLING CODE 8010–01–P

[9] In approving this proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[10] 15 U.S.C. 78f(b)(5).

[11] *See* Securities Exchange Act Release No. 52081 (July 20, 2005), 70 FR 43488 (July 27, 2005) (SR–NYSE–2005–44).

[12] 15 U.S.C. 78s(b)(2).

[13] 15 U.S.C. 78s(b)(2).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52814; File No. SR–PCX–2005–85]

Self-Regulatory Organizations; Pacific Exchange, Inc.; Order Approving Proposed Rule Change and Amendment Nos. 2 and 3 Thereto Relating to Exposure of Orders in the PCX Plus Crossing Mechanism

November 21, 2005.

On July 19, 2005, the Pacific Exchange, Inc. (''PCX'' or ''Exchange''), filed with the Securities and Exchange Commission (''Commission'') a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] to reduce the exposure period in the Crossing Mechanism of the PCX Plus System from 30 seconds to 10 seconds. The PCX filed Amendment No. 1 to the proposed rule change on September 20, 2005 and subsequently withdrew Amendment No. 1. The PCX filed Amendment Nos. 2 and 3 to the proposed rule change on September 23, 2005 and September 27, 2005, respectively. The proposed rule change, as amended, was published for comment in the **Federal Register** on October 7, 2005.[3] The Commission received no comments on the proposal.

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of Section 6(b) of the Act[4] and the rules and regulations thereunder applicable to a national securities exchange,[5] and in particular with Section 6(b)(5) of the Act.[6] The Commission believes that, in the electronic environment of PCX Plus, reducing the exposure period to 10 seconds could facilitate the prompt execution of orders, while providing participants in the PCX Plus System

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 52542 (September 30, 2005), 70 FR 58773.

[4] 15 U.S.C. 78f(b).

[5] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[6] 15 U.S.C. 78f(b)(5).

with an adequate opportunity to compete for those orders.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[7] that the proposed rule change (SR–PCX–2005–85), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–6622 Filed 11–28–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52811; File No. SR–PCX–2005–125]

Self-Regulatory Organizations; Pacific Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Extend Certain Exceptions From the Voting and Ownership Limitations in the Certificate of Incorporation of PCX Holdings, Inc.

November 21, 2005.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 15, 2005, the Pacific Exchange, Inc. (''PCX'' or the ''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 PCX. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and is approving the proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

PCX hereby submits to the Commission a proposed rule change to extend certain exceptions from the voting and ownership limitations in the certificate of incorporation of PCX Holdings, Inc. (''PCXH''), a Delaware corporation and the parent company of PCX, approved by the Commission in an order issued on September 22, 2005,[3] so as to allow Archipelago Holdings, Inc. (''Archipelago''), a Delaware corporation and the ultimate parent company of PCXH and PCX, to continue to (i) own and operate the ATS OTC Function (as defined below) of its wholly-owned subsidiary, Archipelago Trading Services, Inc. (''Arca Trading''), and (ii) until the closing of the proposed business combination of Archipelago and the New York Stock Exchange, Inc. (the ''NYSE''), a New York not-for-profit corporation (the ''Proposed Archipelago NYSE Merger''), own and operate the DOT Function (as defined below) of its wholly-owned subsidiary, Archipelago Securities, L.L.C. (''Archipelago Securities'').

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, PCX 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 III below. The self-regulatory organization 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

a. PCXH Acquisition and the Amendment of the PCXH Certificate of Incorporation

On September 26, 2005, Archipelago completed its acquisition of PCXH and all of its wholly-owned subsidiaries, including PCX and PCX Equities, Inc. (''PCXE'') (the ''PCXH Acquisition''). The PCXH Acquisition was accomplished by way of a merger of PCXH with a wholly-owned subsidiary of Archipelago, with PCXH being the surviving corporation in the merger and becoming a wholly-owned subsidiary of Archipelago.

The certificate of incorporation of PCXH (as amended to date, the ''PCXH Certificate of Incorporation'') contains various ownership and voting restrictions on PCXH's capital stock, which are designed to safeguard the independence of the self-regulatory functions of PCX and to protect the Commission's oversight responsibilities. In order to allow Archipelago to own 100% of the capital stock of PCXH, prior to the completion of the PCXH Acquisition, PCX filed with the Commission a proposed rule change which sought to, among other things, amend the PCXH Certificate of Incorporation to create an exception from the voting and ownership restrictions for Archipelago and certain of its related persons (the ''Original Rule Filing'').[4] The Original Rule Filing, as amended by Amendment No. 1 and Amendment No. 2 thereto, was approved by the Commission on September 22, 2005[5] and the amended PCXH Certificate of Incorporation became effective on September 26, 2005, upon the closing of the PCXH Acquisition.

Article Nine of the PCXH Certificate of Incorporation provides that no Person,[6] either alone or together with its Related Persons,[7] may own, directly or indirectly, shares constituting more than 40% of the outstanding shares of any class of PCXH capital stock,[8] and that no Person, either alone or together with its Related Persons who is a trading permit holder of PCX or an equities trading permit holder of PCXE, may own, directly or indirectly, shares

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[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 52497 (September 22, 2005), 70 FR 56949 (September 29, 2005) (''Order Approving SR–PCX–2005–90'').

[4] *See* Pacific Exchange, Inc., Proposed Rule Change Relating to the Certificate of Incorporation of PCX Holdings, Inc., PCX Rules, and Bylaws of Archipelago Holdings, Inc., File No. SR–PCX–2005–90 (August 1, 2005).

[5] *See* Order Approving SR–PCX–2005–90.

[6] ''Person'' is defined to mean an individual, partnership (general or limited), joint stock company, corporation, limited liability company, trust or unincorporated organization, or any governmental entity or agency or political subdivision thereof. PCXH Certificate of Incorporation, Article Nine, section 1(b)(iv).

[7] The term ''Related Person,'' as defined in the PCXH Certificate of Incorporation, means (i) with respect to any person, all ''affiliates'' and ''associates'' of such person (as such terms are defined in Rule 12b–2 under the Act; (ii) with respect to any person constituting a trading permit holder of PCX or an equities trading permit holder of PCXE, any broker dealer with which such holder is associated; and (iii) any two or more persons that have any agreement, arrangement or understanding (whether or not in writing) to act together for the purpose of acquiring, voting, holding or disposing of shares of the capital stock of PCXH. PCXH Certificate of Incorporation, Article Nine, section 1(b)(iv).

[8] PCXH Certificate of Incorporation, Article Nine, section 1(b)(i). However, such restriction may be waived by the Board of Directors of PCXH pursuant to an amendment to the Bylaws of PCXH adopted by the Board of Directors, if, in connection with the adoption of such amendment, the Board of Directors adopts a resolution stating that it is the determination of such Board that such amendment will not impair the ability of PCX to carry out its functions and responsibilities as an ''exchange'' under the Act and is otherwise in the best interests of PCXH and its stockholders and PCX, and will not impair the ability of the Commission to enforce said Act, and such amendment shall not be effective until approved by said Commission; *provided* that the Board of Directors of PCXH shall have determined that such Person and its Related Persons are not subject to any applicable ''statutory disqualification'' (within the meaning of section 3(a)(39) of the Act). PCXH Certificate of Incorporation, Article Nine, sections 1(b)(i)(B) and 1(b)(i)(C).

constituting more than 20% of any class of PCXH capital stock.[9] Furthermore, the PCXH Certificate of Incorporation provides that, for so long as PCXH controls, directly or indirectly, PCX, no Person, either alone or with its Related Persons, may directly or indirectly vote or cause the voting of shares of PCXH capital stock or give any proxy or consent with respect to shares representing more than 20% of the voting power of the issued and outstanding PCXH capital stock.[10] The PCXH Certificate of Incorporation also places limitations on the right of any Person, either alone or with its Related Persons, to enter into any agreement with respect to the withholding of any vote or proxy.[11]

PCX proposed (and the Commission approved) an exception from the ownership and voting limitations described above by adding a new paragraph at the end of Article Nine of the PCXH Certificate of Incorporation, which provides that for so long as Archipelago directly owns all of the outstanding capital stock of PCXH, these ownership and voting limitations shall not be applicable to the ownership and voting of shares of PCXH by (i) Archipelago, (ii) any Person that is a Related Person of Archipelago, either alone or together with its Related Persons, and (iii) any other Person to which Archipelago is a Related Person, either alone or together with its Related Persons.[12] These exceptions to the ownership and voting limitations, however, shall not apply to any ''Prohibited Persons,'' [13] which is defined to mean any Person that is, or that has a Related Person that is (i) an OTP Holder or an OTP Firm (as defined in the rules of PCX) [14] or (ii) an ETP Holder (as defined in the rules of PCXE),[15] unless such Person is also a ''Permitted Person'' under the PCXH Certificate of Incorporation.[16] The PCXH Certificate of Incorporation further provides that any Prohibited Person not covered by the definition of a Permitted Person who is subject to and exceeds the voting and ownership limitations imposed by Article Nine as of the date of the closing of the PCXH Acquisition shall be permitted to exceed the voting and ownership limitations imposed by Article Nine only to the extent and for the time period approved by the Commission.[17]

b. ATS OTC Function

Arca Trading is a broker-dealer and an ETP Holder of PCXE. The business of Arca Trading includes, among other things, the operation of an alternative trading system (''ATS'') (as defined in Regulation ATS promulgated by the Commission under the Act) [18] for trading of over-the-counter bulletin board securities that are not traded on any securities exchange or Nasdaq (including, for the avoidance of doubt, The NASDAQ National Market and The NASDAQ SmallCap Market) (such function was referred to as the ''ATS OTC Function'' in the Order Approving SR–PCX–2005–90). Because Arca Trading is a broker-dealer and an ETP Holder, and a wholly-owned subsidiary and, consequently, a Related Person, of Archipelago, it falls within the definition of ''Prohibited Persons.'' Absent an exception, Archipelago's ownership of PCXH would cause Arca Trading to exceed the voting and ownership limitations imposed by Article Nine of the PCXH Certificate of Incorporation. Therefore, in connection with the PCXH Acquisition, PCX requested an exception on a pilot basis for Arca Trading from the ownership and voting limitations in the PCX Certificate of Incorporation for Archipelago's ownership and operation of the ATS OTC Function of Arca Trading.[19] The Commission approved PCX's proposal and allowed Archipelago to continue to own and operate the ATS OTC Function of Arca Trading for a period of 60 days following the closing of the PCXH Acquisition.[20] The pilot approval was designed to provide the public and other interested parties the opportunity to comment on the exception before the exception being made permanent. In the Order Approving SR–PCX–2005–90, the Commission specifically noted that in its adoption of Regulation ATS, it had stated that exchanges could form subsidiaries that operate ATSs registered as broker-dealers and that such subsidiaries would of course be required to become members of a national securities association or another national securities exchange.[21]

c. DOT Function of Archipelago Securities

Archipelago Securities is a registered broker-dealer, a member of the National Association of Securities Dealers, Inc. and an ETP Holder of PCXE. Among other things, Archipelago Securities engages in the business of providing broker-dealer clients with direct connectivity, through the NYSE Designated Order Turnaround System, to the NYSE (such function was referred to as the ''DOT Function'' in the Order Approving SR–PCX–2005–90). Because Archipelago Securities is a broker-dealer and an ETP Holder, and a wholly-owned subsidiary and, consequently, a Related Person, of Archipelago, it falls within the definition of ''Prohibited Persons.'' Absent an exception, Archipelago's ownership of PCXH would cause Archipelago Securities to exceed the voting and ownership limitations imposed by Article Nine of the PCXH Certificate of Incorporation. Therefore, in connection with the PCXH Acquisition, PCX requested an exception on a pilot basis for Archipelago Securities from the ownership and voting limitations for Archipelago's ownership and operation

[9] PCXH Certificate of Incorporation, Article Nine, section 1(b)(ii).

[10] PCXH Certificate of Incorporation, Article Nine, section 1(c).

[11] *Id.*

[12] PCXH Certificate of Incorporation, Article Nine, Section 4.

[13] *Id.*

[14] PCX rules define an ''OTP Holder'' to mean any natural person, in good standing, who has been issued an Options Trading Permit (''OTP'') by the Exchange for effecting approved securities transactions on the Exchange's trading facilities, or has been named as a Nominee. PCX Rule 1.1(q). The term ''Nominee'' means an individual who is authorized by an ''OTP Firm'' (a sole proprietorship, partnership, corporation, limited liability company or other organization in good standing who holds an OTP or upon whom an individual OTP Holder has conferred trading privileges on the Exchange's trading facilities) to conduct business on the Exchange's trading facilities and to represent such OTP Firm in all matters relating to the Exchange. PCX Rule 1.1(n).

[15] PCXE rules define an ''ETP Holder'' to mean any sole proprietorship, partnership, corporation, limited liability company or other organization in good standing that has been issued an Equity Trading Permit, a permit issued by the PCXE for effecting approved securities transactions on the trading facilities of PCXE. PCXE Rule 1.1(n).

[16] ''Permitted Person'' is defined to mean (A) any broker or dealer approved by the Commission after June 20, 2005 to be a facility (as defined in Section 3(a)(2) of the Act) of PCX; (B) any Person that has been approved by the Commission prior to it becoming subject to the provisions of Article Nine of the PCXH Certificate of Incorporation with respect to the voting and ownership of shares of PCXH capital stock by such Person; and (C) any Person that is a Related Person of Archipelago solely by reason of beneficially owning, either alone or together with its Related Persons, less than 20% of the outstanding shares of Archipelago capital stock. PCXH Certificate of Incorporation, Article Nine, section 4.

[17] *Id.*

[18] 17 CFR 242.300 through 17 CFR 242.303.

[19] *See* Amendment No. 2 to the Original Rule Filing (File Number SR–PCX–2005–90), at 6 (September 16, 2005) (''Amendment No. 2'').

[20] *See* Order Approving SR–PCX–2005–90, at 56960.

[21] *Id.* at 56959. The Commission also noted in the Order Approving SR–PCX–2005–90 that in adopting Regulation ATS, the Commission stated that any subsidiary or affiliate ATS could not integrate, or otherwise link the ATS with the exchange, including using the premises or property of such exchange for effecting or reporting a transaction, without being considered a facility of the exchange. *Id.*

of the DOT Function of Archipelago Securities, on the condition that in no event would Archipelago or PCX request that this exception be extended beyond the completion of the Proposed Archipelago NYSE Merger.[22] In the Order Approving SR–PCX–2005–90, the Commission approved PCX's request for Archipelago to continue to own and operate the DOT Function of Archipelago Securities until the earlier of a period of 60 days following the closing of the PCXH Acquisition and the closing of the Proposed Archipelago NYSE Merger.[23]

d. Requests for Approval

Because the PCXH Acquisition was consummated on September 26, 2005, the temporary approvals with respect to the ATS OTC Function of Arca Trading and the DOT Function of Archipelago Securities will expire on November 25, 2005. The Exchange hereby submits to the Commission the following requests:

(i) The Exchange hereby requests that the Commission approve Archipelago's ownership and operation of the ATS OTC function of Arca Trading on a permanent basis. Without the Commission's approval sought hereby, upon the expiration of the 60 day pilot approval, Archipelago's ownership of PCXH would cause Arca Trading to exceed the voting and ownership limitations imposed by Article Nine of the PCXH Certificate of Incorporation because ATS, a broker-dealer and an ETP Holder of PCXE, is a wholly owned subsidiary and, consequently, a Related Person, of Archipelago.

(ii) The Exchange hereby requests that the Commission approve an extension of the pilot approval with respect to Archipelago's ownership and operation of the DOT Function of Archipelago Securities until the closing of the Proposed Archipelago NYSE Merger. Without the Commission's approval sought hereby, upon the expiration of the 60 day pilot approval, Archipelago's ownership of PCXH would cause Archipelago Securities to exceed the voting and ownership limitations imposed by Article Nine of the PCXH Certificate of Incorporation because Archipelago Securities, a broker-dealer and an ETP Holder of PCXE, is a wholly owned subsidiary and, consequently, a Related Person, of Archipelago and the approval of the other functions of Archipelago Securities granted by the Commission previously were limited in scope and did not include its DOT Function.

[22] *See* Amendment No. 2, at 7.

[23] *See* Order Approving SR–PCX–2005–90, at 56960.

2. Basis

The Exchange believes that the proposed rule change in this filing is consistent with section 6(b) of the Act,[24] in general, and furthers the objectives of section 6(b)(1),[25] in particular, in that it enables the Exchange to be so organized so as to have the capacity to be able to carry out the purposes of the Act and to comply, and (subject to any rule or order of the Commission pursuant to section 17(d) or 19(g)(2) of the Act) to enforce compliance by its exchange members and Persons associated with its exchange members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange. The Exchange also believes that this filing furthers the objectives of section 6(b)(5),[26] in particular, because the rules summarized herein would create a governance and regulatory structure with respect to the operation of the business of PCX[27] that is designed to help prevent fraudulent and manipulative acts and practices; to promote just and equitable principals of trade; to foster cooperation and coordination with Persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; and 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.

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

Written comments on the proposed rule change were neither solicited nor received.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–PCX–2005–125 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–PCX–2005–125. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of 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–2005–125 and should be submitted on or before December 20, 2005.

IV. Discussion of Commission Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national

[24] 15 U.S.C. 78f(b).

[25] 15 U.S.C. 78f(b)(1).

[26] 15 U.S.C. 78f(b)(5).

[27] PCX clarified that the governance and regulatory structure created by the proposal relates to the operation of PCX's business generally, not only to its options business. Telephone conversation between Janet Angstadt, Deputy General Counsel and Assistant Corporate Secretary, PCX and Jennifer Dodd, Special Counsel, Division of Market Regulation, Commission, on November 21, 2005.

securities exchange.[28] In particular, the Commission finds that the proposal is consistent with section 6(b)(1) of the Act,[29] which requires a national securities exchange to be so organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by its members and persons associated with its members with the provisions of the Act, the rules or regulations thereunder, and the rules of the exchange. The Commission also finds that the proposal is consistent with section 6(b)(5) of the Act,[30] which requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade, to facilitate transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Pursuant to section 19(b)(2) of the Act,[31] the Commission may not approve any proposed rule change, or amendment thereto, prior to the thirtieth day after the date of publication of the notice thereof, unless the Commission find good cause for so doing. The Commission hereby finds good cause for approving the proposed rule change prior to the thirtieth day after publishing notice thereof in the **Federal Register** pursuant to section 19(b)(2) of the Act.[32] The Commission believes that the requested extensions are consistent with the terms and conditions set forth in the Order Approving SR–PCX–2005–90, and notes that in its filing, PCX represented that accelerated effectiveness of the proposed rule change before the expiration of the pilot approvals would provide continuity of Archipelago's operation of the ATS OTC Function and DOT Function. The Commission also notes that the proposed changes are extensions of exceptions that the Commission approved on a pilot basis in the Order Approving SR–PCX–2005–90 and, as such, do not raise any new or novel issues. The pilots are both currently set to expire on November 25, 2005. Permitting PCX to extend the pilots will permit Archipelago to avoid disruption of its operation of the ATS OTC Function and the DOT Function. Furthermore, the Commission notes that after the publication of the pilot approvals in the **Federal Register**, the Commission did not receive any comment with respect to Archipelago's ownership and operation of the ATS OTC Function of Arca Trading and the DOT Function of Archipelago Securities.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the requirements of the Act the rules and regulations thereunder, and finds that good cause exists to accelerate approval of the proposed rule change, pursuant to section 19(b)(2) of the Act.[33]

V. Conclusion

It Is Therefore Ordered, pursuant to section 19(b)(2) of the Act,[34] that the proposed rule change (SR–PCX–2005–125) is approved on an accelerated basis. Specifically, a permanent exception for the ATS OTC Function of Arca Trading is approved; and the exception for the DOT Function of Archipelago Securities is approved on a pilot basis until the closing date of the Proposed Archipelago NYSE Merger.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[35]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–6624 Filed 11–28–05; 8:45 am]

BILLING CODE 8010–01–P

[28] In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[29] 15 U.S.C. 78f(b)(1).

[30] 15 U.S.C. 78f(b)(5).

[31] 15 U.S.C. 78s(b)(2).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[License No. 02/72–0634]

L Capital Partners SBIC, L.P.; Notice Seeking Exemption Under Section 312 of the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that L Capital Partners SBIC, L.P., 10 East 53rd Street, 37th Floor, New York, New York 10022, a Federal Licensee under the Small Business Investment Act of 1958, as amended (''the Act''), in connection with the financing of a small concern, has sought an exemption under section 312 of the Act and section 107.730, Financings which Constitute Conflicts of Interest of the Small Business Administration (''SBA'') rules and regulations (13 CFR 107.730 (2002)). L Capital Partners SBIC, L.P. proposes to purchase preferred securities issued by Sceptor Industries, Inc., 8301 State Line Road, Suite 101, Kansas City, MO 64114 (''Sceptor''). The financing will enable Sceptor to expand its scope of licensed technology and intellectual property which will better position Sceptor to obtain growth capital.

The financing is brought within the purview of Sec. 107.730(a)(1) of the Regulations because Shalom Equity Fund Limited, an Associate of L Capital Partners SBIC, L.P. owns 42% of the existing and outstanding stock of Sceptor.

Therefore, this transaction is considered a financing of an Associate requiring prior SBA approval.

Notice is hereby given that any interested person may submit written comments on the transaction, within 15 days of the date of this publication, to the Associate Administrator for Investment, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

Dated: November 22, 2005.

Jaime Guzman-Fournier,

Associate Administrator, for Investment.

[FR Doc. E5–6633 Filed 11–28–05; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Small Business Size Standards: Waiver of the Nonmanufacturer Rule

AGENCY: U.S. Small Business Administration.

ACTION: Notice of intent to terminate waiver of the Nonmanufacturer Rule for Commercial Cooking Equipment.

SUMMARY: The U.S. Small Business Administration (SBA) is considering terminating the waiver of the Nonmanufacturer Rule for Commercial Cooking Equipment based on our recent discovery of a small business manufacturer for this class of products. Terminating this waiver will require recipients of contracts set aside for small businesses, service-disabled veteran-owned small businesses, or SBA's 8(a) Business Development Program to provide the products of small business manufacturers or processors on such contracts.

DATES: Comments and sources must be submitted on or before December 12, 2005.

FOR FURTHER INFORMATION CONTACT: Edith Butler, Program Analyst, by telephone at (202) 619–0422; by FAX at (202) 481–1788; or by e-mail at *edith.butler@sba.gov.*

SUPPLEMENTARY INFORMATION: Section 8(a)(17) of the Small Business Act (Act), 15 U.S.C. 637(a)(17), requires that recipients of Federal contracts set aside for small businesses, service-disabled veteran-owned small businesses, or SBA's 8(a) Business Development

Program provide the product of a small business manufacturer or processor, if the recipient is other than the actual manufacturer or processor of the product. This requirement is commonly referred to as the Nonmanufacturer Rule.

The SBA regulations imposing this requirement are found at 13 CFR 121.406(b). Section 8(a)(17)(b)(iv) of the Act authorizes SBA to waive the Nonmanufacturer Rule for any ''class of products'' for which there are no small business manufacturers or processors available to participate in the Federal market.

As implemented in SBA's regulations at 13 CFR 121.1202 (c), in order to be considered available to participate in the Federal market for a class of products, a small business manufacturer must have submitted a proposal for a contract solicitation or received a contract from the Federal government within the last 24 months. The SBA defines ''class of products'' based on six digit coding systems. The first coding system is the Office of Management and Budget North American Industry Classification System (NAICS). The second is the Product and Service Code required as a data entry by the Federal Procurement Data System.

The SBA received a request on July 25, 2005 to waive the Nonmanufacturer Rule for Commercial Cooking Equipment. In response, on August 25, 2005, SBA published in the **Federal Register** a notice of intent to the waiver of the Nonmanufacturer Rule for Commercial Cooking Equipment.

SBA explained in the notice that it was soliciting comments and sources of small business manufacturers of this class of products. In response to this notice, a comment was received from an interested party. Accordingly, based on the available information, SBA has determined that there is a small business manufacturer of this class of products, and, is therefore considering terminating the class waiver of the Nonmanufacturer Rule for Commercial Cooking Equipment, NAICS 333319.

Authority: 15 U.S.C. 637(a)(17).

Dated: November 22, 2005.

Karen C. Hontz,

Associate Administrator for Government Contracting.

[FR Doc. E5–6635 Filed 11–28–05; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 5239]

Culturally Significant Objects Imported for Exhibition Determinations: ''The Princess and the Patriot: Ekaterina Dashkova, Benjamin Franklin and the Age of Enlightenment''

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition ''The Princess and the Patriot: Ekaterina Dashkova, Benjamin Franklin and the Age of Enlightenment'', imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners. I also determine that the exhibition or display of the exhibit objects at The Museum of the American Philosophical Society in Philosophical Hall, Philadelphia, PA, from on or about February 17, 2006, until on or about December 31, 2006, and at possible additional venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Richard Lahne, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202/453–8058). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: November 18, 2005.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 05–23428 Filed 11–28–05; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF STATE

[Public Notice 5238]

Advisory Committee on Historical Diplomatic Documentation; Notice of Meeting

SUMMARY: The Advisory Committee on Historical Diplomatic Documentation will meet in the Department of State, 2201 ''C'' Street NW., Washington, DC, December 12–13, 2005, in Conference Room 1406. Prior notification and a valid government-issued photo ID (such as driver's license, passport, U.S. government or military ID) are required for entrance into the building. Members of the public planning to attend must notify Chris Tudda, Office of the Historian (202–663–3054) no later than December 8, 2005 to provide date of birth, valid government-issued photo identification number and type (such as driver's license number/state, passport number/country, or U.S. government ID number/agency or military ID number/branch), and relevant telephone numbers. If you cannot provide one of the enumerated forms of ID, please consult with Chris Tudda for acceptable alternative forms of picture identification.

The Committee will meet in open session from 1:30 p.m. through 3 p.m. on Monday, December 12, 2005, in Room 1406 to discuss declassification and transfer of Department of State records to the National Archives and Records Administration and the status of the *Foreign Relations* series. The remainder of the Committee's sessions from 3:15 p.m. until 4:30 p.m. on Monday, December 12, 2005, and 9 a.m. until 1 p.m. on Tuesday, December 13, 2005, will be closed in accordance with section 10(d) of the Federal Advisory Committee Act (Pub. L. 92–463). The agenda calls for discussions of agency declassification decisions concerning the *Foreign Relations* series and other declassification issues. These are matters not subject to public disclosure under 5 U.S.C. 552b(c)(1) and the public interest requires that such activities be withheld from disclosure.

Questions concerning the meeting should be directed to Marc J. Susser, Executive Secretary, Advisory Committee on Historical Diplomatic Documentation, Department of State, Office of the Historian, Washington, DC 20520, telephone (202) 663–1123, (e-mail history state.gov).

Marc J. Susser,

Executive Secretary, Department of State.

[FR Doc. 05–23427 Filed 11–28–05; 8:45 am]

BILLING CODE 4710–11–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Project Number STPD–1069–00 (006)]

Environmental Impact Statement: Washington and Bolivar Counties, MS

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice of intent.

SUMMARY: The Federal Highway Administration is issuing this notice to advise the public that an Environmental Impact Statement will be prepared for a proposed connector route from the proposed Interstate 69 to U.S. Highway 82 near the City of Greenville, MS in the above referenced counties.

FOR FURTHER INFORMATION CONTACT: Mr. Cecil Vick, Realty Officer/Environmental Coordinator, Federal Highway Administration, 666 North Street, Suite 105, Jackson, MS 39202–3199, Telephone: (601) 965–4217. Contacts at the State and local level, respectively are: Mr. Claiborne Barnwell, Environmental/Location Division Engineer, Mississippi Department of Transportation, P. O. Box 1850, Jackson, MS, 39215–1850, telephone: (601) 359–7920; and Mr. Walter Lyons, District 3 Engineer, Mississippi Department of Transportation, 1240 Highway 49 West, Yazoo City, MS 39194, telephone (662) 746–2513.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Mississippi Department of Transportation (MDOT) will prepare an Environmental Impact Statement (EIS) for an approximate 20-mile alignment of the I–69 Connector, which will be built to Interstate standards through the Delta region east of the Mississippi River, moving in a generally north-south alignment. This alignment will have logical termini on the southern end at U.S. Highway 82 in Greenville in Washington County and on the northern end at the proposed Interstate 69 near Benoit in Bolivar County.

The purpose of the EIS is to address the transportation, environmental, and safety issues of a connector route to the projected I–69. The connection will also significantly improve mobility and access Statewide and beyond, creating a valuable transportation network. The need will be further heightened due to the increased traffic along the projected I–69. The connector route will spur economic activity for the City of Greenville and surrounding areas in the Mississippi Delta region. The highway is a proposed full control of access facility and appropriate interchanges will be studied at various locations. Alternatives under consideration include (1) taking no action and (2) build alternatives.

The FHWA and MDOT are seeking input as a part of the scoping process to assist in determining and clarifying issues relative to this project. Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State, and local agencies, Native American tribes, private organizations and citizens who have previously expressed or are known to have interest in this proposal. A formal scoping meeting with Federal, state, and local agencies, and other interested parties will be held in the near future as well as several public involvement meetings held throughout the EIS process. The draft EIS will be available for public and agency review and comment prior to the official public hearing.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA at the address provided above.

Andrew H. Hughes,

Division Administrator, Federal Highway Administration, Mississippi Division, Jackson, Mississippi.

[FR Doc. E5–6645 Filed 11–28–05; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement; Skowhegan Transportation Study; Skowhegan and Madison, Somerset County, MA

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an Environmental Impact Statement (EIS) will be prepared for a proposed highway project in the Towns of Skowhegan and Madison, Maine.

FOR FURTHER INFORMATION CONTACT: Mark Hasselmann, Right of Way and Environmental Programs Manager, Maine Division, Federal Highway Administration, 40 Western Ave., Augusta, Maine 04330, Tel. 207/622–8350, Ext. 101; Raymond Faucher, Project Manager, Maine Department of Transportation, State House Station 16, Augusta, Maine 04333–0016, Tel. 207/624–3300.

SUPPLEMENTARY INFORMATION: On October 14, 2005, FHWA Maine Division informed MaineDOT that they had completed their review of the NEPA process to date for the Skowhegan Transportation Study and decided that an Environmental Impact Statement will be required before location and design approval. The principal reason for this decision is the public controversy that has been generated late in the NEPA process regarding proposed highway alignments.

The FHWA, in cooperation with the Maine Department of Transportation, will prepare an EIS to evaluate transportation alternatives to enhance mobility, safety, and accessibility through and around Skowhegan. The EIS will examine both new highway alignments and infrastructure improvements. The EIS will study corridor alternatives, including upgrades within existing highway corridors, corridors on new location, and the no-build alternative. The area under consideration extends from Route 2/201A west of the Town of Skowhegan easterly and northerly around Skowhegan and then westerly to Route 201 in Madison just north of Skowhegan. The length of the corridor is approximately 6.5 miles. Goals for the study include: (1) Improving safety and relieving congestion on U.S. Routes 2 and 201, and State Routes 104 and 150, (2) improving regional east-west and north-south traffic flow, (3) improving emergency cross-river access and response capabilities, and (4) providing the capacity to meet current and future traffic demands. The work completed to date in the Skowhegan Transportation Study will provide the foundation for the EIS analysis.

This project was initiated as a transportation planning study in 1998, with agency scoping and coordination initiated at interagency meetings in that year and the intent to prepare a NEPA document. Public participation was also initiated in 1998 with the formation of a Public Advisory Committee, a July 28 public scoping meeting, and the development of a study purpose and need. A wide range of alternatives was developed and evaluated. Preparation of an Environmental Assessment began in March of 2002. In July of 2005, Alternative E3E received a preliminary determination from the Army Corps of Engineers that it is the Least Environmentally Damaging Practicable Alternative (LEDPA).

Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State and local agencies and private organizations that have previously expressed or are known to have interest in the proposed action. All public and agency comments, including early scoping comments, received during the NEPA process will be addressed in the EIS. The draft EIS will be available for public and agency review and comment prior to a public hearing. To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA and/or MaineDOT at the addresses provided above.

FHWA anticipates that the following Federal approvals will be necessary for the proposed project.

Section 404 Clean Water Act permit

Design, Right of Way, and Construction Funding Authorization

Authority: 23 U.S.C. 315; 49 CFR 1.48.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: November 17, 2005.

Jonathan McDade,

Division Administrator, Federal Highway Administration, Augusta, Maine.

[FR Doc. 05–23415 Filed 11–28–05; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

Maritime Administration

Reports, Forms and Recordkeeping Requirements; Agency Information Collection Activity Under OMB Review

AGENCY: Maritime Administration, DOT.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and approval. The nature of the information collection is described as well as its expected burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on August 29, 2005, and comments were due by October 28, 2005. No comments were received.

DATES: Comments must be submitted on or before December 29, 2005.

FOR FURTHER INFORMATION CONTACT: T. Mitchell Hudson, Maritime Administration, 400 Seventh Street Southwest, Washington, DC 20590. Telephone: 202–366–5320; FAX: 202–366–7485; or e-mail: *mitch.hudson@dot.gov.* Copies of this collection also can be obtained from that office.

SUPPLEMENTARY INFORMATION: Maritime Administration (MARAD).

Title: Eligibility of U.S.-flag Vessels 100 feet or Greater in Registered Length To Obtain a Fishery Endorsement to the Vessel's Documentation.

OMB Control Number: 2133–0530.

Type of Request: Extension of currently approved collection.

Affected Public: Vessel owners, charterers, mortgagees, mortgage trustees and managers of vessels of 100 feet or greater who seek a fishery endorsement for the vessel.

Forms: None.

Abstract: In accordance with the American Fisheries Act of 1998 (AFA), owners of vessels of 100 feet or greater who wish to obtain a fishery endorsement to the vessel's documentation will be required to file an affidavit of United States citizenship. The information collection is necessary for MARAD to determine that a given vessel is owned and controlled by citizens of the United States in accordance with the requirements of the AFA, and therefore, is eligible to receive a fishery endorsement to its documentation.

Annual Estimated Burden Hours: 2,950 hours.

ADDRESSES: Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, Northwest, Washington, DC 20503, Attention MARAD Desk Officer.

Comments are invited on: 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; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

Authority: 49 CFR 1.66.

Issued in Washington, DC on November 16, 2005.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. E5–6638 Filed 11–28–05; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket Number 2005–23095]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel CARIBBEAN SPIRIT.

SUMMARY: As authorized by Public Law 105–383 and Public Law 107–295, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket 2005–23095 at *http://dms.dot.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with Public Law 105–383 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before December 29, 2005.

ADDRESSES: Comments should refer to docket number MARAD–2005 23095. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. DOT Dockets, Room PL–401, Department of Transportation, 400 7th

St., SW., Washington, DC 20590–0001. You may also send comments electronically via the Internet at *http://dmses.dot.gov/submit/.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Michael J. Gordon, U.S. Department of Transportation, Maritime Administration, MAR–830 Room 7201, 400 Seventh Street, SW., Washington, DC 20590. Telephone 202–366–5468.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel CARIBBEAN SPIRIT is:

Intended Use: Sailing charters.

Geographic Region: Coastal waters of Florida.

Dated: November 22, 2005.

By order of the Maritime Administrator.

Murray A. Bloom,

Acting Secretary, Maritime Administration.

[FR Doc. 05–23397 Filed 11–28–05; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket Number 2005–23097]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel DYNASTY.

SUMMARY: As authorized by Public Law 105–383 and Public Law 107–295, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket 2005–23097 at *http://dms.dot.gov*. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with Public Law 105–383 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before December 29, 2005.

ADDRESSES: Comments should refer to docket number MARAD–2005 23097. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. DOT Dockets, Room PL–401, Department of Transportation, 400 7th St., SW., Washington, DC 20590–0001. You may also send comments electronically via the Internet at *http://dmses.dot.gov/submit/*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://dms.dot.gov*.

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, MAR–830 Room 7201, 400 Seventh Street, SW., Washington, DC 20590. Telephone 202–366–5979.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel DYNASTY is:

Intended Use: ''Charters along the west coast of the continental United States; occasional chartering in the Gulf of Mexico, United States territories (Puerto Rico and U.S. Virgin Islands) and along Florida's eastern seaboard.''

Geographic Region: Intended operations will be mainly the west coast of the United States, from the Canadian border to the Mexican border, more specifically from Puget Sound and the San Juan Islands, along the coast of Washington, the coast of Oregon, and the Coast of California south to San Diego Bay and the Mexican Border.

Additionally, on occasion, it is our intention that the boat will be in the Gulf of Mexico and travel along the Texas, Louisiana, Mississippi, Alabama, and Florida coastlines, also visiting United States territories including United States Virgin Islands and Puerto Rico.

Dated: November 22, 2005.

By order of the Maritime Administrator.

Murray A. Bloom,

Acting Secretary, Maritime Administration.

[FR Doc. E5–6639 Filed 11–28–05; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket Number 2005–23094]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel PARAISO.

SUMMARY: As authorized by Public Law 105–383 and Public Law 107–295, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket 2005–23094 at *http://dms.dot.gov*. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with Pub. L. 105–383 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before December 29, 2005.

ADDRESSES: Comments should refer to docket number MARAD–2005 23094. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. DOT Dockets, Room PL–401, Department of Transportation, 400 7th St., SW., Washington, DC 20590–0001. You may also send comments electronically via the Internet at *http://*

dmses.dot.gov/submit/. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://dms.dot.gov*.

FOR FURTHER INFORMATION CONTACT: Michael Gordon, U.S. Department of Transportation, Maritime Administration, MAR–830 Room 7201, 400 Seventh Street, SW., Washington, DC 20590. Telephone 202–366–5468.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel PARAISO is:

Intended Use: ''This vessel will operate for short to extended periods of time with captain, crew, and 12 or less passengers on harbor cruises, corporate executive sightseeing tours, and extended cruises.

Geographic Region: U.S. West Coast and harbors, Catalina Island.

Dated: November 22, 2005.

By order of the Maritime Administrator.

Murray A. Bloom,

Acting Secretary, Maritime Administration.

[FR Doc. E5–6641 Filed 11–28–05; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket Number 2005–23096]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel ROWDY.

SUMMARY: As authorized by Public Law 105–383 and Public Law 107–295, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket 2005–23096 at *http://dms.dot.gov*. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with Public Law 105–383 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before December 29, 2005.

ADDRESSES: Comments should refer to docket number MARAD–2005 23096. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. DOT Dockets, Room PL–401, Department of Transportation, 400 7th St., SW., Washington, DC 20590–0001. You may also send comments electronically via the Internet at *http://dmses.dot.gov/submit/*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://dms.dot.gov*.

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, MAR–830 Room 7201, 400 Seventh Street, SW., Washington, DC 20590. Telephone 202–366–5979.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel ROWDY is:

Intended Use: ''The vessel will operate as a six passenger charter charter vessel.''

Geographic Region: Narragansett Bay, Rhode Island.

Dated: November 22, 2005.

By order of the Maritime Administrator.

Murray A. Bloom,

Acting Secretary, Maritime Administration.

[FR Doc. E5–6640 Filed 11–28–05; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Reports, Forms and Record Keeping Requirements; Agency Information Collection Activity Under OMB Review

AGENCY: National Highway Traffic Safety Administration (NHTSA), U.S. Department of Transportation.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collections and their expected burden. The **Federal Register** Notice with a 60-day comment period was published on May 19, 2005 (70 FR 28843). This is a request for a new collection.

DATES: Comments must be submitted on or before December 29, 2005.

ADDRESSES: Send comments, within 30 days, to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention NHTSA Desk Officer.

FOR FURTHER INFORMATION CONTACT: Mary Versailles, NHTSA, 400 Seventh Street, SW., Room 5320, NVS–131, Washington, DC 20590. Ms. Versailles' telephone number is (202) 366–2057.

SUPPLEMENTARY INFORMATION:

National Highway Traffic Safety Administration

Title: 49 CFR 545—Federal Motor Vehicle Theft Prevention Standard Phase-In and Small-Volume Line Reporting Requirement.

OMB Control Number: 2127–.

Form Number: None.

Affected Public: Vehicle manufacturers.

Requested Expiration Date of Approval: Three years from approval date.

Abstract: Part 545 requires manufacturers to file a single report within 60 days of the end of the first year of the phase-in (August 31, 2007) indicating compliance with the phase-in of the expansion of the parts marking requirements of 49 CFR part 541.

49 CFR part 541, Federal *Motor Vehicle Theft Prevention Standard*, requires the major parts of certain motor vehicle lines to be indelibly marked with labels containing the Vehicle Identification Number. This ''parts

marking requirement'' reduces the incidence of motor vehicle thefts by facilitating the tracing and recovery of parts from stolen vehicles, and prosecuting thieves, chop shop operators, and stolen parts dealers.

The Anti Car Theft Act of 1992 (Pub. L. 102–519, October 25, 1992, codified in 49 U.S.C. chapter 331, *Theft Prevention*) required the Department of Transportation to expand the parts marking requirement to vehicle lines not subject to the current parts marking requirements (except light duty trucks (LDT) lines), unless subsequent to a study reviewing the effectiveness of parts marking, the Attorney General made a finding that extending the requirement would not substantially inhibit chop shop operations and motor vehicle theft.

On April 6, 2004 the agency published a final rule (69 FR 17960) extending the parts marking requirements to certain vehicle lines that were not previously subject to these requirements, specifically: (1) All low theft passenger car lines; (2) all low theft multipurpose passenger vehicle (MPV) lines with a gross vehicle weight rating (GVWR) of 6,000 pounds or less; and (3) low theft LDT lines with a GVWR of 6,000 pounds or less that have major parts that are interchangeable with a majority of the covered major parts of passenger cars or MPVs described above. On May 19, 2005, in response to petitions for reconsideration (70 FR 28843) NHTSA amended the final rule to phase in the effective date over a two-year period.

NHTSA anticipates that no more than 21 vehicle manufacturers will be affected by these reporting requirements. NHTSA does not believe that any of these 21 manufacturers are a small business (*i.e.*, one that employs less than 500 persons) since each manufacturer employs more than 500 persons.

NHTSA estimates that the vehicle manufacturers will incur a total annual reporting burden of 42 hours and a cost burden of $630–$840.

Comments Are Invited On:

- Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility.
- Whether the Department's estimate for the burden of the proposed information collection is accurate.
- Ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is most effective if OMB receives it within 30 days of publication.

Issued on: November 22, 2005.

H. Keith Brewer,

Director, Office of Crash Avoidance Standards.

[FR Doc. E5–6636 Filed 11–28–05; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[U.S. DOT Docket Number NHTSA–2005–23079]

Reports, Forms, and Recordkeeping Requirements

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Request for public comment on a previously approved collection of information.

SUMMARY: Before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). Under procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatement of previously approved collections.

This document describes one collection of information for which NHTSA intends to seek OMB approval.

DATES: Comments must be received on or before January 30, 2006.

ADDRESSES: You may submit comments (identified by DOT Docket No. NHTSA–2005–23079) by any of the following methods:

- *Web Site: http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001.
- *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number for this proposed collection of information. Note that all comments received will be posted without change to *http://dms.dot.gov* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Complete copies of each request for collection of information may be obtained at no charge from Ms. Carlita Ballard, NHTSA, 400 Seventh Street, SW., Room 5320, Washington, DC 20590. Ms. Ballard's telephone number is (202 366–5222). Please identify the relevant collection of information by referring to its OMB Control Number.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to OMB for approval, it must first publish a document in the **Federal Register** providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulation (at 5 CFR 1320.8(d)), an agency must ask for public comment on the following:

(i) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(ii) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) how to enhance the quality, utility, and clarity of the information to be collected;

(iv) how to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.* permitting electronic submission of responses.

In compliance with these requirements, NHTSA asks for public comments on the following previously approved collection of information:

Title: Insurer Reporting Requirement for 49 CFR Part 544.

OMB Control Number: 2127–0547.

Affected Public: Business or other for-profit.

Form Number: The collection of information uses no standard forms.

Abstract: This information collection supports the Department's strategic goal of Economic Growth and Trade. The Motor Vehicle Theft Law Enforcement Act of 1984, added Title VI to the Motor Vehicle and Information Cost Savings Act (recodified as Chapter 331 of Title 49, United States Code) (copy attached) which mandated this information collection. The 1984 Theft act was amended by the Anti Car Theft Act (ACTA) of 1992 (Pub. L. 102–519). NHTSA is authorized under 49 U.S.C. 33112, to collect this information. This information collection supports the agency's economic growth and trade goal through rulemaking implementation developed to help reduce the cost of vehicle ownership by reducing the cost of comprehensive insurance coverage. 49 U.S.C. 33112 requires certain passenger motor vehicle insurance companies and rental/leasing companies to provide information to NHTSA on comprehensive insurance premiums, theft and recoveries and actions taken to address motor vehicle theft.

Estimated Annual Burden: Based on prior years' insurer compilation information, the agency estimates that the time to review and compile information for the reports will take approximately a total of 66,300 burden hours (56,700 man-hours for 28 insurance companies and 9,600 man-hours for 17 rental and leasing companies). Most recent year insurer compilation information estimates that it takes an average cost of $36.00 per hour for clerical and technical staff to prepare the annual reports. Therefore, the agency estimates the total cost associated with the burden hours to be $2,386,800.

The burden hour for rental and leasing companies is significantly less than that for insurance companies because rental and leasing companies comply with fewer reporting requirements than the insurance companies. The reporting burden is based on claim adjusters' salaries, clerical and technical expenses, and labor costs.

Number of Respondents: 45.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued on: November 22, 2005.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. E5–6637 Filed 11–28–05; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

November 22, 2005.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before December 29, 2005 to be assured of consideration.

Alcohol and Tobacco Tax and Trade Bureau (TTB)

OMB Number: 1513–0042.

Type of Review: Extension.

Title: Drawback on Distilled Spirits Exported.

Form: TTB form F 5110.30.

Description: TTB form 5110.30 is used by persons who export distilled spirits and wish to claim a drawback of taxes already paid in the United States (U.S.). The form describes the claimant, spirits for tax purposes, amount of tax to be refunded, and a certification by the U.S. Government agent attesting to exportation.

Respondents: Business or other for-profit.

Estimated Total Burden Hours: 10,000 hours.

Clearance Officer: Frank Foote (202) 927–9347, Alcohol and Tobacco Tax and Trade Bureau, Room 200 East, 1310 G. Street, NW., Washington, DC 20005.

OMB Reviewer: Alexander T. Hunt (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Michael A. Robinson,

Treasury PRA Clearance Officer.

[FR Doc. E5–6672 Filed 11–28–05; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

November 22, 2005.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before December 29, 2005 to be assured of consideration.

Departmental Office (DO)

OMB Number: 1505–0001.

Type of Review: Revision.

Title: Treasury International Capital Form S, ''Purchases and Sales of Long-term Securities by Foreigners.''

Form: International Capital Form S.

Description: Form S is required by law and is designed to collect timely information on international portfolio capital movements, including foreigners' purchases and sales of long-term securities in transactions with U.S. persons. The information will be used in the computation of the U.S. balance of payments accounts and international investment position, as well as in the formulation of U.S. international financial and monetary policies.

Respondents: Business or other for-profit.

Estimated Total Burden Hours: 17,358 hours.

OMB Number: 1505–0199.

Type of Review: Revision.

Title: Treasury International Capital (TIC) Form D ''Report of Holdings of, and Transactions in, Financial Derivatives Contracts with Foreign Residents.

Form: International Capital Form D.

Description: Form D is required by law and is designed to collect timely

information on international portfolio capital movements, including U.S. residents' holdings of, and transactions in, financial derivatives contracts with foreign residents. The information will be used in the computation of the U.S. balance of payments accounts and international investment position, as well as in the formulation of U.S. international financial and monetary policies.

Respondents: Business or other for-profit.

Estimated Total Burden Hours: 5,490 hours.

Clearance Officer: Dwight Wolkow, (202) 622–1276, Department of Treasury, Room 4410–1440NYA, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

OMB Reviewer: Alexander T. Hunt, (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Michael A. Robinson,

Treasury PRA Clearance Officer.

[FR Doc. E5–6673 Filed 11–28–05; 8:45 am]

BILLING CODE 4810–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8023

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 8023, Elections Under Section 338 for Corporations Making Qualified Stock Purchases.

DATES: Written comments should be received on or before January 30, 2006 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn 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 Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, Room 6516, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Elections Under Section 338 for Corporations Making Qualified Stock Purchases.

OMB Number: 1545–1428.

Form Number: 8023.

Abstract: Form 8023 is used by a corporation that acquires the stock of another corporation to elect to treat the purchase of stock as a purchase of the other corporation's assets. This election allows the acquiring corporation to depreciate these assets and claim a deduction on its income tax return. IRS uses Form 8023 to determine if the election is properly made and as a check against the acquiring corporation's deduction for depreciation. The form is also used to determine if the selling corporation reports the amount of sale in its income.

Current Actions: There are no changes being made to Form 8023 at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit organizations.

Estimated Number of Respondents: 201.

Estimated Time Per Respondent: 12 hr., 44 min.

Estimated Total Annual Burden Hours: 5,559.

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: November 18, 2005.

Glenn Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E5–6612 Filed 11–28–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[FI–189–84]

Proposed Collection; Comment Request for Regulation Project

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 an existing final regulation, FI–189–84 (TD 8517), Debt Instruments With Original Issue Discount; Imputed Interest on Deferred Payment Sales or Exchanges of Property (§§ 1.1272–3, 1.1273–2(h), 1.1274–3(d), 1.1274–5(b), 1.1274A–1(c), and 1.1274–3(b)).

DATES: Written comments should be received on or before January 30, 2006 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn 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 regulation should be directed to Allan Hopkins, at (202) 622–3869, or at Internal Revenue Service, room 6516, Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Debt Instruments With Original Issue Discount; Imputed Interest on

Deferred Payment Sales or Exchanges of Property.

OMB Number: 1545–1353.

Regulation Project Number: FI–189–84.

Abstract: This regulation provides definitions, reporting requirements, elections, and general rules relating to the tax treatment of debt instruments with original issue discount and the imputation of, and accounting for, interest on certain sales or exchanges of property.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, business or other for-profit organizations, farms and state, local or tribal governments.

Estimated Number of Respondents: 525,000.

Estimated Time Per Respondent: 21 min.

Estimated Total Annual Burden Hours: 185,500

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: November 16, 2005.

Glenn Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E5–6613 Filed 11–28–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Ad Hoc Committee of the Taxpayer Advocacy Panel

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Ad Hoc Committee of the Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, December 20, 2005 from 1 p.m. to 2 p.m. ET.

FOR FURTHER INFORMATION CONTACT: Inez De Jesus at 1–888–912–1227, or 954–423–7977.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10 (a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Ad Hoc Committee of the Taxpayer Advocacy Panel will be held Tuesday, December 20, 2005, from 1 p.m. to 2 p.m. ET via a telephone conference call. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 954–423–7977, or write Inez De Jesus, TAP Office, 1000 South Pine Island Road, Suite 340, Plantation, FL 33324. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Inez De Jesus. Ms. De Jesus can be reached at 1–888–912–1227 or 954–423–7977, or post comments to the Web site: *http://www.improveirs.org.*

The agenda will include: Various IRS issues.

Dated: November 21, 2005.

John Fay,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E5–6610 Filed 11–28–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Joint Committee of the Taxpayer Advocacy Panel

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice

SUMMARY: An open meeting of the Joint Committee of the Taxpayer Advocacy Panel will be conducted via teleconference. The Taxpayer Advocacy Panel is soliciting public comment, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Wednesday, December 21, at 1 p.m., Eastern Time.

FOR FURTHER INFORMATION CONTACT: Barbara Toy at 1–888–912–1227, or 414–297–1611.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Joint Committee of the Taxpayer Advocacy Panel (TAP) will be held Wednesday, December 21, 2005, at 1 p.m. Eastern Time via a telephone conference call. If you would like to have the Joint Committee of TAP consider a written statement, please call 1–888–912–1227 or 414–297–1611, or write Barbara Toy, TAP Office, MS–1006–MIL, 310 West Wisconsin Avenue, Milwaukee, WI 53203–2221, or FAX to 414–297–1623, or you can contact us at *http://www.improveirs.org.* Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Barbara Toy.

Ms. Toy can be reached at 1–888–912–1227, or 414–297–1611, or by FAX at 414–297–1623.

The agenda will include the following: monthly committee summary report, discussion of issues brought to the joint committee, office report, and discussion of next meeting.

Dated: November 18, 2005.

Martha Curry,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E5–6611 Filed 11–28–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 4 Taxpayer Advocacy Panel (Including the States of Illinois, Indiana, Kentucky, Michigan, Ohio, Tennessee, and Wisconsin)

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Area 4 Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel is soliciting public comment, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, December 20, 2005, at 11 a.m., Eastern Time.

FOR FURTHER INFORMATION CONTACT: Mary Ann Delzer at 1–888–912–1227, or (414) 297–1604.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Area 4 Taxpayer Advocacy Panel will be held Tuesday, December 20, 2005, at 11 a.m., Eastern time via a telephone conference call. You can submit written comments to the panel by faxing the comments to (414) 297–1623, or by mail to Taxpayer Advocacy Panel, Stop 1006MIL, 310 West Wisconsin Avenue, Milwaukee, WI 53203–2221, or you can contact us at *http://www.improveirs.org*. This meeting is not required to be open to the public, but because we are always interested in community input, we will accept public comments. Please contact Mary Ann Delzer at 1–888–912–1227 or (414) 297–1604 for dial-in information.

The agenda will include the following: Various IRS issues.

Dated: November 18, 2005.

Martha Curry,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E5–6614 Filed 11–28–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0061]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521) this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 29, 2005.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 565–8374, FAX (202) 565–6590 or e-mail: *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0061.''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0061'' in any correspondence.

SUPPLEMENTARY INFORMATION: *Titles:* Request for Supplies (Chapter 31–Vocational Rehabilitation), VA Form 28–1905m.

OMB Control Number: 2900–0061.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 28–1905m is used to request supplies for veterans in rehabilitation programs. An official at the facility providing rehabilitation services to a veteran completes the form and certifies that the veteran needs the supplies to continue his or her program. The veteran must also certify that he or she is not in possession of any of the supplies listed on the form.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on July 07, 2005, at pages 33260–33261.

Affected Public: Not-for-profit institutions, Individuals or Households, Business or Other for-profit, and Farms.

Estimated Annual Burden: 1,200 hours.

Estimated Average Burden Per Respondent: 1 hour.

Frequency of Response: On occasion.

Estimated Number of Respondents: 1,200.

Dated: November 15, 2005.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. 05–23368 Filed 11–28–05; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0548]

Agency Information Collection Activities Under OMB Review

AGENCY: Board of Veterans' Appeals, Department of Veterans Affairs

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Board of Veterans' Appeals (BVA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 29, 2005.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 565–8374 or FAX (202) 565–6590 or e-mail: *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0548.''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0548'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for Board of Veterans' Appeals Customer Satisfaction with Hearing Survey, VA Form 0745.

OMB Control Number: 2900–0548.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 0745 is completed by appellants at the conclusion of their hearing with the Board of Veterans' Appeals. The appellant's participation is voluntary, anonymous, and will have no bearing on the outcome of his or her appeal. The data collected will be used to assess the effectiveness of current

hearing procedures used in conducting hearings and to develop better methods of serving veterans and their families.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on July 28, 2005 at page 43736.

Affected Public: Individuals or households.

Estimated Annual Burden: 86 hours.

Estimated Average Burden Per Respondent: 6 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 859.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E5–6594 Filed 11–28–05; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0171]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 29, 2005.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 565–8374, FAX (202) 565–6950 or e-mail: *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0171.''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0171'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Application and Enrollment Certification for Individualized Tutorial Assistance (38 U.S.C. Chapters 30, 31, 32, 35; 10 U.S.C. Chapter 1606; Section 903 of Public Law 96–342, and the Omnibus Diplomatic Security and Antiterrorism Act of 1986), VA Form 22–1990t.

OMB Control Number: 2900–0171.

Type of Review: Extension of a currently approved collection.

Abstract: Students receiving VA educational assistance and who need tutoring to overcome a deficiency in one or more course complete VA Form 22–1990t to apply for supplemental allowance for tutorial assistance. The student must provide the course or courses for which he or she requires tutoring, the number of hours and charges for each tutorial session and the name of the tutor. The tutor must certify that he or she provided tutoring at the specified charges and that he or she is not a close relative of the student. Certifying officials at the student's educational institution must certify that the tutoring was necessary for the student's pursuit of program; the tutor was qualified to conduct individualized tutorial assistance; and the charges for the tutoring did not exceed the customary charges for other students who receive the same tutorial assistance.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on September 21, 2005 at pages 55454–55455.

Affected Public: Individuals or households.

Estimated Annual Burden: 400 hours.

Estimated Average Burden Per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 400.

Number of Responses Annually: 800.

Dated: November 21, 2005.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E5–6595 Filed 11–28–05; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0458]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 29, 2005.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington DC 20420, (202) 565–8374, FAX (202) 565–6950 or e-mail *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0458.''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0458'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Certification of School Attendance or Termination, VA Forms 21–8960 and 21–8960–1.

OMB Control Number: 2900–0458.

Type of Review: Extension of a currently approved collection.

Abstract: Claimants complete VA Form 21–8960 and VA Form 21–8960–1 to certify that a child between the ages of 18 and 23 years old is attending school. VA uses the information collected to determine the child's continued entitlement to benefits. Benefits are discontinued if the child marries, or no longer attends school.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection

of information was published on June 7, 2005 at pages 33259–33260.

Affected Public: Individuals or households.

Estimated Annual Burden: 11,667 hours.

Estimated Average Burden Per Respondent: 10 minutes.

Frequency of Response: Annually.

Estimated Number of Respondents: 70,000.

Dated: November 15, 2005.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E5–6596 Filed 11–28–05; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0399]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATE: Comments must be submitted on or before December 29, 2005.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 565–8374, FAX (202) 565–6950 or e-mail: *denise.mclamb@mail.va.gov*. Please refer to ''OMB Control No. 2900–0399.''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0399'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Student Beneficiary Report—REPS (Restored Entitlement Program For Survivors), VA Forms 21–8938 and 21–8938–1.

OMB Control Number: 2900–0399.

Type of Review: Extension of a currently approved collection.

Abstract: Students between the ages of 18–23 who are receiving Restored Entitlement Program for Survivors (REPS) benefits based on schoolchild status complete VA Forms 21–8938 and 21–8938–1 to certify that he or she is enroll full-time in an approved school. REPS benefit is paid to children of veterans who died in service or who died as a result of service-connected disability incurred or aggravated prior to August 13, 1981. VA uses the data collected to determine the student's eligibility for continued REPS benefits.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on June 16, 2005 at pages 35160–35161.

Affected Public: Individuals or households.

Estimated Annual Burden: 1,767.

Estimated Average Burden Per Respondent: 20 minutes.

Frequency of Response: Annually.

Estimated Number of Respondents: 5,300.

Dated: November 15, 2005.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E5–6597 Filed 11–28–05; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0067]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 29, 2005.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 565–8374, FAX (202) 565–6590 or e-mail: *denise.mclamb@mail.va.gov*. Please refer to ''OMB Control No. 2900–0067.''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0067'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Application for Automobile or other Conveyance and Adaptive Equipment (under 38 U.S.C. 3901–3904), VA Form 21–4502.

OMB Control Number: 2900–0067.

Type of Review: Extension of a currently approved collection.

Abstract: Veterans and servicepersons complete VA Form 21–4502 to apply for automobile or other conveyance allowance, and reimbursement for the cost and installation of adaptive equipment. The claimants must possess one of the following disabilities that resulted from injury or a disease that was incurred or aggravated during active military service: (1) Loss or permanent loss of use of one or both feet, or hands; (2) permanent impairment of vision in both eyes with a central visual acuity of 20/200 or less in the better eye with corrective glasses, or central visual acuity of more than 20/200 if there is a field defect in which the peripheral field had contracted to such an extent that the widest diameter of visual field has an angular distance no greater than 20 degrees in the better eye. VA uses the information to determine the claimant's eligibility for such benefits.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on June 7, 2005, at page 33259.

Affected Public: Individuals or Households.

Estimated Annual Burden: 388 hours.

Estimated Average Burden Per Respondent: 15 minutes.

Frequency of Response: One-time.

Estimated Number of Respondents: 1,552.

Dated: November 15, 2005.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E5–6598 Filed 11–28–05; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0108]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 29, 2005.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 565–8374, FAX (202) 565–6950 or e-mail: *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0108.''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0108'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Report of Income from Property or Business, VA form 21–4185.

OMB Control Number: 2900–0108.

Type of Review: Extension of a currently approved collection.

Abstract: Claimants complete VA Form 21–4185 to report income and expenses that derived from rental property and/or operation of a business. VA uses the information to determine whether the claimant is eligible for VA benefits and, if eligibility exists, the proper rate of payment.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on June 30, 2005, at page 37897.

Affected Public: Individuals or households.

Estimated Annual Burden: 3,500 hours.

Estimated Average Burden Per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 7,000.

Dated: November 9, 2005.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Information Management Service.

[FR Doc. E5–6599 Filed 11–28–05; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Office of Research and Development

Government Owned Invention Available for Licensing

AGENCY: Office of Research and Development, VA.

ACTION: Notice of Government Owned Invention Available for Licensing.

SUMMARY: The invention listed below is owned by the U.S. government as represented by the Department of Veterans Affairs, and is available for licensing in accordance with 35 U.S.C. 207 and 37 CFR part 404 and/or Cooperative Research and Development Agreements (CRADA) Collaboration under 15 U.S.C. 3710a to achieve expeditious commercialization of results of Federally-funded research and development. Foreign patents are filed on selected inventions to extend market coverage for U.S. companies and may also be available for licensing.

FOR FURTHER INFORMATION CONTACT: Technical and licensing information on the invention may be obtained by writing to: Amy E. Centanni, Department of Veterans Affairs, Director, Technology Transfer Program, Office of Research and Development, 810 Vermont Avenue, NW., Washington, DC 20420; fax: 202–254–0255; e-mail at: *amy.centanni@mail.va.gov.*

Any request for information should include the Number and Title for the relevant invention as indicated below. Issued patents may be obtained from the Commissioner of Patents, U.S. Patent and Trademark Office, Washington, DC 20231.

SUPPLEMENTARY INFORMATION: The invention available for licensing is: U.S. Provisional Patent Application No. 60/690,696 ''Compositions and Methods for Osteogenic Gene therapy.''

Dated: November 22, 2005.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

[FR Doc. 05–23447 Filed 11–28–05; 8:45 am]

BILLING CODE 8320–01–M

DEPARTMENT OF VETERANS AFFAIRS

Office of Research and Development

Government Owned Invention Available for Licensing

AGENCY: Office of Research and Development, VA.

ACTION: Notice of Government Owned Invention Available for Licensing.

SUMMARY: The invention listed below is owned by the U.S. Government as represented by the Department of Veterans Affairs, and is available for licensing in accordance with 35 U.S.C. 207 and 37 CFR part 404 and/or Cooperative Research and Development Act (CRADA) Collaboration under 15 U.S.C. 3710a to achieve expeditious commercialization of results of Federally-funded research and development. Foreign patents are filed on selected inventions to extend market coverage for U.S. companies and may also be available for licensing.

FOR FURTHER INFORMATION CONTACT: Technical and licensing information on the invention may be obtained by writing to: Amy E. Centanni, Department of Veterans Affairs, Director, Technology Transfer Program, Office of Research and Development, 810 Vermont Avenue, NW., Washington, DC 20420; fax: 202–254–0255; e-mail at: *amy.centanni@mail.va.gov.*

Any request for information should include the Number and Title for the relevant invention as indicated below. Issued patents may be obtained from the Commissioner of Patents, U.S. Patent and Trademark Office, Washington, DC 20231.

SUPPLEMENTARY INFORMATION: The invention available for licensing is: VHA No. 03–127 ''Cyclic Peptides of MUC1 and Methods of use Thereof.''

Dated: November 22, 2005.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

[FR Doc. 05–23448 Filed 11–28–05; 8:45 am]

BILLING CODE 8320–01–M

DEPARTMENT OF VETERANS AFFAIRS

Office of Research and Development

Government Owned Invention Available for Licensing

AGENCY: Office of Research and Development, VA.

ACTION: Notice of Government Owned Invention Available for Licensing.

SUMMARY: The invention listed below is owned by the U.S. Government as represented by the Department of Veterans Affairs, and is available for licensing in accordance with 35 U.S.C. 207 and 37 CFR part 404 and/or Cooperative Research and Development Agreements (CRADA) Collaboration under 15 U.S.C. 3710a to achieve expeditious commercialization of results of Federally-funded research and development. Foreign patents are filed on selected inventions to extend market coverage for U.S. companies and may also be available for licensing.

FOR FURTHER INFORMATION CONTACT: Technical and licensing information on the invention may be obtained by writing to: Amy E. Centanni, Department of Veterans Affairs, Director, Technology Transfer Program, Office of Research and Development, 810 Vermont Avenue NW., Washington, DC 20420; fax: 202–254–0255; e-mail at: *amy.centanni@mail.va.gov.*

Any request for information should include the Number and Title for the relevant invention as indicated below. Issued patents may be obtained from the Commissioner of Patents, U.S. Patent and Trademark Office, Washington, DC 20231.

SUPPLEMENTARY INFORMATION: The invention available for licensing is: U.S. Provisional Patent Application No. 60/702,874 ''Agents for Inhibiting Lymphocyte or Tumor Proliferation and Methods Thereof.''

Dated: November 22, 2005.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

[FR Doc. 05–23463 Filed 11–28–05; 8:45 am]

BILLING CODE 8320–01–M

Corrections

Federal Register

Vol. 70, No. 228

Tuesday, November 29, 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.

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–522]

In the Matter of Certain Ink Markers and Packaging Thereof; Issuance of a General Exclusion Order and a Cease and Desist Order; Termination of Investigation

Correction

In notice document 05–21591 appearing on page 62328 in the issue of Monday, October 31, 2005, make the following correction:

On page 62328, in the first column, the docket number is corrected to read as set forth above.

[FR Doc. C5–21591 Filed 11–28–05; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–ANE–43–AD; Amendment 39–14242; AD 2005–18–02]

RIN 2120–AA64

Airworthiness Directives; Pratt & Whitney JT8D–209, –217, –217A, –217C, and –219 Turbofan Engines

Correction

In rule document 05–17319 beginning on page 52004 in the issue of Thursday, September 1, 2005 make the following correction:

§39.13 [Corrected]

On page 52006, in §39.13(f), in the table, under the heading ''Inspection No.'', in the last entry ''–02'' should read ''–02'''.

[FR Doc. C5–17319 Filed 11–28–05; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Tuesday,
November 29, 2005

Part II

Environmental Protection Agency

40 CFR Parts 51, 52, and 80

Final Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51, 52, and 80

[OAR 2003–0079; FRL–7996–8]

RIN 2060–AJ99

Final Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 2; Final Rule To Implement Certain Aspects of the 1990 Amendments Relating to New Source Review and Prevention of Significant Deterioration as They Apply in Carbon Monoxide, Particulate Matter and Ozone NAAQS; Final Rule for Reformulated Gasoline

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In this document, we are taking final action on most remaining elements of the program to implement the 8-hour ozone national ambient air quality standard (NAAQS or standard). This final rule addresses, among other things, the following control and planning obligations as they apply to areas designated nonattainment for the 8-hour ozone NAAQS: reasonably available control technology and measures (RACT and RACM), reasonable further progress (RFP), modeling and attainment demonstrations, and new source review (NSR). We are issuing this rule so that States and Tribes will know how these statutory control and planning obligations apply and when State implementation plan (SIP) revisions are due for these obligations so that the States may develop timely submissions consistent with the statutory obligations and attain the NAAQS as expeditiously as practicable but no later than their maximum attainment dates. The intended effect of the rule is to provide certainty to States and Tribes regarding development of those plans.

In this rule, we are also finalizing several revisions to the regulations governing the nonattainment NSR programs mandated by section 110(a)(2)(C) and part D of title I of the Clean Air Act (CAA).

Finally, this rule addresses what effect the transition to the 8-hour standard will have on certain aspects of the Reformulated Gasoline (RFG) program. The nine original mandatory RFG areas, as well as most other areas that have become mandatory RFG areas by being reclassified as severe areas under section 181(b) of the CAA, will continue to be required to use RFG at least until they are redesignated to attainment for the 8-hour NAAQS. The EPA reserves for future consideration what effect the transition to the 8-hour standard will have on areas reclassified as severe areas for the 1-hour NAAQS under section 181(b) of the CAA that were redesignated to attainment for the 1-hour standard before revocation of that standard.

EFFECTIVE DATE: This rule is effective on January 30, 2006.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. OAR–2003–0079. 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., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the EPA Docket Center (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 Office of Air and Radiation Docket and Information Center is (202) 566–1742.

In addition, we have placed a variety of earlier materials regarding implementation of the 8-hour ozone NAAQS on the Web site: *http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr*.

FOR FURTHER INFORMATION CONTACT: For general information: Mr. John Silvasi, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Mail Code C539–02, Research Triangle Park, NC 27711, phone number (919) 541-5666, fax number (919) 541-0824 or by e-mail at *silvasi.john@epa.gov* or Ms. Denise Gerth, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Mail Code C539–02, Research Triangle Park, NC 27711, phone number (919) 541–5550, fax number (919) 541–0824 or by e-mail at *gerth.denise@epa.gov*. For information concerning new source review: Ms. Janet McDonald, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Mail Code C539–03, Research Triangle Park, NC 27711, phone number (919) 541–1450, fax number (919) 541–5509 or by e-mail at *mcdonald.janet@epa.gov*.

SUPPLEMENTARY INFORMATION:

Outline

I. What is the Background for this Rule?
II. What is Included in this Rule?
III. In Short, What Does this Final Rule Contain?
IV. Final Rule for Phase 2 Elements Other than NSR and RFG
  A. Should prescribed requirements of subpart 2 apply in all 8-hour nonattainment areas classified under subpart 2, or is there flexibility in application in certain narrowly-defined circumstances?
  B. How will we address long-range transport of ground-level ozone and its precursors when implementing the 8-hour ozone standard?
  C. How will we address transport of ground-level ozone and its precursors for rural nonattainment areas, areas affected by intrastate transport, and areas affected by international transport?
  D. How will EPA address requirements for modeling and attainment demonstration SIPs for areas implementing the 8-hour ozone standard?
  E. What requirements for RFP should apply under the 8-hour ozone standard?
  F. Are contingency measures required in the event of failure to meet a milestone or attain the 8-hour ozone NAAQS?
  G. What requirements should apply for RACM and RACT for 8-hour ozone nonattainment areas?
  H. How will the section 182(f) NO_X provisions be handled under the 8-hour ozone standard?
  I. Should EPA promulgate a NSR provision to encourage development patterns that reduce overall emissions?
  J. How will EPA ensure that the 8-hour ozone standard will be implemented in a way which allows an optimal mix of controls for ozone, PM2.5, and regional haze?
  K. What emissions inventory requirements should apply under the 8-hour ozone NAAQS?
  L. What guidance should be provided that is specific to Tribes?
  M. What are the requirements for Ozone Transport Regions (OTRs) under the 8-hour ozone standard?
  N. Are there any additional requirements related to enforcement and compliance?
  O. What requirements should apply to emergency episodes?
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  Q. When will EPA require 8-hour attainment demonstration SIP submissions?
  R. How will the statutory time periods in the CAA be addressed when we redesignate areas to nonattainment following initial designations for the 8-hour NAAQS?
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Appendix B to Preamble—Glossary Of Terms and Acronyms

I. What Is the Background for This Rule?

On June 2, 2003 (68 FR 32805), we published a proposed rule to implement the 8-hour ozone NAAQS. The proposal addressed a number of implementation issues. We proposed one or more options for each issue addressed in the proposal. Please refer to the proposed rule (68 FR 32802) for a detailed discussion and background information on the 8-hour ozone NAAQS; the associated litigation; our proposed strategy for areas to achieve the NAAQS; and the stakeholder process for gathering input into this effort, among other topics.

On August 6, 2003 (68 FR 46536), we published a notice of availability of the draft regulatory text for the proposed rule to implement the 8-hour ozone NAAQS. This notice started a 30-day public comment period on the draft regulatory text.

On April 30, 2004 (69 FR 23951), we published a final rule that addressed the following key elements related to implementation of the 8-hour ozone NAAQS: classifications for the 8-hour NAAQS; revocation of the 1-hour NAAQS (i.e., when the 1-hour NAAQS will no longer apply); how anti-backsliding principles will ensure continued progress toward attainment of the 8-hour ozone NAAQS; attainment dates; and the timing of emissions reductions needed for attainment.

Following publication of the April 30, 2004 final rule, the Administrator received three petitions, pursuant to section 307(b)(7)(B) of the CAA requesting reconsideration of a number of aspects of the final rule.[1] On September 23, 2004, we granted reconsideration of three issues raised in the Earthjustice Petition. On February 3, 2005 (70 FR 5593), we published a proposed rule to take comment on two of these issues: (1) The provision that section 185 fees would no longer be applicable once the 1-hour NAAQS is revoked and (2) the timing for determination of what is an ''applicable requirement.'' On May 20, 2005, the final rule on these two issues was signed by the Administrator of EPA. On April 4, 2005 (70 FR 17018), we published a proposed rule to take comment on the issue of whether we should interpret the Act to require areas to retain major NSR requirements that apply to certain 1-hour ozone nonattainment areas in implementing the 8-hour standard. We took final action on the NSR issues on June 30, 2005 (70 FR 39413; July 8, 2005).

On January 10, 2005, we granted reconsideration of the overwhelming transport classification issue raised by Earthjustice in their Petition. At the same time, we denied reconsideration of the issues they raised in their Petition dealing with the applicability of RFG when the 1-hour NAAQS is revoked and future 8-hour ozone redesignations to nonattainment. We intend to publish a proposed rule on the overwhelming transport classification shortly. We are continuing to review the issues raised in the National Petrochemical and Refiners Association and American Petroleum Institute Petitions. Copies of the Petitions for Reconsideration and actions EPA has taken regarding the Petitions may be found at: *www.epa.gov/ttn/naaqs/ozone/o3imp8hr*.

In addition, in the April 30, 2004 rule, we established a subpart E in 40 CFR part 81 ''Identification of Area Designations and Classifications for the 1-Hour Ozone NAAQS as of June 15, 2004 [Reserved].'' We intend to publish that list shortly.

Concerning the major NSR provisions, today's final regulations were proposed as part of two different regulatory packages. On July 23, 1996 (61 FR 38250), we proposed changes to the major NSR program, including codification of the requirements of part D of title I of the 1990 CAA Amendments for major stationary sources of volatile organic compounds (VOC), NO_X, particulate matter having a nominal aerodynamic diameter less than or equal to 10 microns (PM_{10}), and CO. On June 2, 2003 (68 FR 32802), we proposed a rule to implement the 8-hour ozone NAAQS. In the 2003 action, we proposed a rule to identify the statutory requirements that apply for purposes of developing SIPs under the CAA to implement the 8-hour ozone NAAQS (68 FR 32802). We did not propose specific regulatory language for implementation of NSR under the 8-hour NAAQS. However, we indicated that we intended to revise the nonattainment NSR regulations to be consistent with the rule for implementing the 8-hour ozone NAAQS (68 FR 32844). On April 30, 2004 (69 FR 23951), we published a final rule that addressed classifications for the 8-hour NAAQS. The April 2004 rule also included the NSR permitting requirements for the 8-hour ozone standard, which necessarily follow from the classification scheme chosen under the terms of subpart 1 and subpart 2.

Also, in our 1996 action, and then again in our June 2, 2003 action, we proposed to amend our nonattainment NSR provisions to expressly include NO_X as an ozone precursor in nonattainment major NSR programs (61 FR 38297 and 68 FR 32847). We also proposed that, as provided under CAA section 182(f), a waiver from nonattainment NSR for NO_X as an ozone precursor would be available for both subpart 1 and subpart 2 areas (68 FR 32846). Moreover, we proposed to require States to modify their existing programs to include NO_X as an ozone

[1] Three petitions for reconsideration of the Phase 1 Rule were filed by: (1) Earthjustice on behalf of the American Lung Association, Environmental Defense, Natural Resources Defense Council, Sierra Club, Clean Air Task Force, Conservation Law Foundation, and Southern Alliance for Clean Energy; (2) the National Petrochemical and Refiners Association and the National Association of Manufacturers; and (3) the American Petroleum Institute, American Chemistry Council, American Iron and Steel Institute, National Association of Manufacturers and the U.S. Chamber of Commerce.

precursor in attainment areas (68 FR 32846).

In 1996, we proposed to revise the regulations limiting offsets from emissions reductions due to shutting down an existing source or curtailing production or operating hours below baseline levels (''shutdowns/curtailments''). We proposed substantive revisions in two alternatives that would ease, under certain circumstances, the existing restrictions on the use of emission reduction credits from source shutdowns and curtailments as offsets.

On July 23, 1996, we proposed to revise § 52.24 to incorporate changes made by the 1990 CAA Amendments related to the applicability of construction bans (61 FR 38305). To clarify our intent, our proposed 8-hour ozone NAAQS implementation rule in June 2003 explained that § 52.24(k) remained in effect and would be retained. In that action, we also proposed that we would revise § 52.24(k) to reflect the changes in the 1990 CAA Amendments (68 FR 32846). On June 2, 2003 (68 FR 32802), we explained implementation of the major NSR program under the 8-hour ozone NAAQS during the SIP development period, and proposed flexible NSR requirements for areas that expected to attain the 8-hour NAAQS within 3 years after designation.

In this rule, we are also finalizing several revisions to the regulations governing the nonattainment NSR programs mandated by section 110(a)(2)(C) and part D of title I of the Clean Air Act (CAA). First, we are codifying requirements added to part D of title I of the CAA in the 1990 Amendments related to permitting of major stationary sources in areas that are nonattainment for the ozone, particulate matter (PM), and carbon monoxide (CO) NAAQS. Second, we are revising the criteria for crediting emissions reductions credits from shutdowns and curtailments as offsets. Third, we are revising the regulations for permitting of major stationary sources in nonattainment areas in interim periods between designation of new nonattainment areas and EPA's approval of a revised SIP. Fourth, we are changing the regulations that impose a moratorium (ban) prohibiting construction of new or modified major stationary sources in nonattainment areas where the State fails to have an implementation plan meeting all of the requirements of part D. In addition to the changes to the nonattainment NSR regulations, we also are making one change to the Prevention of Significant Deterioration (PSD) regulations under part C of title I of the CAA. We are codifying nitrogen oxides (NO_X) as an ozone precursor in attainment and unclassifiable areas.

Today's changes regarding NSR are based on the proposed rule published on June 2, 2003 to Implement the 8-hour Ozone National Ambient Air Quality Standard (NAAQS), as well as the proposed rule published on July 23, 1996 for ''Prevention of Significant Deterioration (PSD) and Non-attainment New Source Review (NSR).'' These changes provide a consistent national program for permitting major stationary sources under section 110(a)(2)(C) and parts C and D of title I, including major stationary sources of ozone precursors in ozone nonattainment areas.

For the reader's convenience, a glossary and list of acronyms appears in Appendix B of this preamble.

II. What Is Included in This Rule?

Today's action, Phase 2 of the implementation rule, addresses numerous topics, but primarily focuses on the following key implementation obligations for areas designated nonattainment for the 8-hour NAAQS: RACT and RACM; RFP; modeling and attainment demonstrations; and NSR. It also addresses what effect the transition to the 8-hour standard will have on certain aspects of the RFG program.

III. In Short, What Does This Final Rule Contain?

This summary is intended to give only a convenient overview of our final rule. It should not be relied on for the details of the actual rule. The final rule (regulatory text) and the discussion of it in the sections below should be consulted directly.

Summary of Section IV (Below): Final Rule for Phase 2 Elements Other Than NSR and RFG

A. Should prescribed requirements of subpart 2 apply in all 8-hour nonattainment areas classified under subpart 2, or is there flexibility in application in certain narrowly defined circumstances?

There may be a basis for waiving a prescribed requirement on a case-by-case basis where imposition of the requirement would create an absurd result. If a State submits a demonstration that application of a specific requirement in a specific nonattainment area would create an absurd result, we will consider application of the absurd results doctrine at that time. We believe that absurd results that might occur from application of mandatory control measures would happen only in rare instances, if at all.

B. How will we address long-range transport of ground-level ozone and its precursors when implementing the 8-hour ozone standard?

The EPA has issued two major rules to address interstate transport of ozone pollution. The 1998 NO_X SIP Call Rule already is achieving significant reductions in NO_X emissions that contribute to interstate ozone pollution in the eastern United States. Nineteen States were required to achieve reductions by May 2004, and additional reductions are required by May 2007.

On May 12, 2005, EPA published the Clean Air Interstate Rule (CAIR) in the **Federal Register** (70 FR 25162). It establishes statewide sulfur dioxide (SO_2) and NO_X emissions budgets for upwind States that significantly contribute to nonattainment or interfere with maintenance of the fine particle or 8-hour ozone air quality standards in downwind States. For ozone, this action established summertime NO_X budgets for the District of Columbia and 25 States in the eastern half of the country, with reductions to be achieved by 2009 and 2015. The CAIR goes beyond the SIP call by requiring reductions from additional States and by requiring further emissions reductions in SIP call States.

C. How will we address transport of ground-level ozone and its precursors for rural nonattainment areas, areas affected by intrastate transport, and areas affected by international transport?

1. Rural Transport Nonattainment Areas

The final rule does not contain any revisions to current policy on rural transport areas under section 182(h). We do not believe there are any 8-hour nonattainment areas covered under subpart 2 that are ''rural'' and therefore eligible for consideration for coverage under section 182(h).

2. Intrastate Transport

The final rule does not contain any additional provisions for addressing intrastate transport for the reasons stated in the proposal.

3. How will EPA address transport of ground-level ozone and its precursors for areas affected by international transport?

We are not setting forth any regulatory provisions related to international transport in this rule. Section 179B of the CAA applies for these purposes. We continue to recommend that States confer with the appropriate EPA

Regional Office to establish on a case-by-case basis the technical requirements for these analyses. These analyses will be subject to public comment during the State and Federal SIP processes.

D. How will EPA address requirements for modeling and attainment demonstration SIPs for areas implementing the 8-hour ozone standard?

The final rule retains the following three elements that each attainment demonstration SIP must include: (1) Technical analyses to locate and identify sources of emissions that are causing violations of the 8-hour NAAQS within nonattainment areas (i.e., analyses related to the emissions inventory required for the nonattainment area), (2) adopted measures with schedules for implementation and other means and techniques necessary and appropriate for attainment, and (3) contingency measures required under section 172(c)(9) of the CAA that can be implemented without further action by the State or the Administrator to cover failures to meet RFP milestones and/or attainment.

1. Attainment Demonstration Due Date

Areas required to submit an attainment demonstration must do so no later than 3 years after the effective date of designation for the 8-hour ozone NAAQS.

2. Multi-State Nonattainment Areas

State partners involved in a multi-State ozone nonattainment area must work together to perform the appropriate modeling analyses to identify control measures that will enable the area to achieve attainment as expeditiously as practicable. Each State will be responsible for its portion of the control program and will be held accountable for controls identified for implementation within its State boundaries.

3. Role of Modeling Guidance in Attainment Demonstrations

Attainment demonstrations must be consistent with 40 CFR 51.112. We will generally review the demonstrations for technical merit using EPA's most recent modeling guidance at the time the modeled attainment demonstration is performed.

4. Multi-pollutant Assessments (One-Atmosphere Modeling)

There is no regulatory text on this issue, but the preamble makes several recommendations concerning multi-pollutant assessments.

E. What requirements for RFP should apply under the 8-hour ozone standard?

1. General Discussion

We are adopting nearly all the approaches set forth in our proposed rule for the various 1-hour rate-of-progress (ROP) and 8-hour RFP issues.

2. What is the content and timing of the plan for addressing the RFP requirements under section 182(b)(1) for areas covered under subpart 2?

Areas that are classified as moderate under the 8-hour standard that have already implemented their 15 percent plans under their 1-hour ozone SIPs would be considered to have met the statutory 15 percent requirement. Reasonable further progress for the first 6 years from the baseline year would be covered under the more generic RFP requirements of subpart 1. Serious and above areas would have to meet 3 percent reductions per year starting in the baseline year averaged over each 3-year period out to the attainment year.

An 8-hour nonattainment area that is identical, geographically, to its predecessor 1-hour nonattainment area (which has already done the 15 percent reduction) will not be required to do another 15 percent VOC-only reduction plan. For an 8-hour moderate or higher nonattainment area that contains a 1-hour nonattainment area that has an approved 15 percent VOC ROP plan but also contains areas that do not have an approved 15 percent VOC ROP plan, the final rule allows States the choice between two options:

Option 1. Develop a new baseline and new 15 percent VOC ROP emission reduction target for the entire newly expanded area. Determine that emissions reductions that occur after the 2002 baseline emissions inventory year are creditable in the combined new area. The reductions must be of VOC only.

Option 2. Treat the 8-hour nonattainment area as divided between the old 1-hour area(s) and the newly added 8-hour area. For the newly added portion (which had not previously implemented a 15 percent plan), States must establish a separate 15 percent VOC target under subpart 2. The previous nonattainment area that fell under the 1-hour standard will now be subject to the subpart 1 provisions of the CAA and will be able to credit both VOC and NO_X toward meeting the RFP target for this portion of the nonattainment area. VOC reductions to meet the 15 percent requirement for the portion of the new 8-hour nonattainment area that has not yet met this requirement may come from across the entire 8-hour area.

The subpart 1 RFP provisions addressed by the rule below that are applicable in the former 1-hour portion of the area depend on the subpart 2 area's attainment date as follows:

- In moderate areas that have an attainment date within 5 years after their 8-hour designation, for which portions of the area have previously met their 15 percent requirements under the 1-hour standard, the former 1-hour portion will only be subject to subpart 1 RFP requirements, which will be satisfied with the measures that demonstrate attainment as expeditiously as practicable. These areas will not be developing RFP plans separate from their attainment plans. Thus, for these areas, the only motor vehicle emissions budgets that will be developed will be for the attainment year.
- In moderate areas that have an attainment date beyond 5 years after their 8-hour designation, for which portions of the area have previously met their 15 percent requirements under the 1-hour standard, the former 1-hour portion will only be subject to subpart 1 RFP requirements, which will be satisfied with a plan to demonstrate 15 percent emissions reductions (which may be either VOC or NO_X or a combination of both) from 2002 to 2008, and any additional emissions reductions needed for attainment beyond 2008. Thus, these areas (the entire 8-hour nonattainment area) would establish a motor vehicle emission budget for 2008 and for their attainment year.

Serious and above areas will be developing both a 15 percent VOC plan for the new portion of the 8-hour nonattainment area and an 18 percent VOC/NO_X plan for the portion of the area that previously met its 15 percent requirement. Thus, the RFP plan as a whole will establish total allowable emissions for 2008 for the entire 8-hour nonattainment area. Therefore, the plans for these areas, as well as moderate areas that choose option one, will establish motor vehicle emissions budgets for both 2008 and the attainment year.

3. What baseline year should be required for the emissions inventory for the RFP requirement?

We are using the 2002 inventory as the baseline inventory for the RFP requirement for areas designated nonattainment in 2004 primarily because of timing concerns related to attainment dates and when data is collected and compiled. However, in response to several comments, we are allowing States the option of justifying the use of an alternative baseline year inventory year for RFP.

4. Should moderate and higher classified areas be subject to prescribed additional RFP requirements prior to their attainment date?

Moderate areas would have to provide additional emissions reductions (VOC/NO_X) needed to provide for attainment by the beginning of the ozone season prior to the area's attainment date. Serious and higher classified areas would need to provide in their SIPs an additional average of three percent per year emission reduction over each subsequent 3-year period beyond the initial 6-year period through the attainment year.

5. What is the timing of the submission of the RFP plan?

For moderate and higher classified areas, the first RFP SIP must be submitted within 3 years after the area's nonattainment designation. For areas with a June 15, 2004 effective date, for the 8-hour designations, the SIP would be due by June 15, 2007. This would provide up to 3 years for States to develop and submit RFP plans, and 1 additional year (until the end of 2008) for control measures to be implemented. The RFP SIP for any remaining 3-year periods out to the attainment date beyond the first 6 years would be required to be submitted with the attainment demonstration, i.e., within 3 years after designation. We recommend that States complete their RFP plans as soon as possible after designation to provide more time for sources to implement the emissions reductions.

6. How should CAA restrictions on creditable measures be interpreted? Which national measures should count as generating emissions reductions credit toward RFP requirements?

All emissions reductions that occur after the baseline emissions inventory year are creditable for purposes of the RFP requirements in this section except as specifically provided in section 182(b)(1)(C) and (D) and section 182(c)(2)(B) of the CAA which exclude four categories of emissions reductions requirements required to be adopted prior to 1990.

7. For areas covered only by subpart 1, how should the RFP requirement be structured?

We are finalizing rules for two rather than three categories of areas based on the CAA's division of attainment dates for subpart 1 areas under section 172(a)(2). The following are the two scenarios and the RFP requirements for each:

Scenario A: Areas with attainment dates 5 years or less after designation (i.e., for most areas on or before June 15, 2009). Reasonable further progress for these areas would be met by ensuring emissions reductions needed for attainment are implemented, as noted above, by the beginning of the ozone season prior to the attainment date. This would be similar to subpart 2 RFP for areas classified as marginal.

Scenario B: Areas with attainment dates beyond 5 years after designation (i.e., beyond 2009).

- The RFP plan must show increments of progress from the baseline emissions inventory year out to the attainment date.
- The RFP SIP would first have to provide for a 15 percent emission reduction from the baseline year within 6 years after the baseline year (i.e., out to 2008).
- The 15 percent RFP SIP would have to be submitted within 3 years after designation (i.e., in 2007).
- Either NO_X or VOC emissions reductions (or both) could be used to achieve the 15 percent emission reduction requirement.
- For each subsequent 3-year period (after 2008) out to the attainment date, the RFP SIP would have to provide for an additional increment of progress no less than the amount of emissions reductions that would be roughly proportional to the time between the end of the first increment (in 2008) and the attainment date. This second RFP SIP would also have to be submitted within 3 years after the effective date of designation (i.e., in 2007).

8. Where part of an 8-hour nonattainment area was a 1-hour nonattainment area with a ROP obligation extending past 2002, can emissions reductions from the area's 1-hour ROP plan be used as credit toward meeting the area's 8-hour RFP plan?

Where an area has both 1-hour and 8-hour RFP obligations for the post-2002 period, the State may rely on emissions reductions from the 1-hour plan in achieving RFP for the 8-hour standard. The State could develop a new baseline and new RFP emission reduction targets for the entire 8-hour standard nonattainment area (i.e., the old 1-hour standard nonattainment area and any newly added portion of the 8-hour standard nonattainment area). Emissions reductions from measures in the 1-hour ozone SIP that are achieved after the 8-hour ozone NAAQS baseline year could count (subject to creditability restrictions as discussed above) toward meeting the RFP requirement for the entire 8-hour area.

This approach would set an RFP target for the entire 8-hour ozone nonattainment area. Under this approach, the new RFP target for the 8-hour standard would replace the previous 1-hour ROP target (while ensuring that, at a minimum, the emissions reductions required to meet the old target are met; see 40 CFR 51.905(a)(1)(iii)).

9. Will EPA's ''Clean Data Policy'' apply for purposes of 8-hour RFP, attainment demonstrations and other related requirements?

We intend to apply the Clean Data Policy, which we had applied under the 1-hour standard, for purposes of the 8-hour standard. In this action EPA is finalizing the statutory interpretation that is embodied in the policy. The text of the final rule encapsulates the statutory interpretation set forth in the policy.

10. How will RFP be addressed in Tribal areas?

We intend to follow the Tribal Authority Rule (TAR), which provides Tribes with the ability to develop Tribal implementation plans (TIPs) to address and implement the NAAQS in Indian country. It further provides the Tribes with flexibility to develop these plans in a modular way, as long as the elements of their TIPs are reasonably ''severable.''

11. How will RFP targets be calculated?

Appendix A to the preamble to this final rule provides calculation procedures for determining the RFP targets. These have been revised from those in the proposal to account for NO_X and for emissions models in addition to the MOBILE model.

12. Should EPA continue the policy of allowing substitution of controls from outside the nonattainment area within 100 kilometers for VOC and 200 kilometers for NO_X?

We intend to continue to rely on this policy at the current time. The use of emissions reductions outside the nonattainment area must be shown to be beneficial toward reducing ozone in the nonattainment area and must ensure that the reductions meet the standard tests of creditability (permanent, enforceable, surplus, and quantifiable).

13. When must RFP emissions reductions be achieved?

The target level of emissions must be met by the attainment date of the attainment year. Section 182(c)(2)(B) requires that RFP be continued out to the attainment date.

14. Banked emission reduction credits (including shutdown credits): Can pre-baseline emission reduction credits be used to satisfy the RFP requirement?

- The baseline emissions should not include pre-enactment banked emission credits since they were not actual emissions during the calendar year of enactment of the CAA Amendments of 1990.
- Banked emissions reductions credits created prior to enactment of the CAA Amendments of 1990 are not creditable toward the 15 percent progress requirement. However, for purposes of equity, EPA encourages States to allow sources to use such banked emissions credits for offsets and netting as authorized.
- When States use such banked credits for offsets and netting to the extent otherwise creditable under the part D NSR regulations, these pre-enactment emissions credits must be treated as growth. Prior guidance on this issue is still relevant for banked emission reduction credits in relation to the RFP requirement for the 8-hour ozone standard. However, because the rule for implementing the 8-hour ozone standard uses a 2002 baseline year, the prior guidance should be interpreted with that baseline in mind instead of enactment of the CAA Amendments of 1990.

F. Are contingency measures required in the event of failure to meet a milestone or attain the 8-hour ozone NAAQS?

Contingency measures are required to be implemented in the event of failure to meet a milestone or attain the 8-hour ozone NAAQS and must accompany the attainment demonstration SIP. All subpart 1 and subpart 2 areas other than marginal areas need contingency measures.

G. What requirements should apply for RACM and RACT for 8-hour ozone nonattainment areas?

1. Reasonably Available Control Technology (RACT)

For subpart 1 areas that submit a demonstration of attainment for 5 or less years after designation (i.e., do not request an attainment date extension beyond 5 years after designation), the CAA's RACT requirement is met with the control requirements associated with a demonstration that the NAAQS is attained as expeditiously as practicable.

For subpart 1 areas that submit an attainment demonstration that requests an attainment date extension (i.e., beyond 5 years after designation), subpart 2 moderate and above areas, and areas within an Ozone Transport Region (OTR), a RACT SIP is required covering CTG sources and major non-CTG sources. The RACT submittal date is 27 months after designation, except a subpart 1 area shall submit the RACT SIP with its attainment date extension request.[2] States must require sources to implement RACT no later than the first ozone season or portion thereof which occurs 30 months after the required submittal date.

Where a RACT SIP is required, State SIPs implementing the 8-hour standard generally must assure that RACT is met, either through a certification that previously required RACT controls represent RACT for 8-hour implementation purposes or through a new RACT determination. States may use existing EPA guidance in making RACT determinations. The State need not perform a NO_X RACT analysis for sources subject to the State's emission cap-and-trade program where the cap-and-trade program has been adopted by the State and approved by EPA as meeting the NO_X SIP Call requirements or, in States achieving CAIR reductions solely from electric generating units (EGUs), the CAIR NO_X requirements.[3] States are free to conduct case-by-case RACT determinations, or RACT determinations or certifications for groups of sources, at their discretion.

2. Reasonably Available Control Measures (RACM)

For each nonattainment area required to submit an attainment demonstration, the State must submit with the attainment demonstration a SIP revision demonstrating that it has adopted all control measures necessary to demonstrate attainment as expeditiously as practicable and to meet any RFP requirements.

H. How will the section 182(f) NO_X provisions be handled under the 8-hour ozone standard?

The final rule allows a person to petition the Administrator for an exemption from nonattainment major NSR and/or RACT requirements for major stationary sources of NO_X in 8-hour ozone nonattainment areas and for any area in a section 184 ozone transport region. The final rule includes an extension of the NO_X waiver provisions to 8-hour ozone nonattainment areas covered under subpart 1 (as proposed) as well as subpart 2 nonattainment areas. In addition, the final rule states that a section 182(f) NO_X exemption granted under the 1-hour ozone standard does not relieve the area from any requirements under the 8-hour ozone standard. A petition must contain adequate documentation that the exemption provisions in section 182(f) are met. We recently issued updated guidance on appropriate documentation regarding section 182(f) for application to the 8-hour ozone program.[4]

I. Should EPA promulgate a NSR provision to encourage development patterns that reduce overall emissions?

Section V of this preamble below addresses rules for NSR for the 8-hour ozone standard. We are not at this time issuing any rule related to Clean Air Development Communities (CADCs).

J. How will EPA ensure that the 8-hour ozone standard will be implemented in a way which allows an optimal mix of controls for ozone, fine particulate matter $PM_{2.5}$), and regional haze?

We are continuing our policy of encouraging each State with an ozone nonattainment area which overlaps or is nearby a $PM_{2.5}$ nonattainment area to take all reasonable steps to coordinate the required revisions for these nonattainment areas and meet reasonable progress goals for regional haze.

K. What emissions inventory requirements should apply under the 8-hour ozone NAAQS?

Existing ozone-relevant emissions data element requirements under 40 CFR 51 subpart A are sufficient to satisfy the emissions inventory data requirements under the 8-hour ozone NAAQS.

L. What guidance should be provided that is specific to Tribes?

Section 301(d) of the CAA recognizes that American Indian Tribal governments are generally the appropriate authority to implement the CAA in Indian country. As discussed in the TAR, it is appropriate to treat Tribes in the same manner as States for purposes of implementing all of the provisions of the CAA, except those provisions for which EPA has specifically determined that it is not appropriate to treat Tribes in the same

[2] This is generally expected with the submission of the attainment demonstration.

[3] Alternatively, a State need not perform a NO_X RACT analysis for sources subject to Federal implementation plan that implements the emission reductions required by the NO_X SIP call or the CAIR.

[4] Memorandum dated January 14, 2005, ''Guidance on Limiting Nitrogen Oxides (NO_X) Requirements Related to 8-Hour Ozone Implementation'' from Stephen D. Page, Director, Office of Air Quality Planning and Standards, to Air Directors, Regions I–X.

manner as States. (The CAA provisions for which EPA has determined it is not appropriate to treat Tribes in the same manner as States are listed in section IV.L. of this preamble.) Examples of CAA provisions for which EPA has determined it is not appropriate to treat Tribes in the same manner as States include specific plan submittal and implementation deadlines.

In implementing this rule, it is important for both States and Tribes to work together to coordinate planning efforts. Other than in very limited circumstances, State regulations do not apply to Indian Country, but SIP control measures could impact downwind areas, including Indian communities. In addition, nonattainment area boundaries may include a portion of Indian Country. Coordinated planning will help ensure that the planning decisions made by the States and Tribes complement each other and achieve progress toward meeting the NAAQS.

M. What are the requirements for Ozone Transport Regions (OTRs) under the 8-hour ozone standard?

Section 184 continues to apply for purposes of the 8-hour standard; therefore, the current OTR remains in place and the section 184 control requirements continue to apply for purposes of the 8-hour standard. If a new OTR is established for purposes of the 8-hour standard pursuant to section 176A, that area would also be subject to the provisions and additional control requirements of section 184.

N. Are there any additional requirements related to enforcement and compliance?

We are not setting forth any additional rule related to compliance and enforcement.

O. What requirements should apply to emergency episodes?

We have not yet proposed any rule revision related to emergency episodes (at 40 CFR part 51, subpart H), and the final rule below does not contain any such rule revision.

P. What ambient monitoring requirements will apply under the 8-hour ozone NAAQS?

No monitoring requirements are being promulgated as part of this rulemaking. The preamble discusses current relevant requirements (40 CFR part 58) and anticipated activities.

Q. When will EPA require 8-hour attainment demonstration SIP submissions?

Modeled attainment demonstrations—where required—must be submitted within 3 years after the effective date of the area's nonattainment designation.

R. How will the statutory time periods in the CAA be addressed when we redesignate areas to nonattainment following initial designations for the 8-hour NAAQS?

For any area that is initially designated attainment or unclassifiable for the 8-hour NAAQS and subsequently redesignated to nonattainment for the 8-hour ozone NAAQS, the attainment date and dates for submittal of any applicable requirements under subpart 1 or subpart 2 and these regulations would run from the date of redesignation to nonattainment for the 8-hour NAAQS.

Summary of Section V (Below): EPA's Final Rule for New Source Review

In today's action, we are finalizing previously proposed changes to three regulations that govern major NSR permitting of major stationary sources in nonattainment areas—40 CFR 51.165, appendix S of 40 CFR part 51, and 40 CFR 52.24.

The regulations at 40 CFR 51.165 contain the minimum elements that a State's preconstruction permitting program for major stationary sources in nonattainment areas must contain in order for EPA to approve the State's program into the SIP. In § 51.165, we are making revisions to incorporate the major stationary source thresholds, significant emission rates, and offset ratios pursuant to part D of title I of the CAA, as amended in 1990, for the 8-hour ozone NAAQS, the CO NAAQS, and the PM_{10} NAAQS. We are also promulgating final changes to the requirements for emissions reductions achieved from shutdowns or curtailments at § 51.165(a)(3)(ii)(C). We are not currently acting on any other proposed changes to 40 CFR 51.165.

Appendix S of 40 CFR part 51 contains the preconstruction permitting program that applies to major stationary sources in nonattainment areas lacking an approved part D NSR program. It applies during the interim period after EPA designates an area as nonattainment, but before EPA approves a SIP to implement the nonattainment NSR requirements for that pollutant (SIP development period). We are making the same changes to appendix S that we are making to § 51.165 to implement the CAA as revised by the 1990 Amendments. In addition, we are finalizing revisions to section VI of appendix S to qualify applicability of this section. This revision is an outgrowth of the proposed revisions to section VI in the 8-hour NAAQS implementation proposal (68 FR 32802). We also are removing an outdated exemption for sources increasing emissions less than 50 tons per year (tpy).

The regulations at 40 CFR 52.24 contain restrictions on the construction or modification of major stationary sources, including a construction ban applicable in circumstances enumerated by the 1977 CAA. These regulations also apply if the Administrator determines pursuant to CAA section 173(a)(4) that the State is not adequately implementing the SIP for meeting the part D requirements. today's final rules codify requirements of the 1990 CAA Amendments related to the applicability of construction bans. The final rules at § 52.24 also codify that § 51.165 applies in interpreting the terms in § 52.24. The regulations at 40 CFR 52.24(k) retain the requirement that appendix S governs permits to construct and operate applied for during the period between the date of designation as nonattainment and the date the part D plan for NSR is approved, but is updated to remove the reference to the construction ban.

In addition to the changes to the nonattainment NSR regulations, we also are making one change to the PSD regulations under part C of title I of the CAA. We are codifying NO_X as an ozone precursor in attainment and unclassifiable areas.

Summary of Section VI (Below): Final Rule for RFG

Today's rule specifies that the nine original RFG mandatory areas must continue to use RFG at least until they are redesignated to attainment for the 8-hour standard. Similarly, areas that have been reclassified as severe areas under section 181(b) of the CAA for the 1-hour NAAQS, and which were not redesignated to attainment for the 1-hour NAAQS prior to its revocation, must continue to use RFG at least until they are redesignated to attainment for the 8-hour standard. The EPA is reserving for future consideration what RFG requirements apply to areas that were reclassified as severe under the 1-hour standard, but were redesignated to attainment for that standard before its revocation. The only such area that was redesignated to attainment prior to revocation of the 1-hour standard is Atlanta, Georgia. The EPA is also reserving for future consideration whether areas must continue using RFG

after they are redesignated to attainment for the 8-hour standard, for the original nine mandatory areas as well as the areas reclassified to severe. Finally, EPA clarifies that the current opt-in rules will remain in place after the 1-hour standard is revoked. Areas classified under subpart 2 as marginal or above are eligible to opt-in to the RFG program.

Summary of Section VII (Below): Other Considerations

A. How will EPA's implementation of the 8-hour ozone NAAQS affect funding under the Congestion Mitigation and Air Quality Improvement (CMAQ) Program?

This section describes the relationship between the CMAQ program and the 8-hour ozone NAAQS implementation program.

B. What is the relationship between implementation of the 8-hour standard and the CAA's title V permits program?

The interrelationship between implementation of the 8-hour ozone standard and the title V permits program was not discussed in the proposed rule. However, various questions have been raised about the interface between the implementation of the 8-hour ozone standard and the title V operating permits program. The preamble presents several questions and answers, mainly dealing with how title V applicability is affected by the new 8-hr ozone standard and the revocation of the 1-hour ozone standard.

C. What action is EPA taking on the Overwhelming Transport Classification for subpart 1 areas?

We are not completing rulemaking on the overwhelming transport classification in this rulemaking. This section discusses the status of the rulemaking.

IV. Final Rule for Phase 2 Elements Other Than New Source Review and Reformulated Gasoline

The discussion of many of the regulatory elements below address timing of required actions, such as submission dates for SIP revisions. The discussion is primarily directed toward 8-hour ozone nonattainment areas for which the effective date of the designation was June 15, 2004. However, a number of areas may have later effective dates for their designations, such as early action compact areas and areas subsequently redesignated from attainment to nonattainment for the 8-hour ozone standard. For these situations, the timing will run from the effective date of those designations. In cases in this preamble where we have used June 15, 2004 as a substitute for the ''effective date,'' we are using it only for purposes of those areas with an effective date of June 15, 2004.

A. Should prescribed requirements of subpart 2 apply in all 8-hour nonattainment areas classified under subpart 2, or is there flexibility in application in certain narrowly-defined circumstances?

[Section VI.D. of June 2, 2003 proposed rule (68 FR 32825); no draft or final regulatory text.]

1. Background

The 1990 CAA Amendments overhauled the CAA's requirements for ozone nonattainment areas and, in doing so, specified new mandatory measures for many areas. The approach embodied in subpart 2 was to classify areas according to the severity of their pollution. Areas with more serious ozone pollution were given a higher classification that did two things. First, the successively higher classifications provided a successively longer maximum timeframe for attaining the ozone NAAQS. Second, each higher classification mandated specific additional and/or more stringent obligations than the classification immediately below. Specifying mandatory measures in the statute was necessary because States and EPA, prior to 1990, had failed to ensure that SIPs achieved steady reasonable progress in reducing emissions or to require readily available measures that were cost effective and necessary to meet the standard. See generally H.R. Rep. No. 101–490 at 144–48 (1990).

For this rule, we examined the issue of mandatory measures from both a legal and policy standpoint. Our legal view is guided by the statutory language in part D of title I of the CAA. In addition, we were guided by the Supreme Court's view of this language. Our policy view is guided by past precedents and also the principles we set forth in our proposed rule (June 3, 2003; 68 FR 32802).

We have consistently interpreted the CAA to mean that once an area is classified under subpart 2, the subpart 2 requirements apply. While certain requirements allow for some flexibility in how they apply, the requirements do not allow for broad waivers. For example, all areas classified as serious or above must meet the requirement for an enhanced inspection and maintenance (I/M) program, however, there is some flexibility in determining what type of I/M program meets the requirement for an enhanced I/M program. The Supreme Court, in addressing whether the classification provisions in subpart 2 applied for purposes of the 8-hour ozone NAAQS found that they did and stated that EPA's implementation scheme, which would have avoided classifications under subpart 2, was unreasonable because it would effectively nullify the subpart 2 provisions that Congress created with the intent to limit State and EPA discretion. *Whitman* v. *American Trucking Assoc.,* 531 U.S. 484–85.

In the proposed rule, we recognized that there is case law doctrine that might allow a case-by-case waiver from mandatory requirements when sufficient evidence is presented that application of a specific requirement in a particular area would cause absurd results.

2. Final Rule

We continue to interpret the CAA to mean that the prescribed requirements for each classification under subpart 2 apply to areas with such classification for the 8-hour NAAQS. As we noted in the preamble to the proposed rule, there may be a basis for waiving a prescribed requirement on a case-by-case basis where imposition of the requirement would create an absurd result. However, as stated in the proposed rule, we believe that absurd results that might occur from application of mandatory control measures would happen only in rare instances. If a State submits a demonstration that application of a specific requirement in a specific nonattainment area would create an absurd result, we will consider application of the absurd results doctrine at that time.

3. Comment and Responses

Comment: A number of commenters supported the approach that we discussed in the proposed rule. Other commenters agreed with the overall concept that we proposed but felt that we should take additional factors into consideration if we make case-by-case waivers from subpart 2 requirements. Several commenters suggested that we take the cost of controls into consideration when determining if there were an absurd result while others suggested that we look at relative control strategy effectiveness, e.g., allowing a demonstration that NO_X reductions are more effective and therefore may be substituted for mandatory VOC emissions reductions.

Several other commenters stated that we should more broadly allow substitution of subpart 2 mandatory measures. One commenter felt that substitution of subpart 2 measures should be allowed as long as the

substituted measures are at least equivalent to the mandatory measures. Another commenter stated that we should allow areas to adopt substitute measures in lieu of subpart 2 measures where the subpart 2 measures would not be as effective as the substitute measures in reaching attainment. The commenter stated that we have been overly limited in our characterization of when subpart 2 measures might be waived to avoid an absurd result. The commenter believed that we should create a categorical exemption as an exercise of agency power to allow areas to substitute NO_X for VOC measures or more effective control measures for less effective control measures when doing so would expedite attainment. Another commenter urged us to limit the strict application of subpart 2 measures because the imposition of such measures creates economic disincentives for companies to locate and expand in nonattainment areas. A number of commenters stated that they do not support the vehicle I/M or Stage II vapor recovery programs and recommended that we provide States with flexibility in meeting these requirements.

Response: Many of the commenters' suggestions go beyond the application of an absurd results doctrine and instead suggest broad waiver of subpart 2 requirements based on a determination that an alternative or substitute is more effective. We do not believe that we have the authority to broadly waive measures mandated by Congress. As noted by the Supreme Court, Congress intended to cabin States' discretion when it mandated the specific controls under subpart 2. See e.g., *Whitman,* 531 U.S. 484–85. (''Whereas subpart 1 gives EPA considerable discretion to shape nonattainment programs, subpart 2 prescribes large parts of them by law'' and ''EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit discretion'').

However, as stated in our proposed rule, we believe that case law may provide EPA with limited flexibility to waive federally mandated requirements on a case-by-case basis where application of those requirements would produce an absurd result. We do not need to conclude here what precise circumstances would create an absurd result. Rather, that decision would need to be made on a case-by-case basis in the context of a specific request. In general, we note that to demonstrate an absurd result, a State would need to demonstrate that application of the requirement would result in more harm than benefit. For example, the programs mandated under subpart 2 are generally effective in reducing emissions of the two ozone precursors—NO_X and VOC—and because reductions of those precursors generally lead to improved air quality, we believe that such a demonstration could be made, if at all, only in rare instances.

With regard to the comment relating to Stage II vapor recovery, section 202(a)(6) of the CAA does provide for revision or waiver of the Stage II vapor recovery requirement under certain conditions: ''The requirements of section 182(b)(3) (relating to stage II gasoline vapor recovery) for areas classified under section 181 as moderate for ozone shall not apply after promulgation of such standards and the Administrator may, by rule, revise or waive the application of the requirements of such section 182(b)(3) for areas classified under section 181 as Serious, Severe, or Extreme for ozone, as appropriate, after such time as the Administrator determines that onboard emissions control systems required under this paragraph are in widespread use throughout the motor vehicle fleet.'' Currently, EPA is formulating policy concerning how widespread use will be determined and has been seeking participation from affected parties. Further information is available at: *http://www.epa.gov/ttn/naaqs/ozone/ozonetech/stage2/.*

Comment: A few commenters disagreed with the approach in our proposed rule. One commenter stated that we do not have the statutory authority to create new waivers to subpart 2 requirements. Another commenter stated that the CAA does not allow case-by-case waivers to avoid ''absurd'' results. The commenter further stated that doing so would in effect require us to rewrite the statute by regulation.

Response: As stated above, we agree that we do not have broad authority to waive subpart 2 requirements and that the CAA itself does not expressly create authority to waive such requirements. However, the ''absurd results'' line of cases provides that where application of a statute as written would create a result counter to what Congress intended, an Agency has limited authority to construe that provision in a manner than would effectuate Congress' intent.[5]

B. How will we address long-range transport of ground-level ozone and its precursors when implementing the 8-hour ozone standard?

[Section VI.F. of June 2, 2003 proposed rule (68 FR 32827); no draft or final regulatory text.]

1. Background

Interstate transport can make it difficult or impossible for some States to meet attainment deadlines for areas within their boundaries solely by regulating sources within their own boundaries. Section 110(a)(2)(D) of the CAA provides an important tool for addressing the problem of interstate transport. It provides that a State must include adequate provisions in its SIP to prohibit sources within the State from emitting air pollutants in amounts that contribute significantly to nonattainment, or interfere with maintenance, in one or more downwind States. Section 110(k)(5) of the CAA authorizes EPA to find that a SIP is substantially inadequate to meet any CAA requirement, including the requirements of section 110(a)(2)(D) of the CAA. If we make such a finding, we must require the State to submit, within a specified period, a SIP revision to correct the inadequacy. The CAA further addresses interstate transport of pollution in section 126, which authorizes any State to petition EPA to regulate emissions from significant upwind sources of air pollutants in other States.

In addition to requiring States to control interstate air pollution under section 110(a)(2)(D), the CAA requires States with nonattainment areas to develop State plans under part D that provide for meeting the NAAQS as expeditiously as practicable, and for maintaining healthy air quality in those areas over time. Together, the section 110(a)(2)(D) and part D provisions provide for upwind State and in-State controls to ensure that national health-based air quality standards are met and maintained.

2. Current Approach

In the NO_X SIP Call Rule, EPA found the SIPs for certain States in the eastern U.S. to be substantially inadequate to address emissions transported to downwind States and required those States to select and adopt control measures to meet statewide ozone-season NO_X emissions budgets based on highly cost-effective NO_X emissions

[5] See Holy Trinity Church v. United States, 143 U.S. 457 (1892) (''If literal construction of the words of a statute be absurd, the act must be so construed to avoid the absurdity.''); Griffin v. Oceanic Contractors, Inc. 458 U.S. 564 (1982) (recognizing the absurdity exemption, but concluding that a harsh penalty provision did not produce results counter to Congress' intent); Mova Pharm. Corp. v. Shalala, 140 F. 3d 1060 (D.C. Cir. 1998) (recognizing the absurdity exemption, but finding that a ''successful defense'' regulation went beyond the statute was not necessary to meet Congressional intent.)

reductions (63 FR 57356, October 27, 1998.) In that rule, we determined that the same level of emissions reductions was needed to address transport for both the 1-hour and 8-hour standards.[6]

The NO_X SIP Call Rule is achieving substantial emissions reductions and air quality improvement well in advance of the attainment dates of 8-hour nonattainment areas. In the eastern United States, monitoring data shows a 10 percent improvement between 2002 and 2004 in the seasonal (May–September) average of daily maximum 8-hour ozone concentrations, after adjustment for meteorological differences. The EPA believes that the NO_X reductions achieved as a result of the NO_X SIP Call are an important factor in this improvement. The compliance date for achieving the required NO_X reductions under phase I of the NO_X SIP Call was May 31, 2004. All of the 19 affected States and the District of Columbia submitted complete Phase I SIPs, which EPA approved, in response to the NO_X SIP Call and are implementing their NO_X control programs. State programs to implement the rule have focused on reducing emissions from electric power generators and large industrial emitters. The phase II NO_X SIP Call Rule, which responds to court decisions on issues from the original SIP call rule involving certain types of sources and geographic coverage, requires additional emissions reductions by May 1, 2007.

The EPA's modeling for the CAIR indicates that ozone levels across the eastern half of the country will improve substantially by 2010 because of existing requirements—including the NO_X SIP call, federal motor vehicle and nonroad engine regulations, and other existing State and federal rules. Last year, EPA designated more than 100 areas in that region as having ozone levels not meeting the 8-hour ozone standard, based on 2001–2003 data. Air quality improvements due to existing requirements (i.e., without State measures required for areas designated nonattainment for the 8-hour standard) are projected to leave only 16 of these areas in nonattainment in 2010. This estimate is derived from base case CAIR modeling results shown in the final notice for the CAIR (70 FR 25254, Table VI–12).

On May 12, 2005, EPA published the Clean Air Interstate Rule in the **Federal Register** (70 FR 25162). The EPA determined that 28 States and the District of Columbia contribute significantly to downwind nonattainment, or interfere with maintenance, of the $PM_{2.5}$ and 8-hour ozone NAAQS in other States. The rule requires these States to submit SIP revisions to reduce SO_2 and/or NO_X emissions.

To reduce interstate ozone transport, the rule established statewide ozone-season NO_X budgets for 25 States and the District of Columbia. The budgets are based on the level of emissions that can be achieved through highly cost-effective controls that EPA determined are available from EGUs; however, States have flexibility to choose the measures they will use to achieve the necessary emissions reductions. Due to feasibility constraints, EPA is requiring the CAIR budgets to be achieved in two phases. For summertime NO_X, the first phase starts in 2009 (covering 2009–2014);[7] the second phase of NO_X reductions begins in 2015 (covering 2015 and thereafter).

The 25 States that are required to meet a summertime NO_X cap for ozone purposes, along with the District of Columbia, are Alabama, Arkansas, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, West Virginia, and Wisconsin.

The CAIR is geographically broader and more stringent than EPA's previous ozone interstate transport rule, the NO_X SIP Call, adopted in 1998.[8] The CAIR's ozone requirements are based on updated analyses of the impacts of pollution transported across State borders, and of highly cost-effective control opportunities for NO_X.

As detailed in the final CAIR action, the CAIR rule will further reduce ozone transport to assist States in their efforts to bring ozone nonattainment areas into attainment or—in the case of downwind receptor areas that attain prior to some or all CAIR reductions—maintain air quality meeting the 8-hour ozone NAAQS. In the CAIR rulemaking, EPA projected that 39 counties (in the 16 nonattainment areas referenced above) would have ozone levels exceeding the standard in 2010 in the absence of further control requirements (i.e., the base case without CAIR). Most of these counties were projected to be within a few parts per billion (ppb) of the standard. For the 39 counties, the average reduction in ozone levels estimated from 2009 CAIR NO_X controls is 0.4 ppb, and the maximum improvement is 1.4 ppb (70 FR 25254, Table VI–12.) The 2009 CAIR NO_X requirements will achieve reductions prior to the maximum attainment date for downwind 8-hour ozone areas classified as moderate.

We believe that States will be able to demonstrate timely attainment for most 8-hour ozone nonattainment areas with the help of emissions reductions from Federal rules. However, we also believe that a limited number of downwind areas, while showing improvement, are likely to remain in nonattainment after 2009. This is due to the severity of projected ozone levels in certain areas, uncertainties about the levels of emissions reductions that will actually occur, and persistence of historical difficulties with attaining the 1-hour ozone standard. The EPA determined in the CAIR that even if all downwind receptor areas attained on time, many areas will remain close enough to the standard to be at risk of falling back into nonattainment. The EPA concluded that the 2015 summertime NO_X reductions will assist attainment and maintenance of the 8-hour standard.[9]

In addition to controlling interstate air pollution under section 110(a)(2)(D), EPA national rules and State rules for controlling local sources of emissions are significantly reducing, and in the future will further reduce, the amount of pollution transported to 8-hour ozone nonattainment areas in downwind States. Downwind States, in devising their attainment and maintenance plans, will be able to take required upwind reductions into account. Depending on the particular area, the upwind reductions will help to hasten attainment of the NAAQS, make attainment and maintenance of the NAAQS less difficult and costly, or both.

The EPA notes that interstate pollution transport will be further reduced through cost-effective measures that individual States adopt for purposes of bringing their ozone

[6] In light of various challenges to the 8-hour NAAQS, we stayed the 8-hour basis for the NO_X SIP Call Rule (65 FR 56245; September 18, 2000).

[7] The CAIR first phase also provides an annual NO_X budget, which also starts in 2009.

[8] The CAIR requires summertime NO_X reductions in the following States not covered by the NO_X SIP Call: Arkansas, Florida, Iowa, Louisiana, Mississippi, and Wisconsin. The NO_X SIP Call has requirements for two States not covered by CAIR ozone requirements: Rhode Island and Georgia. The EPA has proposed a stay of applicability of the SIP Call to Georgia as an initial response to a petition for reconsideration on whether Georgia should be covered.

[9] For the 22 counties projected to be in nonattainment in 2015 in the absence of further control requirements (i.e., the CAIR base case), the average ozone reduction in 2015 from CAIR is 1.1 ppb, and the maximum improvement is 1.6 ppb. (70 FR 25254, 25455, Table VI–13.)

nonattainment areas into attainment.[10] Given the potential for measures adopted by one State to improve air quality downwind, EPA is supportive of multi-State cooperation on strategies for attaining the 8-hour standard.

3. Comments and Responses

This section addresses the more significant comments received; the response to comment document addresses other comments also.

Comment: Several commenters thought the June 2, 2003, 8-hour implementation proposal failed to adequately address transport and disagreed with our statement that 8-hour transport has been addressed up front by the NO_X SIP Call. Some added that this puts northeastern States located in the OTR in a situation where their citizens and businesses are bearing a disproportionate burden of health and economic impacts compared to upwind States that have fewer control requirements than OTR States. Some OTR State commenters said that the rule should address this inequity. One said we cannot assume that transport has been addressed until after the NO_X SIP Call is implemented and has been evaluated.

Response: The 8-hour ozone implementation rule is not intended as a rule to address interstate transport of pollution and to achieve emissions reductions from upwind sources as provided under CAA section 110(a)(2)(D). Rather, its purpose is to interpret nonattainment requirements (in subparts 1 and 2 of part D of title I) for State plans to implement the 8-hour NAAQS. We have addressed the section 110(a)(2)(D) obligation through the NO_X SIP Call and CAIR, which provide substantial air quality benefit for downwind areas significantly affected by transport of pollution from other States.

Comment: Two commenters recommended a regional approach among States to address transport. One commenter thought that Clear Skies is the best way to address transport, but absent that, would support a regional approach. Some commenters thought the 8-hour ozone implementation proposal ignored the issue that ozone is a regional problem that can only be solved through regional planning. These commenters added that instead of incentives for regional planning there were disincentives. Another commenter thought that EPA unrealistically expects States to be able to resolve all potential conflicts between the States by working together in a collaborative process to identify and adopt appropriate controls that provide for attainment. The commenter suggested that EPA oversight may be necessary in these situations. One commenter thought the development of multiple OTRs for regional planning and coordination may be highly desirable to bring States with a common problem together to coordinate efforts with the strength of several States rather than to go-it alone. Another suggested some criteria for EPA to use if we were to choose to establish OTRs.

Response: We believe that addressing interstate transport requires regional approaches and regional cooperation. The EPA has ensured regional action to reduce interstate ozone transport through the NO_X SIP Call Rule and CAIR. In addition, we note that groups of States have worked effectively together in the past to address regional ozone problems. For example, the Lake Michigan Air Directors Consortium (LADCO) was established in 1990 by the States of Illinois, Indiana, Michigan, and Wisconsin. The main purpose of LADCO is to provide technical assessments for and assistance to its member States on problems of ozone air quality and to provide a forum for its member States to discuss air quality issues. We will continue to encourage these multi-State efforts to assess and address ozone nonattainment and will work with these States as needed to provide support and ensure progress.

We agree with other commenters that States should work together in the SIP development process to ensure localized transport is addressed. States that share an interstate nonattainment area are expected to work together in developing the nonattainment SIP for that area and in reducing emissions that contribute to local-scale interstate transport problems. We would also encourage collaborative efforts even in cases where there is not a multi-State nonattainment area but where significant emissions sources in one State might affect air quality in a nonattainment area in an adjacent State.

In response to comments suggesting that EPA establish additional transport regions, at this time we do not anticipate formalizing any additional transport regions. We believe that the NO_X SIP Call and CAIR rules go far to effectively address the kind of transport that establishment of a transport region would be intended to address, without the costs of setting up a commission to oversee the transport region.

Comment: Some commenters stated that we should not rely on the proposed Clear Skies legislation to reduce emissions transport because there is no guarantee that the legislation will be enacted. Several State commenters added that Clear Skies would not provide adequate or timely emissions reductions. Another commenter suggested that we work with Congress to enact legislation to allow for the development and use of a transport argument in attainment demonstrations.

Response: While we still hope that Congress will adopt the Administration's Clear Skies multi-pollutant legislation, we acknowledge that the outcome of that process is uncertain. To ensure that regional transport is addressed in a timely manner, EPA finalized the CAIR in May 2005 based on our existing regulatory authority.

Comment: One commenter proposed that rather than addressing transport through national measures, we could include transport as one of the criteria for determining the adequacy of a SIP. This commenter supported the multi-State collaborative effort mentioned in the proposed rule, so that areas work together to address transport as their SIPs are being developed. The commenter asserted that our proposed early, top-down approach could significantly hinder SIP planning for local areas considering the complex chemistry of ozone and $PM_{2.5}$ formation.

Response: We believe that the NO_X SIP Call and CAIR help, rather than hinder, SIP planning for nonattainment areas. We agree that the CAA does allow the States to work together in a collaborative fashion to assess regional or sub-national transport. The EPA worked with a State-led effort in the mid-to late-1990's [the Ozone Transport Assessment Group (OTAG) process] to perform such an assessment, which documented the magnitude and extent of long-range transport of ozone and its precursors. At that time, EPA concluded that without some certainty of what levels of emission controls would be required in the larger region, States faced great uncertainty regarding the amounts of ozone and precursor concentrations being transported into the modeling domain of the nonattainment area for which they were required to develop their attainment demonstrations. Therefore, EPA issued the NO_X SIP Call—and more recently, CAIR—to establish the emission reduction responsibilities of upwind States under section 110(a)(2)(D). In this way, eastern States could then have a fair degree of certainty regarding required upwind reductions and the amount of transported emissions to be assumed in their 1-hour ozone

[10] Many types of sources contribute to ozone transport. The CAIR reduction requirements are based solely upon potential reductions from EGUs; EPA did not find other source types highly cost effective to control.

attainment demonstrations for individual nonattainment areas. Based on the OTAG experience, we believed that there was high risk that States working together in a collaborative fashion would not agree on a regional control strategy within the time the CAA provides for States to develop 8-hour attainment demonstrations. Therefore, we believe the commenter is incorrect that the ''top-down'' approach will significantly hinder SIP planning for the individual areas, and on the contrary, will provide the certainty needed to complete the attainment demonstrations in a timely manner.

The commenter also proposed that rather than addressing transport through national measures, we could include transport as one of the criteria for determining the adequacy of a SIP. It is true that section 110(a)(2)(D)(i)(I) requires a SIP to ''contain adequate provisions * * * prohibiting, consistent with the provisions of this title, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard * * *'' Furthermore, sections 110(a)(1) and (2) of the CAA require States to submit SIPs that implement, maintain, and enforce a new or revised NAAQS within 3 years of promulgation of the standard. Among other things, these SIP revisions must address a State's significant contribution of pollution to nonattainment and maintenance problems in other States under section 110(a)(2)(D). On March 10, 2005, EPA officially notified States that they have failed to submit SIPs to satisfy this requirement of the CAA with respect to the 8-hour ozone and $PM_{2.5}$ NAAQS (70 FR 21147; April 25, 2005). The finding starts a 2-year clock for EPA to issue a final Federal Implementation Plan (FIP) that will address the requirements of section 110(a)(2)(D) unless a SIP revision correcting the deficiency is approved by EPA before the FIP is promulgated. The EPA plans to issue guidance regarding how States could satisfy the section 110(a)(2)(D) requirement. For States affected by CAIR, an approved SIP responding to the CAIR would satisfy the requirement and turn off the FIP clock.

C. How will we address transport of ground-level ozone and its precursors for rural nonattainment areas, areas affected by intrastate transport, and areas affected by international transport?

[Section VI.G. of June 2, 2003 proposed rule (68 FR 32828); no draft or final regulatory text.] [11]

1. Rural Transport Nonattainment Areas

a. Background

In the June 2, 2003 proposal, we noted that section 182(h) of the CAA (under subpart 2) recognizes that the ozone problem in a rural transport area is almost entirely attributable to emissions from upwind areas. This section provides that the only requirements applicable to an area classified under subpart 2 that we determine is a rural transport area are the minimal requirements specified for marginal areas, i.e., those areas expected to attain within 3 years after designation. The timing for attainment for these areas will depend on the schedule for adoption and implementation of control measures in the upwind areas. We did not propose any revision to current policy and practices related to the rural transport area provisions under section 182(h).

b. Summary of Final Rule

The final rule does not contain any revisions to current policy on rural transport areas under section 182(h).[12]

c. Comments and Responses

Comment: Several commenters favored the proposed approach of not revising our current policies with regard to subpart 2 areas that meet the criteria for being a rural transport area under section 182(h).

Response: We agree with these comments.

Comment: Several commenters urged us to provide more flexibility such as extending the provision to other areas whose problems are caused by transport but that do not qualify as rural under section 182(h).

Response: These commenters did not suggest any legal mechanism for granting the flexibility provided under section 182(h) to areas that do not qualify as rural under section 182(h). We have not found any such legal mechanism and, therefore, the final rule does not extend the flexibility provided under section 182(h) to additional areas.

2. Intrastate Transport

a. Background

In the proposed rule, we noted that a number of State air agency representatives had voiced concern about intrastate transport of ozone and precursor emissions and asked EPA to address this concern. We indicated that the CAA requires individual States, as an initial matter, to deal with intrastate transport. We also pointed out that a State could recommend designation of nonattainment areas that are large enough to encompass upwind and downwind areas of the State and require that the individual jurisdictions work together on an attainment plan that accounts for transport and results in attainment by the attainment date for the entire nonattainment area. We also solicited comments on other ways of addressing intrastate transport within the context of the CAA provisions.

b. Summary of Final Rule

The final rule does not contain any additional provisions for addressing intrastate transport for the reasons stated in the proposal. However, as indicated in the Phase 1 Rule published on April 30, 2004, for subpart 1 areas, States and EPA could consider intrastate transport in determining the attainment date for an area.[13] In identifying the appropriate attainment date for an area, the State should consider measures to address intrastate transport of pollution from sources within its jurisdiction.

c. Comments and Responses

Comment: Two commenters recommended that States have regulatory authority to require controls as necessary regarding the problem of intrastate transport. They asserted that nonattainment areas should work with upwind contributing areas within the State to address regional transport within the State.

Response: As provided in the proposed rule (68 FR 32829), we agree with the commenters that States have the obligation and authority to address the transport of pollution from one area

[11] This section of the proposal also addressed multi-State nonattainment areas. The discussion of multi-State nonattainment areas is now covered under the discussion below on attainment demonstrations and modeling.

[12] Based on current information, we do not believe there are any 8-hour nonattainment areas covered under subpart 2 that are ''rural'' and therefore eligible for consideration for coverage under section 182(h). Existing policy on rural transport areas includes the ''General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990; Proposed Rule,'' April 16, 1992 (57 FR 13505).

[13] Intrastate transport also could be considered in determining the attainment date that is as expeditious as practicable for subpart 2 areas, but if the date were later than allowed for the area's classification, the State would need to request bump-up of the area to a higher classification for that date to be approved.

of the State to a different area of the State.

Comment: Several comments recommended an intrastate transport classification.

Response: Our response to those comments is in the response to comment document for the Phase 1 Rule of April 30, 2004. (Docket document OAR–2003–0079–0717; p. 68.)

3. How will EPA address transport of ground-level ozone and its precursors for areas affected by international transport?

a. Background

As discussed in the proposal, international transboundary transport of ozone and ozone precursors can contribute to exceedances of the NAAQS. It is possible that the international transport of air pollutants may affect the ability of some areas to attain and maintain the 8-hour ozone NAAQS. Section 179B of the CAA (International Border Areas), applies to nonattainment areas that are affected by emissions emanating from outside the United States. This provision requires EPA to approve a SIP for an ozone nonattainment area if it meets all of the requirements applicable under the CAA, other than a requirement that the area demonstrate attainment and maintenance of the ozone NAAQS by the applicable attainment date, and the State establishes to EPA's satisfaction that the SIP would be adequate to attain and maintain the ozone NAAQS by the applicable attainment date but for emissions emanating from outside the United States. The preamble to the proposed rule recommended that States should confer with the appropriate EPA Regional Office to establish on a case-by-case basis the technical requirements for these analyses.

b. Final Rule

As in the proposal, we are not setting forth any regulatory provisions related to international transport. Section 179B of the CAA applies for these purposes. We continue to recommend that States confer with the appropriate EPA Regional Office to establish on a case-by-case basis the technical requirements for analyses to support showings under section 179B. These analyses will be subject to public comment during the State and Federal SIP processes.

c. Comments and Responses

Comment: Several commenters addressed the discussion of international transport in the proposed rule. Two commenters suggested that EPA is placing too high a burden on States to make a demonstration that a nonattainment area would attain but for international transport (e.g., assessing emissions from foreign countries). These commenters stated that EPA has the appropriate resources and technical expertise to evaluate international transport and highlighted certain data EPA has gathered and modeling EPA has performed. The commenters suggested that EPA should re-evaluate relevant policies regarding section 179B of the CAA to ensure they are streamlined and not unnecessarily burdensome on States in making an international transport demonstration. Another commenter thought that the proposed rule does not adequately address ozone from international sources, especially in a situation where a State does not have jurisdiction over most of the significant sources of ozone or access to available data for modeling in that region. Another commenter encouraged EPA to expand its view of the applicability of section 179B and allow consideration of the impact on attainment of smoke from crop burning activities in Southern Mexico and Central America.

Response: The CAA, not EPA's proposed rule, places the burden on States to demonstrate that an area would be able to attain but for emissions from sources located outside the United States. However, EPA agrees with the commenters that EPA has been performing numerous activities that will provide data that States may be able to rely on as they develop these demonstrations. We recognize that adequate data for foreign sources may not be available to States. Therefore, modeling, according to the modeling guidance for attainment demonstrations, may not be possible in all cases. Because the availability of information and the causes of international pollution vary significantly from one area to another, EPA continues to believe that the best approach for addressing international transport is for States to work with EPA on an area-by-area basis to determine what is the best available information and the best method for analysis that fits the unique situation for each area.

Regarding consideration under section 179B of the impact on attainment of smoke from crop burning activities in Southern Mexico and Central America, in many cases it may not be possible to confidently quantify the impacts to the total ozone loadings from individual foreign sources that are hundreds or even thousands of miles from the U.S. border. Particularly since 1998, when spring fires in Mexico and Central America were very severe, EPA has received much information about the potential impacts from such occurrences on ozone and PM levels in the United States. A prime lesson learned from those experiences is that a well-designed, detailed analysis is required before one can estimate the degree of influence from such fires. In many cases, sufficient data will not exist to draw such a conclusion. Case-by-case consultation between EPA and the State will help determine how best to consider this information in attainment planning.

With respect to the applicability of section 179B to areas affected by emissions from very distant, foreign sources, EPA currently has not taken a position. If and when there are any SIP submittals that request a section 179B dispensation on such a basis, EPA will examine those submittals on a case-by-case basis, including focusing on the sufficiency of the technical demonstration, in order to make a determination of section 179B applicability.

The EPA considers international transport of pollution an important issue. The EPA is engaged in several international efforts that will allow us to better understand the linkages between air pollution sources in other countries and their impacts on public health and air quality in the United States. The EPA has cooperative agreements with both Canada and Mexico to investigate international border transport. The information generated by these partnerships will assist States in evaluating international transport affecting 8-hour nonattainment areas.

D. How will EPA address requirements for modeling and attainment demonstration SIPs for areas implementing the 8-hour ozone standard?

[Section VI.H. of June 2, 2003 proposed rule (68 FR 32830); § 51.908 in draft and final regulatory text.]

As noted in the proposal, an attainment demonstration SIP consists of (1) technical analyses to locate and identify sources of emissions that are causing violations of the 8-hour NAAQS within nonattainment areas (i.e., analyses related to the emissions inventory required for the nonattainment area), (2) adopted measures with schedules for implementation and other means and techniques necessary and appropriate for attainment, (3) commitments, in some cases, to perform a mid-course review (MCR), and (4) contingency measures required under section 172(c)(9) of the CAA that can be implemented without further action by the State or the Administrator to cover failures to meet RFP milestones and/or

attainment. The final rule retains three of these four elements, the exception being the requirement for a commitment to perform a MCR. As noted below, EPA will assess whether a MCR is needed on a case-by-case basis in reviewing individual attainment demonstrations.

In the Phase 1 Rule, § 51.908 contained only the requirement related to the timing of implementation of the emissions reductions needed for attainment. In today's final rule, that provision is retained as paragraph (d) of § 51.908, and other requirements related to modeling and attainment demonstrations appear in the remaining paragraphs of § 51.908.

In the proposal, we also solicited public comment on the guidance related to multi-pollutant assessments (as discussed below), areas with earlier and later attainment dates, MCR, modeling guidance, and multi-State nonattainment areas. These topics are discussed below. Associated with the attainment demonstration also are the RFP/ROP plans and the SIP submission concerning RACM, both of which we discussed elsewhere in the preamble to the proposed rule and which are discussed in later sections of this preamble.

1. Areas With Early Attainment Dates

a. Background

The proposal noted that under section 182(a), marginal areas, which have a maximum attainment date of 3 years after designation, are not required to perform a complex modeling analysis using photochemical grid modeling. We noted that areas covered under either subpart 1 or 2 with ozone concentrations close to the level of the NAAQS [e.g., within 0.005 parts per million (ppm)] [14] will most likely come into attainment within 3 years after designation as nonattainment without any additional local planning as a result of national and/or regional emission control measures that are scheduled to occur. We noted that regional scale modeling for national rules, such as the NO_X SIP Call and Tier II motor vehicle tailpipe standards, projects major ozone benefits for the 3-year period of 2004–2006. Attainment for many areas classified as marginal is further indicated by subsequent modeling used to support the CAIR. This 3-year period coincides with the period that would be used to determine whether an area attains the 8-hour standard within 3 years after designation for areas classified as marginal.

If existing modeling for a marginal area does not indicate the area will attain with the current planned control measures, EPA encouraged the areas to request reclassification to moderate and encouraged the State or Tribe to develop an attainment demonstration using photochemical grid modeling. (See 68 FR 32831; June 2, 2003.) Even though modeling is not required, it may be prudent.

In the proposal, we noted that many subpart 1 areas are projected through regional modeling to come into attainment within 3 years after designation with current control programs. Therefore, we proposed that no additional modeled attainment demonstration would be required for areas with air quality observations close to the level of the standard and where regional or national modeling exists that is appropriate for use to demonstrate the area will attain the 8-hour standard within 3 years after designation (i.e., based on data from 2004–2006).

We proposed that areas subject only to subpart 1 may request an attainment date no later than 3 years following designation for the 8-hour NAAQS by submitting within 1 year of the designation a SIP that demonstrates the area will attain within 3 years following designation. The demonstration must include modeling results and analyses that the State is relying on to support its claim. Such modeling must be consistent with EPA guidance and must be appropriate for the area.

b. Summary of Final Rule

Although we proposed that subpart 1 areas requesting an attainment date within 3 years after designation should submit their attainment demonstration within 12 months, we have removed that provision from the final rule. A subpart 1 area is free to choose to submit its attainment demonstration at any time prior to the 3-year due date.[15] As is the case with all required attainment demonstrations, the demonstration must be submitted no later than 3 years following designation and must be appropriate for use in the area. We anticipate that most subpart 1 areas will be included in the modeling analyses conducted by areas with later attainment dates. States are encouraged to use these available analyses, as well as future EPA national or regional modeling. The demonstration must include modeling results and analyses that the State or Tribe is relying on to support its claim. Such modeling should be consistent with EPA guidance and should be applicable and appropriate for the area.[16] If acceptable available modeling does not demonstrate attainment, the area would need to submit a local modeled attainment demonstration.

c. Comments and Responses

Comment: Several commenters recommended that the requirement for attainment demonstrations from all subpart 1 areas be eliminated.

Response: Section 172(c)(1) clearly requires that nonattainment areas "* * * shall provide for attainment of the national primary ambient air quality standards." To meet this requirement, a State must demonstrate that the area will attain by a specified date and identify and adopt the control measures that will bring the area into attainment. We see no authority for waiving this requirement for areas.

Comment: What are the requirements for subpart 1 areas requesting attainment dates within 3 years of designation?

Response: Subpart 1 areas must submit their attainment demonstrations within 3 years after designation.

2. Areas With Later Attainment Dates

a. Background

For areas with attainment dates of more than 3 years after designation, regardless of whether they are covered under subpart 1 or subpart 2 (except marginal areas), we proposed to require them to submit an attainment demonstration SIP. This proposal was reflected in § 51.908(b) and (c) of the draft regulatory text. We stated that local, regional and national modeling developed to support Federal or local controls could be used provided the modeling is consistent with EPA's modeling guidance. Several States have invested considerable time and resources in regional 8-hour ozone modeling projects following this guidance. Where exceedances of the 8-hour ozone standard are more pervasive and widespread than they were for the 1-hour ozone standard, we recommended that States work together in multi-State modeling efforts and

[14] Even though the June 2, 2003 proposal contained the reference to the 0.005 ppm criterion, the draft regulatory text issued for public comment did not contain a reference to this criterion.

[15] The EPA notes that 8-hour ozone nonattainment areas are also free to develop early SIPs with motor vehicle emissions budgets for transportation conformity purposes in advance of a complete SIP attainment demonstration. For more information on establishing an early 8-hour ozone SIP and how it could be used for conformity, please refer to EPA's July 1, 2004, conformity final rule (69 FR 40019).

[16] If an assessment indicates that a regional modeling analysis is not applicable to a particular nonattainment area, additional local modeling would be required.

leverage off work under development and resources spent on these projects.

b. Summary of Final Rule

Subpart 1 areas with attainment dates later than 3 years after designation and areas classified as moderate or higher under § 51.903, are required to submit an attainment demonstration no later than 3 years after the effective date of designation for the 8-hour ozone NAAQS. Areas with an effective date of designation of June 15, 2004 are required to submit an attainment demonstration no later than June 15, 2007. These demonstrations must be consistent with section 51.112, including appendix W. In addition, for the review of technical adequacy, we will generally rely on our most recent modeling guidance at the time the modeled attainment demonstration is performed. We will be making available a final version of the modeling guidance related to developing attainment demonstrations for the 8-hour ozone standard.[17]

Areas required to submit an attainment demonstration are encouraged to follow the procedures described in this guidance. Local, regional and national modeling developed to support Federal or local controls generally may be used provided the modeling is consistent with EPA's modeling guidance at the time the modeled attainment demonstration is performed.[18]

c. Comments and Responses

We received no comments on this topic per se; comments on the timing of submission of attainment demonstrations is discussed elsewhere. We noted in the proposal that comments on the modeling guidance were welcome at any time and that we would consider those comments in any future revision of that document. We noted that comments submitted on the modeling guidance document would not be docketed as part of this rulemaking, nor would a comment/response summary of these comments be a part of the final 8-hour ozone implementation rule since they will not affect the rule itself. We will address those comments at the time we issue the final modeling guidance.

3. Multi-State Nonattainment Areas

a. Background

As discussed in the June 2003 proposal, section 182(j) of the CAA defines a multi-State ozone nonattainment area as an ozone nonattainment area, portions of which lie in two or more States. Section 182(j)(1)(A) and (B) set forth certain requirements for such areas. First, each State in which a multi-State ozone nonattainment area lies must take all reasonable steps to coordinate the implementation of the required revisions to SIPs for the given nonattainment area [section 182(j)(1)(A)]. Next, section 182(j)(1)(B) requires the States to use photochemical grid modeling or any other equally effective analytical method approved by us for demonstrating attainment. We are prevented by section 182(j) from approving any SIP revision submitted under that section if a State has failed to meet the above requirements.

To address the provisions of section 182(j)(1)(A), States that include portions of a multi-State ozone nonattainment area should develop a joint work plan as evidence of early cooperation and integration. The work plan should include a schedule for developing the emissions inventories, and the attainment demonstration for the entire multi-State area. Each State within a multi-State ozone nonattainment area is responsible for meeting all the requirements relevant to the given area. Care should be taken to coordinate strategies and assumptions in a modeled area with those in other, nearby modeled areas in order to ensure that consistent, plausible strategies are developed.

Section 182(j)(2) for multi-State nonattainment areas recognizes that one State may not be able to demonstrate attainment for the nonattainment area if other States in which portions of the nonattainment area are located do not adopt and submit the necessary attainment plan for the area. In such cases, even though the area as a whole would not have an approvable attainment demonstration, the sanction provisions of section 179 will not apply in the portion of the nonattainment area located in a State that submitted an attainment plan.

b. Summary of Final Rule

As discussed in the proposal, State partners involved in a multi-State ozone nonattainment area must work together to perform the appropriate modeling analyses to identify control measures that will enable the area to achieve attainment as expeditiously as practicable. Each State will be responsible for its portion of the control program and therefore will be held accountable for controls identified for implementation within its State boundaries. The modeling analyses should encompass the entire multi-State nonattainment area as well as adjacent counties which may contribute to the nonattainment problem. State plans should address local transport within the region and its contribution to nonattainment in the multi-State area. Consideration of long-range transport and its contributions to nonattainment is discussed in section IV.B. of this preamble. Multi-State nonattainment areas are subject to the same modeling and attainment demonstration requirements of the final rule that apply to all other areas. Marginal multi-State nonattainment areas do not have to submit a modeled attainment demonstration because section 182(a) exempts marginal areas from the requirement to submit an attainment demonstration.

c. Comments and Responses

Comment: Several commenters encouraged us to clearly define in the rule how multi-State nonattainment areas will be treated if all or a portion of an area is subject only to subpart 1. One of these commenters requested a clarification that photochemical grid modeling will not be required for multi-State areas classified under subpart 1 or areas that are classified as marginal. The commenter's reasoning was that such modeling is unnecessary since they are close to achieving the 8-hour NAAQS and will be in attainment before the modeling can be completed.

Response: We agree with these commenters that since section 182(a) exempts marginal areas from the requirement to submit an attainment demonstration, such areas need not develop an attainment demonstration. Section 182(j) of the CAA requires that multi-State areas use photochemical grid modeling as part of their attainment demonstrations while Section 172 (Subpart 1 areas) of the CAA does not explicitly require photochemical grid modeling. For subpart 1 areas that do not seek an attainment date of 3 years or less after designation, we make no distinction between multi-State and

[17] U.S. EPA, (November 4, 2005), Guidance on the Use of Models and Other Related Analyses in Attainment Demonstrations for the 8-Hour Ozone NAAQS, EPA–454/R–05–002, *http://www.epa.gov/ttn/scram,* (Modeling Guidance, File name: ozone-final.pdf).

[18] The guidance may not apply to a particular situation, depending upon the circumstances. The EPA and State decision makers retain the discretion to adopt approaches on a case-by-case basis that differ from this guidance where appropriate. Any decisions by EPA regarding a particular SIP demonstration will only be made based on the statute and regulations, and will only be made following notice and opportunity for public review and comment. Therefore, interested parties will be able to raise questions and objections about the contents of this guidance and the appropriateness of its application for any particular situation.

single-State subpart 1 nonattainment areas. All subpart 1 nonattainment areas are required to submit an attainment demonstration that relies on photochemical grid modeling, either one that has already been performed that is appropriate for use in the area, or a new one. We do not believe that techniques other than those based on photochemical grid modeling will provide credible assurance that an area will achieve the 8-hour ozone standard by the area's attainment date.

Comment: One commenter requested that we perform the modeling for multi-State areas. Two commenters stated that if any additional photochemical modeling is required for such areas pursuant to CAA 182(j)(1)(B), then EPA should refine previous modeling; perform new modeling; or approve a less resource-intensive, alternate method that fulfills the requirement. The commenters asserted that we should assist the States in coordinating the development of the attainment/maintenance plans and ensure that areas involving multiple EPA Regions are not hampered by jurisdictional conflicts and inconsistencies.

Response: The EPA has conducted, and will continue to conduct, regional and national scale modeling that covers most of the ozone nonattainment areas. Both single State and multi-State nonattainment areas will be able to make use of EPA modeling, where appropriate. The EPA will work with States to determine the steps necessary for the proper use of EPA modeling in a local attainment demonstration. States that plan to use EPA modeling in lieu of local modeling should be prepared to justify the local use of the regional projections as well as conduct additional analyses to monitor progress towards attainment. The EPA will continue to work with States to coordinate the development of consistent attainment/maintenance plans.

4. Role of Modeling Guidance in Attainment Demonstrations

a. Background

The proposal noted that section 182(b)(1)(A) requires ozone nonattainment areas to develop an attainment demonstration which provides for reductions in VOC and NO_X emissions ''as necessary to attain the national primary ambient air quality standard for ozone.'' Section 172(c), requires areas covered under subpart 1 to demonstrate attainment. For a subpart 1 area that does not qualify for an attainment date within 3 years after designation, we proposed to require the State to develop and submit a modeled attainment demonstration.[19]

We noted that section 182(c)(2)(A) provides that for serious and higher-classified areas the ''attainment demonstration must be based on photochemical grid modeling or any other analytical method determined by the Administrator, in the Administrator's discretion, to be at least as effective.'' A photochemical grid model should meet several general criteria for it to be a candidate for consideration in an attainment demonstration. We noted that, unlike in previous guidance,[20] we did not propose recommending a specific photochemical grid model for use in the attainment demonstration for the 8-hour NAAQS for ozone. At present, there is no single model which has been extensively tested and shown to be clearly superior or easier to use than other available models. Criteria for attainment demonstrations are contained in 40 CFR 51.112, including appendix W (i.e., ''EPA's Guideline on Air Quality Models,'' 68 FR 18440, April 15, 2003). Appendix W refers to EPA's ''Use of Models and Other Analyses in Attainment Demonstrations for the 8-Hour Ozone NAAQS'' and lists a set of general requirements that an air quality model should meet to qualify for use in an attainment demonstration for the 8-hour ozone NAAQS.[21] The proposal described alternatives available to the States and the scope and coverage of the draft guideline. The draft regulatory text of 2003 addressed this requirement in § 51.908(d).

We noted that we were planning to make substantial changes to the draft version of this document before finalizing the attainment demonstration aspects of the implementation rule. We said we welcomed public comments on the guidance at any time and would consider those comments in any future revision of the document. However, we said we would not consider comments on the technical merits of the modeling guidance in this present rulemaking.

b. Summary of Final Rule

The final rule [§ 51.908(c)] requires each attainment demonstration to be consistent with the provisions of § 51.112, including appendix W to 40 CFR part 51. In addition, we will generally review the demonstrations for technical merit using EPA's most recent modeling guidance at the time the modeling relied on in the attainment demonstration is performed. This guidance will generally have the State provide (1) technical analyses to locate and identify sources of emissions that are causing violations of the 8-hour NAAQS within nonattainment areas, (2) adopted measures with schedules for implementation and other means and techniques necessary and appropriate for attainment that are needed for attainment, with implementation no later than the beginning of the attainment year ozone season[22] (e.g., prior to 2009 ozone season for areas with June 15, 2010 attainment dates), and (3) contingency measures required under section 172(c)(9) of the CAA that can be implemented without further action by the State or the Administrator to cover emissions shortfalls in RFP plans and failures to attain.

c. Comments and Responses

Comment: One commenter recommended that EPA must ensure that attainment demonstrations are based on scientifically valid regional airshed modeling rather than scientifically invalid linear proportional rollback and weight-of-evidence methods.

Response: Criteria for attainment demonstrations are contained in 40 CFR 51.112, including appendix W (i.e., ''EPA's Guideline on Air Quality Models,'' 68 FR 18440, April 15, 2003). Appendix W cites EPA's ''Use of Models and Other Analyses in Attainment Demonstrations for the 8-Hour Ozone NAAQS'' and describes a set of general criteria that an air quality model and its application should meet to qualify for use in an attainment demonstration for the 8-hour ozone NAAQS.[23] The draft guidance was developed through a collaborative process, which included review from the scientific community, and it has been revised to reflect recent review comments. The procedures described are considered a scientifically

[19] As noted above in the discussion of subpart 1 areas with early attainment dates, although the draft regulatory text in § 51.908(a) was structured such that no attainment demonstration was needed for subpart 1 areas that received an attainment date within 3 years after the effective date of the nonattainment designation, this was misleading, since the draft § 51.904(b)(2) provision that affected these areas required submission of a demonstration of attainment within 3 years after designation. The final regulatory text in § 51.908(b) clarifies this point.

[20] U.S. EPA, (1991), Guideline for Regulatory Application of the Urban Airshed Model, EPA–450/4–91–013. Available at: *http://www.epa.gov/scram001/tt25.htm;* see document DRAFT8HR.

[21] U.S. EPA, (May 1998), Draft Guidance on the Use of Models and Other Analyses in Attainment Demonstrations for the 8-Hour Ozone NAAQS, EPA–454/R–99–004, *http://www.epa.gov/ttn/scram,* (Modeling Guidance, File name: DRAFT8HR).

[22] See 40 CFR 51.900(g) for definition.

[23] U.S. EPA, (1998), Draft Guidance on the Use of Models and Other Analyses in Attainment Demonstrations for the 8-Hour Ozone NAAQS, EPA–454/R–99–004, *http://www.epa.gov/ttn/scram,* (Modeling Guidance, File name: DRAFT8HR).

valid use of regional and urban airshed modeling. The modeled attainment test makes use of the model derived relationship between ozone and its precursors. It does not, as is the case with proportional rollback, assume equal proportions of the precursors will provide an equally proportional reduction in ozone. For example, it does not assume that 20 percent reduction in precursors will provide 20 percent improvement in ozone.

The guidance also identifies additional data which, if available, should enhance the credibility of model results and results of other analyses used in a weight of evidence determination. The EPA believes use of weight of evidence is appropriate as do many in the scientific community. Weight of evidence is a credible approach for considering inherent uncertainties in a modeling application. As noted above, we will be making available a final version of the modeling and attainment demonstration guidance for the 8-hour ozone standard.[24]

Comment: All attainment demonstrations should be subject to the same rigorous standards.

Response: The EPA envisions that the final 8-hour ozone modeling guidance will be available for use by the majority of subpart 1 areas and subpart 2 areas classified as moderate and above. However, due to the unique nature of the ozone problem in many areas, EPA will accept various applications of the guidance. Although EPA anticipates all areas will follow the guidance closely, there will be variation based on availability of new and improved data methods and field study data. The EPA is always striving to make best use of available data and improvements in methodologies as the science and our understanding of ozone formation and transport in different parts of the country increases. Unique to many areas is the source receptor configuration, level of precursor data collected and the model's ability to simulate unique factors influencing the formation and transport of ozone. As more information becomes available in particular areas, EPA expects more rigorous demonstrations will be provided. Areas close to attaining the standard for which there is a better understanding of the meteorology and the relationships between precursor emissions and ozone may not require as much rigor. These decisions will be made on a case-by-case basis and the public will be able to express their views during the State SIP development and EPA review process.

Comment: The EPA cannot adopt or change the Draft Guidance, use it for regulatory purposes, or require States to use it for regulatory purposes, without subjecting it to separate notice-and-comment rulemaking.

Response: The final rule [§ 51.908(c)] requires each attainment demonstration to be consistent with the provisions of 40 CFR 51.112, including appendix W. However, we are not adopting the Guidance as a rule. The EPA plans to use the current (2005) guidance and future updates as a benchmark for reviewing the technical analysis submitted in support of 8-hour ozone attainment demonstrations. The guidance document is not a regulation. Therefore, it does not impose binding, enforceable requirements on any party, and may not apply to a particular situation based upon the circumstances. The EPA and State decision makers have the discretion to adopt approaches on a case-by-case basis that differ from this guidance where appropriate. Any decisions by EPA regarding adequacy of a particular SIP to meet the 8-hour ozone NAAQS will be based on the CAA and our regulations. Therefore, interested parties are free to raise questions and objections about the appropriateness of the application of this guidance to a particular situation during the State SIP development and EPA review process.

Comment: One commenter requested an opportunity to review and comment on the revised guidance prior to the ''final'' release.

Response: States, Tribes and others were given an opportunity to comment on the revised draft guidance prior to release. Also, EPA received additional comments on the draft guidance during the comment period on the implementation rule. The EPA has reviewed and considered the comments and will be releasing the final guidance. For more information and updates to the modeling guidance for ozone, visit EPA's Technology Transfer Network Support Center for Regulatory Air Models (TTN/SCRAM) on the Internet, http://www.epa.gov/ttn/scram/. Even though the guidance will be issued in final form shortly, EPA is always open to suggestions for future improvements to the guidance, including the incorporation of methodologies and procedures that increase accuracy and credibility of results. Such suggestions may be made to EPA regional or headquarters modeling contacts listed at the above TTN/SCRAM web site.

Comment: The EPA should carefully consider the resources that will be needed to perform the requisite modeling for multiple areas in many States.

Response: States/Tribes are encouraged to share and leverage resources currently being used in regional model applications that affect multiple areas. There is much opportunity for common use of data and methodologies among the modeling requirements for the regional haze program, the $PM_{2.5}$ attainment demonstrations and the ozone attainment demonstrations that should make the overall exercise less onerous. States and Tribes are encouraged to model multiple precursor strategies for multiple areas and review their efficacy for all three programs.

Comment: Any photochemical grid model utilized must either be in the public domain or licensed for unlimited use by any person for purposes of modeling within the area.

Response: The EPA modeling guidance supports this comment which is addressed in section 10 of the modeling guidance. ''Applicable models'' may be used, if they are non-proprietary. A ''non-proprietary'' model is one whose source code is available for free or for a reasonable cost. Further, the user must be free to revise the code to perform diagnostic analyses and/or to improve the model's ability to describe observations in a credible manner.

Comment: One commenter recommended that EPA update its guidance in 40 CFR 51, appendix W to include a discussion of the role of weight-of-evidence as part of a modeling demonstration, and to make any updates in appendix W subject to public review.

Response: In regard to the role of weight of evidence, EPA does not plan to revise appendix W. Use of weight of evidence is dependent on local information only available when the technical analysis for a specific model application is under development. Therefore, use of weight of evidence is considered on a case-by-case basis as the appropriate Regional Office works with the State as it develops its SIP and during the State adoption process and during EPA's SIP approval process. Any weight of evidence analysis is available for public review.

5. Mid-Course Review (MCR)

a. Background

The proposal noted that a MCR provides an opportunity to assess whether a nonattainment area is or is not making sufficient progress toward attainment of the 8-hour ozone standard, as predicted in its attainment demonstration. We noted that a

[24] U.S. EPA, (2005), Guidance on the Use of Models and Other Related Analyses in Attainment Demonstrations for the 8-Hour Ozone NAAQS, EPA–454/R–05–002, *http://www.epa.gov/ttn/scram,* (Modeling Guidance, File name: ozone-final.pdf).

commitment to perform a MCR is a critical element of an attainment demonstration that employs a long-term projection period and relies on weight of evidence. Because of the uncertainty in long-term projections, we said we believed such attainment demonstrations need 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.

A number of States participated in a consultative process with EPA, which resulted in the development of the 1-hour MCR guidance.[25] We noted that we would update the 1-hour MCR policy and technical guidance to include 8-hour metrics and that we were soliciting comment on appropriate revisions. We proposed that the final MCR guidance incorporating 8-hour metrics would be available at the time we issue our final implementation rule.

The proposal briefly described the procedure for performing a MCR. The proposal noted that States would not have to commit in advance to adopt new control measures as a result of the MCR process. Based on the MCR, if we determine sufficient progress has not been made, we would determine whether additional emissions reductions are necessary from the State(s) in which the nonattainment area is located or upwind States or both. We would then require the appropriate State(s) to adopt and submit new measures to bring about the necessary emissions reductions within a specified period. We anticipated that these findings would be made as calls for SIP revisions under section 110(k)(5) and, therefore, the period for submission of the measures would be no longer than 18 months after the EPA finding. Thus, we proposed that States complete the MCR 3 or more years before the applicable attainment date to ensure that any additional controls that may be needed can be adopted in sufficient time to reduce emissions by the start of the ozone season in the attainment year.

b. Summary of Final Rule

The final regulatory text does not contain a requirement for the MCR. In reviewing attainment demonstrations from individual States, however EPA will assess the need for a MCR for areas with an attainment date beyond 6 years after the effective date of the area's designation in the context of whether the attainment demonstration and any weight of evidence analysis is supportable without a commitment by the State to perform a MCR.

The 8-hour ozone modeling guidance[26] is expected to identify measurements and activities to support subsequent reviews of an attainment demonstration SIP (i.e., MCR), such as improvements in air quality monitoring, meteorology and emission measurements. Even though the proposal noted that we expected to revise the existing 1-hour MCR guidance, EPA now believes the 1-hour MCR guidance coupled with the 8-hour modeling guidance provides sufficient guidance. States should consult with EPA prior to using a methodology other than the one developed through the public consultative process.

Guidance for performing a MCR for the 1-hour ozone NAAQS identifies several methods for reviewing whether the existing SIP is sufficient for the area to attain by its attainment date.[27] These guidance documents should provide adequate information for developing protocols for performing MCRs for the 8-hour ozone NAAQS. States/Tribes should prepare protocols which identify analyses and data bases to be used to support a MCR and discuss these with the appropriate EPA Regional Office prior to performing a MCR. If we determine that additional guidance is needed, we will issue updated guidance in a timeframe suitable to support the timely completion of MCRs.

c. Comments and Responses

Comment: Requiring the MCR 3 or more years prior to the attainment date is not reasonable or feasible for some areas. The EPA needs to recognize that for moderate and lower classifications the MCR would be due at the time of the SIP submittal. Mid-course review should be required only for areas with nonattainment classifications of serious or greater, as at least 3 years of monitored data are required for a MCR, after the implementation of controls. One commenter recommended that EPA make the MCR process part of the requirements for RFP and ROP.

Response: The final regulatory text does not require a MCR; as noted above, EPA will assess on a case-by-case basis whether a MCR would be needed in the context of a particular attainment demonstration.

Comment: The EPA should develop proper analysis techniques so that meteorological conditions do not affect a nonattainment area's perceived progress towards attainment. A MCR should also include an evaluation of ozone transport into the nonattainment area and control implementation in upwind areas.

Response: Assessments of transport are covered in the MCR guidance. The EPA is improving methods for determining the ozone trends and how they are affected by meteorology. The latest information will be made available.

Comment: The EPA needs to release the revised MCR guidance before the final rule is issued in order for it to be reviewed and commented on during the public comment period.

Response: The final rule does not incorporate any MCR guidance by reference. The 8-hour ozone modeling guidance[28] is expected to identify measurements and activities to support subsequent reviews of an attainment demonstration SIP (i.e., MCR), such as improvements in air quality monitoring, meteorology and emission measurements. Guidance for performing a MCR for the 1-hour ozone NAAQS identifies several methods for reviewing whether a SIP is on track to attain within prescribed time limits.[29] These guidance documents should provide adequate information for developing protocols for performing MCRs for the 8-hour ozone NAAQS. States/Tribes should prepare protocols which identify analyses and data bases to be used to support a MCR and discuss these with the appropriate EPA Regional Office prior to performing a MCR. If we determine that additional guidance is needed, we will issue updated guidance in a timeframe suitable to support completion of MCR's within established deadlines.

[25] Memorandum of March 28, 2002, from Lydia N. Wegman and J. David Mobley, re: ''Mid-Course Review Guidance for the 1-Hour Ozone Nonattainment Areas that Rely on Weight-of-Evidence for Attainment Demonstration.'' Located at URL: *http://www.epa.gov/scram001/guidance/guide/policymem33d.pdf.*

[26] U.S. EPA, (2005), Guidance on the Use of Models and Other Related Analyses in Attainment Demonstrations for the 8-Hour Ozone NAAQS, EPA–454/R–05–002, *http://www.epa.gov/ttn/scram*, (Modeling Guidance, File name: ozone-final.pdf).

[27] Memorandum of March 28, 2002, from Lydia N. Wegman and J. David Mobley, re: ''Mid-Course Review Guidance for the 1-Hour Ozone Nonattainment Areas that Rely on Weight-of-Evidence for Attainment Demonstration.'' Located at URL: *http://www.epa.gov/scram001/guidance/guide/policymem33d.pdf.*

[28] U.S. EPA, (2005), Guidance on the Use of Models and Other Related Analyses in Attainment Demonstrations for the 8-Hour Ozone NAAQS, EPA–454/R–05–002, *http://www.epa.gov/ttn/scram*, (Modeling Guidance, File name: ozone-final.pdf).

[29] Memorandum of March 28, 2002, from Lydia N. Wegman and J. David Mobley, re: ''Mid-Course Review Guidance for the 1-Hour Ozone Nonattainment Areas that Rely on Weight-of-Evidence for Attainment Demonstration.'' Located at URL: *http://www.epa.gov/scram001/guidance/guide/policymem33d.pdf.*

6. Multi-Pollutant Assessments (One-Atmosphere Modeling) [30]

a. Background

The proposal noted that many factors affecting formation and transport of secondary fine particles (i.e., $PM_{2.5}$ components) are the same as those affecting formation and transport of ozone. The proposal, therefore, noted that models and data analysis intended to address visibility impairment need to be capable of simulating transport and formation of both secondary fine particles and ozone. At a minimum, modeling should include previously implemented or planned measures to reduce ozone, secondary fine particles, and visibility impairment. An integrated assessment of the impact controls have on ozone, secondary fine particles, and regional haze provides safeguards to ensure ozone controls will not preclude optimal controls for secondary fine particles and visibility impairment.

The concept of modeling control impacts on all three programs is further strengthened by the alignment of the implementation process for ozone and secondary fine particles. As the dates for attainment demonstration and planning SIPs for the three programs are anticipated to be fairly close, the practicality of using common data bases and analysis tools for all three programs is viable and encourages use of shared resources.

The proposal noted that States that undertake multi-pollutant assessments as part of their attainment demonstration would assess the impact of their ozone attainment strategies on secondary fine particles and visibility or perform a consistent analysis for ozone, secondary fine particles, and visibility. To facilitate such an effort, we encouraged States to work closely with established regional haze Regional Planning Organizations (RPOs) and the jurisdictions responsible for developing $PM_{2.5}$ implementation plans. We encouraged States to perform similar multi-pollutant assessments as part of their ozone attainment demonstrations, considering the control programs that are in place at the time of the assessment. Multi-pollutant assessments are discussed elsewhere in this proposed rulemaking.

[30] Use of models that are capable of simulating transport and formation of multiple pollutants simultaneously. For example, for ozone and fine particles, it is critical that the model simulate photochemistry, which includes interactions among the pollutants and their precursors.

b. Summary of Final Rule

There is no regulatory text on the issue of multi-pollutant assessments, but we recommend the following:

- Attainment demonstration modeling should include previously implemented or planned measures to reduce ozone, secondary fine particles, and visibility impairment.
- An integrated assessment of the impact controls have on ozone, secondary fine particles, and regional haze is encouraged to promote efficiencies in strategies for achieving all three goals.
- States are also encouraged to use common data bases and analysis tools for all three programs and work closely with established regional haze RPOs and the jurisdictions responsible for developing $PM_{2.5}$ implementation plans.
- States are encouraged to follow EPA's lead and perform similar multi-pollutant assessments as part of their ozone attainment demonstrations, considering the control programs that are in place at the time of the assessment.

c. Comments and Responses

Comments: The EPA received several comments on the recommendation that States perform multi-pollutant assessments as part of their ozone attainment demonstrations. Almost all of the comments agreed with the basic rationale behind encouraging an analysis of the expected ozone, $PM_{2.5}$, and visibility impacts of a given set of air quality control measures associated with an 8-hour ozone attainment demonstration. The comments differed on whether multi-pollutant assessments should be required or only encouraged. The commenters who urged EPA to encourage rather than require a multi-pollutant assessment provided reasons for why they believe a multi-pollutant assessment is not possible at this time. One commenter indicated that the proposal was unclear as to whether the multi-pollutant assessments were required.

One commenter recommended that EPA require, in certain unspecified cases, nonattainment areas to perform an integrated control strategy assessment to ensure that ozone controls will not preclude optimal controls for secondary fine particles and visibility impairment. Conversely, several other commenters expressed the opinion that the multi-pollutant assessment should not be a requirement of an ozone attainment demonstration. Several reasons were offered for why the assessment should remain optional: (1) That the state of the science for assessing $PM_{2.5}$ and visibility is not yet sufficient for providing meaningful input to the regulatory process, (2) that the additional resources necessary to model the atmosphere as a single system would result in an undue burden on the States, and (3) that requiring a $PM_{2.5}$ and visibility assessment would result in delayed attainment due to the additional time necessary to complete such an analysis.

Response: The EPA continues to believe that encouraging, but not requiring, multi-pollutant assessments is the most sound approach for total air quality management given the schedule by which ozone attainment demonstrations are legally required. Much progress has been made on improving the available $PM_{2.5}$ models and inputs to these models over the past 3 years. As a result, EPA believes that the available tools are able to support air quality planning. Further improvements are likely over the next several years; much of which will be driven by the RPO's. By working closely with the appropriate RPO's, States can reduce the burden associated with one-atmosphere modeling analyses. However, EPA recognizes that many States have already invested resources in an ozone-only modeling platform analysis which is typically conducted over a finite number of episode days and for geographic regions that are typically less than (in time) and smaller than (in space) what might be required in a multi-pollutant assessment. By encouraging States to consider such assessments, EPA hopes to speed the process of the transition to more integrated air quality planning tools while yielding sound multi-pollutant control strategies. It is prudent for areas to perform these multi-pollutant assessments earlier as it will lessen the planning burden in the long-term since later planning activities for $PM_{2.5}$ and regional haze will need to consider the effects of emission control measures adopted for the ozone attainment plan.

7. What baseline emission inventory should be used for the attainment demonstration?

[Not addressed in the June 2, 2003 proposal; § 51.909 of the draft regulatory text.]

The June 2, 2003 proposal did not discuss baselines for purposes of the attainment demonstration. (It did, however, discuss baselines for RFP demonstrations.) Section 51.909 of the draft regulatory text provided that 2002 should be used as the baseline emission inventory year for purposes of both RFP and the attainment demonstration for areas with an effective date of

designation of June 15, 2004. We recognize, however, that some areas have already begun to perform modeling for their attainment demonstrations using baseline year inventories earlier than the 2002 inventory, and because the 2002 inventory may not be in a format to readily be used for photochemical grid modeling.[31] Therefore, the final rule does not specify a baseline for purposes of the attainment demonstration and modeling. As discussed more fully in the section of the preamble regarding RFP, the specification of 2002 as a baseline year for RFP purposes (for areas with an effective date of designation of June 15, 2004) appears in the RFP provisions of 40 CFR 51.910. Section 51.909 remains reserved.

8. Voluntary Reclassifications (''Bump-Ups'')

Although we believe most 8-hour nonattainment areas will attain the standard by their statutory attainment date, we recognize that some areas classified under subpart 2 may need additional time beyond the statutory attainment date for their area to attain as expeditiously as practicable. As discussed in the Phase 1 Rule (69 FR at 23959, col. 3), in the event an area cannot practicably attain by the maximum date for its classification, the Clean Air Act provides the opportunity for more time. An area regulated under subpart 2 can receive a later maximum attainment date through a State request to bump-up to a higher classification (e.g. from moderate to serious). The Act requires EPA to grant a State request to reclassify an area to a higher classification; the State plan still must provide for attainment as expeditiously as practicable. Although bump-up means that certain additional specified requirements apply, an area may already be meeting most or all of these specified requirements due to controls previously adopted to implement the 1-hour ozone standard. This is because some areas had 1-hour classifications that were higher (and more restrictive) than the areas' 8-hour classification,[32] and because the Phase 1 final implementation rule for the 8-hour O3 NAAQS contains anti-backsliding provisions generally requiring areas to continue implementing measures required for the 1-hour classification. Although there may not be additional mandatory control measures required because the areas may already have such measures in place, an area that needs more time to attain may need additional emission reductions to reach attainment.

E. What requirements for RFP should apply under the 8-hour ozone standard?

[Section VI.I. of June 2, 2003 proposed rule (68 FR 32832); § 51.909 and § 51.910 in draft; § 51.910(d) in final regulatory text.]

1. General Discussion

a. Background

As noted in the June 2, 2003 proposal, section 172(c)(2), which is located in subpart 1, requires State plans for nonattainment areas to require RFP. Section 171(1) of the CAA defines RFP to mean ''such annual incremental reductions in emissions of the relevant air pollutant as are required by this part [part D of title I] or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable [NAAQS] by the applicable date.''

Subpart 2 provides more specific RFP requirements for ozone areas classified under section 181.[33] In particular, subpart 2 specifies the base year emissions inventory upon which RFP is to be planned for and implemented, the increments of emissions reductions required over specified time periods, and the process for determining whether the RFP milestones were achieved.

Subpart 2 does not specify RFP requirements for marginal areas. Section 182(b)(1)(A) mandates a 15 percent VOC emission reduction, accounting for growth, between 1990 and 1996 for moderate and above ozone nonattainment areas. Furthermore, section 182(c)(2)(B) of the CAA requires each serious and above ozone nonattainment area to submit a SIP revision providing for an actual VOC emission reduction of at least 3 percent per year averaged over each consecutive 3-year period beginning in 1996 until the area's attainment date (referred to as the post-1996 ROP plan for the 1-hour standard). Section 182(c)(2)(C) of the CAA allows for substitution of NO_X for VOC emissions reductions for reductions required under section 182(c)(2)(B). The EPA's policy, NO_X Substitution Guidance (December 15, 1993; available at *http://www.epa.gov/ttn/oarpg/t1pgm.html*), addresses the substitution of NO_X emissions reductions for VOC emissions reductions. The baseline emissions inventory for determining the required ROP reductions for the 1-hour standard is specified in section 182 as 1990.

The requirements for RFP under subparts 1 and 2, as described above, are the minimum required for an area. More reductions may be necessary for attainment within the nonattainment area. Moreover, an upwind area that contributes to nonattainment in a downwind area in the same State may need reductions in order for the downwind area to reach attainment by its required attainment date. As we noted above in section IV.D.8., we recognize that some areas classified under subpart 2 may need additional time beyond the statutory attainment date for their current classification to attain the 8-hour standard as expeditiously as practicable. In the event an area cannot practicably attain by the maximum date for its classification, the CAA provides the opportunity for more time. An area regulated under subpart 2 can receive a later maximum attainment date through a State request to bump-up to a higher classification (e.g. from moderate to serious). Although a higher classification would mandate additional control measures, in fact there may not be additional mandatory control measures required because the area may already have such measures because of its classification for the 1-hour standard and the anti-backsliding provisions. However, an area that needs more time to attain may also need additional emissions reductions to reach attainment. These reductions may be achieved through implementation of measures that are necessary to demonstrate RFP requirements or additional reductions beyond RFP may be needed. Preliminary analyses indicate that already required control measures (e.g., motor vehicle and

[31] The EPA guidance on baseline years is found in the memorandum of November 18, 2002, from Lydia Wegman and Peter Tsirigotis, ''2002 Base Year Emission Inventory SIP Planning: 8-hr Ozone, $PM_{2.5}$ and Regional Haze Programs.'' This document is available at the following Web site: *http://www.epa.gov/ttn/oarpg/meta.442.1.202baseinv.pdf*. That document noted, ''The EPA is aware that some areas have already begun on a voluntary basis to model for purposes of the 8-hour ozone standard. These areas may continue to use modeling from previous base years for each set of meteorological episode conditions for use in their SIP submittals if these studies are still applicable for an attainment demonstration.''

[32] Although some 8-hour ozone nonattainment areas have additional areas beyond the boundary of the former 1-hour nonattainment area and thus would be faced with new requirements for the higher classification.

[33] Note that § 51.900 provides the following definitions:

(p) *Reasonable further progress (RFP)* means for the purposes of the 8-hour NAAQS, the progress reductions required under section 172(c)(2) and section 182(b)(1) and (c)(2)(B) and (c)(2)(C) of the CAA.

(q) *Rate of progress (ROP)* means for purposes of the 1-hour NAAQS, the progress reductions required under section 172(c)(2) and section 182(b)(1) and (c)(2)(B) and (c)(2)(C) of the CAA.

nonroad-engine rules, CAIR, etc.) may largely or fully fulfill RFP requirements for many areas and that they will provide substantial progress toward attainment for most areas.

Many areas may have significant creditable reductions as a result of Federal motor vehicle and nonroad rules, the NO_X SIP Call, and the CAIR. With the statutory exceptions enumerated above, assured emissions reductions that will occur in an area after the base year can be credited toward meeting an RFP emission reduction milestone.

To reduce interstate ozone transport, the CAIR (described above in section IV.B.) established statewide ozone-season NO_X budgets for 25 States and the District of Columbia (i.e., the eastern part of the U.S. where all 8-hour nonattainment areas are classified as moderate or below). As noted above, the first phase of NO_X reductions under CAIR starts in 2009 (covering 2009–2014); the second phase of NO_X reductions begins in 2015 (covering 2015 and thereafter).

With respect to timing of reductions, the following table shows how summertime NO_X reductions from local CAIR sources that will be achieved by May 1, 2009, or earlier can assist in demonstrating RFP.

Type of 8-hour nonattainment area	RFP requirement *	Relationship of CAIR and RFP
—Subpart 1 areas with attainment dates within 5 years of designation; —Subpart 2 moderate areas for which of expeditious attainment is no later than 5 years after designation.	Meet RFP through showing of expeditious attainment.	CAIR reductions not required prior to ozone season preceding latest attainment date.
Subpart 1 areas with attainment dates 6–10 years from designation.	Must demonstrate RFP through their attainment date.	CAIR reductions in 2009 can help fulfill RFP requirement.
Subpart 2 marginal areas	No subpart 2 RFP requirement for marginal areas.	Not applicable.
Subpart 2 moderate areas with an attainment date later than 5 years after designation.	Subject to RFP similar to subpart 1 areas; must demonstrate RFP through their attainment date.	CAIR NO_X reductions in 2009 can help fulfill RFP requirement.
Subpart 2 moderate-and-above areas that did not implement 15% VOC reductions for 1-hour ozone standard.	15% VOC reduction required between 2002 and 2008; continued progress required through attainment date.	CAIR 2009 NO_X reductions can help demonstrate continued progress after 2008 attainment date.

* RFP requirement descriptions in table are abbreviated; RFP requirements are more precisely described elsewhere in preamble and rule text.

The CAIR provisions do not require States to require emissions reductions prior to January 1, 2009. However, States may choose to require or some sources may elect to apply CAIR-level NO_X controls earlier than that date. If such controls are made enforceable in the SIP (e.g., through a specific rule), the State may take RFP credit for such emissions reductions for the RFP period (i.e., an RFP period ending earlier than December 31, 2008) during which the reductions occur.

The RFP provisions in the CAA for both subpart 1 and subpart 2 areas require that actual emissions be reduced from the baseline by the milestone year. Only emissions reductions required to be achieved during an RFP period may be credited toward the State's RFP obligation for that period. In developing their RFP plans, States will have to provide their best estimate of the CAIR-affected sources that are expected to actually reduce emissions to meet the CAIR requirements and those that are expected to meet CAIR through holding allowances and not actually reducing emissions.

Local CAIR NO_X reductions that States must require by May 1, 2015, could assist in meeting RFP for an area that is bumped up to severe and demonstrates attainment cannot be achieved before the end of the 2015 ozone season.

b. Summary of Final RFP Features

We are adopting nearly all the approaches set forth in our proposed rule for the various 8-hour RFP issues. We are making exceptions where convincing arguments were presented by commenters for a suitable alternative or where, through reassessment of the issue, EPA was able to develop a better option that still reflects the concepts in the original proposal. The issues for which we have adopted approaches that vary from the proposal are: (a) The timing of the submission of the RFP plan; (b) the structuring of RFP requirements in subpart 1 areas; (c) the implementation of RFP in areas designated for the 8-hour ozone standard that entirely or in part encompass an area that was designated nonattainment for the 1-hour ozone standard; and (d) the substitution of controls from outside the nonattainment area within 100 kilometers (km) for VOC and 200 km for NO_X. These changes are discussed in the sections below.

In developing an approach for addressing the RFP requirements for the 8-hour ozone standard, we are adopting the following:

- The same baseline year would be used both to address growth (in emissions, vehicle miles traveled (VMT) or otherwise) and to calculate the RFP target level. The baseline year of 2002 applies for areas with an 8-hour ozone nonattainment designation effective in June 2004.
- Emissions reductions from outside the nonattainment area up to 100 km for VOC and 200 km for NO_X (and statewide for areas that are part of a regional strategy) would be allowed consistent with (a) the concepts in EPA's existing December 1997 interim implementation policy for 1-hour ozone NAAQS [34], and (b) with the constraint that in all cases the distances in the policy provide only a general policy presumption that, if used, would need data in the record showing that reductions from sources in the specific locations outside the nonattainment area benefit the nonattainment area. This is discussed further below in section IV.E.12. of this preamble.
- For all 8-hour nonattainment areas classified under subpart 2 as moderate

[34] Memorandum of December 29, 1997 from Richard D. Wilson to Regional Administrators, Regions I–X re ''Guidance for Implementing the 1-Hour Ozone and Pre-Existing PM10 NAAQS.'' Located at URL: *http://www.epa.gov/ttn/oarpg/t1/memoranda/iig.pdf.* This policy recognized that VOC emissions up to 100 km and NO_X emissions up to 200 km from the nonattainment area could be relied on for RFP. Those distances resulted from Federal Advisory Committee Act discussions cited earlier and generally represent transport of 1 to 2 days. We still believe it is appropriate to allow this credit. However, as noted below, because we received concerns about this policy outside the rulemaking process, we are in the process of subjecting this policy to a technical review and may revise it in light of that review.

and above that had not met the 15 percent VOC emission reduction requirement for the 1-hour standard, the RFP requirements specified in subpart 2 would apply, namely a 15 percent VOC emission reduction, accounting for growth, in the first 6 years after the baseline year for moderate and above ozone nonattainment areas. In addition, for all 8-hour nonattainment areas classified as serious and above, the RFP provisions in subpart 2 require a VOC or NO_X emission reduction of at least three percent per year averaged over each consecutive 3-year period beginning 6 years after the baseline year. (See section 182(c)(2)(B)).

• Areas classified under subpart 2 as moderate that had met the 15 percent VOC emission reduction requirement for the 1-hour standard are treated in the final rule like areas covered under subpart 1.

• Areas classified under subpart 2 as serious and above that had met the 15 percent VOC emission reduction requirement for the 1-hour standard would be subject to the RFP requirement in section 172(e) and the final rule would require them to obtain an average of 3 percent annual reductions of VOC and/or NO_X emissions reductions for the first 6 years after the baseline year and every subsequent 3 years out to their attainment date.

• The periods for RFP under subpart 2 for the 8-hour ozone NAAQS run from the date of the baseline year, and would be equivalent to the periods Congress established in subpart 2, which applied for the 1-hour NAAQS. Thus, the first 15 percent reduction would be required for the 6-year period starting after the end of the last day of the baseline year (e.g., January 1, 2003–December 31, 2008). The first 3-year period for the subsequent (average of) three percent per year emission reduction requirement in serious and higher areas would begin 6 years after the end of the last day of the baseline year (e.g., January 1, 2009–December 31, 2011). However, the last period for any area would end on the attainment date for the area.

• Subpart 1 areas with attainment dates 5 years or less after designation can meet the RFP requirement by achieving the emission reductions necessary to attain as expeditiously as practicable. These emissions reductions must be implemented by the beginning of the full ozone season prior to the attainment date (See 40 CFR § 1.908).[35] For subpart 1 areas with attainment dates beyond 5 years after designation, the RFP SIP must provide for a 15 percent emission reduction (either NO_X and/or VOC) from the baseline year within 6 years after the baseline year. For each subsequent 3-year period out to the attainment date, the RFP SIP would have to provide for an additional increment of progress. The increment for each 3-year period would be a portion of the remaining emission reductions needed for attainment beyond those reductions achieved for the first increment of progress (e.g., beyond 2008 for areas designated nonattainment in June 2004). Specifically, the amount of reductions needed for attainment should be divided by the number of years needed for attainment after the first increment of progress in order to establish an ''annual increment.'' For each 3-year period out to the attainment date, the area must achieve roughly the portion of reductions equivalent to three annual increments.[36]

• Subpart 2 moderate or higher areas that had not met the 15 percent VOC reduction requirement under the 1-hour standard would be subject to section 182(b)(1) for the 8-hour standard and would need to obtain the emissions reductions within 6 years after the baseline year (e.g., for areas designated in June 2004, the reductions would need to occur by the end of 2008, based on a baseline year 2002).

• Reductions from any Federal and regional measures promulgated after 1990 (except those measures that were not creditable under the CAAs creditability provisions (section 182(b)(1)(D)) and achieved after the baseline year are creditable for the RFP requirement.

• Allow use of the ''Clean Data Policy.''

c. Comments and Responses

This set of comments and responses on our proposal on RFP are of a general nature. Comments and responses on specific topics appear with the sections below on those topics.

Comment: One commenter stated that EPA's proposed 8-hour ozone rule would sharply slow momentum to implement health protective emission reduction strategies in areas with unhealthful air quality. It would curtail the effectiveness of transportation conformity in areas with inadequate air quality, including both old and new ozone nonattainment areas. It would do this by proposing to eliminate any further RFP requirements for pollution reduction in existing 1-hour ozone areas.

Response: The EPA has developed anti-backsliding provisions to ensure continuing progress toward attainment of the ozone NAAQS. Under these provisions, areas that are nonattainment for the 8-hour standard must continue to meet most obligations for the 1-hour standard, including RFP requirements. Those provisions (adopted as part of the Phase 1 Rule published April 30, 2004) will ensure areas maintain progress in achieving emissions reductions in areas with unhealthful air quality. Additionally, 8-hour ozone nonattainment areas with attainment dates later than 5 years after designation must meet specified increments of reductions as provided in more detail below.

Comment: Another commenter recommends that EPA not strictly interpret the CAA requirement of a 15 percent reduction in VOC in the first 6 years. If reductions in VOC would not assist the area in progress toward attainment and if an area can provide an analysis that it is at least as sensitive to NO_X controls, then the area should be able to reduce NO_X emissions for RFP requirements.

Response: We addressed in general those comments that recommended alternatives to the mandatory measures of subpart 2 (which includes the RFP requirement) in the response to comments above under the topic, ''Should prescribed requirements of subpart 2 apply in all 8-hour nonattainment areas classified under subpart 2, or is there flexibility in application in certain narrowly-defined circumstances?'' We conclude in that section that EPA has no discretion to broadly waive mandatory requirements. However, we noted that case law may provide support for case-by-case waivers where implementation of a measure would produce an absurd result.

Comment: One commenter stated that EPA should consider highly reactive VOC reductions that achieve ozone reductions equivalent to an average of 3 percent per year reduction of VOC and/or NO_X as meeting RFP requirements.

Response: The CAA's RFP provisions do not appear to provide for variations

[35] With today's rulemaking, this provision is now codified as 40 CFR 51.908(d).

[36] For example, if the area's attainment date is 2014, and a total of 30 percent reduction is needed between the end of 2008 and the attainment date (a 6-year period) to reach attainment, the ''annual increment'' would be 5 percent (i.e., ⅙ of 30 percent). Thus, the area must achieve roughly the portion of reductions equivalent to three annual increments or 15 percent during the first 3 years (2009, 2010, 2011), and the remaining amount over the next 3 years (2012, 2013, 2014). Additional discussion of what is meant by ''roughly proportional'' appears in he full discussion of RFP for subpart 1 areas in section IV.E.7. of this preamble.

in the required percent reduction in VOC based on differences of reactivity of the various VOC compounds. However, EPA is participating with a group called the Reactivity Research Working Group, along with representatives from States, industry and universities, to study the scientific aspects of reactivity and to try to determine if more cost-effective and greater ozone reductions can be achieved through use of the concept. The requirement to obtain the required percent reduction of total VOCs remains, and if EPA decides to propose a change, it would be undertaken in a separate rulemaking action.

2. What is the content and timing of the plan for addressing the RFP requirements under section 182(b)(1) and 182(c)(2)(B) for areas covered under subpart 2?

[Section VI.I.3 of June 2, 2003 proposed rule (68 FR 32833); § 51.910(a)(1)(ii) of the draft and final regulatory text.]

a. Background

Section 182(b)(1) requires areas classified as moderate and above to submit a plan to achieve a 15 percent reduction in VOC emissions over a 6-year period following the baseline year. Section 182(c)(2)(B) requires serious and above areas to achieve an average of nine percent additional emissions reductions for each subsequent 3-year period. We proposed two options regarding how this requirement might apply for purposes of implementing the 8-hour NAAQS.

(i) *Option 1.* Require 15 percent VOC reductions within 6 years after the baseline year for all areas designated moderate and above for the 8-hour ozone NAAQS. After 6 years, all serious and above areas would be required to achieve a nine percent reduction in VOC and/or NO_X emissions every 3 years, i.e., an average of three percent per year, until attainment.

(ii) *Option 2.* For those areas that have an approved 15 percent plan for their 1-hour ozone SIPs, an additional 15 percent VOC reduction is not necessary. Subpart 2 areas that have approved 15 percent plans for the 1-hour ozone standard would be considered to have met the statutory 15 percent requirement. Instead, such an area that is classified as moderate for the 8-hour standard would be subject to the general RFP requirements of subpart 1 in the same manner as subpart 1 areas. Such an area that is classified as serious and above for the 8-hour standard would be subject to the RFP requirement in section 182(c)(2)(B) and would have to include in their SIPs an RFP plan that would achieve an average of three percent per year of VOC and/or NO_X over each 3-year period starting at the end of the baseline year out to their attainment year.

We recognized in the proposal that for serious and above areas it would be difficult to adopt and implement emission controls that would provide for the first nine percent emission reduction within 3 years after nonattainment designation. Therefore, consistent with what Congress did under section 182(b)(1), we proposed to allow the first RFP increment to be averaged over 6 years. We proposed that an area classified serious or above submit its RFP plan within 2 years after designation such that it provides for 18 percent emissions reductions (VOC and/or NO_X) over the first 6 years from the baseline year (e.g., January 1, 2003 to December 31, 2008 using the proposed 2002 baseline year). Then, within 3 years after designation, submit a plan that provides 9 percent emissions reductions (VOC and/or NO_X) over each of the next 3-year periods until the area's attainment date (e.g., from January 1, 2009 to the attainment date).

The proposal noted that this option recognizes previous efforts by areas that submitted 15 percent plans as required under the 1-hour ozone NAAQS and provides flexibility to States to use a mix of NO_X and VOC reductions as appropriate to meet the additional ROP/RFP requirements. For many areas of the country, particularly in the Eastern U.S. outside major metropolitan areas, there is a greater need for NO_X reductions rather than VOC reductions to bring about reduced ambient ozone levels. Areas do not have the flexibility to control NO_X under the 15 percent requirement—NO_X substitution is only allowed under section 182 for the post-1996 RFP requirement (three percent per year averaged over 3 years). We believe that the statute can be interpreted to require the mandatory 15 percent VOC reduction only once for a given area.

Once the 15 percent VOC reduction requirements have been met, an area would instead be subject to the other RFP requirements of the CAA. In some cases, such as for serious and above areas, this might result in an obligation to achieve greater emissions reductions, i.e., 18 percent rather than 15 percent for the 6-year period, but the area would have the flexibility to choose either VOC or NO_X reductions as appropriate. We indicated in the proposal that we preferred this second option because it provides more flexibility for the RFP plan to be consistent with the area's needs in attaining the standard. The draft regulatory text incorporated this option.

The proposal did not specifically address an 8-hour area that is partially comprised of one or more 1-hour ozone nonattainment areas with approved 15 percent plans and one or more areas that were not previously subject to the 15 percent requirement.

b. Summary of Final Rule

We are adopting the second option described in the Background above, as adjusted in response to comment.

1. Final rule for 8-hour areas comprised in total of one or more 1-hour nonattainment areas with approved 15 percent plans for the 1-hour standard.

Those 8-hour areas that are composed entirely of one or more 1-hour areas that have approved 15 percent plans for their 1-hour ozone SIPs, will be considered to have met the 15 percent VOC requirement in section 182(b)(1). Such areas that are classified as moderate would instead be subject to the more general RFP requirements of subpart 1. As discussed below, the subpart 1 requirement would depend on the moderate area's attainment date as follows:

- Moderate areas that have an attainment date of 5 years or less after their 8-hour designation, for which all portions of the area have previously met their 15 percent requirements under the 1-hour standard, will be subject to subpart 1 RFP requirements, which will be satisfied with measures that demonstrate attainment as expeditiously as practicable.
- Moderate areas that have an attainment date beyond 5 years after their 8-hour designation, for which all portions of the area have previously met their 15 percent requirements under the 1-hour standard, will be subject to subpart 1 RFP requirements, which will be satisfied with a plan to demonstrate 15 percent emissions reductions (which may be either VOC or NO_X or a combination of both) from 2002 to 2008, and any additional emission reductions needed for attainment beyond 2008.

Such areas that are classified as serious or above would be subject to the RFP requirements of section 182(c)(2)(B) and would need to submit a plan achieving an average of 3 percent reductions per year over the 6 years following the baseline year and then an average of 3 percent per year for each subsequent 3-year period out to the attainment year.[37]

[37] As discussed below in section 5 (the discussion of the timing of submission of the RFP plan) the RFP plan would have to be submitted within 3 years after designation (not 2 years as proposed).

2. Final rule for 8-hour areas comprised in part of one or more 1-hour attainment areas with an approved 15 percent plan for the 1-hour standard and in part of one or more areas without approved 15 percent plans for the 1-hour standard.

For 8-hour moderate areas that include all or part of one or more 1-hour areas with an approved 1-hour 15 percent plan, but also include areas that were not subject to the 1-hour 15 percent plan, the final rule would allow the area to choose between two alternative approaches that are consistent with the proposed rule.

• *Approach 1.* Develop a new baseline and new 8-hour 15 percent VOC ROP emission reduction target for the entire 8-hour area. Emissions reductions that occur after the 2002 baseline emissions inventory year are creditable except as limited by section 182, as described elsewhere in this final rule. The reductions must be of VOC only.

• *Approach 2.*

• Treat the 8-hour nonattainment area as divided between portions of the area that are subject to an approved 15 percent VOC-only plan for the 1-hour standard and the portions of the area that are not subject to a 15 percent plan for the 1-hour standard.

• For those areas not subject to an approved 15 percent plan for the 1-hour standard, States must establish a separate 15 percent VOC target under subpart 2. VOC emissions reductions to meet the 15 percent requirement may, however, come from across the entire 8-hour nonattainment area.

• For the portion of the area with an approved 15 percent plan for the 1-hour standard, the subpart 1 RFP requirements will apply if the area is classified as moderate for the 8-hour standard and the section 182(c)(2)(B) RFP requirement will apply if the area is classified as serious or above for the 8-hour standard. These requirements would apply as described above for areas comprised entirely of areas with approved 15 percent plans for the 1-hour standard.

c. Comments and Responses

Comment: One commenter expressed concern that for a number of subpart 2 areas that were nonattainment for the 1-hour standard, especially those dominated by mobile source emissions and/or those with existing stringent stationary source controls, it may be difficult to achieve another 18 percent precursor emission reduction within 6 years from the baseline year and then an additional 3 percent per year precursor reduction after that until the area's attainment date. Specific areas were mentioned such as the South Coast District of California and the Houston-Galveston Area, which the commenter indicated will be well beyond best available control technology (BACT) controls and in some cases at or near lowest achievable emission rate (LAER) NO_X controls on stationary sources making them dependent on mobile source fleet turnover for SIP RFP emissions reductions. The commenter further suggested that EPA should have available approved policy options that allow areas in such predicaments to maintain approved SIPs if additional emissions reductions are not available to meet RFP requirements and/or if available emission reduction techniques might be counterproductive to other local and regional air quality goals.

Response: We addressed in general those comments that recommended alternatives to the mandatory measures of subpart 2 (which includes the RFP requirement) in the response to comments above under the topic, ''Should prescribed requirements of subpart 2 apply in all 8-hour nonattainment areas classified under subpart 2, or is there flexibility in application in certain narrowly-defined circumstances?'' We concluded in that section that EPA has no discretion to broadly waive mandatory requirements. However, we noted that case law may provide support for case-by-case waivers where implementation of a measure would produce an absurd result. Additionally, we note that section 182(b)(1)(A)(ii) specifically addresses the situation where an area demonstrates that it cannot achieve the required 15 percent reduction. It provides that an area may achieve less than the 15 percent VOC reduction required where the State demonstrates (1) NSR requirements apply as they would in an area classified as extreme except that the terms ''major source'' and ''major stationary source'' shall include any source with the potential to emit at least 5 tpy of VOCs; (2) RACT is required for all major sources (i.e., a source with the potential to emit at least 5 tons per year of VOCs; and (3) the plan includes all measures that can feasibly be implemented in light of technological achievability.[38]

Comment: Another commenter supported EPA in recognizing the previous efforts of areas to meet ROP requirements under the 1-hour standard. The commenter concurred with EPA's preferred option, which allows States the flexibility to choose a combination of NO_X and VOC strategies to meet ROP/RFP requirements consistent with an area's need to meet the standard.

Response: We agree with the commenter that if an area has already met the 15 percent VOC emission reduction requirement for the 1-hour standard, the area should not be required to meet that requirement a second time for the 8-hour standard but instead will be subject to the other applicable RFP provisions of the CAA.

Comment: One commenter preferred Option 1 as more protective of air quality and more consistent with the requirements of the CAA. Option 1 would require States to develop RFP plans based on severity and local situation. Option 2 has some attractive features by recognizing progress that States have already made. This commenter believed that Option 2 is problematic, however, because it relies on plans developed based on 1990 to 1996 emissions. This time period has passed.

One commenter believed EPA to be completely without authority to waive the 15 percent RFP plan requirement, which is an explicit mandate of subpart 2. A 15 percent ROP plan under the 1-hour standard cannot possibly satisfy the 15 percent RFP plan obligation for the 8-hour standard, because the new RFP requirement is designed to implement a revised NAAQS and is measured from a different baseline year. They further believe that EPA offers no plausible legal rationale for waiving the 15 percent ROP requirement, and, indeed, none exists. Moreover, although the agency proposed to require RFP demonstrations for the first 6 years for serious and severe areas, there is no lawful or rational basis for exempting moderate areas from this statutory requirement. Allowing States to rely on their 1-hour 15 percent ROP demonstrations is further unsupportable because those demonstrations are almost certainly no longer valid.

Response: The EPA acknowledges that under subpart 2 we must require 15 percent VOC reductions for all moderate and above areas, but we maintain that if an area has met this requirement while subject to section 182(b)(1)(A) for the 1-hour standard, they will not have to meet it again for the 8-hour standard. The EPA believes that the CAA is quite clear that the SIP must provide for a 15 percent reduction in baseline VOC emissions for some period after 1990 in an area subject to section 182(b)(1)(A), and, consequently, the SIP for any area newly subject to section 182(b)(1)(A) must provide for a 15 percent reduction

[38] Section 182(c)(2)(B)(ii) also contains a similar RFP provision for serious and higher classified areas that allows less than 3 percent of baseline emissions each year after the initial 15 percent reduction after designation and classification.

in VOC baseline emissions. But, EPA disagrees that the CAA plainly requires that the SIP for an area must require a *second* 15 percent reduction in VOC baseline emissions under a revised ozone standard. The EPA believes that section 182(b)(1)(A) limits our discretion only to the extent that we cannot let the SIP for any area classified as moderate or worse for the 8-hour standard avoid a demonstration that the SIP contains sufficient measures to achieve a 15 percent reduction in VOC baseline emissions and further limits our discretion to allow NO_X substitution for the 15 percent RFP demonstration requirement under section 182(b)(1)(A).

If serious and above areas have already met the 15 percent requirement under the 1-hour standard, they must meet the next RFP requirement, namely, the section 182(c)(2)(B) RFP requirement, which will actually achieve greater reductions, i.e., 3 percent per year over 6 years for a total of 18 percent, but they can meet it with either VOC or NO_X reductions. For moderate areas that have already met the 15 percent VOC emission reduction requirement for the 1-hour standard, EPA believes appropriate RFP under subpart 1 should be achieved. For purposes of RFP under subpart 1, there is nothing that limits such reductions to VOC. This provision simply requires reasonable annual incremental reductions towards attainment by the applicable attainment date, and this could be achieved by either VOC or NO_X emissions reductions or a combination of both.

Section 182(b)(1)(A) is the only statutory provision that limits State discretion to substitute NO_X reductions for VOC reductions. This applies only for purposes of the initial 15 percent reduction requirement for the 6-year period after the baseline year.

Comment: Another commenter believed the subpart 2 provisions of the CAA do not allow for NO_X for VOC substitutions for the initial 15 percent RFP requirements.

Response: We agree that the 15 percent requirement in section 182(b)(1) does not allow the substitution of NO_X for VOC. However, the RFP requirements in section 172(c)(2) and 182(c)(2)(B) are not constrained by that limitation and either VOC or NO_X emissions reductions may be counted toward meeting RFP under those two provisions.

Comment: Some commenters believed an additional 15 percent VOC reduction should not be necessary for 8-hour areas that encompass in whole or in part a 1-hour nonattainment area with an approved 15 percent plan. Such areas should simply be required to achieve whatever NO_X or VOC emissions reductions are needed for attainment.

One commenter noted that the proposed § 51.910(a)(ii) did not address all boundary change scenarios consistent with our proposed approach found in section VI.I.9. of the June 2, 2003 proposed rule (68 FR 32835).

Response: We agree with the commenter that an area with an approved 15 percent plan for the 1-hour standard is not required to adopt a second 15 percent plan under section 182(b)(1) for purposes of the 8-hour standard. However, if a portion of the 8-hour area was not subject to an approved 15 percent plan for the 1-hour standard, section 182(b)(1) applies to that portion of the 8-hour area and may be met by one of two approaches described above and in the regulatory text. We agree with the second commenter who noted that the proposed rule did not explicitly address all possible boundary scenarios; we believe we have fully addressed these different boundary scenarios in the final rule in a manner consistent with the proposal.

Comment: A commenter indicated that they preferred to work with EPA in the development of an alternative that will eliminate or minimize the planning burdens associated with development of a 15 percent RFP plan for one town. One alternative might be the development of a ''comparability demonstration,'' showing that the town had implemented the same controls that had been previously responsible for achieving a 15 percent reduction in VOCs in the l-hour ozone nonattainment area associated with the 8-hour nonattainment area including this town.

Response: We are willing to work with individual areas as they develop their 8-hour 15 percent plans and to help them avoid unnecessary planning burdens. We believe that the portion of an 8-hour area not subject to an approved 1-hour 15 percent plan may be able to meet the 15 percent obligation for the 8-hour standard if the area adopts the same VOC control measures (for example, VOC RACT at the same source thresholds, I/M, etc. * * *) as in the portion of the 8-hour nonattainment area subject to a 15 percent plan for the 1-hour standard and if the area has the same mix of emissions sources as in the area subject to the 15 percent plan for the 1-hour standard. We anticipate we could propose approval of a SIP on this basis where supported by the record.

Comments on Draft Regulatory Text

Comment: Another commenter generally supported the RFP provisions but suggested that in section 51.910(a)(1)(ii)(A) of the draft regulatory text, we insert the language shown in bold:

''An area classified as moderate or higher that has the same boundaries as an area for which EPA fully approved a 15 percent plan for the 1-hour NAAQS is not subject to section 182(b)(1) of the CAA for the 8-hour NAAQS, but instead—(A) If classified as moderate, is subject to RFP under section 172(c)(2) of the CAA and shall meet that obligation by submitting 3 years after the effective date of its designation a SIP revision that provides for implementation of all emission reductions of **VOCs and/or NO_X** needed for attainment by the beginning of the ozone season in the area's attainment year.'' The commenter claimed this language is consistent with the approach EPA has taken in other provisions of this draft.

Response: The commenter's concern is noted. Section 51.910 has been restructured for reasons noted elsewhere in this preamble and it addresses the commenter's concern.

Comment: One commenter suggested that § 51.910(a)(3) of the draft regulatory text be revised to allow (even if conditional) NO_X reductions to be substituted for VOC reductions (for any ROP or RFP requirement) whenever such reductions would ''result in a reduction in ozone concentrations at least equivalent to that which would result from the amount of VOC emission reductions required.''

Response: As noted above we do not believe the CAA allows substitution of NO_X for VOC to meet the 15 percent requirement of section 182(b)(1).

Comment: One commenter stated that draft § 51.910(a)(1)(ii) eliminates the 15 percent requirement for areas that have already achieved this requirement under the 8-hour standard and supported that change. However, they further state that the strict criteria of ''same boundaries'' should be revisited because there may be limited changes in the nonattainment areas ''boundaries'' when areas are designated for the 8-hour standard. Such changes should not negate this provision. A broader definition needs to apply to this section to allow for changes to boundaries in nonattainment areas between 1-hour and 8-hour designations where such changes do not substantially alter the geographical or population characteristics for the area.

Another commenter supports an exemption for 8-hour nonattainment areas that have met the 15 percent ROP requirement for the 1-hour NAAQS. The commenter requests that EPA clarify the criteria that the area must have the same geographic boundaries to qualify for the

exemption. This means that in the geographic areas for which a State has an approved 15 percent plan, the 15 percent requirement will not apply, and the 15 percent requirement is only intended to apply to the new geographic areas of the 8-hour nonattainment area, and that the 15 percent reduction of emissions from the new areas could come from the entire nonattainment area to satisfy this requirement.

Response: As we explain in our summary of the final rule, we have recognized that there are a variety of boundary scenarios for 8-hour nonattainment areas in relation to the boundaries of areas for the 1-hour standard. We have modified the draft regulatory text such that the final rule speaks in terms of 8-hour areas that include all or part of an area with an approved 15 percent plan for the 1-hour standard. For those portions of the 8-hour area with an approved 1-hour 15 percent plan, the 8-hour area is not required to develop a second 15 percent plan under section 182(b)(1) for purposes of the 8-hour standard, but instead will be subject to section 172(c)(2) if it is an 8-hour moderate area or subject to section 182(c)(2)(B) if it is classified as serious or above for the 8-hour standard. If the 8-hour area includes both areas that were subject to an approved 15 percent plan for the 1-hour standard and areas that were not, then the 8-hour area can choose whether to develop a section 182(b)(1) 15 percent plan for the entire 8-hour area or to develop a 182(b)(1) plan only for the area not previously subject to such a plan and to treat the remaining portions of the area under section 172(c)(2) or 182(c)(2)(B), as described above.

As noted, EPA does not believe the statute allows it to relieve any area that has not already met the 15 percent requirement for the 1-hour standard from the obligation to meet that requirement except as provided in section 182(b)(1)(A)(ii).

3. What baseline year should be required for the emissions inventory for the RFP requirement?

[Section VI.I.4. of June 2, 2003 proposed rule (68 FR 32833); § 51.909 of the draft regulatory text; § 51.910(d) of the final regulatory text.]

a. Background

The baseline inventory for RFP (under subpart 2) is used as the starting point for the determination of a target level of emissions for the future year RFP and as the baseline from which creditable reductions are determined. We designated ozone nonattainment areas in April 2004. Under the ''Consolidated Emissions Reporting Rule'' (67 FR 39602; June 10, 2002) revised emissions inventories are required for the years 2002 and 2005; therefore, we proposed to require use of the 2002 inventory as the baseline inventory for the RFP requirement. This would be the most recent inventory available at the time of designation. We issued a memorandum identifying 2002 as the anticipated emissions inventory base year for the SIP planning process to address the 8-hour ozone and the $PM_{2.5}$ standards.[39]

b. Summary of Final Rule

As set forth in our proposed rule, for areas designated nonattainment for the 8-hour ozone NAAQS with an effective date of June 15, 2004, we are requiring States to use the 2002 inventory as the baseline inventory for the RFP requirement. As noted in the proposal, the inventory for the 2002 calendar year would be the most recently available inventory at the time of designation in 2004. However, in response to several comments, we are allowing States the option of justifying the use of an alternative baseline inventory year for RFP. To justify an alternative, the State would have to demonstrate how the alternative year meets the CAA's provisions for RFP and provide a rationale for why it is appropriate to use the alternative baseline year rather than 2002 to comply with the CAA's RFP provisions. We believe that for multi-State nonattainment areas, several States must agree on a single baseline. Even if a State chooses an alternative baseline inventory year for RFP, 2002 remains the valid baseline year for transportation conformity purposes as described in 40 CFR 93.119. The baseline year test is used only in conformity determinations prior to the submission of a SIP that establishes motor vehicle emissions budgets (e.g., an RFP SIP). Therefore, areas using the baseline year test would continue to use 2002 as the baseline year for conformity purposes because an area's baseline year would not be changed until an RFP SIP is submitted. Once an RFP SIP is submitted and the motor vehicle emissions budgets in that SIP are found adequate or are approved the area would no longer use the baseline year test. Instead the area would use the adequate or approved budgets in the RFP SIP in conformity determinations.

The baseline emissions inventory is calculated as of the effective date of an area's nonattainment designation using the most recent calendar year for which a complete inventory is required to be submitted to EPA under subpart A of 40 CFR part 51, subpart A. Under 40 CFR part 51, subpart A, States are required to submit a comprehensive inventory on 3-year cycles within 17 months after the close of the reporting period. Thus, the 2002 inventory was due 17 months after the December 31, 2002 close of the reporting period, i.e., was due by June 1, 2004. For those areas designated nonattainment for the 8-hour ozone NAAQS effective June 15, 2004 (69 FR 23858; April 30, 2004), the baseline emissions inventory should be based on the calendar year 2002 because the 2002 inventory was due under 40 CFR part 51, subpart A, prior to the time of designation. For areas with an effective nonattainment designation in the future, the baseline inventory will be for the calendar year of the most recent triennial inventory as of the date of designation.[40] As provided above, the State may use an alternative baseline only if it is demonstrated that it is consistent with the CAA and the State demonstrates why it is appropriate.

c. Comments and Responses

Comment: Some commenters agreed there is a reasonable basis to select 2002 as the date of emissions inventories for the purpose of establishing creditable reductions from the inventory. States are not required by the CAA to adopt the year of the nonattainment designation for the 8-hour standard as the basis for their planning, even though that was the case under the 1990 CAA Amendments. The commenter claims there are a variety of measures that would be implemented after 2002 that local jurisdictions would like to be able to account for as new emissions reductions in their modeling demonstrations. The commenter thus believes that reductions between these years ''should count.'' In addition, this was the most recent quality assured/quality controlled inventory used to support the States' recommendations for proposed nonattainment designations on July 15, 2003.

Several commenters recommended that the baseline year (starting the 6-year period for RFP) be set for the year in which designations were made (i.e., 2004).

[39] Memorandum of November 18, 2002, from Lydia Wegman and Peter Tsirigotis, ''2002 Base Year Emission Inventory SIP Planning: 8-hr Ozone, $PM_{2.5}$ and Regional Haze Programs.'' This document is available at the following Web site: *http://www.epa.gov/ttn/oarpg/meta.442.1.2002baseinv.pdf.*

[40] For example, where the effective date of designation to nonattainment for an area for the 8-hour ozone NAAQS is after June 1, 2007 but before June 1, 2010, the baseline inventory will be for calendar year 2005.

Response: The EPA has decided to establish 2002 as the baseline year for RFP SIPs in conformity with both the language of the CAA and the inventory year cycle. Of reasonable importance is the need to maintain consistency with the periodic inventory for use in various milestone considerations such as RFP, milestone compliance demonstration, attainment, and contingency plans. In addition, while there would be a difference in the RFP requirement based on the choice of the RFP baseline, there should be little if any difference in terms of emissions reductions needed to demonstrate timely attainment. If we use 2002, the baseline may be higher but areas can take credit for any 2002–2004 emissions reductions from federally enforceable control measures. If we use 2004, the baseline may be lower but areas can't take credit for measures that produce emissions reductions between 2002–2004. Depending on the area, the difference should be minimal in terms of the difference in the amount of reductions needed to reach attainment and what new measures are necessary to get there. We believe it is reasonable to select an inventory year for which States were already required to produce an inventory rather than requiring States to produce an additional inventory (e.g., for 2004) that is not otherwise required. Moreover, requiring the use of an inventory for the designation year would cause delay, as it would take the States 1–2 years after the end of 2004 to produce the inventory which would be the basis for selecting controls to achieve the necessary reductions for RFP and for modeling attainment. However, we are allowing States the option of justifying the use of an alternative baseline emission inventory, provided it meets the requirement of the CAA's RFP provisions. As noted above, the use of an alternative year for the baseline inventory for RFP does not change the requirement to use 2002 as the baseline year for transportation conformity as described in 40 CFR 93.119.

Comment: Another commenter referred to EPA's proposal language regarding the RFP SIP that would have required submission of the RFP plan within 2 years after designation. They stated that EPA is missing the point in that the attainment and RFP submission dates established in subpart 2 are to allow States a sufficient amount of time to achieve the mandated goals.

That commenter referred to another alternative that would amend the proposal to require a 1990, rather than 2002 baseline for those areas not having a previously-approved 15 percent RFP plan. They further commented that although a 1990 baseline would not eliminate the planning burden associated with this requirement, it would go far towards minimizing the necessary additional work.

Response: We disagree with the commenters who urged use of the 1990 inventories as the baseline for planning for the 8-hour NAAQS. Use of the 1990 baseline would be unreasonable now since it would have to be substantially recalculated due to changes in emission calculating methodologies. Furthermore, a 1990 inventory was only required for nonattainment areas as of enactment of the 1990 CAA Amendments and therefore may not exist for a number of areas that are currently designated nonattainment for the 8-hour standard. Finally, we believe that reliance on emissions reductions that may have occurred well before 8-hour designations and classifications should not be counted as making progress toward attainment.

Comment: Another commenter noted that the 18 percent reduction for serious areas would have to be achieved by 2008. This is 6 years after the base year. The commenter noted that the 2 years that would remain after SIP submission (from the proposed SIP due date of 2006 until 2008) would be totally inadequate to achieve either the 15 percent reduction in VOCs or the 18 percent reduction in VOCs and/or NO_X. The commenter noted the CAA provides for submission of RFP plans within 3 years (from 1990) in section 182(b)(1)(A) and 4 years in section 182(c)(2).

Response: The final rule reflects a change from the proposal to allow submission of the RFP plan up to 3 years from the date of designation. We do not believe the RFP provisions of subpart 2 of the Act provides relief from the requirement to obtain the specified percent reductions from the RFP baseline within the time constraints specified in those provisions.

Comment: A comment on draft regulatory text § 51.909 noted that EPA specified various program milestone dates, which were derived from the relationship of these dates to the expected date of initial designation. The commenter recommends deleting all such specific date references from the regulation, to avoid the need for revising regulations if the initial designations are not concluded as expected. This should be replaced by a generic approach, for example by requiring the most recent year's data to be used as the baseline in the second sentence of § 51.909. Deleting the calendar-specific dates would not change the result if the designations occur as planned, yet would allow for more recent data to be used if factors beyond the agency's control create a delay in designations. This approach also will allow the regulation to apply to future area designation changes, such as areas that are redesignated nonattainment at some point in the future. Such specific dates are more appropriately included as examples in agency guidance or within the preamble of a final rule with a discussion of how they are derived. The regulation itself should retain only the generic relationship between the milestone and the effective date of designation, which is the approach taken elsewhere in the rule.

Response: Because the designations have already taken effect at this point, we believe it is appropriate to specify 2002 as the presumptive baseline year. The final version of the rule (now § 51.910(d)) provides general language regarding the appropriate baseline year for areas that have an effective date of a nonattainment designation in the future.[41]

4. Should moderate and higher classified areas be subject to prescribed additional RFP requirements prior to their attainment date?

[Section VI.I.5 of June 2, 2003 proposed rule (68 FR 32834); no draft regulatory text; section 51.910(a)(1)(i) of final regulatory text.]

a. Background

As noted in the proposal, for areas initially classified moderate and higher for the 1-hour ozone standard, the baseline inventory was defined as 1990 in the CAA Amendments. Therefore, the 6-year period for the initial 15 percent RFP requirement ended in the same year as the attainment date for moderate areas, viz., 1996. For areas classified moderate and higher under the 8-hour ozone standard, however, we proposed that the 15 percent RFP target level of emissions would be calculated for the 6-year period after the 2002 baseline year, i.e., 2003–2008. Moderate areas would be required to meet an attainment date no later than 6 years after the area is designated nonattainment for the 8-hour standard. Since the effective date of designation of nonattainment areas is June 15, 2004, the outside statutory attainment date would be June 15, 2010. This leaves approximately a 1½ year gap between the end of the 6-year period for the 15 percent RFP requirement (i.e., December 31, 2008) and the maximum statutory attainment

[41] We note that even though the draft regulatory text was structured to place the specification of the baseline year for RFP (as well as for attainment demonstrations) in § 51.909, the final rule places the RFP baseline year requirement in § 51.910.

date. If we were to also require moderate areas to obtain an additional three percent per year emission reduction beyond 2008 for the 1½ additional years out to 2010, the RFP requirement could be more than what we believe Congress intended for moderate areas under subpart 2. Additional three percent per year reductions were only required for serious and higher classified ozone nonattainment areas. We proposed that the only specific RFP requirement applicable for moderate areas is the 15 percent VOC requirement between the end of 2002 and the end of 2008. However, section 172(c)(2), which requires areas to meet RFP generally, would apply for any period for which RFP is not addressed in subpart 2. For purposes of section 172(c)(2), RFP means annual incremental reductions as may be required by the Administrator for purposes of ensuring attainment [CAA Section 171(1)]. Therefore, we proposed a moderate area would need to provide any additional emissions reductions—VOC and/or NO_X—needed to provide for attainment by the area's attainment date. In proposing this approach for this circumstance, we interpreted the subpart 1 RFP requirement to mean that the area must achieve whatever further reduction is needed for attainment in the remaining period prior to the attainment date (2009 through June 15, 2010).

We proposed that serious and higher classified areas would need to provide in their SIPs an additional average of three percent per year emission reduction over each subsequent 3-year period beyond the initial 6-year period through the attainment year, consistent with what Congress specified in section 182(c)(2)(B) of the CAA.

b. Summary of Final Rule

In the final rule, we are taking the approach we proposed. We are not prescribing additional increments of reductions for the 1½ years before the maximum attainment date for moderate areas. Such areas must provide for any additional emissions reductions (VOC/NO_X) needed to provide for attainment by the beginning of the ozone season prior to the area's attainment date.[42] Serious and higher classified areas would need to provide in their SIPs an additional average of three percent per year emission reduction over each subsequent 3-year period beyond the initial 6-year period through the attainment year.

c. Comments and Responses

Comment: One commenter suggested that following the statutory timetable rather than the one proposed by EPA would eliminate the problem of how to handle the ''1½ year gap between the end of the 6-year period for the 15 percent RFP requirement (i.e., December 31, 2008, as proposed by EPA) and the attainment date.'' The commenter continued by saying that no such gap is contemplated by subpart 2, which provides in section 18l(b)(l) that moderate area's attainment dates and their 15-percent VOC RFP date are to be the same: 6 years after their designation and classification.

Response: As provided in an earlier response, we do not believe the CAA requires the end of the 15 percent RFP period and the attainment date to be the same.

Comment: Another commenter noted the proposal states that the only specific RFP requirement applicable for moderate areas is the 15 percent VOC requirement between the end of 2002 and the end of 2008. However, section 172(c)(2) also applies, requiring areas to meet RFP generally. Therefore, a moderate area would still also have to provide any additional emissions reductions—VOC and/or NO_X, i.e., whatever is needed to provide for attainment by the beginning of the ozone season prior to the area's attainment date. The commenter agrees that any additional emissions reductions needed to achieve attainment are the only reductions that should be required of moderate areas.

Response: We agree with the commenter, and our rule requires that for purposes of meeting RFP beyond 2008 until the area's attainment date, moderate areas must reduce VOC and NO_X emissions as necessary to attain by the area's attainment date.

5. What is the timing of the submission of the RFP plan?

[Section VI.I.6 of June 2, 2003 proposed rule (68 FR 32834); § 51.910 of the draft and final regulatory text (several locations).]

a. Background

As noted in the proposal, section 182(b)(1) requires that moderate and higher classified areas submit their 15 percent RFP plans within 3 years after 1990. Obviously, applying the statute as written is absurd, since we are well past that date. The CAA uses identical language for identifying area's attainment dates under subpart 2. In our Phase 1 Rule, for purposes of attainment dates for the 8-hour NAAQS, we interpreted the CAA's language referring to the date of enactment of the 1990 CAA Amendments to mean the date of designations for the 8-hour standard. We noted in the proposal that if we applied the same interpretation for RFP plans, i.e., that they should be submitted within 3 years after the area's nonattainment designation date (i.e., in 2007 if the area has an effective designation in 2004), the plans would have to be implemented within 1 year after submission to ensure the 15 percent emissions reductions are achieved by the end of the relevant 6-year period (i.e., December 2008). We indicated concern that this might not provide sources with sufficient time to achieve the reductions by the required deadline. Therefore, we proposed that the RFP SIP be submitted within 2 years after nonattainment designation—namely by 2006 for areas designated in 2004. This would provide for 2 years for the State to develop and submit its RFP plan, and another 2 years for the control measures to be implemented.

We also proposed that an area classified serious or above submit within 2 years after designation its RFP plan that provides for 18 percent emissions reductions (VOC and/or NO_X) over the first 6 years from the baseline year and then submit within 3 years after designation a RFP plan that provides nine percent emissions reductions (VOC and/or NO_X) over each of the next 3-year periods until the area's attainment date.

b. Summary of Final Rule

In the final rule, we are taking a different approach than proposed in light of concerns raised by States in public comments. These commenters stated that they would need more than 2 years for development, adoption and submission of RFP plans for the increment of progress over the first 6 years after the baseline year. The EPA agrees with the several commenters who urged that 3 years was more consistent with the CAA. Additionally, 3 years is a more reasonable time period for submission because it allows States the necessary time to move regulatory actions through their legislative processes and allows States to consider RFP in conjunction with their attainment demonstrations. Therefore, for moderate and higher classified areas, the first RFP SIP must be submitted within 3 years after the area's nonattainment designation. For areas with a June 15, 2004 effective date for the 8-hour designations, the SIP would be due by June 15, 2007. This would

[42] We note that areas must implement controls prior to the beginning of the last full ozone season preceding the attainment date. For moderate areas designated as of June 15, 2004, such reductions would be needed by the beginning of the 2009 ozone season.

provide up to 3 years for States to develop and submit RFP plans, and 1 additional year (until the end of 2008) for control measures to be implemented. The RFP SIP for any remaining 3-year periods out to the attainment date beyond the first 6 years also would be submitted with the attainment demonstration, i.e., within 3 years after designation. However, since States maintain the flexibility to submit plans early to provide more time for implementation of their SIP control measures, we recommend that States complete their RFP plans as soon as possible after designation to provide as much time as possible for sources to implement the emissions reductions. Furthermore, States may also begin implementing their control measures before submission to EPA as part of their SIPs, which would provide additional time sources may need to comply.

c. Comments and Responses

Comment: Several commenters opposed EPA's proposal to shorten to 2 years the statutory 3-year period for development and submittal of 15-percent VOC RFP plans. They claim this proposal violates the guarantee of 3 years for plan development to the State in section 182(b)(l)(A) and is contrary to EPA's basic proposed principle that [quoting from the proposal] ''subpart 2 SIP submittals will be due as a general matter by the same period of time after designation and classification under the 8-hour standard as provided in subpart 2 for areas designated and classified at the time of enactment of the 1990 CAA.'' The commenters contended that subpart 2 gives EPA no authority to shorten the statutory 3-year period. In contrast, Congress in subpart 1 authorized EPA to set a schedule for nonattainment SIP submissions. Congress, therefore, knew how to give EPA discretion to shorten SIP submission deadlines according to the commenters; it did not do so in subpart 2.

Concerning the timing of submission of the RFP plan, another commenter was concerned that the States may not have sufficient photochemical modeling and ambient air analyses to indicate the best mix of RFP SIP controls. Additionally, in areas dominated by mobile source emissions, it may not be feasible to implement control measures to achieve the RFP target within the 2 years after the proposed required RFP SIP submission date as EPA has suggested. The commenter suggested that EPA develop policy options that allow areas in such predicaments to maintain approved SIPs if emissions reductions are not available to meet RFP requirements and/or if available emission reduction techniques might be counterproductive to other local and regional air quality goals.

Another commenter stated revisions to State emission reduction measures cannot be adopted easily in a 2-year time period because they require administrative action and frequently State legislation to approve. This period can lengthen when proposed measures like enhanced vehicle I/M involve controversial actions affecting the public. Logistically, a State must establish a regulation by administrative action with public input before (though sometimes after) such a measure is approved by the state's legislature. A number of jurisdictions' legislatures are only in regular session to consider such measures several months or, in alternate years. Thus, it is unreasonable for States to have only 2 years from their nonattainment designations to adopt new measures.

Another commenter referenced the case *NRDC* v. *EPA*, 22 F. 3d 1125, 1135 (D.C. Cir., 1994), where the Court considered the propriety of EPA's extension of the deadlines by which States had to submit elements of their SIPs. The Court upheld EPA's decision to extend the deadline for submission of a SIP given EPA's failure to meet its own deadline for providing certain necessary guidance to the States. The Court allowed EPA to use the extraordinary remedy of a deadline extension in this instance because Congress would have intended that the deadline be extended to provide a party the full statutory time for acting on the agency guidance. The commenter referenced CAA section 126(c) where EPA may set a compliance deadline ''as expeditiously as possible, but in no case later than 3 years after the date of such finding.''

One commenter noted that CAA section 182(b)(1)(A) as modified by section 181(b)(1) requires for moderate areas that the RFP SIP be submitted 3 years after designation. The commenter disagreed with the RFP plan requirement to submit the plan 2 years after the effective date of the nonattainment designation as not being consistent with or supported by these CAA sections. The resources involved in developing, proposing and adopting any SIP revision are not insignificant. In order to ensure the most efficient use of resources, the commenter contended that EPA should not require this SIP revision sooner than the submission of the attainment demonstration, 3 years after the effective date of the designations. Allowing States 3 years to submit the RFP plan is consistent with existing CAA requirements.

Response: After consideration of the comments, we have changed the final rule to be consistent with the approach advocated by a number of commenters. In consideration of the 2004 designation and the need to achieve the 2008 RFP reductions by December 2008, it seems reasonable to EPA that States first be given sufficient time after designation to formulate RFP plans. Therefore, the final rule allows States up to 3 years after designation to submit their RFP SIPs. However, to the extent States are relying on newly developed rules to meet all or part of the RFP requirement, we recommend that States adopt those rules as soon as possible after designation to provide as much time as possible for sources to achieve the emissions reductions.

6. How should CAA restrictions on creditable measures be interpreted? Which national measures should count as generating emissions reductions credit toward RFP requirements?

[Section VI.I.7 of June 2, 2003 proposed rule (68 FR 32834); § 51.910(a)(4) of the draft regulatory text; § 51.910(a)(3) of the final regulatory text.]

a. Background

Section 182(b)(1) contains provisions that limit creditability toward meeting RFP for certain limited emission reduction measures required prior to the enactment of the CAA Amendments of 1990. We noted in the proposal that we believe these specific restrictions should continue to apply for purposes of the 8-hour NAAQS. The proposal noted that Congress intended to prevent areas from taking credit for RFP only for those specific measures that were already adopted and in place (or required to be in place) prior to the date of enactment of the CAA Amendments of 1990 (November 15, 1990). We said that this same holds true for the RFP requirement as it applies to the 8-hour ozone standard, namely preventing credit toward the mandatory RFP percent reductions for continuing reductions from those specific measures cited in the CAA that were already adopted and in place (or required to be adopted and in place) prior to the date of enactment of the CAA Amendments of 1990. There is no indication in the CAA that this exclusion should be changed. Congress mandated many emissions reductions in the 1990 CAA Amendments with no indication that they should not be credited to meeting RFP or attainment of any existing or revised NAAQS. Therefore, we proposed that all

emissions reductions that occur from all Federal and any other measures not otherwise identified in section 182(b)(1)(C) and (D) and that occur after the baseline emissions inventory year would be creditable for the RFP requirement. A number of examples demonstrating emissions reductions that would be creditable toward the RFP requirement were set forth in our proposal.

b. Summary of Final Rule

We are taking the approach we proposed, under which all emissions reductions that occur after the baseline emissions inventory year are creditable for purposes of the RFP requirements in this section except as specifically provided in section 182(b)(1)(C) and (D) and section 182(c)(2)(B) of the CAA. The restriction imposed by section 182(b)(1)(D) limits crediting reductions from the following four categories:

- Corrections to or additions of RACT rules as required by CAA section 182(a)(2)(A).
- Corrections to I/M programs for areas where the SIP included or was required to include a schedule for I/M implementation under the CAA in effect immediately before November 15, 1990.
- Regulations concerning Reid Vapor Pressure (RVP) promulgated by EPA before November 15, 1990 or required to be promulgated under CAA section 211(h).
- Motor vehicle exhaust or evaporative emissions measures promulgated by EPA by January 1, 1990.

c. Comments and Responses

Comment: One commenter supported EPA's proposal to allow credit towards RFP requirements of all emissions reductions, which occur after the baseline emissions inventory year (2002) from all Federal, and any other measures not otherwise identified under section 182(b)(1)(D). This would include reductions from cleaner fuels and engines, reductions from ongoing 1-hour SIP controls and VOC reductions from implementation of MACT standards after the baseline year. The commenter stated that this proposed approach would be critical in a number of areas that already have stringent stationary source controls and/or in areas dominated by mobile source emissions.

Response: The EPA acknowledges this comment of support for our final action.

Comment: Another commenter believed that early voluntary emissions reductions prior to 2003, and not required under the CAA, should also be creditable toward RFP requirements. The commenter recommended that EPA's final rule clarify that States be allowed credit for RFP for early voluntary emissions reductions occurring prior to 2003. As a company that has proactively taken measures to reduce NO_X emissions through innovative Combustion Initiative (an enhanced efficiency technology), the commenter believed that EPA's regulations should take these efforts into account as they have resulted in real improvements to air quality. Another commenter stated that companies who made voluntary reductions prior to 2003 would be penalized for having undertaken such voluntary measures and, thus disallowing credit for these reductions provides disincentives for voluntary reductions.

Response: Voluntary reductions that occur prior to January 1, 2003 will be reflected in the area's baseline inventory. This lower baseline means that fewer reductions will be needed to achieve RFP.[43] Allowing an area to take credit for reducing emissions that are not included in the inventory would result in ''double counting'' of those emissions reductions.

Comment: One commenter suggested that areas should be able to take credit for MACT standards that may reduce VOC for which compliance is required after the 2002 baseline year. The commenter said it would be helpful to States if EPA produced a document detailing the expected VOC reductions after implementation of MACT standards. States could claim these reductions toward any reductions required to meet their target. The commenter suggested that the most useful way to express the reduction would be as a percent of the 2002 emissions.

Response: The EPA agrees that areas can take credit in RFP plans for post-2002 VOC reductions from MACT standards. We are considering whether to develop the recommended guidance.

Comment: One commenter objected to EPA's proposal to allow States to claim RFP credit from any reductions achieved through post-1990 adoption of the types of measures listed in section 182(b)(1)(D). The commenter further stated that section 182(b)(1)(D) prohibits granting RFP credit for any measures contained on the list. Congress wanted the RFP reductions to be new reductions rather than emission cuts that would have occurred anyway. In the case of 8-hour nonattainment areas, the baseline year will be 2002. Therefore, according to the commenter, to be consistent with subpart 2, EPA must disallow RFP credit for measures listed in section 182(b)(1)(D) adopted any time prior to 2002.

Another commenter urged EPA to consider a hybrid approach that gives States credit for approved RFP plans that go beyond 2002, provided that the Plan is evaluated on a 2002 baseline. This approach would give States credit for ongoing emissions reductions, recognize the need to address the 8-hour standard as the ozone standard (rather than rely on plans developed to meet the 1-hour standard), and potentially avoid some unneeded controls.

Another commenter recommended that EPA not allow emissions reductions credit for all emissions reductions occurring after the baseline year. Emissions reductions to satisfy the RFP requirements of CAA section 182(b)(1) and 182(c)(2)(B) are required to be achieved by submitting ''a revision to the applicable implementation plan to provide for * * * emissions reductions.'' The commenter argued that emissions reductions already required by, or accounted for in, the applicable implementation plan may not be credited toward the new RFP requirements. For example, reductions that were required to be achieved by SIP or other requirements, but which were not achieved in practice prior to the baseline year, should not be credited toward meeting the new RFP reductions required after the baseline year. Only new measures submitted with the new SIP revision may be credited for this purpose.

Response: The EPA believes that, with certain exceptions (see CAA section 182(b)(1)(C) and (D)), any reductions that occur after 2002 are creditable towards RFP and attainment and that it should not matter when the State initially adopted or EPA promulgated the measures that produce those reductions. The CAA does not mandate the approaches advocated in the comments. While the comments cite phrases in the CAA that might be read to support the approach advocated in the comments, EPA believes such an interpretation is at odds with other provisions of the CAA. In addition to the restriction imposed by section 182(b)(1)(D) on crediting certain measures, section 182(b)(1)(C) places only two restrictions on creditability of reductions towards RFP: first, reductions are creditable if they result from measures in the applicable implementation plan, i.e., the approved

[43] For example, if an area had VOC emissions in 2001 of 100 tons per day, and a source reduces emissions by 10 tons per day in 2002, the baseline emissions will be 90 tons per day. Thus, the area will need to achieve 13.5 tons per day reduction to meet its 15 percent requirement, rather than 15 tons per day. However, the area cannot take credit in the 15 percent plan for the 10 tons per day of emissions that are not part of the baseline inventory.

SIP or from rules promulgated by EPA, or from the applicable requirements [44] that are incorporated into a title V permit; and secondly, only those reductions that have actually occurred after the baseline year and before the milestone date may be credited towards a RFP milestone. The requirement that the reductions result from measures in the applicable implementation plan or EPA regulations, or applicable requirements contained in a title V operating permit imposes no restriction that such measures must be enacted after the date of designation or after the baseline year. This restriction only requires that the measure approved into the SIP be a rule promulgated by EPA or be an applicable requirement included in a title V permit issued before or concurrently with approval of the RFP SIP revisions, and that the reductions occur after the baseline year and before the milestone date.

While this provision limits EPA's discretion to allow credit towards the RFP requirement from any reduction that does not fit into any of the three aforementioned classes of measures, EPA does not see anything in the statute that mandates the adoption of the approach advocated in the comments. In fact, EPA believes the opposite is the case.

The same argument (i.e., that creditable RFP measures must be measures adopted/promulgated after designation or after the baseline year) could have been made for the various programs mandated by the 1990 CAA Amendments. These mandated measures included RACT requirements under section 182(b)(2), Stage II vapor recovery under section 182(b)(3), motor vehicle I/M under sections 182(b)(4) and 182(c)(3), RFG under section 211(k), and the Tier 1 motor vehicle standards under title II. The EPA believes the statute is plain that Congress envisioned that all of these would be adopted after 1990 and in most cases implemented before 1996 because the statute contains enforceable deadlines for submission of the requisite SIP revisions or promulgation of the EPA rules. In many cases, they contain required implementation dates before 1996. Congress clearly did not limit credit for RFP for any of these measures. In our proposed rulemaking, EPA specifically proposed allowing use of reductions resulting from any measure as long as the reductions meet the creditability criteria of section 182(b)(1)(C) for the very reason EPA concluded Congress did not intend to impose the sort of limit on creditability advocated in the comments for the 1-hour standard and for any revised standard.

In summary, the statute says that only four specific categories of emissions reductions are restricted. It does not refer to or include any post-1990 rules' emissions reductions as restricted and only speaks to creditability in terms of when the reductions occurred, not when the rules or measures were adopted. As explained in the proposal and the preceding paragraphs, Congress had reason to limit creditability of pre-1990 rules, mandated many post-90 rules and allowed these rules to be credited towards post-90 RFP, and nothing in the statute leads us to believe that Congress would not have wanted them to also be creditable to post-2002 RFP. The EPA believes it is appropriate to allow credit toward RFP for emissions reductions other than reductions from the four categories specified in the CAA pursuant to section 182(b)(1)(D). Language that was once pertinent to the schedule of the 1990 CAA Amendments should be reinterpreted now to mean emissions reductions are creditable toward emissions reductions requirements to the extent they actually occur during the relevant ROP period and after the baseline year.

7. For areas covered only by subpart 1, how should the RFP requirement be structured?

[Section VI.I.8. of June 2, 2003 proposed rule (68 FR 32834); § 51.910(b) of the draft and final regulatory text.]

a. Background

The proposal noted that the RFP requirement under subpart 1 is more general than that under subpart 2, and EPA thus has more flexibility in determining what RFP means under subpart 1. For instance, the State may rely on emissions reductions of VOC or NO_X, or a combination of both to meet its RFP requirement whereas subpart 2 limits the initial 15 percent to VOC emissions reductions. However, we acknowledged the concern about treating in a similar manner areas under subpart 1 that have an ozone problem similar to areas covered under subpart 2.

We proposed scenarios for three types of subpart 1 areas: (a) Areas with attainment dates 3 years or less after designation, (b) Areas with attainment dates between 3 to 6 years after designation, and (c) Areas with attainment dates beyond 6 years after attainment.

- *Areas with attainment dates 3 years or less after designation.*

We proposed these areas would be treated similar to areas under subpart 2 that are classified as marginal, which do not have an RFP requirement. We proposed such an area would not be subject to a separate RFP requirement, but RFP would be met by demonstrating the area could attain the standard by its attainment date.

- *Areas with attainment dates between 3 to 6 years after designation.*

These areas would have attainment dates similar to subpart 2 areas classified as moderate. We proposed two options for these areas:

- *Option 1.* This option would require the RFP plan to be submitted with the attainment demonstration within 3 years after designation of the nonattainment area and RFP would be met by a SIP that provides for attainment as expeditiously as practicable. Where areas have only 3 years after SIP submission before attainment, this option recognizes that there may be only a short amount of time available to achieve any specified emissions reductions to meet RFP. The draft regulatory text incorporated this option.
- *Option 2.* This option would require these areas to be treated in a manner similar to subpart 2 areas classified as moderate. The RFP SIP would have to provide for a 15 percent emission reduction from the baseline year within 6 years after the baseline year. The RFP SIP would have to be submitted within 2 years after designation. However, since the area is subject only to subpart 1, VOC or NO_X emissions reductions could be relied on to meet the 15 percent reduction requirement, consistent with EPA's NO_X substitution policy.[45] Also, we solicited comment on whether a percentage other than 15 percent should be required as the minimum. Additional measures that would provide the remaining portion of the emissions reductions needed for attainment would have to be submitted with the area's attainment demonstration within 3 years after designation.

- *Areas with attainment dates beyond 6 years after designation.*

These areas would have attainment dates similar to areas classified under subpart 2 as serious or higher. We proposed that the RFP plan show increments of progress from the baseline emissions inventory year out to the attainment date. The RFP SIP would

[44] Applicable requirements are federally-enforceable requirements under the CAA that are created elsewhere but incorporated into a title V permit. See the definition of ''Applicable requirement'' in 40 CFR 70.2 and 71.2.

[45] NO_X Substitution Guidance. December 15, 1993 (available at *http://www.epa.gov/ttn/oarpg/t1pgm.html).*

first have to provide for a 15 percent emission reduction from the baseline year within 6 years after the baseline year. The 15 percent RFP SIP would have to be submitted within 2 years after designation. However, since the area is subject only to subpart 1, NO_X emissions reductions could be substituted for some or all of the 15 percent reduction requirement, consistent with EPA's NO_X substitution policy. Also, we solicited comment on whether a percentage other than 15 percent would be more appropriate. For each subsequent 3-year period out to the attainment date, another RFP SIP would have to provide for an additional increment of progress no less than the amount of emissions reductions that would be proportional to the time between the end of the first increment to the attainment date. This second RFP SIP would have to be submitted at the same time as the attainment demonstration, namely within 3 years after designation.

b. Summary of Final Rule

We are finalizing rules for two, rather than three, categories of areas based on the CAA's division of attainment dates for subpart 1 areas under section 172(a)(2). This provision requires that subpart 1 areas must attain as expeditiously as practicable but no later than 5 years after designation as a nonattainment area. It also allows the Administrator to extend the attainment date beyond that 5 year period ''* * * for a period no greater than 10 years from the date of designation as nonattainment, considering the severity of nonattainment and the availability and feasibility of pollution control measures.'' The two scenarios for RFP for subpart 1 areas are based on whether the area does or does not receive an extended attainment date. The following are the two scenarios and the RFP requirements for each:

Scenario A: Areas with attainment dates 5 years or less after designation (i.e., on or before June 15, 2009 for areas designated June 15, 2004).

As noted elsewhere in this preamble, for areas classified under subpart 1, emissions reductions needed for attainment must occur by the beginning of the ozone season preceding the attainment date. Thus, to enable a SIP to demonstrate attainment by June 15, 2009, the area must achieve all necessary reductions by the beginning of the 2008 ozone season. The final rule provides that RFP for these areas would be met by ensuring emissions reductions needed for attainment are implemented as noted above by the beginning of the ozone season prior to the attainment date.

Scenario B: Areas with attainment dates more than 5 years after designation (i.e., beyond June 15, 2009 for those areas designated June 15, 2004). For these areas:

- The RFP plan must show increments of progress from the baseline emissions inventory year out to the attainment date.
- The RFP SIP would first have to provide for a 15 percent emission reduction from the baseline year through the 6th year after the baseline year (e.g., from January 1, 2003 through December 31, 2008).
- The 15 percent RFP SIP must be submitted within 3 years after designation (e.g., by June 15, 2007).
- However, since the area is subject only to subpart 1, NO_X or VOC emissions reductions (or both) could be used to achieve the 15 percent emission reduction requirement.
- For each subsequent 3-year period out to the attainment date, the RFP SIP would have to provide for an additional increment of progress. The increment for each 3-year period would be a portion of the remaining emission reductions needed for attainment beyond those reductions achieved for the first increment of progress (e.g., beyond 2008 for areas designated nonattainment in June 2004). Specifically, the amount of reductions needed for attainment should be divided by the number of years needed for attainment after the first increment of progress in order to establish an ''annual increment.'' For each 3-year period out to the attainment date, the area must achieve roughly the portion of reductions equivalent to three annual increments.[46] This second RFP SIP must also be submitted within 3 years after the effective date of designation (i.e., by June 15, 2007).

While the adopted rule is not identical to any of the proposed options, we believe it is a logical outgrowth of our three proposed scenarios. The adopted approach is more stringent than certain of the proposed options and less stringent than others. Since this final decision incorporates elements of the three proposed scenarios, we believe it is similar in result to the three scenarios proposed.

c. Comments and Responses

Comment: One commenter stated that EPA has no authority to adopt ''Option 1'' for areas with attainment dates between 3 and 6 years after designation, because that option would waive any showing of RFP.

Response: The EPA acknowledges that Congress prescribed specific RFP requirements under subpart 2, but for subpart 1 provided more flexibility.

Our rule does not eliminate RFP obligations for subpart 1 areas. We are not requiring any specific percent reduction for subpart 1 areas with near-term attainment dates. The measures that bring about near-term attainment represent all the reductions that are reasonable to require as annual incremental progress towards attainment. The EPA is not compelled to require a 15 percent emission reduction for all subpart 1 areas, especially in those cases where a full 15 percent is not needed in order to reach attainment. However, we believe that it is generally appropriate to require the full 15 percent for areas with long-term attainment dates to ensure interim progress towards attainment.

Comment: Some commenters supported the proposal that ties the required RFP showing to the attainment date. Specifically, these commenters supported the proposal that areas with attainment dates of 3 years or less should have no separate RFP requirement, consistent with the requirement applicable to marginal areas under subpart 2. In addition, support was shown for Option 1 for subpart 1 areas with an attainment date between 3 and 6 years following designations. Under Option 1, areas

[46] For example, if the area's attainment date is 2014, and a total of 30 percent reduction is needed between the end of 2008 and the attainment date (a 6-year period) to reach attainment, the ''annual increment'' would be 5 percent (i.e., 1/6 of 30 percent). Thus, the area must achieve roughly the portion of reductions equivalent to 15 percent (3 × 5 percent) during the first 3 years (2009, 2010, 2011), and the remaining amount over the next 3 years (2012, 2013, 2014). By using the word ''roughly'' in the regulatory text, EPA does not intend that States would be able to delay substantial emission reductions from one 3-year period to the next. Rather, EPA intends this modifier to allow small deviations from the amount of emission reductions that would be needed to meet a 3-year RFP requirement. For example, assume that the ''annual increment'' of reductions needed for an area to reach attainment (after the initial 6-year RFP obligation) is 5 tons per day and that the area has 6 additional years until attainment. Thus, for each of the two 3-year periods until attainment, the area would need ''roughly'' 15 tons per day, so long as the total for both periods is equivalent to or greater than 30 tons per day (i.e., the total reductions needed for attainment). Assuming the area could achieve 14 tons per day during the first 3-year period, and achieve the remaining 16 tons per day during the second 3-year period, we believe this would be consistent with achieving ''roughly the portion of reductions equivalent to three annual increments.'' We do not believe, however, that use of the word roughly allows States to delay substantial emission reductions. Thus, in the example above, it would not be appropriate for the State to delay reductions of several tons per day until the second 3-year period.

would have to show an adequate rate of reduction in order to achieve attainment by the deadline, but there would be no specific percentage reduction required.

Response: We acknowledge the support of these comments.

Comment: Another commenter believed that a 15 percent emissions reductions requirement should only be required where such reductions would meaningfully advance the date of attainment. The RFP requirement in subpart 1 requires that the SIP provide for ''reasonable further progress,'' and where emissions reductions would not create ''reasonable further progress'' either in the area itself or in downwind areas, there is no basis under subpart 1 to require such specific emissions reductions. They further said that requiring a potentially expensive reduction in emissions in those cases where that reduction would not improve air quality was not justified based on a notion of ''equity'' with similar areas classified under subpart 2 and noted that such an interpretation was not required by the statute or sensible. That some subpart 2 areas might have to reduce emissions by a specified percentage even where such reductions would yield no positive environmental benefits is an unfortunate result of the Congress' decision to limit EPA's discretion under subpart 2—which in turn is a result of a far less sophisticated understanding of the dynamics of ozone creation in 1990 than exists now—and where EPA has the discretion not to dictate an ineffective and inefficient result, it must exercise that discretion.

Response: We addressed in general those comments that recommended alternatives to the mandatory measures of subpart 2 (which includes the RFP requirement) in the response to comments above under the topic, ''Should prescribed requirements of subpart 2 apply in all 8-hour nonattainment areas classified under subpart 2, or is there flexibility in application in certain narrowly-defined circumstances?'' We conclude in that section that EPA has no discretion to broadly waive mandatory requirements. However, we noted that case law may provide support for case-by-case waivers where implementation of a measure would produce an absurd result.

8. Where Part of an 8-hour Nonattainment Area Was a 1-hour Nonattainment Area With a ROP Obligation Extending Past 2002, Can Emissions Reductions From the Area's 1-hour ROP Plan Be Used as Credit Toward Meeting the Area's 8-hour RFP Plan?

[Section VI.I.9. of June 2, 2003 proposed rule (68 FR 32835); no draft or final regulatory text.]

a. Background

We proposed the following approach to address this issue. Where an area has both 1-hour and 8-hour RFP obligations for the post-2002 period, the State may rely on emissions reductions from the 1-hour plan in achieving RFP for the 8-hour standard. The State could develop a new baseline and new RFP emission reduction targets for the entire 8-hour standard nonattainment area (i.e., the old 1-hour standard nonattainment area and any newly added portion of the 8-hour standard nonattainment area). Emissions reductions from measures in the 1-hour ozone SIP that are achieved after the 8-hour ozone NAAQS baseline year could count (subject to creditability restrictions as discussed above) toward meeting the RFP requirement for the entire 8-hour area.

This approach would set a RFP target for the entire 8-hour ozone nonattainment area. Under this approach, the new RFP target for the 8-hour standard would replace the previous 1-hour ROP target (while ensuring that, at a minimum, the emissions reductions required to meet the old target are met; see 40 CFR 51.905(a)(1)(iii)).

b. Summary of Final Rule

We are adopting the approach from the proposal.

c. Comments and Responses

Comment: One commenter agreed with the approach outlined in the proposal but cautioned that the States would have to ensure that the target is at least as stringent as the 1-hour ROP target, thus ensuring no backsliding on the 1-hour NAAQS requirements. Under this approach, the State would have to develop a new baseline and new RFP emission reduction targets for the entire 8-hour standard nonattainment area. Emissions reductions from measures in the 1-hour ozone SIP that are achieved after the 8-hour ozone NAAQS baseline year could count (subject to credibility restrictions as discussed in the proposed rulemaking) toward meeting the RFP requirement for the entire 8-hour area. The new RFP target for the 8-hour standard would replace the previous 1-hour ozone target (while ensuring that, at a minimum, the emissions reductions required to meet the old target are met).

Response: We agree with the commenter that the emission reduction targets under the 8-hour standard must be at least as stringent as the 1-hour targets. Section IV.E.3. of this preamble discusses the requirements for RFP for several situations relative to the area's former obligations under the 1-hour standard and the current obligations under the 8-hour standard. The obligations of an area under the anti-backsliding provisions of 40 CFR 51.905(a)(1)(iii) would still apply, meaning that emissions reductions under the 1-hour ROP requirements would still be required as if the 1-hour standard had never been revoked. Therefore, the new 8-hour emission target for the 8-hour area would be logically at least as stringent as under the 1-hour area for a given time period.

9. Will EPA's ''Clean Data Policy'' Apply for Purposes of 8-hour RFP, Attainment Demonstrations and Other Related Requirements?

[Section VI.I.10 of June 2, 2003 proposed rule (68 FR 32835); no draft regulatory text; section 51.918 of final rule.]

a. Background

As noted in the proposal, we issued a policy on May 10, 1995, which allows EPA to determine that an area has attained the standard and that certain planning requirements (e.g., RFP and attainment demonstrations) will not apply so long as the area remains in attainment.[47] This is referred to as the ''Clean Data Policy.'' We proposed that this policy would remain effective for purposes of areas that EPA determines have attained the 8-hour ozone NAAQS.

b. Summary of Final Rule

In the proposed rule, we indicated that the Clean Data Policy, which we had applied under the 1-hour standard, should apply for purposes of the 8-hour standard. We are adopting this approach. In this action EPA is finalizing the statutory interpretation that is embodied in the policy. The text of the final rule encapsulates the statutory interpretation set forth in the policy. Determinations as to whether individual areas have attained the 8-

[47] Memorandum of May 10, 1995, ''RFP, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard,'' from John S. Seitz, Director, Office of Air Quality Planning and Standards. Available at: *http://www.epa.gov/ttn/oarpg/t1/memoranda/clean15.pdf.*

hour standard and thus qualify for application of the policy will be made in the context of rulemakings for those individual areas.

The EPA has applied the Clean Data Policy in rulemakings under the 1-hour ozone standard to both subpart 1 areas, e.g., San Francisco Bay Area (69 FR 21717; April 22, 2004) and subpart 2 areas, e.g., St. Louis, Missouri (68 FR 25418; May 12, 2003). The EPA will also apply the policy to both subpart 1 and subpart 2 areas under the 8-hour standard.

c. Comments and Responses

Comment: One commenter stated that EPA's ''Clean Data Policy'' is unlawful with respect to both the 1-hour and 8-hour NAAQS. A commenter argued that EPA also has no authority to waive the attainment demonstration and RFP plans mandated by subpart 2 on the pretext that an area has clean data. The CAA unambiguously requires these plans for any area designated nonattainment for the pollutant ozone, and gives EPA no power whatsoever to waive such plan requirements.

Several other commenters supported the continued use of the ''Clean Data Policy.''

Response: The EPA believes that the Clean Data Policy comports with the provisions of the CAA in regard to attainment demonstrations, ROP plans, RACM, contingency measures and other related requirements. The Clean Data Policy, issued on May 10, 1995, sets forth EPA's interpretation that where EPA has determined that an area has attained the standard, certain SIP requirements are suspended (e.g., RFP) for so long as the area remains in attainment.

As set forth in its May 10, 1995 policy, EPA believes it is reasonable to interpret the provisions regarding RFP and attainment demonstrations, along with certain other related provisions, as not requiring further submissions to achieve attainment for so long as the area is in fact attaining the standard. Under the policy, EPA is not granting an exemption from any applicable requirements under part D. Rather, EPA has interpreted these requirements of subparts 1 and 2 as not applying for so long as the area remains in attainment with the standard. This is not a waiver of requirements that by their terms apply; it is a determination that certain requirements are written so as to be operative only if the area is not attaining the standard.

The EPA has explained in other rulemaking actions on the 1-hour ozone standard its rationale for the reasonableness of this interpretation of the CAA and incorporates these explanations by reference. See, for example, 67 FR 49600 (July 31, 2002); 65 FR 37879 (June 19, 2000) (Cincinnati-Hamilton, Ohio-Kentucky); 61 FR 20458 (May 7, 1996) (Cleveland-Akron-Lorain, Ohio); 66 FR 53094 (October 19, 2001) (Pittsburgh-Beaver Valley, Pennsylvania); 60 FR 37366 (July 20, 1995); 61 FR 31832–33 (June 21, 1996) (Grand Rapids, MI); 60 FR 36723 (July 18, 1995) (Salt Lake and Davis Counties, Utah); 68 FR 25418 (May 12, 2003) (St. Louis, Missouri); 69 FR 21717 (April 22, 2004) (San Francisco Bay Area). The EPA has also set forth its legal rationale for the Clean Data Policy in briefs filed in the 10th, 7th, and 9th Circuits, and hereby incorporates those briefs insofar as relevant here. See *Sierra Club* v. *EPA,* No. 95–9541 (10th Cir.), *Sierra Club* v. *EPA,* No. 03–2839, 03–3329 (7th Cir.), *Our Children's Earth Foundation* v. *EPA,* No. 04–73032 (9th Circuit).

As stated in the policy, the attainment demonstration, RFP requirements and contingency measure requirement are designed to bring an area into attainment. Once this goal has been achieved, it is appropriate to suspend the obligation that States submit plans to meet these goals, so long as the area continues to attain the relevant standard.

The Tenth, Seventh and Ninth Circuits have upheld EPA rulemakings applying the Clean Data Policy. See *Sierra Club* v. *EPA,* 99 F. 3d 1551 (10th Circuit, 1996), *Sierra Club* v. *EPA,* 375 F. 3d 537 (7th Circuit, 2004) and *Our Children's Earth Foundation* v. *EPA,* No. 04–73032 (9th Circuit, June 28, 2005) memorandum opinion.

Comment: A commenter said that although subpart 2 contains some narrowly crafted exceptions [e.g., CAA 182(b)(1)(A)(ii)], there are no exceptions based on clean data. In the past, EPA has cited a Tenth Circuit decision, *Sierra Club* v. *EPA,* 99 F. 3d 1551 (10th Circuit, 1996), as supporting the Clean Data Policy. The commenter contended that case was wrongly decided and has been superseded by the Supreme Court decision in *Whitman* v. *American Trucking Assoc., Inc.,* 531 U.S. 457 (2001). There, the Court held that subpart 2 eliminates regulatory discretion previously allowed to EPA under subpart 1, and noted that subpart 2 prescribes large parts of nonattainment programs, for example, section 182. The requirements for RFP and attainment demonstrations are among those subpart 2 nonattainment programs that Congress prescribed by law, thereby eliminating EPA discretion to accept something less. See also *Sierra Club* v. *EPA,* 293 F. 3d 155 (D.C. Circuit, 2002) (holding that EPA is without authority to infer exceptions to attainment deadlines and to explicit subpart 2 requirements for RFP plans).

Response: The EPA believes that the Tenth Circuit correctly decided *Sierra Club* v. *EPA* and that the comments misconstrue both *Whitman* and *Sierra Club* v. *EPA,* 293 F. 3d 155 (D.C. Circuit, 2002) (Sierra Club 2002). The *Sierra Club 2002* case addressed the statutory requirements applicable to an area not attaining the standard. The issue of the requirements of part D of title I of the CAA that must continue to be met by areas that EPA has determined are monitoring attainment of the standard was not before the court. As discussed below, the *Sierra Club 2002* decision upheld EPA's determination that the RACM provision under section 172(c)(1) requires only additional measures that could contribute to RFP or attainment, which is an element of EPA's application of the Clean Data Policy. To this limited extent, *Sierra Club 2002* is relevant to EPA's interpretation that the policy will apply for the 8-hour ozone standard, and the decision supports EPA's interpretation. However, the other issues addressed in the decision (extension of the statutory attainment date for areas affected by ozone transport, the content of a demonstration of RFP toward attainment, and whether contingency measures must be submitted as part of an attainment demonstration or plan for RFP) did not relate to the Clean Data Policy or how the subpart 2 requirements apply to areas attaining the standard.

The issue addressed by the Clean Data Policy is whether an area that has attained the standard (as evinced by air quality monitoring data) still needs to submit a demonstration of how the area will achieve enough reductions to demonstrate that it will ''attain the NAAQS,'' a plan to obtain reasonable periodic reductions towards the goal of attainment and other related requirements.

The EPA continues to believe that the statutory requirement for an attainment demonstration—a SIP revision which identifies the level of future reductions needed to achieve the NAAQS and any additional adopted measures needed to achieve these future reductions—is written so as to be inapplicable once the NAAQS is attained.

In addition, EPA believes that the RACM requirements are a ''component'' of an area's attainment demonstration under section 172(c)(1). General Preamble 57 FR 13560; April 16, 1992. Thus, since for the same reason the attainment demonstration no longer

applies by its own terms, RACM also no longer applies. The EPA has consistently interpreted this provision to require only implementation of potential RACM measures that could contribute to reasonable further progress or to attainment. General Preamble 57 FR 13498; April 16, 1992. Thus, where an area is already attaining the standard, no additional RACM measures are required.[48]

Likewise, EPA concludes that the provision for RFP—a plan for annual incremental reductions leading to attainment—is also expressed in terms that show that RFP is unnecessary in areas attaining the standard. For areas in attainment, there is no longer a need to plan for measures to meet that goal. Similarly, EPA continues to believe that the contingency measure requirements of section 172(c)(9) no longer apply in an area that is attaining the standard since those ''contingency measures are directed at ensuring RFP and attainment by the applicable date.'' (See 57 FR 13564; April 16, 1992). The section 182(c)(9) contingency measure requirement also no longer applies once an area has attained the standard.

Section 172(c)(2) of the CAA and the related provisions of subpart 2 provide that RFP is required only where an area continues to violate the standard. By definition, the ''reasonable further progress'' provision requires only such reductions in emissions as are necessary to attain the NAAQS by the attainment date. If an area has attained the standard, the stated purpose of the RFP provision has been fulfilled. Also, section 172(c)(1) and the related provisions of subpart 2 require SIPS to provide for attainment of the NAAQS. (See also section 182(b)(1)(A)(i) which requires that SIPS for moderate ozone nonattainment areas must ''provide for such specific annual reductions in emissions of [VOCs] and [NO_X] as necessary to attain the [ozone NAAQS]'' by the applicable attainment date). When an area has attained the NAAQS, there is no need for a plan demonstrating how it will reach attainment, and thus the attainment demonstration provision no longer applies. Similarly section 172(c)(9) and the related provisions of subpart 2 provide that SIPs in nonattainment areas shall provide for contingency measures to be undertaken if the area fails to make RFP or to attain the NAAQS by the applicable attainment date. Since contingency measures are required only if RFP or attainment is not achieved, there is no need for them where the area has attained the standard. The language of these statutory provisions indicates that when an area has attained the standard these requirements no longer apply as the purpose of these provisions—attainment—has been accomplished.

The EPA believes that *Whitman* does not provide a basis to reconsider our position on the Clean Data Policy. In *Whitman,* the Court was addressing EPA's stated approach that subpart 2 did not apply for purposes of implementing the 8-hour NAAQS. In the Phase 1 rule, EPA addressed the Court's decision and concluded that subpart 2 does apply. The issue here is not whether it applies, but how those requirements apply under a specific situation where an area has attained the NAAQS. That issue was not addressed by the Court in *Whitman.* The decision in *Whitman* has no bearing on the question of whether an area that has demonstrated attainment must nonetheless submit an attainment demonstration plan and related requirements. Thus, *Whitman* does not undermine the Tenth Circuit's reasoning in *Sierra Club* v. *EPA,* 99 F. 3d 1551 (10th Circuit, 1996). See also the post-*Whitman* decisions in *Sierra Club* v. *EPA,* 375 F. 3d 537 (7th Circuit, 2004), and *Our Children's Earth Foundation* v. *EPA,* No. 04–73032, memorandum opinion (9th Circuit, June 28, 2005) rejecting challenges to the Clean Data Policy and upholding redesignation actions based on the policy.

10. How will RFP be addressed in Tribal areas?

[Section VI.I.11. of June 2, 2003 proposed rule (68 FR 32835); no draft or final regulatory text.]

a. Background

The TAR provides flexibility for Tribes in the preparation of a TIP to address the NAAQS. As mentioned in the proposed rulemaking, the TAR provides the Tribes with the ability to develop TIPs to address and implement the NAAQS in Indian country. It further provides the Tribes with flexibility to develop these plans in a modular way, as long as the elements of their TIPs are reasonably ''severable.'' For example, each TIP submission must include a demonstration that the Tribe has authority to develop and run its program, the ability to enforce its rules, and the capacity and resources to implement the program it adopts. Therefore, it may include one or two source-specific requirements but may not include provisions for RFP and other SIP requirements. The proposal noted that these TIPs can be an important step in addressing an overall air quality plan to achieve health and environmental goals on Tribal lands. Where a Tribe chooses not to address a specific planning element, EPA may be obligated to step in. Such action would not preclude a Tribe from addressing those elements at a later time.

b. Summary of Policy

We intend to take the approach noted in the proposal. There is no regulatory text for this intention.

c. Comments and Responses

No comments were received on this portion of the proposal.

11. How will RFP targets be calculated?

[Section VI.I.12. of June 2, 2003 proposed rule (68 FR 32836); § 51.910(c) of the draft and final regulatory text.]

a. Background

We proposed a methodology for the calculation of RFP target levels of emissions that is based on the method we developed for the 1-hour standard, while taking into account our interpretation of CAA restrictions on creditable emissions and our proposal to use the 2002 inventory as the baseline inventory for the RFP requirement. The CAA specifies four types of measures that were not creditable toward the 15 percent RFP requirement. These are:

(1) Any measure relating to motor vehicle exhaust or evaporative emissions promulgated by the Administrator by January 1, 1990.

(2) Regulations concerning Reid Vapor Pressure (RVP) promulgated after 1990 or required under section 211(h).

(3) Measures required under section 182(a)(2)(A) to correct deficiencies in SIPs regarding VOC RACT regulations required prior to enactment of the CAA Amendments of 1990.

(4) State regulations submitted to correct deficiencies in I/M existing or required programs.

These four types of measures were all expected to result in a decrease in emissions between 1990 and 1996. Of these four types of measures, RACT and I/M program corrections and the 1992 RVP requirements were completely in place by 1996 and therefore are already accounted for in the 2002 baseline. As a result, they would produce no additional reductions between 2002 and 2008 or later milestone years.

[48] [The EPA's interpretation that the statute requires only implementation of RACM measures that would advance attainment was upheld by the United States Court of Appeals for the Fifth Circuit (*Sierra Club* v. *EPA,* 314 F. 3d 735, 743–745, 5th Cir. 2002) and by the United States Court of Appeals for the D.C. Circuit (*Sierra Club* v. *EPA,* 294 F. 3d 155, 162–163, D.C. Cir. 2002). See also the final rulemakings for Pittsburgh-Beaver Valley, Pennsylvania, 66 FR 53096 (October 19, 2001) and St. Louis, 68 FR 25418 (May 12, 2003).]

However, the pre-1990 Federal Motor Vehicle Control Program (FMVCP) will continue to provide additional benefits during the first two decades of the 21st century as remaining vehicles meeting pre-1990 standards are removed from the vehicle fleet. Because these benefits are not creditable for RFP purposes, in order to calculate the target level of emissions for future RFP milestone years (i.e., 2008, 2011, etc.), States must first calculate the reductions that would occur over these future years as a result of the pre-1990 FMVCP. We proposed three methods to properly account for the non-creditable reductions when calculating RFP targets for the 2008 and later RFP milestone years.

b. Summary of Final Rule

The calculation methods have been revised slightly from those in the proposal. The revisions now account for NO_X reductions and take account of other mobile emissions models other than the MOBILE model. The methods appear as appendix A to this preamble. These methods are consistent with the requirements of sections 182(b)(1)(C) and (D) and 182(c)(2)(B) of the CAA.

c. Comments and Responses

Comment: One commenter agreed that the base emission level should be decreased by reductions that occur from the pre-1990 FMVCP standards (1990 I/M program and fuel RVP of 9.0 or 7.8 psi). However, the commenter further recommended that the reductions from pre-1990 FMVCP standards be calculated using the I/M program and fuel properties in effect during the new baseline year of 2002.

The commenter claimed an advantage of the recommended change is that it removes from the non-creditable reductions from the pre-1990 FMVCP standards, creditable reductions from controls implemented prior to 2003 (such as improvements to the I/M program or cleaner gasoline).

The commenter claimed that the EPA proposal specifies using the MOBILE6 command NO CAA in the calculation of the non-creditable emissions reductions. The commenter concurred that this command could be used, but recognized that some of the controls in effect during 2002 cannot be modeled with this command. (Refer to technical specifics of this comment in the response to comment document).

Response: The EPA does not agree with the commenter that the non-creditable pre-1990 FMVCP reductions should be calculated using the I/M program and fuel properties in effect during the new baseline year of 2002. Including the I/M program and fuel properties in effect in 2002 in the calculation of non-creditable reductions would not accurately account for reductions that are the result of pre-1990 Federal motor vehicle control measures. The EPA believes that the methods provided in the final rule accurately identify the non-creditable reductions from pre-1990 motor vehicle standards and provide appropriate credit for all post-1990 control measures.

12. Should EPA continue the policy of allowing substitution of controls from outside the nonattainment area within 100 kilometers for VOC and 200 kilometers for NO_X?

[Section VI.I.2. of June 2, 2003 proposed rule (68 FR 32833); no draft or final regulatory text.]

a. Background

The proposal noted [68 FR 32833] that EPA currently has a policy that allows States to take credit for RFP for NO_X and VOC controls that occur outside the nonattainment areas [''Guidance for Implementing the 1-Hour Ozone and Pre-Existing PM_{10} NAAQS, December 29, 1997'']. Specifically, the guidance allows credit for VOC reductions occurring up to 100 km outside the area and for NO_X reductions occurring up to 200 km outside the area (statewide where a regional NO_X control strategy is being implemented). The policy indicates that credit may be taken only for emissions reductions from measures not otherwise mandated by the CAA. As explained in the policy, EPA believes that this additional flexibility for crediting reductions outside nonattainment areas is consistent with the CAA. We noted in the proposed policy that reductions from outside a nonattainment area within the geographic limits contribute to progress toward attainment within the area (61 FR 65758).

Under this approach, the geographic area for substitution of VOC emissions reductions is 100 km from the nonattainment area and the geographic area for substitution of NO_X reductions is 200 km from the nonattainment area with the possibility for additional expansion of the NO_X substitution area as follows. Nitrogen oxides emissions reductions from anywhere within the State may be credited for those States that participate in a regional NO_X control strategy such as the NO_X SIP Call. All other States implementing a NO_X substitution strategy for RFP would be restricted to a distance of 200 km from the nonattainment area, unless a substitution for a greater distance is accompanied by adequate technical justification. Substitutions are restricted to intrastate areas unless two or more States involved reach mutual agreement. The EPA notes that in all cases the distances in the policy provide only a general policy presumption that, if used, would need data resources in the record showing that reductions from sources in the specific locations in attainment areas benefit the nonattainment area. *See LEAN* v. *EPA,* 382 F. 3d 575 5th Circuit, 2004.

b. Summary of Final Rule

States may continue to rely on emissions reductions from outside the nonattainment area for credit toward their RFP obligations.[49] In doing so, States should ensure that the reductions meet the standard tests of creditability (permanent, enforceable, surplus, and quantifiable) and are shown to be beneficial toward reducing ozone in the nonattainment area.

c. Comments and Responses

Comment: Several commenters supported this feature of EPA's proposal regarding RFP because it allows the States flexibility to tailor control strategies to address the issues specific to a particular nonattainment area.

The commenters supported codification (68 FR 32833, column 1) in the final rule of the December 29, 1997 guidance memo (''Guidance for Implementing the 1-Hour Ozone and Pre-Existing PM_{10} NAAQS'') that allows emissions reductions from outside the nonattainment area to be creditable toward RFP. One commenter agreed that States ought to be able to account for regional emissions in their attainment demonstrations. On the other hand, the commenter was concerned that the Agency might allow jurisdictions to ''credit'' emissions reductions from sources up to 100 km for VOC and 200 km for NO_X toward 15 percent RFP plans, and this in turn could encourage jurisdictions in need of these tonnage

[49] Last September, the EPA Office of Inspector General submitted a report (outside the rulemaking process) outlining concerns and recommendations with respect to the potential for double counting of emissions reductions and problematic equity issues. U.S. EPA Office of the Inspector General. In responding to that report, we indicated that we would consider the various recommendations as we assess existing policies and guidance in parallel to the rulemaking for implementing the 8-hour ozone standard. [*Evaluation Report: EPA and States Not Making Sufficient Progress in Reducing Ozone Precursor Emissions In Some Major Metropolitan Areas.* Report No. 2004–P–00033. September 29, 2004.] [Memorandum from Jeffrey R. Holmstead to J. Rick Beusse, ''Response to the Office of the Inspector General (OIG) Evaluation Report, *EPA and States Not Making Sufficient Progress in Reducing Ozone Precursor Emissions in Some Major Metropolitan Areas,*'' Report No. 2004–P–00033. December 29, 2004. March 25, 2005.]

reductions to regulate without a sound basis. The commenter contended that while ozone is known to be a ''regional pollutant,'' EPA has failed to establish in this rulemaking any technical basis for allowing States to impose regulations on sources outside the nonattainment area boundaries without independent justification of the impact of such sources on an area's failure to attain the standard.

Response: We developed our 1997 policy as a result of the modeling results relating to the NO_X SIP Call (*see,* for example, 63 FR 57355, October 27, 1998, and 69 FR 21604, April 21, 2004). These modeling analyses demonstrate that significant contribution to nonattainment resulted not only from source emissions within a nonattainment area but also from source emissions over a much broader area. Not only can these emissions from outside the nonattainment area affect air quality within the nonattainment area, in some cases it might be necessary to include and control emission sources located in the nearby areas in order to attain the standard. We believe it is appropriate to allow States to take credit for reductions from sources outside their nonattainment areas where data indicate that those emissions affect air quality in the nonattainment areas.

We note that section 182(c)(2)(C), which provides for the substitution of NO_X controls for VOC, speaks in terms of reductions of ozone concentrations rather than strictly reductions in emissions. This provision led us to conclude that Congress' intent for the ROP requirement is to lower ozone concentrations within the nonattainment area. It is consistent with that intent that emissions reductions from outside the nonattainment area that will reduce ozone concentrations in the nonattainment area should be creditable in RFP demonstrations. We also believe that the CAA is clear that both the 15 percent plan requirement of section 182(b)(1) and the 3 percent per year requirement of section 182(c)(2) are specific varieties of RFP requirements.[50] Section 171(1) of the CAA states that, for purposes of part D of title I, RFP ''means such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable NAAQS by the applicable date.'' Thus, whether dealing with the general RFP requirement of section 172(c)(2), or the more specific RFP requirements of subpart 2 for classified ozone nonattainment areas (i.e., the 15 percent plan requirement of section 182(b)(1) and the 3 percent per year requirement of section 182(c)(2)), the purpose of RFP is to ensure attainment by the applicable attainment date. Emissions reductions strategies applied to sources outside the nonattainment area may help decrease ambient ozone levels within the designated area. Since RFP/ROP is progress towards attainment, specific, annual emissions reductions from geographic areas outside the nonattainment area boundaries that contribute to lower ambient ozone levels in the nonattainment area would fall within the scope of ''such annual incremental reductions in emissions of the relevant air pollutant as are required * * * for the purpose of ensuring attainment of the applicable NAAQS by the applicable date.''

Comment: One commenter requested clarification that if the 100 km/200 km area extends into adjacent States that reductions in those States should also be creditable, especially with regard to the implementation of Federal measures.

Response: We intend to look into this issue further in the future as part of the overall reassessment of the 100 km/200 km credit issue.

Comment: Another commenter expressed confusion by the provision to allow creditable reductions be made outside nonattainment areas. They asked if reductions made outside a nonattainment area actually bring that nonattainment area into compliance with the standard, then shouldn't those outside areas be designated nonattainment by definition? The commenter contended that this contradiction is unacceptable, and a fatal flaw of current designation efforts and this implementation proposal.

Response: The commenter appears to be commenting on the designation process as well as the implementation rule. To the extent that the commenter has concerns about the process EPA used for designating areas as nonattainment, those issues should have been raised prior to the time EPA promulgated designations in April 2004. The EPA is not taking any action in this rulemaking to establish the procedures for designating areas or to designate areas. In the designation process that was completed in April 2004, EPA provided guidance to areas regarding how to determine the boundaries of nonattainment areas in light of the statutory definition of ''nonattainment,'' which provides that an area will be designated nonattainment if it is either violating the NAAQS or is a ''nearby'' area that ''contributes to ambient air quality'' in an area that is violating the standard.[51] The CAA does not establish a hard-and-fast set of rules for determining ''nearby'' or ''contributes to,''—i.e., it does not specify a distance that is nearby or a specific level of emissions that is deemed to ''contribute to'' nonattainment. Nor did EPA establish a hard-and-fast set of rules; rather the guidance provided a broad set of factors for States and EPA to consider in determining the boundaries of each nonattainment area. Thus, it is not inconsistent with the statute that there are areas that were not designated nonattainment, but that have emissions that affect air quality in a nonattainment area.

Comments on Draft Regulatory Text

Comment: One commenter recommended that EPA state, either in the preamble to this rule or in the rule itself, that any VOC emissions reductions within 100 km and any NO_X emissions reductions within 200 km of the nonattainment boundary, including reductions in adjacent States, are creditable for RFP plan purposes. They also suggested that EPA provide that reductions from voluntary measures should be incorporated into the baseline emissions inventory calculation.

Another commenter stated that EPA does not specify in § 51.910(a)(4) that in areas where the 3 percent annual reduction is required, those reductions must be achieved within the statutorily defined baseline ''area.'' [CAA section 182(b)(1)(B)]. The commenter stated that we issued initial NO_X substitution guidance in 1993 that required RFP reductions to be achieved from sources within the designated nonattainment area. The commenter noted that subsequently, we attempted to unlawfully allow RFP reductions to be obtained from sources within the modeling domain. The commenter advocated that we clarify that the CAA requires creditable reductions to be obtained only from sources within the designated nonattainment areas.

Response: We believe that the policy does not need to be incorporated into a rule. Since areas must include record

[50] The EPA notes that paragraph (1) of subsection 182(b) is entitled ''Plan Provisions for Reasonable Further Progress'' and that subparagraph (B) of paragraph 182(c)(2) is entitled ''Reasonable Further Progress Demonstration,'' thereby making it clear that both the 15 percent plan requirement of section 182(b)(1) and the 3 percent per year requirement of section 182(c)(2) are specific varieties of RFP requirements.

[51] Memorandum from John Seitz, ''Boundary Guidance on Air Quality Designations for the 8-Hour Ozone National Ambient Air Quality Standards (NAAQS or Standard).'' March 28, 2000. Found at: *http://www.epa.gov/ozonedesignations/guidance.htm.*

support for application of the policy in an area demonstrating that emissions from regulated sources affect ambient air quality in the specific nonattainment area, individual rulemaking in the context of an area's SIP must be conducted in any event to implement the policy. The EPA believes that any reductions that in fact result in improved air quality within the nonattainment area can be credited to RFP demonstrations. Voluntary emissions reductions that are used to satisfy RFP requirements—or any requirements under the CAA—must meet EPA's criteria for creditability of such reductions, particularly the inclusion in the baseline of the emissions from the sources that would be producing the voluntary reductions. As explained elsewhere in response to another comment on the policy of allowing substitution of controls from outside the nonattainment area within 100 km for VOC and 200 km for NO_X, EPA disagrees with the comment that the CAA limits the scope of creditable emissions reductions to only those reductions in emissions emanating from within the nonattainment area boundaries. We also address elsewhere the comment relating to allowance of RFP credit from emissions reductions outside the State in which the nonattainment area is located.

13. When must RFP emissions reductions be achieved?

[Section VI.I. of June 2, 2003 proposed rule (several locations starting at 68 FR 32832); several locations including § 51.910(a)(1) of the draft and final regulatory text.]

a. Background

Section 51.910(a)(1) of the draft regulatory text provided that for areas initially designated nonattainment for the 8-hour NAAQS, the initial 6-year period for RFP shall run from January 1, 2003 to December 31, 2008. Section 182(c)(2)(B), applicable to serious and above areas, requires that RFP be continued out to the attainment date. Therefore, § 51.910(a)(2) of the draft regulatory text provided, ''For each area classified as serious or higher under § 51.903, the State must submit no later than 3 years after the effective date of the area's nonattainment designation a SIP revision consistent with section 182(c)(2)(B) of the CAA for each 3 year period following the initial 6-year period addressed under paragraph (a)(1)(ii)(B) of this section until the area's attainment date. For areas initially designated nonattainment for the 8-hour NAAQS the 3-year periods referenced in section 182(c)(2)(B) of the Act shall begin January 1, 2009.''

In applying the requirement of section 182(c)(2)(B), it is necessary to know the attainment date for the area. The attainment date is not necessarily the maximum allowed under part D of the CAA, but must be ''as expeditious as practicable'' but no later than the maximum statutory date (e.g., 9 years after designation for a serious area). Thus, for purposes of determining the period for which RFP is needed, the State must have completed an attainment demonstration and RACM analysis (discussed elsewhere in this preamble) to demonstrate that the attainment date selected is as expeditious as practicable.

There are several other provisions that bear on the issue of when emissions reductions must be achieved for purposes of the RFP requirements. The Phase 1 Rule, § 51.900(g) sets forth the following definition: ''Attainment year ozone season shall mean the ozone season immediately preceding a nonattainment area's attainment date.'' Also, § 51.908 [52] (What is the required time frame for obtaining emission reductions to ensure attainment by the attainment date?) provides: ''For each nonattainment area, the State must provide for implementation of all control measures needed for attainment no later than the beginning of the attainment year ozone season.'' Thus, if the latest attainment date allowed by the CAA for a serious area designated in 2004 is June 15, 2013, the (complete) ozone season preceding that date would occur in 2012. However, if all of the reductions necessary to achieve attainment are in place prior to that ozone season, then the most expeditious attainment date would in fact be just after the end of that ozone season in 2012 (assuming the RACM analysis did not compel a more expeditious attainment year). Thus, in light of the Phase 1 rule, the latest possible attainment date for all areas will be just after the end of the ozone season in the year prior to the outside attainment date identified in the statute for the area's classification.[53]

Consistent with the manner in which ROP plans under the 1-hour ozone standard were developed, the RFP baseline for 2002 will have a typical summer day tons/day basis. As such, the attainment year target will also be a typical summer day target. Thus, the target level of emissions must be met by the attainment date of the attainment year.[54]

As noted above, section 182(c)(2)(B) requires that RFP be continued out to the attainment date. Thus, to some extent, the RFP requirement may help determine the attainment date. In the example discussed above of a serious area, the first milestone year after 2008 by which an annual average of 3 percent emissions reductions would have to be achieved over each 3-year period (i.e., 9 percent over 3 years) would be 2011, with an additional annual average of 3 percent per year between the end of 2011 and the attainment year (if the attainment year is beyond 2011). The maximum statutory attainment year under the discussion above would be 2013, but, for the reasons explained above concerning the date by which emissions reductions must be achieved, the actual maximum attainment year would generally be the year prior, viz., 2012. If for example this area needs an additional 7 percent emission reduction for attainment purposes beyond 2008, however, RFP would require implementation of the entire 7 percent no later than the end of 2011. Since that is the amount needed for attainment, the area would actually achieve attainment by 2011, and the attainment date would then have to be no later than 2011. If the area did not achieve this 7 percent reduction until the end of 2011, the RFP requirement in this case could not require the full 9 percent reduction. Thus, since RFP is only needed up to the attainment date, should the area achieve the 7 percent earlier in the year it would have achieved attainment and no further ROP would be required. Therefore, in this example, RFP would not require more reductions than needed for attainment. Furthermore, the RFP requirement by itself would not force an attainment year earlier than 2011 for this case (e.g., 2010—2 years after 2008), since the 7 percent reduction over 2 years is greater than an annual average of 3 percent, which is beyond that required by the RFP requirement. In summary, RFP reductions end at the attainment date, and as shown the RFP requirement would not result in emissions reductions greater than needed for attainment.

b. Summary of Final Rule

For each area classified as moderate or higher, the State's 15 percent VOC

[52] With this rulemaking, this provision is codified as 40 CFR 51.908(d).

[53] With the exception of areas with year-round ozone seasons, in which case the latest attainment date may be earlier in the year of the outside attainment date identified in the statute.

[54] Note that 40 CFR 51.900(g) defines ''Attainment year ozone season'' as the ozone season immediately preceding a nonattainment area's attainment date.

emission reduction plan must provide for the emissions reductions to be achieved by the end of the 6-year period after the baseline year. The 6-year period referenced in section 182(b)(1) of the CAA shall begin January 1 of the year following the year used for the baseline emissions inventory. For areas initially designated nonattainment for the 8-hour NAAQS, the 6-year period runs from January 1, 2003 to December 31, 2008.

For each area classified as serious or higher, the State's RFP plan must provide a 3 percent annual emission reduction requirement averaged over every 3-year period after the initial 6-year period. For areas initially designated nonattainment for the 8-hour NAAQS, the first 3-year period would run from January 1, 2009 to December 31, 2011. The final increment of progress must be achieved no later than the attainment date for the area.

To summarize, for areas designated nonattainment for the 8-hour NAAQS with an effective date of June 15, 2004, the rule would establish the following:

- The 6-year period in section 51.910(a)(1)(i)(A) and (ii)(C)(1) would run from January 1, 2003 to December 31, 2008.
- The first 3-year period in section 51.910(a)(1)(i)(B) would run from January 1, 2009 to December 31, 2011.
- The baseline emissions inventory in section 51.910(d) would be for calendar year 2002.

c. Comments and Responses

No comments were received on the proposal concerning the timing of emissions reductions needed for RFP.

14. Banked Emission Reduction Credits (Including Shutdown Credits)

Can pre-baseline emission reduction credits be used to satisfy the RFP requirement? [No discussion in June 2, 2003 proposal; no draft or final regulatory text.]

a. Background

This topic was not discussed in the proposed rulemaking, but we believe that questions that have arisen on this topic bear some discussion here.

The CAA provides the following definition in section 182(b)(1)(D) regarding the 15 percent VOC RFP requirement:

> Baseline emissions. For purposes of subparagraph (A), the term ''baseline emissions'' means the total amount of *actual VOC* or NO_X emissions from all anthropogenic sources in the area during the calendar year of the enactment of the Clean Air Act Amendments of 1990, excluding * * * [emphasis added.]

The April 1992 General Preamble provides:

> The adjusted base year inventory (i.e., baseline emissions) must contain only actual emissions occurring in the base year, 1990, within the designated nonattainment area boundaries. *The baseline emissions should not include pre-enactment banked emission credits* since they were not actual emissions during the calendar year of enactment [57 FR 13507; April 16, 1992; emphasis added].

and

> Pre-enactment banked emissions reductions credits are not creditable toward the 15 percent progress requirement. However, for purposes of equity, EPA encourages States to allow sources to use such banked emissions credits for offsets and netting. When States use such banked credits for offsets and netting to the extent otherwise creditable under the Part D NSR regulations, these pre-enactment emissions credits must be treated as growth. Consequently, this ''growth'' must be accounted for, as is the case with all other anticipated growth, in order to ensure that it does not interfere with the 15 percent rate of progress requirement (which is ''net'' of growth). In addition, when such growth emissions are used as offsets, they must be applied in accordance with the offset ratio prescribed for the area of concern (e.g., 1.3 to 1 for severe areas, etc.). All pre-enactment banked credits must be included in the nonattainment area's attainment demonstration for ozone to the extent that the State expects that such credits will be used for offsets or netting prior to attainment of the ambient standards. Credits used after that date will need to be consistent with the area's plan for maintenance of the ambient standard [57 FR 13508].

The EPA's 1992 guidance on calculating the 15 percent emission target [55] contained the following:

> 4.3 Pre-enactment Banked Emissions Reduction Credits. If the State has an emissions credit bank that meets the EPA's requirements under an earlier policy statement [56], the State is allowed to use its pre-enactment banked emissions reduction credits to facilitate the location of new sources in nonattainment areas during the 1990–1996 period. However, because these reduction credits represent emissions that are not included in the 1990 base year inventory, any additional emissions that result from the use of banked credits must be treated as growth in order to ensure that the 15 percent VOC emissions reduction requirement is achieved. Also, it is important to note that the use of pre-enactment banked emissions credits must be in accordance with the offset ratios prescribed in the CAA Amendments (e.g., 1.3 to 1 in severe areas.)

The 1992 guidance document provides an example calculation of the above guidance.

b. Interpretation for 8-Hour Ozone NAAQS

The guidance provided above is still relevant for banked emission reduction credits in relation to the RFP requirement for the 8-hour ozone standard. However, because the rule for implementing the 8-hour ozone standard uses a 2002 baseline year, the above guidance should be read—for purposes of implementing the 8-hour ozone RFP requirement—by substituting ''pre-enactment banked emission credits'' with ''pre-2002 banked emission credits.'' A pre-2002 banked emission credit is one that was generated before January 1, 2002 and that is certified in a bank that EPA has approved for such purposes. For a discussion of the use of shutdown/curtailment credits for offsets and netting, see section V.B.1.a of this preamble. For a discussion of the use of emission reduction credits for offsets and netting, see section V.D.5 of this preamble.

F. Are contingency measures required in the event of failure to meet a milestone or attain the 8-hour ozone NAAQS?

[Section VI.J. of June 2, 2003 proposed rule (68 FR 32837); no draft or final regulatory text.]

1. Background

Under the CAA, 8-hour ozone nonattainment areas subject only to subpart 1, as well as those classified under subpart 2 as moderate, serious, severe, and extreme must include in their SIPs contingency measures consistent with sections 172(c)(9) and 182(c)(9), as applicable. Contingency measures are additional controls to be implemented in the event the area fails to meet a RFP milestone or fails to attain by its attainment date. These contingency measures must be fully adopted rules or measures which are ready for implementation quickly upon failure to meet milestones or attainment.

For additional background information, see the Proposal (68 FR 32802, June 2, 2003). Other related information can be found in the following applicable guidance documents:

- ''Contingency Measures for Ozone and Carbon Monoxide (CO)

[55] Guidance on the Adjusted Base Year Emissions Inventory and the 1996 Target for the 15 Percent Rate-of-Progress Plans. Ozone/Carbon Monoxide Programs Branch, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, NC 27711. EPA–452/R–92–005. October 1992.

[56] 51 FR 233 ''Emissions Trading Policy Statement; General Principles for Creation, Banking and Use of Emission Reduction Credits; Final Policy Statement and Technical Issues Document.'' December 4, 1986. This document has been replaced by *Improving Air Quality with Economic Incentive Programs*, January 2001, available at *http://www.epa.gov/region07/programs/artd/air/policy/search.htm.*

Redesignations,'' Memorandum from G.T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, June 1, 1992,

• ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992,

• ''Guidance for Growth Factor, Projections, and Control Strategies for the 15 percent Rate-of-Progress Plans,'' (EPA–452/R–93–002), March 1993,

• ''Early Implementation of Contingency Measures for Ozone and Carbon Monoxide (CO) Nonattainment Areas,'' Memorandum from G.T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, August 13, 1993,

• ''Guidance on Issues Related to the 15 Percent Rate-of-Progress Plans,'' Memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation to the Regional Division Directors, August 23, 1993,

• ''Clarification of Issues Regarding the Contingency Measures that are due on November 15, 1993 for Moderate and Above Ozone Nonattainment Areas,'' Memorandum from D. Kent Berry, Acting Director, Air Quality Management Division, November 8, 1993, and

• ''Guidance on the Post 1996 Rate-of-Progress Plan (ROP) and Attainment Demonstration,'' (EPA–452/R–93–015), January 1994.

2. Summary of Final Rule

We are adopting the approach taken in our proposal. All subpart 1 and subpart 2 areas other than marginal areas are required to adopt contingency measures to be implemented in the event of failure to meet a RFP milestone or to attain the 8-hour ozone NAAQS. The contingency measures SIP should accompany the attainment demonstration SIP required for submission by June 15, 2007.

It should be noted that the CAA requires States to identify contingency measures that will go into effect without further action on the part of the State or EPA. We believe this language means that contingency measures should be adopted regulations but also recognize that some additional State or local action may be necessary (such as notification of sources) before implementation.

Under subpart 2, areas that are nonattainment for the 8-hour ozone NAAQS that have unused adopted contingency measures for the 1-hour ozone NAAQS may use those measures as appropriate as contingency measures for the 8-hour NAAQS.

For subpart 1 areas, States should follow EPA's existing guidance for subpart 2 areas. We intend to provide additional guidance only if needed.

3. Comments and Responses

Comment: Two commenters raised concerns about the difficulty some areas may have in identifying what they referred to as ''reserve'' or ''unused'' measures for the 1-hour standard that could be used as contingency measures for the 8-hour standard for subpart 2 areas. These commenters requested protection for areas that have no ''leftover'' measures to be used in the event of failure to meet the milestone. The commenters contended that EPA needs to have policies that do not penalize areas that have implemented all feasible measures to attain the standard and may not have any identified contingency measures left.

Response: The commenters appear to be asking EPA to drop the requirement for a nonattainment area SIP to contain contingency measures. The commenters have not provided a legal rationale why they believe it is possible to do this. The purpose of contingency measures is to have a quickly implementable backup plan of action should primary measures fail to bring a nonattaining area to the requisite level (be it attainment of the NAAQS or meeting a RFP milestone). It is up to each State to determine what measures the State will commit to implement should failure occur. We note that States may rely on regional and national control measures as well as local control measures to meet the contingency measure obligation.

A list of example contingency measures has been provided. See section 9.5 of ''Guidance for Growth Factor, Projections, and Control Strategies for the 15 percent Rate-of-Progress Plans,'' (EPA–452/R–93–002), March 1993. The States have the responsibility of determining what contingency measures are most appropriate for their area(s). To allow nonattaining areas with seemingly few potential contingency measures to opt out of the contingency measure requirement is counter to the contingency measure provision in the CAA. The EPA does not see any way to interpret the clear language of the statute other than as requiring contingency measures in all nonattainment areas other than marginal subpart 2 areas. It should also be noted that the CAA's requirement for an area's SIP to demonstrate attainment by the attainment date is not limited to the adoption only of those measures that are ''feasible.''

Comment: One commenter alleged EPA's proposal to allow Federal measures that result in additional emissions reductions beyond RFP or attainment to qualify as contingency measures is legally invalid. The commenter further stated that contingency measures must consist of control requirements that will be taken off the shelf and undertaken if and when a RFP or attainment failure occurs. In other words, contingency measures must be new measures not Federal or local measures that already exist.

Response: The CAA states that contingency measures are to be ''specific measures to be undertaken if the area fails to make reasonable further progress, or to attain * * * by the attainment date.'' The April 16, 1992 General Preamble provided the following guidance: ''States must show that their contingency measures can be implemented with minimal further action on their part and with no additional rulemaking actions such as public hearings or legislative review. In general, EPA will expect all actions needed to affect full implementation of the measures to occur within 60 days after EPA notifies the State of its failure.'' (57 FR 13512). This could include Federal measures and local measures already scheduled for implementation.

The EPA has approved numerous SIPs under this interpretation—i.e., that use as contingency measures one or more Federal or local measures that are in place and provide reductions that are in excess to the attainment demonstration or RFP plan. (62 FR 15844, April 3, 1997; 62 FR 66279, December 18, 1997; 66 FR 30811, June 8, 2001; 66 FR 586 and 66 FR 634, January 3, 2001.) The key is that the statute requires extra reductions that are not relied on for RFP or attainment and that are in the demonstration to provide a cushion while the plan is revised to meet the missed milestone. In other words, contingency measures are intended to achieve reductions over and beyond those relied on in the attainment and RFP demonstrations. Nothing in the statute precludes a State from implementing such measures before they are triggered. In fact, a recent court ruling upheld contingency measures that were previously required and implemented where they were in excess of the attainment demonstration and RFP SIP. *See LEAN* v. *EPA*, 382 F. 3d 575 5th Circuit, 2004.

Comment: One commenter supported EPA's proposal to continue to observe existing policies regarding contingency measures for areas covered under

subpart 2 for the 8-hour standard. Additionally, the commenter anticipated that EPA's additional guidance on the contingency measure requirement for subpart 1 will be patterned after the subpart 2 requirement.

Response: The EPA acknowledges the commenter's support of our proposal that subpart 2 8-hour ozone nonattainment areas may rely on our existing contingency measure guidance. As provided above, both subpart 1 and subpart 2 areas should rely on that guidance for purposes of adopting contingency measures.

G. What requirements should apply for RACM and RACT for 8-hour ozone nonattainment areas?

[Section VI.K. of June 2, 2003 proposed rule (68 FR 32837); § 51.912 in draft and final regulatory text.]

The first subsection of this section covers RACT and the second subsection covers RACM.

1. Reasonably Available Control Technology (RACT)

a. Background

As described in more detail in the June 2 proposal, subpart 1 of part D includes a requirement that an attainment plan provide for the implementation of all RACM as expeditiously as practicable, including such reductions that may be obtained through RACT. Under subpart 2, marginal areas are required to correct pre-1990 RACT requirements and new RACT requirements are specified for moderate and above ozone nonattainment areas. Additionally, States must adopt RACT for all areas in an OTR. The RACT requirement applies to both ozone precursors—NO_X and VOC. Since 1990, we have issued guidance documents on the RACT requirements in subpart 2. Prior to enactment of the CAA Amendments of 1990, EPA also issued detailed guidance documents on RACT for ozone nonattainment area SIPs.[57]

Section 183(c) of the CAA requires EPA to ''revise and update such documents [i.e., Control Techniques Guidelines and Alternative Control Techniques] as the Administrator determines necessary.'' As new or updated information becomes available States should consider the new information in their RACT determinations. States should consider the new information in any RACT determinations or certifications that have not been issued by the State as of the time such an update becomes available.[58]

The June 2, 2003 proposal addressed several aspects of the RACT requirement. For subpart 1 areas, we proposed several options. We proposed in one option to interpret the CAA in a manner similar to that under subpart 2 by requiring areas covered under subpart 1 to face different RACT requirements based on the magnitude of the ozone problem in the area (i.e., the area's design value). In another option, we proposed that RACT would be met if the area were able to demonstrate attainment of the standard as expeditiously as practicable with emission control measures in the SIP. We also proposed as an early attainment incentive that RACT would be met in an area which demonstrates attainment within 3 years and submits the demonstration within 1 year. We proposed the RACT submittal dates for subpart 1 areas would be within 2 years after designation.

For subpart 2 areas, we proposed to apply RACT as specified in subpart 2. We proposed (in the draft regulatory text) to require that States submit their subpart 2 RACT SIPs within 2 years after the nonattainment designation. In addition, we proposed the date for affected sources to implement RACT in subpart 2 areas would be 30 months after the required submittal date. We also proposed that States may use current EPA guidance in making RACT determinations; consequently, in some cases, sources previously evaluated under the 1-hour ozone RACT requirement and sources subject to the NO_X SIP Call cap-and-trade program could be determined to meet the 8-hour ozone RACT requirement.

b. Summary of Final Rule

For subpart 1 areas that do not request an attainment date extension (i.e., an attainment date beyond 5 years after designation), RACT will be met with control requirements sufficient to demonstrate that the NAAQS is attained as expeditiously as practicable. The RACT submittal date for these areas is the same as the submittal date for the attainment plan. This submission date is no later than 3 years after designation.

For subpart 1 areas that request an attainment date extension (i.e., an attainment date beyond 5 years after designation), the State shall submit the RACT SIP with its attainment date extension request.[59] For subpart 2 moderate and above areas, and areas within an OTR, RACT is required with the RACT submittal and is due 27 months after designation. States must require sources to implement RACT no later than the first ozone season or portion thereof which occurs 30 months after the required submittal date.

Where a RACT SIP submission (separate from the attainment demonstration) is required (except certain subpart 1 areas, as described two paragraphs prior to this, and except certain sources subject to the NO_X SIP Call or CAIR, as described below), State SIPs implementing the 8-hour standard must assure that RACT is met, either through a certification that previously required RACT controls represent RACT for 8-hour implementation purposes or through a new RACT determination. States may use existing EPA guidance in making RACT determinations. Where a State has adopted and EPA has approved a control measure as RACT for a specific major stationary source or source category for the 1-hour ozone NAAQS, and absent data indicating that the previous RACT determination is no longer appropriate, the State may submit a certification that the source is subject to a SIP-approved RACT requirement. Such certification shall be accompanied by appropriate supporting information, such as consideration of information received from public commenters.

For purposes of meeting the NO_X RACT requirement, the State need not perform (or submit) a NO_X RACT analysis for sources subject to the state's emission cap-and-trade program where the cap-and-trade program has been adopted by the State that meets the NO_X SIP Call requirements or, in States achieving CAIR reductions solely from EGUs, the CAIR NO_X requirements. The EPA believes that the SIP provisions for

[57] The EPA defined RACT as the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility (44 FR 53762; September 17, 1979).

[58] In addition, EPA is considering related recommendations from the Air Quality Management Work Group to the Clean Air Act Advisory Committee (CAAAC) dated January 2005 [available at: *http://www.epa.gov/air/caaac/aqm.html#library*] in response to the recent National Research Council report on *Air Quality Management in the United States* (January 2004) [available for sale; individual pages available for viewing at *http://www.nap.edu/books/0309089328/html*]. One of the recommendations to the CAAAC is that ''for the SIPs States are required to submit over the next several years, EPA and States, locals, and Tribes should promote the consideration of multipollutant impacts, including the impacts of air toxics, and where there is discretion, select regulatory approaches that maximize benefits from controlling key air toxics, as well as ozone, $PM_{2.5}$ and regional haze.'' As part of this effort, EPA intends in the future to develop updated technology guidance with respect to source categories emitting multiple pollutants in large amounts. At this time, however, we think it is unlikely that updated technology guidance will be available in time for the RACT SIPs due in 2006.

[59] This is generally expected with the submission of the attainment demonstration.

those sources meet the ozone NO_X RACT requirement. A State that is relying on this conclusion for the affected sources should document this reliance in its RACT SIP.

Additionally, RACT is considered met for cement kilns and stationary internal combustion engines that are subject to a SIP approved as meeting the NO_X SIP Call obligation to install and operate controls that are expected to achieve at least a 30 percent and 82 percent reduction, respectively, from uncontrolled levels. A State that is relying on this conclusion for the affected sources should document this reliance in its RACT SIP.

A State may meet the NO_X RACT requirement by showing that the weighted average emission rate from a broad range of sources in the nonattainment area subject to RACT meet RACT requirements.

At their discretion, States are free to conduct a case-by-case RACT determination for any source—or RACT determinations or certifications for groups of sources.

As discussed below in greater detail, States may use information gathered from prior BACT or LAER analyses, to the extent it remains valid, to help complete a RACT determination. Similarly, emissions standards developed under 111(d) and NSR/PSD settlement agreements may be considered. This will allow States, in a number of cases, to rely on these prior determinations for purposes of showing that a source is meeting RACT requirements.

For VOC sources subject to MACT standards, States may streamline their RACT analysis by including a discussion of the MACT controls and considerations relevant to VOC RACT. We believe that this will allow States, in many cases, to rely on the MACT standards for purposes of showing that a source has met VOC RACT.

Consistent with the proposed regulatory text for this rule [section 51.912(b)(1)], the final rule provides that, for purposes of meeting the RACT obligations under section 182(b)(2)(C) of the CAA for major stationary sources of VOCs and under section 182(f) of the CAA for major stationary sources of NO_X, the definition of major stationary source in section 302 of the CAA, as modified by the major source definition in either section 182(b), (c), (d) or (e) of the CAA as applicable to the area's classification, applies.

Although we drafted more extensive regulatory language for several aspects of the RACT program in the proposal, we believe it is sufficient to describe EPA's views on the details of the RACT program in today's preamble and in other guidance [e.g., the NO_X Supplement to the General Preamble, November 25, 1992 (57 FR 55620)]. Thus, some detailed portions of the proposed regulatory text regarding RACT were not retained in the final rule (in particular paragraph (b)(2) ''Prior RACT Determinations'').

c. Comments and Responses

Comments: For subpart 2 ozone nonattainment areas, several States expressed agreement with the proposed approach for implementing RACT consistent with section 182 of the CAA.

Response: The EPA agrees with these comments.

Comments: For subpart 1 ozone nonattainment areas, EPA received several comments for and against the options proposed for addressing RACT.

Several State and industry commenters supported EPA's proposed approach that RACT would be met if the area is able to demonstrate attainment of the standard as expeditiously as practicable with emission control measures in the SIP. The reasons provided by these commenters were generally as follows: States should be able to use their discretion in determining which control strategies are the most effective in addressing a particular area's air quality problem; flexibility is needed as areas differ in sensitivity to NO_X and VOC reductions; EPA's regional modeling shows these requirements are unnecessary in many areas; and many of these areas violate the ozone standard primarily or entirely due to transport.

The EPA also received comments, primarily from several States and environmental groups, opposing the approach that RACT would be met by control measures that are part of a SIP demonstrating attainment of the standard as expeditiously as practicable. These commenters made the following points: since section 172(c)(1) of the CAA explicitly mandates RACT ''at a minimum'' in all nonattainment areas, Congress plainly intended to require RACT as a floor level of control technology in addition to any measures needed to demonstrate timely attainment; even where RACT does not advance attainment, it is needed in order to reduce the severity and number of violations; under this approach, the statutory RACT provisions add nothing to the statutory attainment mandate—which violates basic canons of statutory interpretation; RACT in nonattainment areas will substantially reduce transport of ozone and ozone precursors; for equity reasons, sources in similar areas should be subject to the same control; and RACT is a useful tool that should not be abandoned through flexibility mechanisms.

Response: The general RACT provision under subpart 1 in the statute, is found in section 172(c)(1). It is a portion of the RACM provision found in that same section. Our long-standing interpretation of the RACM provision is that areas need only submit such RACM as will contribute to timely attainment and meet RFP, and that measures which might be available but would not advance attainment or contribute to RFP need not be considered RACM. This interpretation has been upheld in several recent court cases. *See Sierra Club* v. *EPA*, 294 F.39 155, 162 (D.C. Circuit, 2002) (concerning the Metropolitan Washington, D.C., attainment demonstration) and *Sierra Club* v. *EPA*, No. 01–60537 (5th Circuit, 2002) (concerning the Beaumont attainment demonstration). Since subpart 1 RACT is a portion of RACM, these cases also support a conclusion that, where we are dealing only with section 172 RACT, it is reasonable to require only such RACT as will meet RFP and advance attainment. In view of these court cases, EPA disagrees with the comments listed above opposing the approach that, in subpart 1 areas, RACT would be met by control measures in a SIP demonstrating attainment of the standard as expeditiously as practicable and meeting RFP.

The EPA generally agrees with comments that States should have flexibility to determine which control strategies are the most effective in reaching attainment as expeditiously as practicable and providing for RFP, and the CAA gives primary authority to States and local governments to select the mix of controls necessary to meet the NAAQS. In addition, EPA believes that section 172(c) is not the appropriate section of the CAA to address the transport of ozone and ozone precursors; EPA has conducted and is conducting rulemaking pursuant to sections 110 and 126 for that purpose.

Finally, some commenters suggested, for equity reasons, that sources in similar areas should be subject to the same control. In the proposal, EPA suggested subpart 1 and 2 areas with the 8-hour ozone design values above 91 ppb should be subject to VOC and NO_X RACT requirements. The EPA also proposed that RACT would be met in an area which demonstrates attainment within 3 years and submits the demonstration within 1 year. In the final rule, EPA has addressed equity concerns by taking portions of these two proposals, such that subpart 1 and subpart 2 areas with attainment

deadlines longer than 5 years after designation must meet the same RACT requirements. We believe longer than 5 years is more appropriate than the 3 years proposed for this requirement since this approximates the maximum attainment date for subpart 2 (moderate) areas subject to RACT and since this approach is consistent with the manner in which ROP/RFP requirements are treated in the final rule.

Therefore, in subpart 1 areas that do not request an extension beyond the initial 5 years after designation, the final rule indicates that RACT would be met by the emission control measures in a SIP that demonstrates attainment of the standard as expeditiously as practicable and meets RFP. In addition, the final rule requires subpart 1 areas with maximum attainment deadlines longer than 5 years after designation to meet the same RACT requirements as subpart 2 areas. This approach minimizes the RACT inequity with subpart 2 areas and provides flexibility for subpart 1 areas demonstrating attainment within 5 years.

Comment: One commenter believes that new marginal nonattainment areas should be subject to RACT under the 8-hour standard just as they would have been subject to RACT immediately prior to the CAA Amendments of 1990.

Response: Section 182(a) provides that marginal and higher classified areas for the 1-hour standard with pre-1990 RACT obligations had to submit corrections to their RACT rules within 6 months after classification under the 1990 CAA Amendments. To the extent that any 8-hour ozone nonattainment areas did have this obligation, they already met it. See footnote 60 in the June 2, 2003 proposal. The CAA does not require RACT for marginal areas other than the obligation to ''correct'' pre-1990 RACT requirements.

Comment: The EPA received several comments for and against the proposal that States may use a prior RACT determination with respect to the 1-hour ozone standard for purposes of meeting the RACT requirements for the 8-hour ozone standard. Further, EPA received comments on the proposal that a new RACT determination is required in cases where the initial RACT analysis under the 1-hour standard for a specific source or source category concluded that no additional controls were necessary.

Several State and industry commenters supported EPA's proposed approach that a prior RACT analysis under the 1-hour ozone standard should meet RACT requirements under the 8-hour standard where major sources or source categories were previously reviewed and controls applied to meet RACT. These commenters stated that RACT is not specific to any particular ozone standard, such that once a source has met RACT, it has met RACT, whether or not the ozone standard is revised to become more (or less) stringent; just as with the 15 percent VOC requirement, the statute provides no basis for duplicative imposition of RACT; and there is no basis in the statute to read in a new requirement for RACT. In addition, some industry commenters stated that EGUs which meet title IV NO_X control requirements would also meet the NO_X RACT requirement.

The EPA also received comments from several States opposing EPA's proposed approach. These commenters believe the NO_X and VOC guidance is too old, needs updating and, in the case of NO_X controls, the improvement over the last 3 years has been dramatic with controls previously considered to be BACT (and therefore generally considered at the time to be more stringent than RACT) are now considered to be merely RACT. In addition, one State suggested the presumptive RACT level should be revised to at least 85 percent control or that NO_X RACT should be defined as up to $10,000/ton of pollutant removed.

Two States disagreed with EPA's proposal that a new RACT determination should be required in cases where the initial RACT analysis under the 1-hour NAAQS found that no additional controls were necessary for a specific source or source category. They indicated such re-analysis would be an unwise use of resources because it would not yield significant benefits. Further, they do not agree that a RACT determination is warranted for major VOC or NO_X sources not in existence during the previous RACT determination, because new sources in 1-hour nonattainment areas have been permitted pursuant to the requirements for NSR and, where applicable, have already been subject to more stringent control requirements.

Several State and industry commenters recommended that RACT requirements apply for major sources in any portion of the 8-hour nonattainment area not subject to a RACT program for the 1-hour standard.

Response: In 1992, EPA set presumptive NO_X RACT for boilers as combustion modification, consistent with title IV acid rain requirements. For all other NO_X stationary source categories, EPA guidance in 1994 indicated States should consider in their RACT determinations technologies that achieve 30–50 percent reduction within a cost range of $160–1300 per ton of NO_X removed. In the NO_X SIP Call Rule, we reviewed all major NO_X source categories and stated in the final rule that the NO_X SIP Call controls, at less than $2,000/ton, represent reductions beyond those required by RACT. The suggestion of one State that EPA's RACT guidance should be revised to reflect 85 percent control and $10,000/ton of pollutant removed is inconsistent with EPA's previous conclusions regarding what level of control represents RACT and because the comment lacked supporting documentation that the suggested values represent feasible control levels for the many source categories affected by the RACT program.

Many areas subject to the major source RACT requirement under the 8-hour ozone standard have previously addressed the RACT requirement with respect to the 1-hour ozone standard. For example, major sources located in States of the Ozone Transport Commission were subject to the NO_X RACT requirement in the mid-1990s. We believe that, in many cases, a new RACT determination under the 8-hour standard would result in the same or similar control technology as the initial RACT determination under the 1-hour standard because the fundamental control techniques, as described in the CTGs and ACTs, are still applicable. In cases where controls were applied due to the 1-hour ozone RACT requirement, we expect the incremental emissions reductions from application of a second round of controls would be small and, therefore, the cost for advancing that small additional increment of reduction would not be reasonable. In such cases, EPA believes the cost per ton of NO_X removed associated with installing a second round of RACT controls (and perhaps the removal of initial RACT controls) is likely to be beyond the costs assumed in our current guidance noted above ($160–$1300/ton). In contrast, a RACT analysis for uncontrolled sources would be much more likely to find that RACT level controls are economically and technically feasible.

The CTGs and ACTs for VOC were completed over a period from the late 1970s to mid-1990s and have not been updated. The CTGs are still used to presumptively define VOC RACT. The EPA issued NO_X ACT documents between 1992 and 1995. In September 2000, updates to the NO_X ACT documents were completed for stationary internal combustion engines and cement kilns. The NO_X and VOC ACTs describe available control techniques and their cost effectiveness, but do not define presumptive RACT levels as the CTGs do. Updating the

ACTs would not, by itself, change EPA's NO_X or VOC RACT guidance, but it could provide information that would lead to a new conclusion as to which control measures constitute RACT for a specific source or source category. Since RACT can change over time as new technology becomes available or the cost of existing technology decreases, EPA does not agree with comments that once a source has met RACT, it has met RACT whether or not the ozone standard is revised.

We agree that progress has been made in improving the cost effectiveness of some NO_X and VOC controls. States and other interested parties should consider available information that may supplement the CTG and ACT documents. In cases where additional information is presented, for example, as part of notice-and-comment rulemaking on a RACT SIP submittal, States (and EPA) would necessarily consider the additional data in reviewing what control obligation is consistent with RACT. Similarly, we encourage States to use the latest information available in making RACT determinations, whether that information is in CTGs, ACTs, or elsewhere.

The EPA agrees that it is more efficient for EPA to broadly assess what is RACT for a specific source category than for States to conduct source-by-source RACT determinations, especially considering that States need to initiate RACT programs in the near future (as discussed in a separate comment/response). The EPA's current RACT guidance may be used for purposes of the 8-hour standard. At the same time, we agree with comments that many of the CTGs/ACTs have not been revised since issued and thus may not provide the most accurate picture of current control options. Therefore, we believe States must consider new information that has become available and certify that a 1-hour ozone RACT determination, even where controls were required, still represents an appropriate RACT level of control for the 8-hour ozone program. In the alternative, the State should revise the SIP to reflect a modified RACT requirement for specific sources or source categories.

In summary, we believe the current NO_X and VOC RACT guidance, including CTGs and ACTs, may continue to be used by States in making RACT determinations with respect to the 8-hour ozone standard. States should ensure that their SIPs accurately reflect RACT based on the current availability of technically and economically feasible controls.

Therefore, in portions of 8-hour ozone nonattainment areas where major sources or source categories were previously reviewed and controls applied to meet the RACT requirement under the 1-hour standard, States should review and, if appropriate, accept the initial RACT analysis as meeting the RACT requirements for the 8-hour standard. Absent data indicating that the previous RACT determination is no longer appropriate, the State need not submit in its SIP a new RACT requirement for these sources. In such cases, the State should submit a certification as part of its SIP revision, with appropriate supporting information, such as consideration of new data, that these sources are already subject to SIP-approved requirements that still meet the RACT obligation. There are cases where the initial RACT analysis under the 1-hour standard for a specific source or source category concluded that no additional controls were necessary. In such cases, a new RACT determination is needed to consider whether more cost-effective control measures have become available for sources that were not previously regulated. A re-analysis may determine that controls are now economically and technically feasible and should be required to meet RACT. Furthermore, in this situation, we expect the incremental emissions reductions to be significant, compared to the uncontrolled emissions levels. Thus, the cost per ton of emissions controlled is more likely to make controls ''reasonably available'' than where a source had already installed controls to meet RACT for the 1-hour standard. In all cases where additional information is presented as part of notice-and-comment rulemaking, including a RACT SIP submittal for sources previously controlled, States (and EPA) must consider the additional information as part of that rulemaking.

We agree with several State and industry comments that RACT requirements apply for major sources in any portion of the 8-hour nonattainment area not subject to a RACT program for the 1-hour standard.

Some commenters objected to EPA's proposal that any major VOC or NO_X source that did not exist during a previous RACT determination must be subject to a RACT determination as part of the SIP for the 8-hour ozone standard. These commenters stated that the BACT or LAER provisions would assure at least RACT level controls on such sources. We agree this should be true in many cases, but not all. The BACT/LAER analyses do not automatically ensure compliance with RACT since the regulated pollutant or source applicability may differ and the analyses may be conducted many years apart. States may, however, rely on information gathered from prior BACT or LAER analyses for the purposes of showing that a source has met RACT to the extent the information remains valid. We believe that the same logic holds true for emissions standards for municipal waste incinerators under CAA section 111(d) and NSR/PSD settlement agreements. Where the State is relying on these standards to represent a RACT level of control, the State should present their analysis with their determination during the SIP adoption process.

For VOC sources subject to MACT standards, States may streamline their RACT analysis by including a discussion of the MACT controls and relevant factors such as whether VOCs are well controlled under the relevant MACT air toxics standard, which units at the facility have MACT controls, and whether any major new developments in technologies or costs have occurred subsequent to the MACT standards. We believe that there are many VOC sources that are well controlled (e.g., through add-on controls or through substitution of non-VOC non-HAP materials for VOC HAP materials) because they are regulated by the MACT standards, which EPA developed under CAA section 112. Any source subject to MACT standards must meet a level that is as stringent as the best-controlled 12 percent of sources in the industry. Examples of these HAP sources that may effectively control VOC emissions include organic chemical plants subject to the hazardous organic NESHAP (HON), pharmaceutical production facilities, and petroleum refineries.[60] We believe that, in many cases, it will be unlikely that States will identify emission controls more stringent than the MACT standards that are not prohibitively expensive and are thus unreasonable. We believe this will allow States, in many cases, to rely on the MACT standards for purposes of showing that a source has met VOC RACT.

Comments: Some commenters pointed out that many companies have employed averaging programs for NO_X SIP Call compliance and want this option preserved under the 8-hour ozone standard since requiring sources

[60] However, there are some MACT categories for which it may not be possible to determine the degree of VOC reductions from the MACT standard without additional analysis; for example, the miscellaneous metal parts and products (40 CFR part 60, subpart MMMM) due to the uncertainty of the compliance method that will be selected.

to individually meet NO_X RACT requirements would greatly increase the costs of compliance at sources already subject to the NO_X cap-and-trade program without achieving greater emissions reductions.

Response: In some cases, a facility or a group of sources in a nonattainment area might choose to meet NO_X RACT by adopting an emissions averaging concept within the area; e.g., over-controlling one or more large units and not controlling other units. We agree with comments that emission averaging and cap-and-trade programs such as the NO_X SIP Call Rule achieve emissions reductions at lower costs. The EPA's NO_X RACT guidance, published on November 25, 1992 (57 FR 55625), was, in part, for the purpose of ''enhancing the ability of States to adopt market-based trading systems for NO_X'' and to encourage States to ''structure their RACT requirements to inherently incorporate an emissions averaging concept (i.e., installing more stringent controls on some units in exchange for lesser control on others).'' EPA believes that such cap-and-trade programs are beneficial ways to achieve the greatest overall reductions in the most cost-effective manner. Consistent with previous guidance,[61] EPA continues to believe that RACT can be met on average by a group of sources within a nonattainment area rather than at each individual source. Therefore, states can show that SIP provisions for these sources meet the ozone RACT requirement using the averaging approach.

Finally, EPA believes that sources complying with the NO_X SIP call trading system meet their RACT obligation, for reasons explained later in this section.

Comments: Several State and industry commenters supported EPA's proposed approach concerning RACT and the NO_X SIP Call. These commenters stated that the level of emissions reductions required by the NO_X SIP Call is far greater than the level of reductions achieved by controls that have been determined to be NO_X RACT. One State encouraged EPA to provide this approach to other areas subject to approved cap-and-trade programs in addition to those areas affected by the NO_X SIP Call.

The EPA also received comments, primarily from several States and environmental groups, opposing the approach. These commenters stated that there are no exceptions to the RACT mandates in either subpart 1 or subpart 2 for sources subject to NO_X SIP Call cap-and-trade programs, and EPA is without authority to invent such an exception. Because the NO_X SIP Call's cap-and-trade program does not require emission control technologies to be installed at a particular source, some commenters conclude that RACT requirements are necessary and appropriate to ensure that all sources implement at least a minimum level of control. One State indicated there have been numerous cases where sources subject to the NO_X SIP Call have not had to install controls comparable to RACT. Commenters also suggested that RACT is intended to be a benchmark for control technology at individual stationary sources, not a level of regional reductions. In addition, some commenters noted that the NO_X SIP Call requirements are specific to the ozone season, where RACT requirements are year-round. Consequently, these commenters recommended that EPA should also consider non-ozone related nitrogen issues, including fine particles, visibility, nitrification and acidification of watersheds and eutrophication of coastal waters all of which would be reduced with year-round controls.

Response: In 2009, when sources in areas designated nonattainment for the 8-hour standard in June 2004 must comply with RACT, the NO_X SIP call trading program is subsumed by the CAIR trading program. As described below, EPA believes that sources meet ozone NO_X RACT requirements if they comply with the NO_X SIP Call trading program or, in States where all CAIR reductions are achieved by EGUs, rules implementing CAIR. Accordingly, a State need not perform a NO_X RACT analysis for non-EGU sources that after 2008 continue to be subject to a SIP that regulates those non-EGU sources equally or more stringently than the State's current rules meeting the NO_X SIP call. In a NO_X SIP Call State that ensures such reductions from non-EGUs, the State need not perform a NO_X RACT analysis for EGU sources if the State retains a summer season EGU budget under CAIR that is at least as restrictive as the EGU budget that was approved in the State's NO_X SIP call SIP. In addition, the State need not perform a NO_X RACT analysis for EGUs subject to a State cap-and-trade program that meets CAIR and achieves CAIR NO_X reductions solely from EGUs. As noted above, the SIP should document that the State is relying on EPA's conclusion in this preamble that these levels of control meet RACT for the covered sources.

The EPA believes the RACT mandate in subpart 1 and subpart 2 applies in specific geographic areas but does not necessarily require every major source to install controls. For example, as discussed in a separate comment/response, where we are dealing only with subpart 1 RACT, we only require such RACT as will advance attainment or meet RFP. Thus, EPA does not agree with commenters who conclude that RACT requirements are necessary and appropriate to ensure that all sources implement at least a minimum level of control or that RACT is intended to be a benchmark for control technology at all individual stationary sources.

Some commenters pointed out that the NO_X SIP Call requirements are specific to the ozone season, yet RACT requirements are year-round. Although there are some exceptions, EPA agrees that RACT usually is an application of controls year-round; thus, there would be non-ozone-related nitrogen benefits, including fine particles, visibility, nitrification and acidification of watersheds and eutrophication of coastal waters due to year-round controls. While the commenters are correct that the NO_X SIP call reductions must be achieved during the 5 months of the ozone season critical for high ozone concentrations for affected States, we believe that the RACT requirement will be satisfied for sources covered by the NO_X SIP Call. In addition to operating advanced controls at least in the ozone season, many sources have installed combustion controls that function all the time; emissions reductions from these controls will occur year round.

(i) *NO_X SIP Call*: All States submitting SIP revisions to meet the NO_X SIP Call (October 27, 1998; 63 FR 57356) elected to require large boilers and turbines to comply with an emissions cap-and-trade program consistent with EPA's model cap-and-trade rule. As a result, the covered sources are already subject to a stringent control program.[62] As described in the June 2, 2003 proposal, these sources collectively achieve more emissions reductions within the SIP

[61] The EPA's NO_X RACT guidance (NO_X General Preamble at 57 FR 55625) encourages States to develop RACT programs that are based on ''areawide average emission rates.'' Thus, EPA's existing policy provides for States to submit a demonstration as part of their RACT submittal showing that the weighted average emission rate from sources in the nonattainment area subject to RACT meet RACT requirements.

[62] The cost of purchasing allowances will often be higher than the cost for achieving a RACT level of control. In the 1998 NO_X SIP Call Rule, average costs of compliance were estimated at about $1500/ton and average RACT level costs are less than $1300/ton. Recent estimates of the projected cost of allowances are about $2000–4000/ton ($NO_X$ Budget Trading Program, 2003 Progress and Compliance Report, August 2004, EPA–430-R–04–010).

Call area than would be required by application of RACT requirements to each source in that area. At the time that EPA promulgated the NO_X SIP Call rule, EPA estimated that in the NO_X SIP Call control case, EGUs would achieve a 64 percent reduction beyond the base case requirements,[63] and that the non-EGUs subject to the States' cap-and-trade program would achieve a 60 percent reduction from uncontrolled levels.[64] These EGU and non-EGU reductions were clearly beyond the 30–50 percent expected from a RACT program.[65] We stated in the final NO_X SIP Call rule that the reductions achieved by that program ''. . . represent reductions beyond those required by Title IV or Title I RACT.'' In addition, because the cap-and-trade program covers units serving a 25 megawatt generator, it may achieve emission reductions from many units that are below the general NO_X RACT threshold of 100 tpy for sources in the East.

EPA generally has the discretion to determine whether a State submitted rule is consistent with the RACT requirements for a particular source in the context of approving individual RACT SIPs. The NO_X SIP Call is estimated to achieve a beyond-RACT degree of control regionally, and sources were required to install any controls needed for compliance no later than May 2004. Under these circumstances, EPA believes that the NO_X SIP call constitutes RACT for those sources covered by the NO_X SIP Call, regardless of the manner of compliance of individual sources (*e.g.*, control equipment installation or purchase of allowances from other sources). EPA is making this finding now for all areas in the NO_X SIP call region, such that States need not submit RACT analyses for sources subject to the NO_X SIP call that are in compliance with a SIP approved as meeting the NO_X SIP call. A State that is relying on this conclusion for affected sources should document this reliance in its RACT SIP.

Whether our judgment that non-EGU sources subject to the NO_X SIP Call trading system meet RACT will continue to apply in the future depends upon how the State chooses to make the transition from the NO_X SIP Call trading system to the CAIR trading system. After 2008, EPA will no longer administer the NO_X SIP Call trading system and will only administer the CAIR trading system. A State subject to the NO_X SIP Call has three choices for the transition. One, a State can bring its non-EGU sources that are subject to the NO_X SIP Call trading program into the CAIR trading program with the same emissions budget allowed by the State's current NO_X SIP Call rules. Two, a State can adopt a SIP that regulates those non-EGU sources at least as stringently as the State's current NO_X SIP Call rules, but does not move those sources into the CAIR trading program. Three, a State can adopt a new SIP that meets its NO_X SIP Call responsibilities, in whole or in part, by regulating sources other than the non-EGU sources regulated by the State's current NO_X SIP Call trading program rules. We believe it is unlikely that States will choose the third option, given that its non-EGU sources already would have complied with the NO_X SIP Call requirements. Under the first two options, we believe that these non-EGU sources would continue to satisfy RACT. Under the third option, the State would need to determine whether non-EGU sources that had participated in the NO_X SIP Call trading program continue to meet RACT (either individually, or through averaging among sources within the nonattainment area).

Finally, as proposed, in cases where States have adopted controls for cement kilns consistent with the NO_X SIP Call (i.e., 30 percent reduction), the State may choose to accept the NO_X SIP Call requirements as meeting the NO_X RACT requirements for the 8-hour standard and need not perform a new NO_X RACT analysis for those sources. In its RACT SIP submission, the State should identify the cement plants that are subject to NO_X SIP Call controls and that, therefore, are already subject to a SIP-approved requirement consistent with RACT. The EPA received comments from States supporting the proposal. Similarly, EPA believes a State may choose to accept the Phase II NO_X SIP Call control level for stationary internal combustion engines[66] as meeting the NO_X RACT requirements and identify these obligations as RACT level controls in its RACT SIP.

(ii) *CAIR:* The EPA has determined that EGU sources complying with CAIR requirements meet ozone NO_X RACT requirements in States where CAIR reductions are achieved from EGUs only.

As discussed more fully in the CAIR final rulemaking, EPA has set the 2009 CAIR NO_X cap at a level that, assuming the reductions are achieved from EGUs, would result in EGUs installing emission controls on the maximum total capacity on which it is feasible to install emission controls by those dates. The 2015 NO_X cap is specifically designed to eliminate all NO_X emissions from EGUs that are highly cost effective to control (the first cap represents an interim step toward that end).[67] In general, we expect that the largest-emitting sources will be the first to install NO_X control technology and that such control technology will gradually be installed on progressively smaller-emitting sources until the ultimate cap is reached.

We do not believe that requiring source-specific RACT controls on EGUs in nonattainment areas will reduce total NO_X emissions from sources covered by CAIR below the levels that would be achieved under CAIR alone. Furthermore, we believe that source-specific RACT could result in more costly emission reductions on a per ton basis. If States chose to require smaller-emitting sources in nonattainment areas to meet source-specific RACT requirements by 2009 (the required compliance timing for RACT), they would likely use labor and other resources that would otherwise be used for emission controls on larger sources. Because of economies of scale, more boiler-makers and other resources may be required per megawatt of power generation for smaller units than larger units. Thus, the cost of achieving such reductions would be greater on a per ton basis. In any event, the imposition of source-specific control requirements on a limited number of sources also covered by a cap-and-trade program would not reduce the total emissions from sources subject to the program. Under a cap-and-trade program such as CAIR, there is a given number of allowances that equals a given emission level. Source-specific control requirements may affect the temporal distribution of emissions (by reducing banking and thus delaying early reductions) or the spatial distribution of emissions (by moving them around from one place to another), but it does not affect total emissions. If source-specific requirements were targeted at the units that can be controlled most cost effectively, then the imposition of source-specific controls would achieve the same result as the projected CAIR cap-and-trade program. If not, however,

[63] The EPA's 1992 NO_X RACT guidance provides that the controls required under title IV of the CAA are RACT controls and specifies emission rates three times larger than the rates later used for coal-fired units in the NO_X SIP Call (0.45–0.50 lb/mmBtu versus 0.15). Base case refers to the situation absent NO_X SIP call controls.

[64] 63 FR 57434–5.

[65] Memorandum of March 16, 1994, from D. Kent Berry re: ''Cost-Effective Nitrogen Oxides (NO_X) Reasonably Available Control Technology (RACT).'' U.S. Environmental Protection Agency, Research Triangle Park, North Carolina.

[66] As described in the April 21, 2004 rule (69 FR 21608).

[67] CAIR achieves about 80% of its NO_X emission reductions in 2009 (remainder in 2015).

the imposition of source-specific requirements would make any given level of emission reduction more costly than it would be under the cap-and-trade program alone. Thus, the combination of source-specific RACT and CAIR would not reduce the collective total emissions from EGUs covered by CAIR, but would likely achieve the same total emissions reductions as CAIR alone, in a more costly way. As a result, we believe that EGUs subject to the CAIR NO_X controls meet the definition of RACT for NO_X (in States that require all CAIR NO_X reductions from EGUs). EPA is making this finding now for all areas in the CAIR region, such that States need not submit RACT analyses for sources subject to CAIR that are in compliance with a SIP approved as meeting CAIR.

Under CAIR, a State may elect to meet its State budget for NO_X emissions solely through requiring reductions from EGUs or through requiring reductions from a combination of sources, including non-EGUs. If the State requires reductions from sources other than EGUs, it is not eligible to participate in the EPA-administered CAIR trading program. Additionally, separate provisions of the CAIR rule allow States to choose to allow large NO_X sources that are not EGUs to opt-in to the program. If only part of the CAIR reductions are required from EGUs, and the balance of the reductions obtained from non-EGU sources, then the stringency of CAIR EGU control would be diminished to some extent (an amount that cannot be determined until a State submits a SIP indicating which sources are participating in the program). Therefore, in these cases, the above rationales for our judgment that CAIR satisfies RACT would not apply. However, even where a State allows opt-ins from other source categories to meet CAIR emission levels, if a State transitions from the NO_X SIP call level of control to CAIR by the first two transition options for non-EGUs discussed above, the NO_X RACT requirement would be met for EGUs (and the State would not need to conduct RACT analyses for these EGUs) if the State retains a summer season EGU budget under CAIR that is at least as restrictive as the EGU budget that was set in the state's NO_X SIP call SIP. Otherwise, the State would need to conduct RACT analyses for EGUs (either on an individual basis, or using the averaging approach within the nonattainment area).

For clarity, we would note that a State has discretion to require beyond-RACT NO_X reductions from any source (including CAIR or NO_X SIP Call sources), and has an obligation to demonstrate attainment as expeditiously as practicable. In certain areas, States may require NO_X controls based on more advanced control technologies to provide for attainment of the ozone standards.

Comments: Several States expressed support for the proposed RACT submittal date of 2 years after designation for subpart 1 and subpart 2 areas. Other commenters suggested the RACT submittal date for subpart 1 areas should be 3 years after designation in order to coincide with the attainment demonstration submittal deadline and to allow a more efficient use of resources. In addition, comments from industry suggested a 48–60 month period is needed for installation of controls, rather than the 30 month period proposed.

Response: As described in an earlier comment/response, in subpart 1 areas that do not request an extension of their attainment date, RACT is met with the control requirements associated with a demonstration that the NAAQS is attained as expeditiously as practicable. The EPA agrees with commenters that it would be more efficient, in these areas, if the date for submittal of the RACT rules were to coincide with submittal of the attainment demonstration since RACT is closely tied to the attainment demonstration. Therefore, in the final rule, the RACT submittal date for these areas is the same as the submittal date for the attainment plan, which is 3 years after designation (June 2007). Although EPA is not setting a specific RACT rule implementation deadline for these areas, as provided in the Phase 1 rule, all controls necessary for attainment must be implemented by the beginning of the attainment year ozone season. For example, States would need to require implementation no later than May 1, 2008 where the area has a June 15, 2009 attainment date.[68] In some cases, the time from State rule adoption to installation of controls by sources may be relatively short; in other cases, sources may need more time. Therefore, EPA encourages States to adopt rules expeditiously (prior to the June 2007 deadline, where possible) so that sources have more than sufficient time to install the controls prior to the start of the attainment year ozone season.

For subpart 2 moderate and above areas and areas within an OTR, the final rule is similar to provisions in section 182 of the CAA which require States to submit RACT rules for these areas within 24 months after the designation. Several commenters supported this approach. Since some States may rely on submittal of SIP revisions meeting CAIR to also satisfy RACT for some sources, the final rule extends the proposed RACT submittal date of 24 months to 27 months after designation (September 15, 2006), to be consistent with the date for submittal of the CAIR SIP (September 10, 2006).

For areas subject to the 27-month RACT submittal date, EPA believes the proposed 30-month period for installation of controls is reasonable, given that this is the statutorily-prescribed period[69] (for the areas covered under subpart 2) and based on our prior experience with States adopting and implementing RACT requirements. For instance, subsequent to submission of the NO_X RACT SIP revisions for the 1-hour standard subject to the 30-month CAA period, EPA approved NO_X RACT SIP submittals in some areas which had been exempt from the requirements, including the Dallas and Houston areas, which required implementation within 2 years from the State adoption date. Also, the EPA recently determined that a 24-month period is adequate for stationary internal combustion engines to install low emission combustion controls (April 21, 2004; 69 FR 21633).

The 48 to 60-month period (June 15, 2011) for installation of controls suggested by some commenters was not adequately supported with a justification that more time is necessary. In addition, as described in an earlier comment/response, EPA anticipates that many sources which applied controls due to RACT requirements with the 1-hour ozone standard will not need to install new controls for the 8-hour standard. Thus, because fewer sources will be subject to new requirements to meet RACT for the 8-hour standard than were subject to the 1-hour standard, there will be less demand for control equipment. States and many sources face a reduced burden compared to the same CAA requirement in the 1990s.

Since the ozone season (40 CFR part 58, appendix D) does not begin for many areas until May 1, however, for areas with an effective date of designation of June 15, 2004, the final rule allows sources until the beginning of the area's 2009 ozone season (generally May 1,

[68] This assumes the ozone season in this example begins May 1.

[69] In the 1990 CAA Amendments, Congress specifically added RACT requirements for major sources in section 182. Section 182 required the RACT rules to be implemented ''as expeditiously as practicable'' but no later than 30 months after the submittal deadline.

2009) rather than March 15, 2009[70] to install controls. Installation of controls before the 2009 ozone season is sufficient to provide the benefits for timely attainment of the ozone standard in areas with a 2010 or later attainment date.[71] And the short delay (generally between March 15, 2009 and May 1, 2009) will cause no harm since it is prior to the ozone season, which is when ozone levels are most likely to be at harmful levels. Sources meeting NO_X RACT through compliance with CAIR would be subject to the CAIR NO_X caps beginning January 1, 2009. Additionally, some areas have ozone seasons that begin earlier than March 15, 2009 and would need to ensure sources are complying by that earlier date.

For subpart 1 areas that request an attainment date extension (i.e., an attainment date beyond 5 years after designation), the final rule sets the RACT submittal and implementation dates the same as required for subpart 2 moderate and above areas, except subpart 1 areas are required to submit the RACT SIP with its attainment date extension request.

2. Reasonably Available Control Measures (RACM)

a. Background

As noted in the June 2, 2003 proposed rule, subpart 1 of part D includes general requirements for all designated nonattainment areas, including a requirement that a nonattainment plan provide for the implementation of all RACM as expeditiously as practicable, including such reductions that may be obtained through RACT. We have also issued guidance for implementing the RACM provisions of the CAA that interprets that provision to require a demonstration that the State has adopted all reasonable measures to meet RFP requirements and to demonstrate attainment as expeditiously as practicable and thus that no additional measures that are reasonably available will advance the attainment date or contribute to RFP for the area.[72] The RACM requirement, which is set forth in section 172(c)(1) of the CAA, applies to all nonattainment areas that are required to submit an attainment demonstration, whether covered under only subpart 1 or also subpart 2. The June 2, 2003 proposal noted that EPA had issued policies and procedures related to RACM. The draft regulatory text (section 51.912(d)) provided that for each nonattainment area required to submit an attainment demonstration under § 51.908, the State would have to submit with the attainment demonstration a SIP revision demonstrating that it has adopted all control measures necessary to demonstrate attainment as expeditiously as practicable and to meet any RFP requirements.

b. Summary of final rule

Section 51.912(d) of the final rule reflects our proposal and draft regulatory text. For each nonattainment area required to submit an attainment demonstration under § 51.908, the State must submit with the attainment demonstration a SIP revision demonstrating that it has adopted all control measures necessary to demonstrate attainment as expeditiously as practicable and to meet any RFP requirements.

In the CAIR rulemaking (May 12, 2005, 70 FR 25221 et seq.), EPA found that the control installations projected to result from the CAIR NO_X and SO_2 caps in 2009 and 2010 would be as much as feasible from EGUs across the CAIR region by those dates. EPA concluded that the CAIR compliance dates represent an aggressive schedule that reflects the limitations of the labor pool, and equipment/vendor availability, and need for electrical generation reliability for installation of NO_X emission controls. We believe that the CAIR rule appropriately reflects the constraints the EGU sector faces in achieving NO_X reductions (and the CAIR SO_2 reductions) in a way that is as expeditious as practicable. States should recognize these constraints in developing their own compliance schedules for NO_X emission controls in meeting their CAIR and RACM responsibilities. However, the CAIR rule did not specify which sources should install emissions control equipment or reduce emission rates to a specific level in order to meet the SO_2 and NO_X caps under CAIR.

Based on our experience developing the NO_X SIP Call, CAIR, and the proposed Clear Skies Legislation, we believe that many power companies will develop their strategies for complying with CAIR based, in part, on consultations with air quality officials in the areas in which their plants are located. Because power plants are generally major emission sources, the operators of those plants typically have ongoing relationships with State and local officials that will be involved in developing air quality plans. We are aware that, in the past, companies have worked with air quality officials to meet their emission control obligations under a cap-and-trade approach such as the NO_X SIP Call while also addressing the concerns of air quality officials about the air quality impacts of specific plants. This has led to controlling emissions from power plants located in or near specific ozone nonattainment areas. A number of companies have indicated that such collaboration will be even more important as the States in which they are located address multiple air quality goals (e.g., visibility, interstate air pollution, local attainment of standards for multiple pollutants).

The EPA expects similar consultations between States and power sector companies on which plants will be controlled under CAIR, considering local attainment needs in planning for CAIR compliance. This consultation might promote opportunities to provide improved air quality earlier for large numbers of people. Power companies may identify economic advantages in situating CAIR controls to help the local area attain; for example, it might need to control fewer facilities for the area to reach attainment. These benefits may outweigh any additional marginal costs

[70] 57 months from June 15, 2004 effective date of designation (27 months to submission plus 30 months to implementation).

[71] Note, since the CAA requires attainment as expeditiously as practicable, some moderate nonattainment areas may have an attainment date earlier than June 15, 2010.

[72] ''State Implementation Plans; General Preamble for Proposed Rulemaking on Approval of Plan Revisions for Nonattainment Areas'' 44 FR 20372 at 20375. ''Provide for implementation of all reasonably available control measures (RACM) as expeditiously as practicable, insofar as necessary to assure reasonable further progress and attainment by the required date * * *''

''State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990; Proposed Rule.'' 57 FR 13498 at 13560 (April 16, 1992). In part this guidance said, ''The EPA * * * indicated that where measures that might in fact be available for implementation in the nonattainment area could not be implemented on a schedule that would advance the date for attainment in the area, EPA would not consider it reasonable to require implementation of such measures. The EPA continues to take this interpretation of the RACM requirement.'' As an example, with regard to one possible list of measures (TCMs under section 108(f) of the Act) that guidance said, ''* * * based on experience with implementing TCM's over the years, EPA now believes that local circumstances vary to such a degree from city-to-city that it is inappropriate to presume that all section 108(f) measures are reasonably available in all areas. It is more appropriate for States to consider TCM's on an area-specific, not national, basis and to consider groups of interacting measures, rather than individual measures.''

''Guidance on the Reasonably Available Control Measures (RACM) Requirement and Attainment Demonstration Submissions for Ozone Nonattainment Areas.'' John S. Seitz, Director, Office of Air Quality Planning and Standards. November 30, 1999. Web site: *www.epa.gov/ttn/oarpg/t1pgm.html.*

Memorandum of December 14, 2000, from John S. Seitz, Director, Office of Air Quality Planning and Standards, re: ''Additional Submission on RACM from States with Severe One-Hour Ozone Nonattainment Area SIPs.''

the company might incur by forgoing less costly controls on another more distant plant. In any event, the intent of these consultations would not be to upset market behavior or incentives. With respect to ozone, we anticipate that these consultations will affect individual control decisions for a few areas.

In this regard, EPA notes that CAIR SIPs will be due in 2006, while local 8-hour ozone attainment plans will be due in 2007. The EPA suggests that consultations on location of CAIR controls would be timely during State development of the CAIR SIP.

As States implement the RACM provisions in conjunction with their attainment demonstration, we recognize that for some moderate areas and some subpart 1 areas it may be difficult to demonstrate attainment in less than 5 years due to the time needed to adopt and implement controls, and the need to achieve significant emissions reductions to advance the attainment date. However, the State will need to assess RACM to determine whether the attainment date could be sooner than 5 years from designation for each nonattainment area.

EPA believes that while areas projected to attain within 5 years of designation as a result of existing national measures should still be required to conduct a RACM analysis, such areas may be able to conduct a limited RACM analysis that does not involve additional air quality modeling beyond that used for the attainment demonstration. A limited analysis of this type could involve the review of available reasonable measures, the estimation of potential emissions reductions, the evaluation of the time needed to implement these measures, and anticipated levels of regional controls affecting ozone in the nonattainment area. In lieu of conducting air quality modeling to assess the impact of potential RACM measures, existing modeling information could be considered in determining the magnitude of emissions reductions that could significantly affect air quality and potentially result in earlier attainment. If the State, in consultation with EPA, determines from this initial, more limited RACM analysis that the area may be able to advance its attainment date through implementation of reasonable measures, then the State must conduct a more detailed RACM analysis, involving air quality modeling analyses, to assess whether it can advance the attainment date.

c. Comments and Responses

Comment: One commenter asked that we clarify whether old SIP measures become RACM.

Response: Under EPA's policy concerning RACM, there are no measures that are automatically deemed RACM. The determination of whether a SIP contains all RACM requires an area-specific analysis that there are no additional economically and technologically feasible control measures (alone or in conjunction with others) that will advance the attainment date.[73] The April 16, 1992, ''General Preamble'' provides some guidance on measures that the State should consider in making its RACM determination, including ''any measure that a commenter indicates during a public comment period is reasonably available should be closely reviewed by the planning agency to determine if it is in fact reasonably available for implementation in the area in light of local circumstances.'' Such measures can be rejected as not being RACM if they will not advance attainment or provide for RFP or if they are not economically or technologically feasible.

Comment: One commenter recommended that EPA revise its policy permitting SIPs to exclude otherwise feasible and potentially RACM that achieve emissions reductions in increments less than the amount necessary to advance the attainment date by a full year. The commenter believed this was an onerous standard that has stymied development of new control measures, particularly transportation control measures. The commenter believed EPA's RACM standard is especially harmful to the ability to provide SIP credit for Smart Growth land use, due to the long timeframe over which land is developed and redeveloped. The commenter believes that ever-increasing suburbanization of our nation inflates the growth rate in VMT, thereby neutralizing improvements in vehicle emissions. The commenter claimed that a significant air quality improvement strategy for the 21st Century is compact mixed use pedestrian-friendly development near frequent transit and believed that changing land use plans in this direction will benefit air quality by reducing the rate of growth in VMT and emissions. The commenter recommended that EPA be aware of this and revise its RACM standard to encourage local governments to alter their land use plans by providing a mechanism to give credit for air quality beneficial land use changes.

Response: We do not believe our RACM policy has ''stymied'' development of new control technologies. New emission reduction technologies have surfaced and continue to surface to meet market demands resulting in part from CAA requirements, which include the requirements to demonstrate attainment as expeditiously as practicable and to make RFP toward attainment. In addition, control measures that produce emissions reductions can be approved into SIPs whether or not such measures meet the definition of RACM. Our RACM policy merely interprets the CAA as not mandating measures that do not contribute to expeditious attainment and timely RFP. The policy does not limit the potential for States to develop any control measures they wish, including land use measures. In fact, we have prepared a separate guidance document on how areas can develop and receive SIP credit for land use control measures.[74] We conclude, however, that to require areas to adopt and implement as RACM every control technology or measure that obtains a small amount of emissions reductions—even if such measure would not advance the attainment date or is not required to meet RFP requirements—is not justified. Such a policy would be extremely burdensome to planning agencies, would detract from the effort to develop more reasonable and effective controls to meet the NAAQS, and would not be necessary to meet the statutory goal of expediting attainment. For these reasons, and because such a requirement is not mandated by the statute, we are not adopting such a policy.

Comment: One commenter believed that the RACM requirements for subpart 1 areas should be designed so as to not require extensive and unneeded control due to the fact that in most or all cases these controls will not be needed for the area to attain.

Response: We believe the current RACM guidance, which applies to both subpart 1 and subpart 2 areas, works to avoid extensive and unneeded controls, while ensuring that areas meet the health-based NAAQS as expeditiously as practicable.

Comment: One commenter believed our RACM guidance provides only minimum requirements to ensure attainment as expeditiously as

[73] Ibid.

[74] Improving Air Quality Through Land Use Activities; Transportation and Regional Programs Division, Office of Transportation and Air Quality, U.S. Environmental Protection Agency. EPA420–R–01–001. January 2001.

practicable and believes that every nonattainment area must be required to consider adoption of measures that have been implemented in other areas, including the South Coast of California, so as to achieve progress and attainment as expeditiously as practicable. An area should be allowed to reject such measures only upon a showing that they are not practicable due to specified unique circumstances. The commenter urged that given the importance of this issue to fair, expeditious and lawful implementation of the 8-hour standard, EPA's final 8-hour standard implementation rule must explicitly require compliance with this guidance.

Response: To meet the RACM provision of the CAA, the State must determine as part of its attainment demonstration whether there are additional measures that are feasible that would expedite attainment. In addition, EPA's RACM policy indicates that areas should consider all candidate measures that are potentially available, including any that have been suggested for the particular nonattainment area.[75] Although areas should consider all available measures, including those being implemented in other areas such as California, areas need adopt measures only if they are both economically and technologically feasible and will advance the attainment date or are necessary for RFP. This interpretation of the section 172 requirements has recently been upheld by several courts. See, e.g., *Sierra Club* v. *EPA,* et al., 294 F. 3d 155 (D.C. Circuit, 2002).

Comment: Several commenters agreed with our proposal to require that the RACM analysis and measures be submitted within 3 years after the effective date of designation for the 8-hour NAAQS.

Response: We acknowledge the support of the comments on the submission timing of the RACM requirements.

H. How will the section 182(f) NO_X provisions be handled under the 8-hour ozone standard?

[Section VI.L. of June 2, 2003 proposed rule (68 FR 32840); § 51.913 in draft and final regulatory text.]

1. Background

While NO_X emissions are necessary for the formation of ozone in the lower atmosphere, a local decrease in NO_X emissions can, in some cases, increase local ozone concentrations. This potential ''NO_X disbenefit'' resulted in Congress including the NO_X exemption provisions in section 182(f) of the CAA for areas classified under subpart 2. Section 182(f) requires States to apply the same requirements to major stationary sources of NO_X as are applied to major stationary sources of VOC under subpart 2. The relevant requirements are RACT and nonattainment major NSR for major stationary sources of NO_X in certain ozone nonattainment areas and throughout States in the OTR.[76] In addition, section 182(f) specifies circumstances under which these NO_X requirements would be limited or would not apply (''NO_X exemption''). Further, areas granted a NO_X exemption under section 182(f) may be exempt from certain requirements of EPA's motor vehicle I/M regulations and from certain Federal requirements of general and transportation conformity.[77]

In the June 2, 2003 action, we indicated the NO_X requirements and exemption provisions in section 182(f) would apply for subpart 2 nonattainment areas and in OTRs.[78] In addition, we proposed to allow subpart 1 nonattainment areas to seek a NO_X exemption, where appropriate. Further, we proposed that areas previously granted a NO_X exemption under the 1-hour ozone standard would need to request an exemption for purposes of the 8-hour standard in order to account for any new information that may point to a different conclusion with respect to the 8-hour standard. Recently, we invited comment[79] on draft guidance intended to update the existing 1-hour ozone guidance[80] regarding section 182(f) for application to the 8-hour ozone program. We issued the updated final guidance regarding section 182(f) on January 14, 2005.[81]

2. Summary of Final Rule

As proposed, the final rule allows a person to petition the Administrator for a NO_X exemption under section 182(f) for an area classified under subpart 2 or located in an OTR or under our regulations for any other area designated nonattainment for the 8-hour ozone NAAQS. As with the 1-hour ozone standard, the NO_X exemption provision in section 182(f) applies to subpart 2 ozone nonattainment areas and in a section 184 OTR. In addition, the final rule extends to subpart 1 ozone nonattainment areas the opportunity to petition the Administrator for an exemption from nonattainment major NSR and/or RACT requirements in a manner consistent with section 182(f) provisions. The petition must contain adequate documentation that the provisions of section 182(f) and/or our regulations are met. We recently issued[82] updated guidance on appropriate documentation regarding section 182(f) for application to the 8-hour ozone program. In addition, the final rule states that a section 182(f) NO_X exemption granted under the 1-hour ozone standard does not relieve the area from any requirements under the 8-hour ozone standard. That is, a new petition with respect to 8-hour ozone must be submitted to EPA and must be approved by EPA before an area is exempt from any 8-hour ozone standard NO_X requirements.

3. Comments and Responses

Comments: Several commenters supported EPA's proposal to make NO_X waivers available to 8-hour nonattainment areas and all areas in an OTR under either subpart 1 or subpart 2, pursuant to the provisions of section 182(f) of the CAA. Some commenters stated that requiring a new NO_X waiver for the 8-hour standard amounts to rescinding the existing waivers. Another commenter asked what is needed to maintain an exemption. One commenter stated that EPA should make it clear that there is no presumption that a NO_X waiver granted under section 182(f) of the CAA for the 1-hour ozone standard

[75] In ''AState Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990; Proposed Rule,'' we noted in the discussion of the RACM requirement that ''In addition, any measure that a commenter indicates during the public commenter period is reasonably available for a given area should be closely reviewed by the planning agency to determine if it is in fact reasonably available for implementation in the area in light of local circumstances.'' The discussion of RACM in that document contains other relevant history concerning the RACM requirement.

[76] See 57 FR 55622 (''Nitrogen Oxides Supplement to the General Preamble,'' published November 25, 1992).

[77] As stated in EPA's I/M (November 5, 1992; 57 FR 52950) and conformity rules (60 FR 57179 for transportation rules and 58 FR 63214 for general rules), certain NO_X requirements in those rules do not apply where EPA grants an areawide exemption under section 182(f).

[78] 68 FR 32840.

[79] September 1, 2004 at 69 FR 53378.

[80] The EPA's primary guidance regarding section 182(f) is contained in the ''Guideline for Determining the Applicability of Nitrogen Oxide Requirements under Section 182(f),'' issued by John S. Seitz, Director, Office of Air Quality Planning and Standards, to the Regional Division Directors, December 16, 1993.

[81] Memorandum dated January 14, 2005, ''Guidance on Limiting Nitrogen Oxides (NO_X) Requirements Related to 8-Hour Ozone Implementation'' from Stephen D. Page, Director, Office of Air Quality Planning and Standards, to Air Directors, Regions I–X.

[82] Memorandum dated January 14, 2005, ''Guidance on Limiting Nitrogen Oxides (NO_X) Requirements Related to 8-Hour Ozone Implementation'' from Stephen D. Page, Director, Office of Air Quality Planning and Standards, to Air Directors, Regions I–X.

is continued for the 8-hour standard. Other commenters recommended that the NO_X waiver should automatically apply for the 8-hour ozone standard in areas where EPA previously granted a NO_X waiver under the 1-hour ozone standard. One commenter stated that the technical basis for granting waivers under the l-hour NAAQS remains valid.

Response: We agree with comments supporting the proposal to apply the section 182(f) exemption provisions to subpart 2 nonattainment areas and OTRs and to extend these protections to subpart 1 areas through regulation.

Since a NO_X exemption granted for the 1-hour ozone standard was completed through notice-and-comment rulemaking, the exemption remains effective for the 1-hour standard unless and until EPA completes rulemaking to remove or revise the waiver for a specific area. This rulemaking on the 8-hour ozone implementation program does not rescind any existing 1-hour NO_X waiver provision.

However, for areas previously granted a NO_X waiver under the 1-hour ozone standard, a petitioner would need to seek a new waiver for purposes of the 8-hour ozone standard. The EPA does not believe NO_X waivers—including those granted under the 1-hour ozone standard—should always be permanent. As sources are regulated and the mix of pollutants is altered, circumstances could show that NO_X reductions will begin to provide a benefit. In several cases, the 1-hour NO_X waiver has been removed in subsequent rulemaking actions.[83] Indeed, when EPA issued waivers under the 1-hour ozone standard, we stated that the NO_X waivers would be removed where new information became available and the rationale for the initial NO_X waiver no longer was supported. For example, the waiver may be removed through rulemaking if subsequent modeling data demonstrated an ozone attainment benefit from NO_X emission controls.

Given that many NO_X waiver actions were based on air quality and dispersion modeling analyses made in the mid-1990s for purposes of the 1-hour standard, EPA believes that newer data and analyses should be used to determine if a NO_X waiver under the 8-hour ozone standard is warranted. Many NO_X waivers were simply based on whether an area had ambient air quality showing attainment of the 1-hour ozone standard; this is not an appropriate basis for a waiver under the 8-hour ozone standard since areas may be attaining the 1-hour standard but exceeding the 8-hour standard. Some NO_X waivers were based on dispersion modeling. In some cases, the modeling later proved inadequate as attainment was not met in the forecast year. In other cases, those modeling analyses have been replaced with more recent analyses. The EPA believes that NO_X waivers under the 8-hour ozone standard should be supported by analyses specific to the 8-hour ozone standard and should consider relevant information developed after the 1-hour waivers were granted.

The EPA believes the NO_X waivers may not be granted except through notice-and-comment rulemaking action. That is, since EPA approval of a waiver request would change SIP requirements, EPA must conduct notice-and-comment rulemaking on that request. The EPA believes this requirement precludes automatic approval of 8-hour NO_X waiver requests based on previously issued 1-hour NO_X waivers.

Comment: Some commenters urged EPA to expand the section 182(f) waiver to VOC RACT as well as NO_X RACT. One commenter states that EPA has substantially more discretion under subpart 1 than it does under subpart 2, and to fail to exercise that discretion to avoid ineffective and inefficient requirements (through NO_X and VOC waivers) would be irresponsible, and an abuse of its discretion.

Response: The EPA disagrees with these comments. We do not see any provision in the CAA that would give us the authority to create such an exemption. While Congress could have created a VOC waiver at the same time the section 182(f) NO_X waiver provisions were enacted, Congress chose not to do so. The Congress further provided for additional review and study under section 185B ''to serve as the basis for the various findings contemplated in the NO_X provisions'' (H.R. Rep. 490 at 257). Under section 185B, EPA, in conjunction with the National Academy of Sciences (NAS), conducted a study on the role of ozone precursors in tropospheric ozone formation. The final section 185B report incorporates this NAS report along with an EPA report addressing the availability and extent of NO_X controls. With respect to VOC, the NAS report states that ''control of VOCs never leads to a significant increase in ozone.''[84] Thus, the section 185B report does not support a waiver provision for VOC. While dispersion modeling analyses show that NO_X emissions reductions can be counterproductive under certain circumstances (the reason for the NO_X waiver provision), we do not see a similar case for VOC.

Comment: One commenter stated that the draft guidance does not contain a discussion of the linkages between 182(f) NO_X exemptions and certain other regional NO_X reduction requirements such as the NO_X SIP Call and the proposed ''Clean Air Interstate Rule.'' The commenter believed EPA has an obligation to assess the impact of any section 182(f) exemption request under the provisions of section 110(a)(2)(D), including the potential for emissions exempted from controls to contribute to downwind nonattainment or to interfere with the maintenance of any NAAQS.

Response: As discussed in section 4.2 of the draft 8-hour exemption guidance, EPA encourages States/petitioners to include consideration of air quality effects that may extend beyond the designated nonattainment area. States should consider such impacts since they are ultimately responsible for achieving attainment in all portions of their State and for ensuring that emissions originating in their State do not contribute significantly to nonattainment in, or interfere with maintenance by, any other State. However, EPA believes NO_X exemptions under section 182(f) of the CAA and interstate transport of emissions under section 110(a)(2)(D) of the CAA can be considered independently. Section 110(a)(2)(D) requires States to reduce emissions from stationary and/or mobile sources where there is evidence showing that such emissions would contribute significantly to nonattainment or interfere with maintenance in other States. In some cases, then, EPA may grant an exemption from certain NO_X requirements and, in a separate action, require NO_X emission decreases under section 110(a)(2)(D). Thus, a NO_X exemption doesn't affect an obligation of a State to meet a NO_X budget established under a NO_X SIP Call or other transport rule.

I. Should EPA promulgate a NSR provision to encourage development patterns that reduce overall emissions?

[Section 0.9. of the June 2, 2003 proposed rule (68 FR 32849). No draft or final regulatory text.]

Note: Section V of this preamble below addresses rules for NSR for the 8-hour ozone standard. This section addresses only the June 2, 2003 proposal related to Clean Air Development Communities (CADC).

[83] E.g: Recision of NO_X waiver for the Dallas-Fort Worth area on April 20, 1999 (64 FR 19283). Also, the temporary waiver for Houston and Beaumont (originally granted April 19, 1995, expired December 31, 1997). (60 FR 19515).

[84] December 1991 NAS report, *Rethinking the Ozone Problem in Urban and Regional Air Pollution, page 377.*

1. Background

In the June 2, 2003 proposal, we considered two options designed to recognize the air quality benefits which can accrue when areas site new sources and plan development in a manner that results in overall reduced emissions. We proposed to define a community that changes its development patterns in such a way that air emissions within the nonattainment area are demonstrably reduced as a CADC. As a result of becoming a CADC, an area would obtain a certain amount of flexibility in its NSR program.

In the first option, we proposed that a CADC would have a more flexible NSR program by: (1) Being subject to subpart 1 NSR as opposed to subpart 2 NSR; (2) lowering NSR major source thresholds for these areas to make them similar to the thresholds for PSD areas; and (3) allowing areas that meet certain development criteria (development zones) to receive NSR offsets from State offset pools. In the second option, we proposed that a CADC would be able to receive a pool of NSR offset credits equal to the reduced emissions from new development patterns. Credits from the pool could be provided to any new or modified source in a ''development zone'' as offsets.

We also requested comments on the options and encouraged comments suggesting other ways of encouraging development patterns that would result in lower emissions.

2. Summary of Final Rule

The EPA is not at this time issuing any rule related to CADCs.

3. Comments and Responses

Comments: The EPA received numerous comments on the proposal, some supporting and others opposing the CADC provision. A number of the commenters noted that the proposal did not appear to have enough detail. A summary of the comments appears in the response to comment document.

Response: The EPA appreciates the many comments it has received on this section. The EPA agrees with a number of commenters that while the ideas in this section are interesting and designed to achieve useful goals, much more work is needed in a separate effort to work through the many issues involved. Therefore, EPA will not move forward with this particular effort at this time.

However, EPA does not plan to ignore the issue. The EPA will be looking to bring a group of stakeholders together to see if the group can come up with and support one or more ways that we can use existing programs and authorities to create positive incentives and tools for communities to reduce sprawl. The process will not be designed to work only through the specific issues in establishing a program to encourage CADCs as outlined in the proposal, but will be open to all ideas.

Issues related to community development, land use and ''sprawl'' will have transportation and air quality implications. Therefore, EPA will work closely with DOT in addressing these issues.

J. How will EPA ensure that the 8-hour ozone standard will be implemented in a way which allows an optimal mix of controls for ozone, $PM_{2.5}$, and regional haze?

[Section VI.P. of June 2, 2003 proposed rule (68 FR 32852); no draft or final regulatory text.]

1. Background

As noted in the proposal, in many cases, States will be developing strategies to attain both the 8-hour ozone and $PM_{2.5}$ NAAQS in the same nonattainment area or in nonattainment areas that have some area or areas in common. Additionally, requirements for regional haze apply to all areas. Certain ozone control measures may also be helpful as part of a $PM_{2.5}$ control strategy or a regional haze plan. Similarly, controls for $PM_{2.5}$ may lead to reductions in ozone or regional haze. Because the precursors for ozone and $PM_{2.5}$ may be transported hundreds of kilometers, regional scale impacts may also be relevant to consider. While EPA expects that strategies to decrease ozone concentrations will not adversely affect strategies to attain the $PM_{2.5}$ NAAQS, we also believe integration of ozone, $PM_{2.5}$, and regional haze planning will reduce overall costs of meeting multiple air quality goals.

2. Summary of final rule

We are encouraging each State with an ozone nonattainment area that overlaps or is nearby a $PM_{2.5}$ nonattainment area to take all reasonable steps to coordinate the SIP development processes for these nonattainment areas and to coordinate the development of these SIPs with the state's SIP to address the reasonable progress goals for regional haze. Specifically, EPA encourages States conducting modeling analyses for ozone to separately estimate effects of a strategy on the following: mass associated with sulfates, nitrates, organic carbon, elemental carbon, and all other species. However, while we believe such coordination may reduce the overall costs to States for implementing these programs, this final rule does not require the State to coordinate these three planning efforts.

3. Comments and Responses

Comments: Several commenters supported EPA's recommendation for States to integrate planning for 8-hour ozone, $PM_{2.5}$, and regional haze. These commenters agreed that the integration of ozone, $PM_{2.5}$ and regional haze controls will reduce the overall costs of meeting multiple air quality goals and that EPA should continue to synchronize the SIP planning requirements for these pollutants to aid in this integration. One commenter asked EPA to clarify that this analysis is not an approvability issue associated with an 8-hour attainment demonstration. Other commenters recommended that EPA require nonattainment areas to perform an integrated control strategy assessment to ensure ozone controls will not preclude optimal controls for secondary fine particles and visibility impairment.

Response: We recognize the importance of integrating planning for 8-hour ozone, $PM_{2.5}$, and regional haze as much as possible, given the overlap in technical work and likely control strategies. None of the commenters, however, has identified legal authority that allows EPA to require nonattainment areas to perform an integrated control strategy assessment to ensure ozone controls will not preclude optimal controls for secondary fine particles and visibility impairment. Therefore, we will continue to encourage States to coordinate their work, but it is not a requirement and, thus, not an approvability issue.

Comments: Other commenters encouraged EPA to identify flexibility so that areas may be provided more time if they are developing a multi-pollutant strategy. Commenters stated that it is imperative that SIP obligations and attainment dates with respect to these regulated air pollutants be harmonized and that regulatory requirements and deadlines be closely coordinated. One commenter stated this may require certain deadlines be extended and that they believe Congress would not be opposed to extending deadlines in the name of efficiency.

Response: To the extent our legal authority allows, we are working to harmonize SIP timelines for ozone, $PM_{2.5}$, and regional haze. This 8-hour ozone implementation rule is necessarily based on the existing CAA and does not assume any changes to the CAA that may occur in the future. Thus, we cannot extend the submission dates for 8-hour ozone SIPs so that they match

the later submission dates for $PM_{2.5}$ and regional haze SIPs. However, there is a substantial overlap in planning periods that will allow States to coordinate planning efforts among programs, without postponing implementation.

K. What emissions inventory requirements should apply under the 8-hour ozone NAAQS?

[Section VI.Q. of June 2, 2003 proposed rule (68 FR 32853); § 51.915 in draft and final regulatory text.]

1. Background

Section 182(a)(1) requires that marginal and above ozone nonattainment areas submit an emission inventory 2 years after designation as nonattainment in 1990. For nonattainment areas classified under subpart 2 for the 8-hour ozone standard, we proposed to interpret this to mean that an emission inventory would be required 2 years after designation (i.e., in 2006 if EPA designates areas in 2004). The Consolidated Emission Reporting Rule (CERR) in 40 CFR part 51, subpart A, requires States to submit comprehensive statewide triennial emission inventories, beginning with the 2002 inventory year, regardless of an area's attainment status. Because these emission inventories will be available, we proposed that the data elements required for emission inventories by the CERR could be used to prepare the emissions inventories under the 8-hour NAAQS. The draft regulatory text, however, did not contain a specific requirement that the emission inventory be submitted as a SIP revision within 2 years after designation.

For subpart 1 areas, section 172, paragraphs (b) and (c)(3) require submission of the nonattainment area emission inventory as part of the SIP by a date established by EPA, which cannot be later than 3 years after designation as a nonattainment area. However, the June 2, 2003 proposal did not specify a deadline for submission of the emission inventory for subpart 1 areas.

The proposal also noted that we would be updating the April 1999 ''Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations,'' EPA–454/R–99–006. This guidance has been updated and now is available as: ''Emission Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations'', EPA–454/R–05–001.[85] This guidance complements the CERR by providing guidance on how to prepare data for emissions inventory SIP submissions.

2. Summary of Final Rule

Section 51.915 of the final rule reflects our June 2, 2003 proposal but is different from the draft regulatory text. To ensure comprehensive treatment of emission inventory requirements, the final rule contains language addressing the deadlines for submission of emission inventories for both subpart 1 and subpart 2 areas. The deadlines reflect the statutory requirements of no later than 3 years after designation for a subpart 1 area, and no later than 2 years after designation for subpart 2 areas. Existing emissions reporting requirements in 40 CFR part 51, subpart A are sufficient to satisfy the emissions inventory data requirements under the 8-hour ozone NAAQS. Consistent with the statutory schedule in section 182(a)(1) of the CAA, the final regulatory text in section 51.915 requires submission of an emission inventory no later than 2 years after designation as part of a subpart 2 SIP. Consistent with the statutory schedule in paragraphs (b) and (c)(3) of section 172 of the CAA, the final regulatory text in section 51.915 requires submission of an emission inventory no later than 3 years after designation as part of a subpart 1 SIP.

In its guidance titled, ''Public Hearing Requirements for 1990 Base-Year Emissions Inventories for Ozone and Carbon Monoxide Nonattainment Areas,'' September 29, 1992, EPA set forth its interpretation of a ''*de minimis*'' deferral of the public hearing requirement and the requirement for EPA to approve or disapprove emissions inventories under section 110(k). The EPA intends to follow this guidance in implementation of the emissions inventory requirements under the 8-hour ozone standard, under which areas could defer holding public hearings on their inventories and EPA could defer approving such inventories until the time the areas adopt and submit their attainment demonstrations and/or RFP plans.

Existing emissions reporting requirements in 40 CFR part 51, subpart A can be applied to determine the data elements required for emissions inventories under the 8-hour ozone NAAQS (see, e.g. Tables 2A, 2B, 2C, and 2D). Where appropriate, the State may use the data elements developed under part 51, subpart A in preparing its emissions inventory under the 8-hour ozone NAAQS. Also, EPA expects the States to consult the guidance document ''Emission Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations'', EPA–454/R–05–001, and to submit inventories that are appropriate for the geographic area at issue and consistent with this guidance.[86] We expect the State to include in its SIP submission documentation explaining how the emissions data were calculated.

3. Comments and Responses

Comment: Several commenters said that the proposal does not discuss specific requirements above and beyond those in the CERR. However, the proposal does mention one EPA guidance document, ''Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations''. This document states that ''The EPA developed this guidance document to complement the CERR and to provide specific guidance to State and local agencies and Tribes on how to develop emissions inventories for 8-hour ozone, $PM_{2.5}$, and regional haze SIPs.'' Since the 8-hour emissions inventory requirements are the same for the CERR, there should be no additional, special requirements needed in emissions inventory development for the proposed 8-hour rule.

Response: In its proposal, when EPA referred to the CERR emissions inventory requirements as satisfying requirements for emissions inventories under the 8-hour standard, EPA was referring to the requirements for data elements. The EPA did not mean to imply that the emissions inventories developed under the CERR, which are statewide, would satisfy all aspects of SIP inventories developed for SIP submissions under the 8-hour standard. While the CERR sets forth requirements for data elements, EPA guidance complements these requirements and indicates how the data should be prepared for SIP submissions. The 2002 emission inventory submitted as a SIP element under the 8-hour ozone SIP process is not necessarily the same as the 2002 emission inventory submitted under the CERR. The two inventories differ in some important ways. For example, the CERR inventory was due June 1, 2004, while the SIP inventory due dates are later. Because of this time

[85] (available at: *http://www.epa.gov/ttn/chief/eidocs/eiguid/index.html*)

[86] The CERR requires emissions inventory data on a statewide basis.

lapse, the State may choose to revise some of the data from the CERR when it prepares its SIP inventory because of improvements in emission estimates. The SIP inventory also must be approved by EPA as a SIP element and is subject to public hearing requirements where the CERR is not. Because of the regulatory significance of the SIP inventory, EPA will need more documentation on how the SIP inventory was developed by the State as opposed to the documentation required for the CERR inventory. In addition, the geographic area encompassed by some aspects of the SIP submission inventory will be different from the statewide area covered by the CERR emissions inventory. The guidance document ''Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations'' [87] provides details on how States should prepare their emission inventory SIP submittals and discusses these and other relevant topics. If a State's 2005 emission inventory (or a later one) becomes available in time to use for an area subsequently redesignated nonattainment, then that inventory should be used. We also encourage the cooperation of the Tribes and the State and local agencies in preparing their emissions inventories.

Comment: One commenter was concerned with the timing of the release of the final version of the NONROAD model (used to estimate mobile source emissions from nonroad sources). The commenter agreed that the draft version out for comment during the comment period was superior to previous calculation methodology and should be used for planning purposes. However, EPA needs to be cognizant of how disruptive to the planning process it is for new versions of emissions models to be released and incorporated in the middle of the development of a SIP. The commenter strongly encourages EPA to expedite the review and approval of any new models that will ultimately be used by States.

Response: We acknowledge that the timing of the release of new models can sometimes complicate the SIP planning process. In this case, the timing of the final release of the NONROAD is dependent on the timing of the new nonroad standards final rule. We will do what we can to expedite the release of a new version of NONROAD that reflects the emissions benefits of the nonroad rule as soon as possible. In addition, we intend to provide guidance on the use of NONROAD that allows for completion of ongoing work with the current version of NONROAD if switching to the new version would cause significant delay. The EPA has included similar language in previous SIP policy guidance for the MOBILE model.

Comment: One commenter urged EPA to improve the quality of $PM_{2.5}$ rates in MOBILE6.2 so that areas will have a more reliable tool for creating a 2002 base-year inventory and for developing SIP revisions. The commenter was concerned about developing $PM_{2.5}$ emissions inventories because $PM_{2.5}$ emissions factors in MOBILE6.2 are based largely on the old Part #5 emission model and are not as sophisticated as the rates for CO, NO_X, and VOC. The commenter also expressed concern about the lack of knowledge and techniques available for performing on-road mobile source fine particulate emissions inventories. Metropolitan Planning Organizations (MPOs) and air quality agency staff need to have a more reliable tool and acceptable methods for creating base year $PM_{2.5}$ inventories and for SIP planning.

Response: This comment is not directly relevant to the 8-hour ozone implementation rule. However in the interest of providing clarification on the issues raised by the commenter, we provide the following background information. Particulate emission factors in MOBILE6.2 are based on the best technical information available at the time the model was developed and we believe that it is the best available tool for estimating on-road emission factors for $PM_{2.5}$. We are currently collecting additional PM data which will be incorporated in future versions of the EPA mobile source emission factor model. We continue to work to improve models and inventory methods for all pollutants. We have released technical guidance on the use of MOBILE6.2 and on methods for developing annual inventories in SIPs and conformity analyses to help MPOs and air quality agency staff perform on-road mobile source fine particulate analyses.

Comment: One commenter stated that since the CERR requires inventories every 3 years, that the CERR should replace the Emission Statement Reporting Program (ESRP) requirement, which was required before the CERR was adopted.

Response: The ESRP is statutorily prescribed in section 182 (a)(3)(B) of the CAA. The emission statement requirement satisfies a different need from the periodic emissions inventory requirement, namely that affected sources themselves have to report to the State their updated emissions information, whereas the emissions inventory requirement is a requirement on States to compile and make available to EPA an emissions inventory. We believe that the ESRP is a complementary program to the CERR and makes it easier for States to satisfy their CERR reporting requirements by providing data to the States from the sources.

Comment: One commenter said that persistent inaccuracies in official emissions inventories have hindered regulatory acknowledgment and mitigation of the automobile VOC and CO gross polluter problem. The EPA should develop realistic emissions inventories and require States to do the same. Known errors in these inventories continue to misdirect emission reduction efforts. In particular, too little focus has been placed on the potential for rapid, substantial VOC and CO reductions from the in-use automobile fleet.

Response: We agree that realistic emissions inventories are important to properly direct emission reduction efforts. Current emission factor models and inventory methods are far superior to previous models and methods and we are working to continually improve models and methods for developing emissions inventories for on-road and nonroad vehicles and equipment.

Comment: One commenter stated that the official emissions inventories generated and used by EPA and State regulatory agencies for SIP planning and implementation have been shown repeatedly to suffer from serious inaccuracies and biases. Problems with inventories include errors in the total amount of emissions, as well as errors in the apportionment of emissions among various source categories. The most serious inventory problems center on VOC and CO, while problems with NO_X inventories appear to be more modest. Since emissions inventories are a fundamental input to the process of choosing pollution reduction measures and to the modeling used to demonstrate future attainment of NAAQS, an inaccurate inventory is likely to lead to poor policy choices in terms of cost, effectiveness, or both.

Response: We agree that emissions inventories are fundamental inputs to the air quality management process. We continue to strive to work with State and local agency partners to develop emissions inventories that best reflect the real world and will thus assist in identifying control strategies to make

[87] EPA–454/R–05–001, August 2005 (available at: *http://www.epa.gov/ttn/chief/eidocs/eiguid/index.html*).

RFP and attain the NAAQS. One should be aware, however, that it is impossible to develop an emissions inventory for an area that is 100 percent accurate. Part of the problem is that most sources—including mobile sources—don't monitor and report emissions continuously, and therefore we and the States must use other methods to estimate emissions from them. Thus, emission inventories are by nature estimates of actual releases to the atmosphere. The EPA believes that current emission inventories are sufficiently accurate to support the air quality management decisions that are derived from the application of emission inventories and air quality models. The emissions data generated and used by EPA and State regulatory agencies for SIP planning and implementation is the best available. Although inventories are often criticized as lacking accuracy, seldom do critics supply better information.

Comment: One commenter stated that the Agency proposes that the latest approved version of the MOBILE model should be used to estimate emissions from on-road transportation systems. The commenter recommended that if there are other models that meet EPA performance criteria and are scientifically peer reviewed, they should also be acceptable [e.g., the California mobile model, ''EMission FACtor'' (EMFAC)].

Response: We believe that MOBILE is the best available tool for estimating emissions from on-road transportation systems outside of California. We are working to continually improve emission factor models and inventory methods for on-road vehicles. The EMFAC is not designed to be able to estimate fleet, activity, fuel, and environmental characteristics outside of California and is not a reasonable substitute for MOBILE in States other than California.

Comment: One commenter supported the use of MOBILE6 in the 8-hour emissions inventory analyses and believed that EPA should change the guidance with respect to the use of MOBILE6 from ''should be used'' to ''must be used.'' The commenter cautioned that MOBILE6 still significantly over-predicts emissions from passenger cars and light duty trucks for many reasons including the following: (1) The model does not adequately account for the benefits of onboard diagnostic regulation in non-I/M areas; and (2) the model does not reflect the decline in trips per day versus vehicle age.

Response: The EPA's January 18, 2002 SIP and conformity policy guidance document (''Policy Guidance on the Use of MOBILE6 for SIP Development and Transportation Conformity,'' memo from John Seitz and Margo Oge to EPA Regional Air Division Directors) states, ''In general, EPA believes that MOBILE6 should be used as expeditiously as possible. The Clean Air Act requires that SIP inventories and control measures be based on the most current information and applicable models that are available when a SIP is developed.'' The EPA's February 14, 2004 SIP and conformity policy guidance document (''Policy Guidance on the Use of MOBILE6.2 and the December 2003 AP–42 Method for Re-Entrained Road Dust for SIP Development and Transportation Conformity'', memo from Margo Oge and Steve Page to EPA Regional Air Division Directors) updates this by stating that ''All states other than California should use MOBILE6.2 for future VOC, NO_X, and CO SIP and conformity analyses in order to take full advantage of the improvements incorporated in this version.'' MOBILE6.2 is the most current applicable model and is based on the best information available at the time of its development and release. Therefore, EPA has indicated that it should be used.

We do not believe that more on-board diagnostic benefits in non-I/M areas was justified based on available data at the time of the release of MOBILE6.2. Likewise, we did not have sufficient data to develop alternative assumptions about the relationship between trips per day and vehicle age. We are working to continually improve emission factor models and inventory methods for on-road vehicles and will review these issues during the development of the next emission factor model.

L. What guidance should be provided that is specific to Tribes?

[Section VI.R. of June 2, 2003 proposed rule (68 FR 32854); no draft or final regulatory text.]

1. Background

As noted in the preamble to the proposal, the TAR (40 CFR, part 49), which implements section 301(d) of the CAA, gives Tribes the option of developing TIPs which can then be submitted to EPA for approval. Unlike States, Tribes are not required to develop implementation plans. Under the TAR, eligible Tribes are treated in the same manner as a State when implementing the CAA; however, EPA has determined that Tribes are not required to meet plan submittal and implementation deadlines in the CAA, e.g., 110(a)(1), 172(a)(2), 182, 187, and 191.[88]

The TAR provides flexibility for Tribes in the preparation of a TIP to address the NAAQS. The ''modular approach'' was described in the June 2, 2003 proposal of this rule. The TAR indicates that EPA ultimately has the responsibility for implementing CAA programs in Indian country, as necessary or appropriate, if Tribes choose not to implement those provisions. The EPA may find it necessary to develop a FIP to reduce emissions from sources in Indian country where the Tribe has not developed a TIP to address an air quality problem.

Finally, as discussed in the June 2, 2003 proposal, it is important for both States and Tribes to work together to coordinate planning efforts since many nonattainment areas may include both Tribal land and non-Tribal land. Coordinated planning will help ensure that the planning decisions made by the States and Tribes complement each other and that the nonattainment area makes reasonable progress toward attainment and ultimately attains the NAAQS. In reviewing and approving the individual TIPs and SIPs, we will make certain they do not conflict with the overall air quality plan for an area.

Section 301(d) of the CAA recognizes that eligible Indian Tribes are generally the appropriate non-Federal authority to implement the CAA in Indian country. As stated in the TAR, it is appropriate to treat eligible Tribes in the same manner as States, except for certain identified provisions, including provisions relating to plan submittal and implementation deadlines, 40 CFR section 49.3, 49.4. Therefore, when we discuss the role of the State in implementing this rule, we are also generally referring to eligible Tribes, with the above exception.

As we noted in the June 2, 2003 proposal, States have an obligation to notify Tribes as well as other States in advance of any public hearing(s) on their State plans that will significantly impact such jurisdictions. Under 40 CFR 51.102(d)(5), States must notify the

[88] See 40 CFR part 49.4(a). In addition, EPA determined it was not appropriate to treat Tribes similarly to States with respect to provisions of the CAA requiring as a condition of program approval the demonstration of criminal enforcement authority or providing for the delegation of such criminal enforcement authority. See 40 CFR part 49.4(g). To the extent a Tribe is precluded from asserting criminal enforcement authority, the Federal government will exercise primary criminal enforcement responsibility. See 40 CFR part 49.8. In such circumstances, Tribes seeking approval for CAA programs provide potential investigative leads to an appropriate Federal enforcement agency.

affected States of hearings on their SIPs; this requirement extends to Tribes under 301(d) of the CAA and the TAR. (40 CFR part 49). Therefore, affected Tribes that have achieved ''treatment in the same manner as States'' status must be informed of the contents of such plans and the extent of documentation to support the plans. In addition to this mandated process, we encourage States to extend the same notice to all Tribes for the reasons noted in the comment and response below. As a matter of policy, EPA intends to consult with and assist all Tribes, regardless of whether a Tribe has received Treatment in the same manner as a State (TAS) approval for the purpose of implementing its own TIP, and we encourage States to do the same.

Understanding the content of a SIP will be important to Tribes located next to areas that are required to adopt SIPs, particularly to Tribes who do not choose or have the capacity to develop a TIP. Therefore, EPA intends to offer Tribes the opportunity for consultation on activities potentially affecting the achievement and maintenance of the NAAQS in Indian country. In addition, we expect States to work with Tribes with land that is part of the same air quality area during the SIP development process and to coordinate with Tribes as they develop the SIPs. In the case where the State models projected emissions and air quality under the SIP, the Tribes should be made aware of these modeling analyses. Tribes may wish to determine if the Tribal area has been affected by upwind pollution and whether projected emissions from the Tribal area have been considered in the modeling analysis.

Generally, Tribal lands have few major sources, but in many cases, air quality in Indian country is affected by the transport—both long range and shorter distance transport—of pollutants. In many cases, Tribal nonattainment problems caused by upwind sources will not be solved by long-range transport policies, as the Tribes' geographic areas are small. Tribes are sovereign entities, and not political subdivisions of States. Strategies used for intrastate transport are not always available. Most of the strategies and policies used by States in dealing with short-range transport are not available to Tribes, e.g., requiring local governments to work together and expanding the area to include the upwind sources. Unlike Tribes, States can generally require local governments to work together, or make the nonattainment area big enough to cover contributing and affected areas. We believe that it is also unfair to Tribes to require disproportionate local regulatory efforts to compensate for upwind emissions. In many cases, attainment could not be reached even if emissions from the Tribe were zero.

To address these concerns, in the June 2, 2003 proposal, we took comment on the following: EPA will review SIPs for their effectiveness in preventing significant contributions to nonattainment in downwind Tribal areas with the same scrutiny it applies to reviewing SIPs with respect to impacts on downwind States. Where a Tribe has ''treatment in the same manner as States,'' EPA will support the Tribes in reviewing upwind area SIPS during the State public comment period.

2. Summary of Policy

We intend to take the approach noted in the proposal.

3. Comments and Responses

Comment: One commenter was concerned about the transport of pollutants, including ozone precursors from urbanized areas into areas of Indian country. The commenter expressed strong support for the proposed 8-hour implementation rule statement that ''EPA will review SIPS for their effectiveness in preventing significant contributions to nonattainment in downwind Tribal areas with the same scrutiny it applies to impacts on downwind States. Where a Tribe has 'treatment in the same manner as States,' EPA will support the Tribe in reviewing upwind area SIPs during the State public comment period.'' This commenter asked for clarification on the nature of EPA's support for Tribes without TAS status. The commenter also asked if EPA would support Tribes without TAS approval in reviewing upwind area SIPs and provide technical assistance in interpreting SIP documentation.

Response: In the TAR, we stated that the CAA protections against interstate pollutant transport apply with equal force to States and eligible Tribes. We stated that the prohibitions and authority contained in sections 110(a)(2)(D) and 126 of the CAA apply to eligible Tribes in the same manner as States. (See 63 FR 7254, 7260; February 12, 1998). Section 110(a)(2)(D) requires, among other things, that States include provisions in their SIPs that prohibit any emissions activity within the State from significantly contributing to nonattainment, interfering with maintenance of the NAAQS or PSD or visibility protection programs in another State. In addition, section 126 authorizes any State or eligible Tribe to petition EPA to enforce these prohibitions against a State containing an allegedly offending source or group of sources.

We intend to consult with and assist Tribes during the TIP and SIP development process, regardless of whether a Tribe has received TAS approval for the purpose of implementing its own TIP. Executive Orders and EPA Indian policy generally call for EPA to be proactive with the Tribes. Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' 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.'' As part of EPA's ongoing efforts to actively involve Tribal officials in the development of programs which have Tribal implications, EPA in the July 18, 2000 ''Guidance on 8-hour Ozone Designations for Indian Tribes'' established a consultation process with each Tribe that EPA used throughout the designations process regardless of whether a particular Tribe has received an eligibility determination to implement section 107 of the CAA. In summary, EPA intends, as a matter of policy, to consult with and assist interested Tribal governments, regardless of their TAS status, in ensuring that the NAAQS are achieved in Indian country, including working with those Tribes located downwind from a polluting area.

Comment: One commenter also asked us to explain how we envision our role in maintaining continued consultation with Tribes throughout the SIP development process.

Response: We intend to continue to offer Tribes the opportunity for consultation on activities potentially affecting attainment and maintenance of the NAAQS in Indian country. In addition, we expect States to work with Tribes with land that is part of a nonattainment area in the SIP development process and to inform Tribes of the content of these SIPs as they develop them. States should coordinate with Tribes when projecting emissions from counties or other areas which include areas of Indian country to ensure that assumptions regarding demographics, economic activity, commuting patterns, etc. are accurate for the Tribal portions. Where the State models project future emissions under the SIP and their effect on air quality, then Tribes should be made aware of these modeling analyses in order to determine if their Indian country is being affected by upwind pollution and whether this impact has been considered in the modeling analyses.

States have an obligation under 40 CFR 51.102(d)(5) to notify other States in advance of any public hearing(s) on their State plans which will significantly impact those other entities. This CAA requirement for States to notify other parties extends to Tribes under section 301(d) and the TAR.

Historically, States have not always understood their responsibility to coordinate with other affected entities, including, where appropriate, Tribes. States may not know how to contact Tribes, particularly when Tribal air programs are not well developed. It may be difficult for a State to obtain a copy of the control requirements for Indian country. We can assist States in identifying and contacting Tribes. When developing control strategies and making policy decisions, States, should as appropriate, coordinate with Tribes at the earliest opportunity. Where States utilize stakeholder-based consensus processes to develop SIP strategies, we recommend that Tribes be provided the opportunity to participate in the process.

We have begun providing training to Tribes about how to participate in SIP development and implementation. Many Tribes may not possess the resources to develop a TIP or may decide not to develop a TIP. Some will develop robust air quality programs, which may or may not include a TIP. We intend to work with Tribes with all levels of air management programs. In general, where areas of Indian country have poor air quality, it is most likely as a result of transported pollution sources. We recognize that the manner in which States construct the SIP and what sources the SIP controls may impact Indian country located in downwind areas.

Comment: One commenter raised concerns about the practical impacts of the NSR program on Indian Tribes. The commenter noted that Tribes have long traditions of environmental stewardship and recognize their responsibility to protect the health of their citizens. However, the commenter noted that Tribes have the right to pursue industrial and economic development. While that development must comply with all current environmental standards, the Tribes should not be burdened with requirements that in effect subsidize non-Tribal sources of pollution.

Under the nonattainment NSR program, new major sources locating in a nonattainment area are required to obtain emissions reductions, referred to as offsets. The commenter stated that this requirement poses a hardship on an Indian reservation located in a larger nonattainment area. The new source wishing to locate on the reservation must obtain offsets from elsewhere in the nonattainment area; there are not usually enough sources on the reservation to supply the needed emissions reductions. When a Tribe is located in such a nonattainment area, efforts to increase economic development may be stalled by an inability of new sources to obtain offsets. The commenter concluded that this requirement is unfair to Tribes because of past barriers to economic development in Indian country. The commenter also stated that in many cases air pollution is transported onto the reservation.

Response: The EPA acknowledges that offsets are a concern for Tribes. We are currently evaluating potential options for addressing this concern.

M. What are the requirements for OTRs under the 8-hour ozone standard?

[Section VI.S. of June 2, 2003 proposed rule (68 FR 32855); § 51.916 in draft and final regulatory text.]

1. Background

Section 176A of the CAA provides EPA with authority to establish interstate transport regions where transport of air pollutants from one or more States contributes significantly to a violation of a NAAQS in one or more other States.

Section 184 of the CAA establishes additional provisions for OTRs. Section 184(a) specifically established an OTR comprising 12 Northeast and Mid-Atlantic States and the District of Columbia in order to address the longstanding problem of interstate ozone pollution in that region. To date, the existing OTR is the only transport region for any pollutant that has been established. The general provisions of section 176A apply to any OTR established under section 184.

Section 184(b) sets forth specific VOC and NO_X regulatory requirements to be applied throughout the entire OTR, in both attainment and nonattainment areas, to reduce interstate pollution. These additional regional regulatory requirements are NSR (for VOC and NO_X), RACT (for VOC and NO_X), enhanced vehicle I/M, and Stage II vapor recovery (for vehicle refueling) or a comparable measure. In general, these requirements duplicate requirements for certain ozone nonattainment areas that are classified under subpart 2. In the proposal, we indicated that we believed that under section 184 the current OTR will remain in place and remain subject to the section 184 control requirements for purposes of the 8-hour standard.

2. Summary of Final Rule

Section 184 continues to apply for purposes of the 8-hour standard. The current OTR remains in place and the section 184 control requirements continue to apply for purposes of the 8-hour standard.

Today's rule describes RACT requirements for portions of an OTR that are not classified moderate or above. Consistent with the RACT requirement for areas classified as moderate and above for the 8-hour standard, the State must submit a SIP revision that meets the RACT requirements of section 184 of the CAA for each area in the OTR that is designated as attainment or unclassifiable or that may be classified marginal, or that is under § 51.904 of this subpart. A major stationary source for these areas is defined as a source which directly emits, or has the potential to emit, 100 tpy or more of NO_X or 50 tpy or more of VOC. For any areas in the OTR, the State is required to submit the RACT revision no later than September 16, 2006 (27 months after designation for the 8-hour NAAQS) and must provide for implementation of RACT as expeditiously as practicable but no later than May 1, 2009 (first day of the first ozone season that is 30 months after the RACT SIP is due).

We believe that this does not result in any new regulatory requirements for any area in the OTR because these regulatory requirements are not associated with an area's designation or classification and already apply regionwide under the 1-hour ozone standard. If a new OTR is established for purposes of the 8-hour standard pursuant to section 176A, that area would also be subject to the provisions and control requirements of section 184.

3. Comments and Responses

Comments: The EPA received two comments supporting our interpretation of section 184 with regard to the 8-hour standard. One commenter further asserted that for any areas that might be added to the OTR, or for any new OTR, if modeling shows that the control requirements from section 184 are not appropriate and should not be required, then EPA has the discretion to exempt such areas from those requirements. The commenter pointed to a portion of the decision in *Alabama Power* v. *Costle,* 636 F. 2d. 323 (D.C. Circuit, 1979).

Response: Regarding the comment about modeling, we are not prepared to determine whether the *de minimis* doctrine established by the court in *Alabama Power* would be available in the situation the commenter describes.

As the court in that case explained, such a determination would first require EPA to assess whether Congress, in enacting section 184 of the CAA, was so prescriptive as to foreclose granting such waivers. Since that issue of statutory interpretation for the described situation is not presently before the Agency, EPA is not addressing whether *de minimis* authority exists under section 184.

N. Are there any additional requirements related to enforcement and compliance?

[Section VI.T. of June 2, 2003 proposed rule (68 FR 32855); no draft or final regulatory text.]

1. Background

In the proposal, we noted that section 172(c)(6) requires nonattainment SIPs to ''include enforceable emission limitations, and such other control measures, means or techniques * * * as well as schedules and timetables for compliance, as may be necessary or appropriate to provide for attainment * * *'' We also noted that the current guidance, ''Guidance on Preparing Enforceable Regulations and Compliance Programs for the 15 Percent Rate-of-Progress Plans (EPA–452/R–93–005, June 1993)'' is relevant to rules adopted for SIPs under the 8-hour ozone NAAQS and should be consulted for purposes of developing appropriate nonattainment plan provisions under section 172(c)(6). We proposed no specific regulatory provisions related to compliance and enforcement.

2. Summary of Final Rule

As in the proposal, we are not setting forth any additional regulatory text related to compliance and enforcement.

3. Comments and Responses

We received no comments on the proposed approach of handling enforcement and compliance provisions related to SIPs for the 8-hour ozone standard.

O. What requirements should apply to emergency episodes?

[Section VI.U. of June 2, 2003 proposed rule (68 FR 32856); no draft or final regulatory text.]

1. Background

In the June 2, 2003 proposal, we noted that subpart H of 40 CFR part 51 specifies requirements for SIPs to address emergency air pollution episodes and for preventing air pollutant levels from reaching levels determined to cause significant harm to the health of persons. We noted that we anticipate proposing a separate rulemaking in the future to update portions of that rule.

2. Summary of Final Rule

We have not yet proposed any rule revision related to emergency episodes, and the final rule below does not contain any such rule revision.

3. Comments and Responses

We received no comments on this aspect of the proposal.

P. What ambient monitoring requirements will apply under the 8-hour ozone NAAQS?

[Section VI.V. of June 2, 2003 proposed rule (68 FR 32856); no draft or final regulatory text.]

1. Background

Ozone monitoring data play an important role in designations, control strategy development, and related implementation activities. We did not propose any revisions to current ambient monitoring requirements listed in 40 CFR part 58.

We indicated in the proposal that we do plan to modify the existing ozone monitoring requirements in a separate rulemaking as part of implementation of the National Ambient Air Monitoring Strategy (NAAMS), including adoption of a national strategy introducing national core monitoring sites (NCore) as a replacement for traditional national air monitoring stations/State and local air monitoring stations (NAMS/SLAMS) monitoring currently codified at 40 CFR part 58. Part of the NCore network would include the existing ozone monitoring sites that currently support the NAAQS-related activities. The regulatory modifications are expected to include ozone monitoring requirements based upon the population of an area and its historical/forecasted ozone air quality values.

We indicated in the proposal that as part of ongoing air quality monitoring network assessments (outside the scope of this present rulemaking), each State, local, and Tribal air monitoring agency is being asked to assess the adequacy of its air pollution monitoring networks, including those sites that measure ozone. We said we would work with these agencies to develop network plans to ensure approval of all network designs. It is expected that the number and location of the original sites will be very similar to the current network. However, on a local basis, there will be some relocation, addition, and removal of ozone sites as a result of regional network assessments.

In addition, we stated that we anticipate that we will include a requirement for measuring multiple air pollutants, including ozone precursors at select locations. The NCore sites are expected to include high-sensitivity nitrogen oxide (NO) and total reactive oxides of nitrogen (NOy) measurements at locations across the nation to support the tracking of emission reduction strategy efforts such as the NO_X SIP Call, the CAIR and, if created, a statute codifying the Administration's Clear Skies Act, which addresses NO_X reductions across the nation.

Section 182(c)(1) of the CAA requires that enhanced ozone (e.g., precursor) monitoring be conducted in any ozone nonattainment area classified as serious, severe, or extreme. Our regulations reflecting the statutory requirements are found at 40 CFR part 58. This is known as the Photochemical Assessment Monitoring Stations (PAMS) program.

The proposal noted that the PAMS monitoring requirements (referred to as ''enhanced monitoring'' under section 182(c)(1) of the CAA) are retained in areas designated as 1-hour ozone serious, severe, and extreme nonattainment areas. Areas that are designated serious or above under the 8-hour ozone NAAQS are not currently addressed in 40 CFR part 58 for ozone precursor monitoring, although such areas are subject to the section 182(c)(1) provision. We anticipated that the revisions to the monitoring regulations would also cover all areas that are classified as serious or above for the 8-hour NAAQS, including any area that is bumped up to serious or above for the 8-hour NAAQS.

2. Summary of Final Rule

There is no change from the proposal. No monitoring requirements are being promulgated as part of this rulemaking. EPA still expects to separately propose a number of amendments to the monitoring requirements, along the lines described above, in December 2005.

3. Comments and Responses

Comment: One commenter noted that the NAAMS, which will likely influence the future of the ozone monitoring network, is based on the presumption that less criteria pollutant monitoring is needed and that resources must be shifted into measures that support other analyses. The commenter pointed out that many States have already curtailed their criteria pollutant monitoring networks in order to meet program requirements. The commenter argued that we should support and maintain the ozone monitoring network since the

data is used as the basis of attainment determinations and the tracking of progress.

Response: While we did discuss some aspects of the NAAMS in the proposed rule, this rulemaking effort does not affect the ambient monitoring requirements listed in 40 CFR part 58. As such, comments on the NAAMS are not germane to this action. As noted above, we are working on a separate rulemaking effort to amend the ambient monitoring requirements. Commenters should raise any concerns they have regarding the NAAMS during the comment period on that action.

We recognize that ozone continues to pose a significant environmental threat. The NAAMS does not recommend curtailing ozone monitoring, but rather recommends that State and local agencies perform assessments of their ozone networks to assure that the available resources are used to maximum benefit. We do not foresee significant changes to the existing ozone network as a result of these assessments. The NAAMS does recommend that resources be shifted from criteria pollutant monitoring to other monitoring initiatives (e.g., air toxics) for those criteria pollutants whose ambient concentrations are well below their respective NAAQS. Specifically, the strategy recommends significant reductions in total suspended particulate (TSP), PM_{10}, SO_2, CO and NO_2 monitoring.

Comment: Two commenters questioned the appropriateness of making high sensitivity NO_X and CO measurements at NCore Level 2 sites which may be in urban areas.

Response: This rulemaking effort does not affect the ambient monitoring requirements listed in 40 CFR part 58. As such, comments on the appropriateness of making high sensitivity NO_X and CO measurements in urban areas are not germane to this action.

Comment: One commenter urged the continued support of the PAMS program. The commenter points out that the PAMS' data has been used to evaluate (and improve) emissions inventories, apply observation-based models, evaluate photochemical grid-based models, and assess effectiveness of control programs. The commenter argues that while fine-tuning the PAMS requirements may be appropriate, the program should be maintained.

Response: As part of the anti-backsliding provisions of the Phase 1 rule, the PAMS monitoring requirements are retained in areas designated as 1-hour ozone serious, severe, and extreme nonattainment areas at the time of a designation of nonattainment for the 8-hour standard. [See 40 CFR 51.900(f)(9)]. In addition, areas that are designated serious or above under the 8-hour ozone NAAQS will also be required to comply with the PAMS monitoring requirements. Also, if an area is bumped up to serious or above for the 8-hour NAAQS, it would be required to conduct the appropriate PAMS monitoring.

Currently, 40 CFR part 58 does not specifically apply to areas for purposes of the 8-hour standard. As discussed above, we are working on a separate rulemaking effort to amend the ambient monitoring requirements. We expect these revisions to ensure that all areas that are classified as serious or above for the 8-hour NAAQS are covered by the PAMS regulations. However, even in the absence of the applicability of these regulations, the enhanced monitoring requirement of section 182(c)(1) applies.

Q. When will EPA require 8-hour attainment demonstration SIP submissions?

[Section VI.W. of June 2, 2003 proposed rule (68 FR 32856); § 51.908(e) in draft regulatory text and § 51.908(d) of final regulatory text.]

1. Background

In the June 2, 2003 action, we proposed that required attainment demonstrations, which will be based on photochemical grid modeling for all areas must be submitted within 3 years after designation. However, we proposed that a subpart 1 area that desires an attainment date within 3 years after designation would have to provide a demonstration within 1 year after designation.

We noted that the proposed time of submission is expected to result in as close as possible a synchronization of the 8-hour ozone and $PM_{2.5}$ attainment demonstration SIP submittal dates.

2. Summary of Final Rule

The final rule provides that attainment demonstrations—where required—must be submitted within 3 years after the effective date of the area's nonattainment designation. As noted in section IV.D.1. above, the final rule does have a separate provision addressing submission of an early attainment demonstration.

On June 18, 2004 (69 FR 34076), EPA announced it was reconsidering the boundaries of the Las Vegas, NV, 8-hour ozone nonattainment area. The EPA deferred the effective date of the designation until September 13, 2004, and that this reconsideration would not affect the time SIPs would be due for the Clark County nonattainment area.

3. Comments and Responses

Comment: Several commenters believed some areas would need longer than 3 years to submit their attainment demonstration. At least one of these commenters noted that section 182(c)(2) allows up to 4 years (rather than 3 years) for submission of a modeled attainment demonstration for serious and above areas. One commenter recommended that EPA should consider extending attainment-modeling deadlines for nonattainment areas that are not currently contained within the 1-hour boundary, but will now be included in the 8-hour boundary. At least one commenter agreed with the timing we proposed.

Response: For the reasons stated in the proposal, we believe it is appropriate to require that the modeled attainment demonstrations be submitted within 3 years after designation. In addition, we note the following:

- In general, the CAA requires these submissions no later than 3 years following designation. See sections 172(b) and 182(b) of the CAA. At the time of enactment of the CAA Amendments of 1990, Congress allowed areas that used the recently developed and complex photochemical grid model an extra year (4 years rather than 3 years) to submit their attainment demonstration. Photochemical grid modeling is now a process more familiar to users for purposes of developing attainment demonstrations, and all areas will be using these models for purposes of their attainment demonstrations and can be completed with the time frame established in this rule. There is no distinction between the tools used for attainment modeling that would justify additional time for these areas to submit attainment demonstrations. Further, where appropriate, existing modeling exercises (e.g., regional analyses, RPO analyses, older 1-hour analyses) may be leveraged for use in certain cases. In most cases, it will not be necessary to conduct a modeling exercise ''from scratch.''
- We do not believe it is appropriate or desirable to require States to submit attainment demonstrations for areas designated nonattainment under the 8-hour standard at different times for different areas. We recognize that photochemical grid modeling—required by the CAA for interstate moderate nonattainment areas, as well as serious and higher—classified areas—will be performed on large enough scales to address transport and will in most cases encompass a number of nonattainment

areas. These numerous nonattainment areas may differ by classification (some areas may be intrastate moderate areas, some interstate moderate areas, and others serious and above nonattainment areas). Some areas that may require attainment demonstrations may be subject to subpart 1 while others may be subject to subpart 2.

• The control strategies that may be modeled for all the areas in the modeling domain will likely be modeled simultaneously, especially if all the areas are located in a single State.

• We also note that an area's RFP plan and the RACM demonstration under section 172(c)(1) are due within 3 years after designation. For the reasons stated in sections describing those requirements, it is appropriate that the attainment demonstration, the RFP plan, and the RACM demonstration be submitted at the same time.

In light of these reasons, we do not believe it is consistent with the CAA and reasonable to require submission of attainment demonstrations no later than 3 years following designation.

Although we proposed that subpart 1 areas requesting an attainment date within 3 years after designation should submit their attainment demonstration within 12 months, the final rule does not include such a provision (see section IV.D.1 above for a further discussion of this).

R. How will the statutory time periods in the CAA be addressed when we redesignate areas to nonattainment following initial designations for the 8-hour NAAQS?

[Section VI.B. of June 2, 2003 proposed rule (68 FR 32816); § 51.906 in draft and final regulatory text.]

1. Background

We noted in the proposal that section 181(b) of the CAA provides that for areas designated attainment or unclassifiable for ozone immediately following enactment of the 1990 CAA Amendments and subsequently redesignated to nonattainment, the period to the maximum statutory attainment date would run from the date the area is classified under subpart 2.[89] Thus, if an area designated as attainment for the 1-hour ozone standard in 1990 was redesignated to nonattainment for the 1-hour ozone standard in January 2002 and classified as moderate, the area's 1-hour attainment date would be no later than 6 years following January 2002, i.e., January 2008. Section 172(a)(2) of the CAA provides for attainment dates to be calculated from the time the area is designated nonattainment.

We also noted in the proposal that most of the SIP submittal dates in subpart 2 are set as a fixed period from the date of enactment of the 1990 CAA Amendments, which was also the date of designation and classification by operation of law for most subpart 2 areas. Section 181(b)(1) of the CAA provides that any fixed dates applicable in connection with any such requirements under section 110, subpart 1 and subpart 2 will be extended by operation of law to a period equal to the length of time between the date of enactment of the 1990 CAA Amendments and the date that an area is subsequently designated and classified.

2. Final Rule

We are adopting the approach set forth in the proposed rule. For any area that is initially designated attainment or unclassifiable for the 8-hour NAAQS and subsequently redesignated to nonattainment for the 8-hour ozone NAAQS, the periods for the attainment date and dates for submittal of any applicable requirements under subpart 1 or subpart 2 would run from the date of redesignation to nonattainment of the 8-hour NAAQS. This is consistent with section 181(b), which gives areas redesignated to nonattainment the same amount of time to submit plans and to attain the standard as areas initially designated nonattainment.

3. Comments and Responses

Comment: One commenter asked what the reasoning was behind the time period extension and if this is an attempt to provide equity, based on the wording of the draft regulatory text.

Response: As stated above, section 181(b)(1) of the CAA provides for extending by operation of law any absolute, fixed date applicable in connection with a nonattainment requirement by a period equal to the length of time between the date of enactment of the CAA Amendments of 1990 and the date the area is classified and redesignated as nonattainment. Thus, an area redesignated to nonattainment for the 1-hour standard and classified as moderate would have been given 3 years to submit an attainment demonstration and up to 6 years to attain, which are the same time periods given to an area designated nonattainment and classified by operation of law at the time of the 1990 CAA Amendments. Since it does not make sense to run deadlines from the date of the CAA Amendments of 1990, we have adopted an approach consistent with the intent of that section—that the statutory time periods run from the date of redesignation to nonattainment.

V. EPA's Final Rule for New Source Review

A. Background

1. The Major NSR Program

The major NSR program contained in parts C and D of title I of the CAA is a preconstruction review and permitting program applicable to new and modified major stationary sources of air pollutants regulated under the CAA. In areas not meeting health-based NAAQS and in OTRs, the program is implemented under the requirements of section 110(a)(2)(C) and part D of title I of the CAA. We call this program the ''nonattainment'' major NSR program. Subpart 1 of part D of title I contains general requirements for nonattainment areas for any criteria pollutant and subpart 2 contains provisions specifically for ozone nonattainment areas. Subparts 3 and 4 contain provisions specifically for CO monoxide and PM_{10}, respectively. In *Whitman* v. *American Trucking Associations,* [531 U.S. 457, 482–86 (2001)], the Supreme Court reviewed EPA's implementation strategy for the revised 8-hour ozone NAAQS, and remanded it to EPA to develop a reasonable resolution of the roles of subparts 1 and 2 in classifying areas for and implementing the revised ozone standard.[90]

In areas meeting the NAAQS (''attainment'' areas) or for which there is insufficient information to determine whether they meet the NAAQS (''unclassifiable'' areas), the NSR requirements under part C of title I of the CAA apply. We call this program the PSD program. Collectively, we also commonly refer to the attainment and nonattainment programs as the major NSR program. These regulations are contained in 40 CFR 51.165, 51.166, 52.21, 52.24, and part 51, appendix S. Of these, the nonattainment area regulations are contained in 40 CFR 51.165, 52.24, and part 51, appendix S.

The major NSR provisions of the CAA are implemented primarily through SIP-approved State preconstruction permitting programs. As provided in section 172(c)(5) of the CAA, the SIP

[89] Section 181(b) provides that ''any absolute, fixed date applicable in connection with any such requirement is extended by operation of law by a period equal to the length of time between the date of enactment of the CAAA of 1990 and the date the area is classified under this paragraph.'' Under section 181(b), the date of classification is the same as the date of redesignation to nonattainment.

[90] For a more complete discussion of this decision and its implications, see 69 FR 23956; April 30, 2004.

must require permits for the construction and operation of new or modified major stationary sources in accordance with section 173 of the CAA. Subpart 2 of title I of the CAA sets forth additional SIP requirements for ozone nonattainment areas, including preconstruction permitting requirements.[91]

The minimum permitting requirements States must meet before EPA can approve a State's nonattainment major NSR program into a SIP are found in part D of title I and 40 CFR 51.165. However, some States are lacking a SIP-approved major NSR program for the 8-hour ozone NAAQS. This may be because the State has never had a nonattainment area in which it needed to apply a nonattainment NSR program or because the approved program does not apply to an 8-hour ozone nonattainment area. As discussed in section V.D of this preamble, EPA is providing States 3 years to develop and submit an approvable nonattainment major NSR program for the 8-hour NAAQS. The regulations at 40 CFR 52.24(k) specify that appendix S governs permits to construct and operate in a nonattainment area or in any area designated under section 107(d) of the CAA as attainment or unclassifiable for ozone that is located in an OTR that a source applies for during this SIP development period (the interim period between the effective date of designations and the date that EPA approves a nonattainment major NSR program).

Appendix S is an interpretation of 40 CFR subpart I (including § 51.165), and has historically reflected substantially the same requirements as those in § 51.165, subject to a limited exemption in section VI. This includes the requirement that a source comply with LAER and obtain offsetting emissions reductions. Pursuant to section 52.24(k), where necessary, appendix S governs nonattainment major NSR permitting of ozone precursors in 8-hour ozone nonattainment areas and all areas within the OTR, including areas designated attainment/unclassifiable, during the SIP development period. Thus, consistent with section 110(a)(2)(C), permitting of new and modified stationary sources in the area will be regulated as necessary to ensure that the NAAQS are achieved.

As we describe further in section V.A.2 of this preamble, today's final regulations were proposed as part of two different regulatory packages. On July 23, 1996 (61 FR 38250), we proposed changes to the major NSR program, including codification of the requirements of part D of title I of the 1990 CAA Amendments.[92] On June 2, 2003 (68 FR 32802), we proposed a rule to implement the 8-hour ozone NAAQS. On April 30, 2004, we promulgated the Phase 1 final rule and you will find a summary of the regulatory development process and stakeholder development for that rulemaking at 69 FR 23951.

2. What We Proposed

a. Proposed Changes to Incorporate the 1990 CAA Amendments

On July 23, 1996 (61 FR 38250), we proposed changes to § 51.165 and appendix S to incorporate requirements in part D of title I of the 1990 CAA Amendments for ozone, CO, and PM_{10} nonattainment areas. Concerning ozone, we proposed (among other things) to codify the following provisions from section 182 of the CAA:

- Major stationary source thresholds (ranging from 10 to 100 tpy, depending on classification),
- Significant emission rates (ranging from 0 to 25 tpy),
- Offset ratios (ranging from 1.1:1 to 1.5:1), and
- Special modification provisions implementing CAA sections 182(c), (d), and (e) for serious, severe, and extreme ozone nonattainment areas.

In the 1996 proposal, we proposed that the major stationary source thresholds and offset ratios of CAA section 182 (subpart 2 of part D) would apply to all major stationary sources of VOC and NO_X to implement major NSR under the 1-hour ozone NAAQS. This proposal is consistent with the 1991 and 1992 Transition Policy Memos explaining major NSR requirements under the 1990 CAA Amendments.[93] These memos also explained that permits must comply with the new statutory requirements for major NSR under the 1-hour NAAQS after the deadlines set by Congress, regardless of the delay in incorporating them into SIPs.

Our 1996 proposal predated promulgation of the 8-hour ozone NAAQS and thus did not explain the details of implementation of these standards under § 51.165 or appendix S. For a discussion of implementation of the 1-hour and 8-hour ozone NAAQS under § 51.165 and appendix S, see section V.D. of this preamble.

Also, in our 1996 action, and then again in our June 2, 2003 action, we proposed to amend our nonattainment NSR provisions to expressly include NO_X as an ozone precursor in nonattainment major NSR programs (61 FR 38297, 68 FR 32847). We also proposed that, as provided under CAA section 182(f), a waiver from nonattainment NSR for NO_X as an ozone precursor would be available for both subpart 1 and subpart 2 areas (68 FR 32846).

On June 2, 2003, we proposed a rule to identify the statutory requirements that apply for purposes of developing SIPs under the CAA to implement the 8-hour ozone NAAQS (68 FR 32802). Specifically, we proposed two options-one in which all nonattainment areas would be classified and regulated under subpart 2 of part D of title I, and one in which some nonattainment areas would be regulated under the less restrictive requirements of subpart 1 and some would be classified and regulated under subpart 2. For areas classified under subpart 2—those with a 1-hour ozone design value at or above 0.121 ppm—the classifications set forth in subpart 2 (marginal, moderate, etc.) would govern part D SIPs for the 8-hour ozone standard, with each area's classification determined by a modified version of the subpart 2 classification table containing 1-hour design values and translated 8-hour design values for each classification. The NSR permitting requirements for the 8-hour ozone standard necessarily follow from the classification scheme chosen under the terms of subpart 1 and subpart 2. We did not propose specific regulatory language for implementation of NSR under the 8-hour NAAQS. However, we indicated that we intended to revise the nonattainment NSR regulations to be consistent with the rule for implementing the 8-hour ozone NAAQS (68 FR 32844).

Concerning CO, in 1996 we proposed the following:

- Major stationary source threshold of 50 tpy for serious nonattainment areas in which the Administrator has determined that stationary sources are significant contributors to CO levels,

[91] In some cases, subpart 1 and subpart 2 requirements are inconsistent or overlap. To the extent that subpart 2 addresses a specific obligation, the provisions in subpart 2 control (68 FR 32811; June 2, 2003).

[92] On December 31, 2002, we finalized five actions from that proposal related to the applicability of the NSR regulations. For a summary of the regulatory development process and stakeholder development for that rulemaking, see 67 FR 80188.

[93] John S. Seitz, ''New Source Review (NSR) Program Transitional Guidance,'' March 11, 1991. We provided additional transitional guidance for nonattainment areas in our September 3, 1992 memorandum, New Source Review (NSR) Program Supplemental Transitional Guidance on Applicability of New Part D NSR Permit Requirements, from John S. Seitz, Director, Office of Air Quality Planning and Standards.

• Significant emission rate of 50 tpy for serious nonattainment areas in which the Administrator has determined that stationary sources are significant contributors to CO levels.

Concerning PM_{10}, in 1996, we proposed to amend our nonattainment NSR regulations to incorporate requirements of the 1990 CAA Amendments and establish significant emission rates. Specifically, we proposed the following:

• Major stationary source threshold of 100 tpy PM_{10} or any specific PM_{10} precursor in moderate PM_{10} nonattainment areas,

• Major stationary source threshold of 70 tpy PM_{10} or any specific PM_{10} precursor in serious PM_{10} nonattainment areas, and

• Significant emission rate of 15 tpy PM_{10} and 40 tpy PM_{10} precursors.

b. Proposed Changes To Criteria for Emission Reduction Credits From Shutdowns and Curtailments

In 1996 we proposed to revise the regulations limiting offsets from emissions reductions due to shutting down an existing source or curtailing production or operating hours below baseline levels (''shutdowns/curtailments''). The prior regulations at § 51.165(a)(3)(ii)(C) provided that such emissions reductions could be used as offsets if the State lacked an approved attainment demonstration, unless the shutdown/curtailment occurred after the date the new source permit application was filed or the applicant could establish that the proposed new source is a replacement for the shutdown/curtailed source. We proposed to revise the existing provisions for crediting emissions reductions by restructuring existing § 51.165(a)(3)(ii)(C)(1) and (2) for clarity without changing the current requirements therein. [See proposed § 51.165 (a)(3)(ii)(C)(1) through (4)]. We also proposed substantive revisions in two alternatives that would ease, under certain circumstances, the existing restrictions on the use of emission reduction credits from source shutdowns and curtailments as offsets. We explained that easing the restrictions may be warranted by the 1990 CAA Amendments, in which Congress significantly reworked the attainment planning requirements of part D of title I of the CAA such that an approved attainment demonstration is unnecessary.

The revised CAA emphasizes the emission inventory as the first requirement in planning, includes new provisions keyed to the inventory requirements, and mandates several adverse consequences for States that fail to meet the planning or emissions reductions requirements related to inventories.[94] In 1993, we issued a policy memorandum addressing the use of shutdown credits for offsets in ozone nonattainment areas and areas in the OTR in light of the new statutory requirements.[95] According to our longstanding policy, we emphasized that sources may use emission reduction credits generated from shutdowns and curtailments as offsets if the State continues to include the emissions in the emissions inventory for attainment demonstration and RFP milestone purposes. We proposed two alternatives to revise the regulations that limit a source's use of emissions reductions as offsets if the reductions were achieved by shutting down an existing emissions unit or curtailing production or operating hours of a unit (shutdowns/curtailments).

Under Alternative 1, we proposed to allow emissions reductions from shutdowns and curtailments from sources located in ozone nonattainment areas that lack an EPA-approved attainment demonstration to be used as offsets or netting credits, if the emissions reductions occur after November 15, 1990 and the area is current with part D ozone nonattainment planning requirements. See proposed § 51.165(a)(3)(ii)(C)(5) and (6) [Alternative 1]. Proposed Alternative 2 generally would have allowed emissions reductions from source shutdowns and source curtailments in all nonattainment areas and for all pollutants to be used as offsets or netting credits when such reductions occur after the base year of the emissions inventory for that pollutant. See proposed § 51.165(a)(3)(ii)(C)(5) [Alternative 2]. The 1996 proposal retained the provision that the permitting authority may consider the shutdown or curtailment to have occurred after the date of its most recent emissions inventory if the inventory explicitly includes as current existing emissions the emissions from such previously shutdown or curtailed sources.

c. Proposed Changes to Revise the Construction Ban Provisions

On July 23, 1996, we proposed to revise § 52.24(a) to incorporate changes made by the 1990 CAA Amendments related to the applicability of construction bans. Under the 1977 Amendments, section 110(a)(2)(I) of the CAA required EPA to place certain areas under a federally imposed construction moratorium (ban) that prohibited the construction of new or modified major stationary sources in nonattainment areas where the State failed to have an implementation plan meeting all of the requirements of part D. The 1990 CAA Amendments removed these provisions from the CAA. However, in section 110(n)(3) of the CAA (Savings Clause), the 1990 CAA Amendments retained the prohibition in cases where it was applied prior to the 1990 CAA Amendments based upon a finding by the Administrator that the area: (1) Lacked an adequate NSR permitting program (as required by section 172(b)(6) of the 1977 CAA); or (2) the State plan failed to achieve the timely attainment of the NAAQS for SO_2 by December 31, 1982. All other construction bans pursuant to section 110(a)(2)(I) are lifted as a result of the new statutory provision. This includes previously imposed construction bans based upon a finding that the plan for the area did not demonstrate timely attainment and maintenance of the ozone or CO NAAQS. In accordance with the amended section 110(n)(3) of the CAA, any remaining construction ban continues in effect until the Administrator determines that the SIP meets either the amended part D permit requirements, or the requirements under subpart 5 of part D for attainment of the NAAQS for SO_2, as applicable.

We note that § 52.24(k) was not retained in our proposed rule text. However, the preamble did not in any manner indicate that EPA believed that NSR permits complying with appendix S were not required during the SIP development period where necessary. To clarify our intent, our proposed 8-hour ozone NAAQS implementation rule explained that § 52.24(k) remained in effect and would be retained. In that action, we also proposed that we would revise § 52.24(k) to reflect the changes in the 1990 CAA Amendments (68 FR 32846). The prior language at section 52.24(k) allowed States to issue permits under appendix S for a maximum period of 18 months after designation. After this time, if the nonattainment area did not have an approved part D NSR permit program, the construction ban would apply. However, the 1990 CAA Amendments to the construction ban provisions altered the provisions of the construction ban such that it would not apply when a State lacked an approved part D NSR program in the

[94] For a complete discussion of how the 1990 CAA Amendments attainment planning requirements relate to shutdown/curtailment credits (61 FR 38311; July 23, 1996).

[95] *Use of Shutdoen Credits for Offsets*, July 21, 1993, John S. Seitz, Director, Office of Air Quality Planning and Standards.

future. Thus, the 1990 CAA Amendments supersede that portion of prior § 52.24 dealing with the construction ban but leave unaltered the requirement that appendix S continues to apply through § 52.24(k). We explained that we have interpreted this language to allow States or EPA to issue permits under appendix S from designation to approval even if the time period between designation and approval exceeds 18 months, and proposed to revise § 52.24(k) to properly reflect this interpretation.

We also proposed regulatory text to reflect the revisions to CAA section 173(a)(4). Before the State can issue a nonattainment major NSR permit, the reviewing authority must first find pursuant to section 173(a)(4) that the ''Administrator has not determined that the applicable implementation plan is not being adequately implemented for the nonattainment area'' in accordance with the requirements of part D. We stated our intent to make this determination by sending a letter to the permitting authority, and publishing a subsequent action in the **Federal Register**, but we solicited comment on the need to undertake notice-and-comment procedures before taking final action.

Section 113(a)(5) of the CAA provides that EPA may issue an order prohibiting the construction or modification of any major stationary source in any area, including an attainment area, where the Administrator finds that the State is not in compliance with the NSR requirements. Specifically, EPA may issue an order under section 113(a)(5) banning construction in an area whenever the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the CAA relating to construction of new sources or the modification of existing sources. To codify the requirements of section 113(a)(5), we proposed new language in § 52.24(c).

We proposed to remove the transition provisions under existing § 52.24(c) and (g). These paragraphs were proposed to be removed because they were originally designed to clarify the applicable requirements for permits issued prior to the initial SIP revisions required by the 1977 CAA Amendments.

In addition to the significant changes already discussed, we proposed several minor changes to § 52.24. These minor changes included: (1) The addition of requirements applicable to transport regions; (2) the inclusion of requirements applicable to criteria pollutant precursors; (3) incorporation of the definitions proposed in § 51.165(a); (4) revisions to the language at § 52.24(h)(2); and (5) revisions to § 52.24(j).

d. Proposed Changes on Applicability of Appendix S and the Transitional NSR Program

On June 2, 2003 (68 FR 32802), we explained implementation of the major NSR program under the 8-hour ozone NAAQS during the SIP development period, and proposed flexible NSR requirements for areas that expected to attain the 8-hour NAAQS within 3 years after designation. We stated that the existing regulation codified at 40 CFR § 52.24(k) requires that permits be issued in compliance with appendix S during this time, and that a State would have to continue implementing part D nonattainment requirements under appendix S unless the source was eligible for flexibility under section VI of the appendix (68 FR 32846–48).

Our June 2, 2003 proposal would limit the circumstances under which section VI of appendix S applies (68 FR 32844). Under the existing regulatory structure of section VI, major new sources and major modifications located in nonattainment areas for which the attainment date has not yet passed may avoid the requirement to comply with LAER and obtain source-specific offsets if the new emissions will not interfere with an area's ability to reach attainment by its attainment date. Because we believed that most new emissions in 8-hour nonattainment areas would generally not meet this criteria of non-interference, we proposed to apply section VI only in areas that qualify for a ''transitional classification'' (68 FR 32846). Accordingly, we called this revised section VI the Transitional NSR Program. We proposed that the program would apply only in nonattainment areas that: (1) Are attaining the 1-hour NAAQS; (2) are subject to subpart 1 (rather than subpart 2) of part D of title I; (3) for which the State submitted an attainment plan by April 15, 2004 that demonstrates attainment within 3 years after designation; (4) and for which the State submitted an attainment plan containing any additional local control measures needed for attainment of the 8-hour standard (68 FR 32847). We also proposed that the sources using section VI would be required to comply with BACT.

On August 6, 2003 (68 FR 46536), we solicited comment on additional options for implementing major NSR under the 8-hour NAAQS, including a major rewrite of appendix S that would include the proposed changes to section VI. We also solicited comment on two alternatives to appendix S for implementing NSR in newly designated nonattainment areas during the transitional SIP development period. One alternative was a Federal part D NSR regulatory program for major new and modified sources, to be codified at 40 CFR 52.10, under which EPA would be responsible for permitting unless a State took delegation of the program. The other alternative was application of the Federal PSD program at 40 CFR 52.21 in such newly designated nonattainment areas. Commenters stated that neither of those alternatives was sufficiently developed for public comment, and we have not pursued them further.

One other proposal affects appendix S applicability. In 1978 (43 FR 26408; June 19, 1978) and 1979 (44 FR 3276; January 16, 1979), we proposed that applicability under PSD and appendix S respectively be based on uncontrolled emissions, but sources would be exempt from control requirements unless the increase in allowable emissions was at least 50 tpy, 1,000 pounds per day, or 100 pounds per hour. The U.S. Court of Appeals for the District of Columbia Circuit, however, ruled that major source applicability should be based on potential to emit, rather than uncontrolled emissions. *Alabama Power Co.* v. *Costle*, 606 F.2d 1068 (D.C. Circuit, 1979), amended 636 F. 3d 323, 356–57 (D.C. Circuit, 1980). The court also ruled that EPA had exceeded its authority in establishing the 50 tpy exemption and remanded the exemption for reconsideration. In response, we proposed removing the 50 tpy exemption from the PSD rules and appendix S in the 1979 Notice of Proposed Rulemaking (NPRM) (44 FR 51930). We finalized these changes in 1980, but we inadvertently did not remove the change in all the places in appendix S where it was located, specifically footnotes 5 and 8 to IV.D.

e. Proposed Changes To Identify NO_X as an Ozone Precursor in Attainment and Unclassifiable Areas

Currently, only VOCs are expressly regulated as ozone precursors under the PSD regulations. Recognizing the role of NO_X in ozone formation and transport, we proposed to amend our PSD regulations to expressly include NO_X as an ozone precursor in attainment and unclassifiable areas. Moreover, we proposed to require States to modify their existing programs to include NO_X as an ozone precursor in these areas (68 FR 32846).

B. Summary of Final Rule and Legal Basis

1. Final Action and Legal Basis for Changes to Incorporate the 1990 CAA Amendments

a. Final Changes to Incorporate the 1990 CAA Amendments

In today's final action, we revised § 51.165 and appendix S to incorporate the major stationary source thresholds, significant emission rates, and offset ratios for sources of ozone precursors pursuant to part D, subpart 1 and subpart 2 of title I of the 1990 CAA Amendments. [See § 51.165(a)(1)(iv), (a)(1)(v), (a)(1)(x), (a)(8), (a)(9) and section II. A. 4, 5, and 10 and section IV.G and H of appendix S.] Accordingly, consistent with statutory requirements and the final rules in 40 CFR part 51, subpart X (Provisions for Implementation of 8-hour Ozone NAAQS), today's final rules in § 51.165 require States' part D NSR SIPs implementing the 8-hour ozone standard to include provisions meeting subpart 1 of part D of the CAA, and subpart 2 as applicable, based on the area's classification. (We note 40 CFR part 51, subpart X includes the specific provisions for determining whether an area is designated and classified under subpart 1 or subpart 2 and these rules are explained in the preamble to those final rules at 69 FR 23954.) Also, appendix S requires States or EPA to issue permits during the SIP development period consistent with these requirements. Specifically, under subpart 1, the major stationary source threshold is 100 tpy, and an offset ratio of at least 1:1 applies. Under subpart 2, the major stationary source threshold ranges from 10 to 100 tpy, depending on the classification of the nonattainment area in which the source is located. The applicable offset ratios range from 1:1 to 1:5, also depending on the classification of the nonattainment area in which the source is located.

We also finalized as proposed in 1996 and 2003 that the NSR requirements applicable to major stationary sources of VOC (including provisions regarding major modifications, significant emission rates, and offsets) apply to NO_X emissions. These requirements apply in all 8-hour ozone nonattainment areas, including subpart 1 and subpart 2 areas. These requirements apply except where the Administrator determines, according to the standards set forth in section 182(f), that NO_X requirements for major stationary sources, including nonattainment major NSR requirements, would not apply or would be limited (''NO_X waiver''). [See § 51.165(a)(8) and appendix S.] According to § 51.913(c), a section 182(f) NO_X exemption granted under the 1-hour ozone standard does not relieve the area from any requirements under the 8-hour ozone standard, including nonattainment major NSR for major stationary sources of NO_X. We discuss whether a NO_X waiver under section 182(f) applies in a particular area and the effects of NO_X waivers on RACT in section IV.H. of this preamble.

We are not taking final action to implement the special modification provisions at CAA sections 182(c), (d), and (e) for serious, severe, and extreme ozone nonattainment areas at this time. We are evaluating additional issues related to implementation of these requirements and anticipate taking final action in the future.

As proposed on July 23, 1996 (61 FR 38250), we have incorporated requirements in part D of title I of the 1990 CAA Amendments for CO. [See § 51.165(a)(1)(iv)(A)(*1*)(*v*) and (a)(1)(x)(D) and appendix S.]

We have also made final changes to incorporate the requirements of the 1990 CAA Amendments concerning PM_{10} nonattainment areas. Specifically, we have promulgated as proposed in 1996 the major stationary source thresholds and significant emission rates for PM_{10} in PM_{10} nonattainment areas. [See § 51.165(a)(1)(iv)(A)(1)(*vi*) and (a)(1)(x). See also appendix S at II.A.4.(i)(a)(*6*) and II.A.4.(i).] We have not taken final action on our 1996 proposed rules for PM_{10} precursors. Instead, we plan to propose regulations concerning PM precursors as part of the $PM_{2.5}$ NAAQS implementation rule. We also plan to address requirements for stationary sources of PM in that action.

b. Legal Basis for Changes To Incorporate the 1990 CAA Amendments

In areas not meeting health-based NAAQS and in the OTR, the major NSR program is implemented under the requirements of section 110(a)(2)(C) and part D of title I of the CAA. Subpart 1 of part D of title I contains general requirements for nonattainment areas for any criteria pollutant. Subpart 2 contains provisions specifically for ozone nonattainment areas. Subpart 3 contains provisions specifically for CO nonattainment areas. Subpart 4 contains provisions specifically for PM_{10} nonattainment areas. On July 23, 1996 (61 FR 38250), we proposed changes to § 51.165 and appendix S to incorporate requirements in part D of title I of the 1990 CAA Amendments for ozone, CO, and PM_{10} nonattainment areas.

We promulgated a new 8-hour ozone NAAQS on July 18, 1997. We indicated that we anticipated that States would implement the 8-hour ozone NAAQS under the less prescriptive subpart 1 requirements. In February 2001, the Supreme Court ruled that the statute was ambiguous as to the relationship of subparts 1 and 2 for purposes of implementing the 8-hour ozone NAAQS. In *Whitman* v. *American Trucking Associations,* [531 U.S. 457, 482–86 (2001)], the Supreme Court reviewed EPA's implementation strategy for the revised 8-hour ozone NAAQS, and remanded it to EPA to develop a reasonable resolution of the roles of subparts 1 and 2 in classifying areas for and implementing the revised ozone standard. On April 30, 2004, we promulgated a final rule to implement the 8-hour ozone NAAQS (69 FR 23951), in which some nonattainment areas would be regulated under the less restrictive requirements of subpart 1 and some would be classified and regulated under subpart 2. All ozone nonattainment areas have now been categorized subpart 1 or subpart 2 areas in 40 CFR part 81. Now that we have designated and classified nonattainment areas, the NSR program requirements (including the specific major stationary source thresholds, significant emission rates, and offset ratios associated with each classification) are determined by reference to subpart 1 and subpart 2, as codified in § 51.165 and appendix S through this rulemaking. Thus, as described in further detail in section V.A.2 of this preamble, we have incorporated the requirements of the 1990 CAA Amendments for major stationary sources of ozone precursors in ozone nonattainment areas as proposed in 1996, and codified those requirements for the 8-hour standard consistent with the designation and classification scheme finalized in the 8-hour ozone implementation rule (69 FR 23951) promulgated in response to *Whitman* v. *American Trucking Associations,* 531 U.S. 457 (2001).

Concerning CO, section 187(c) of the CAA unambiguously establishes the major stationary source threshold of 50 tpy codified today for serious nonattainment areas where the Administrator has determined that stationary sources contribute significantly. It is also reasonable to set the significant emission rate at 50 tpy in those serious nonattainment areas where 50 tpy is the major stationary source threshold. The regulations at § 51.165(a)(1)(iv)(A)(2) require that if a modification itself would constitute a major stationary source, the modification is subject to major NSR.

Concerning PM_{10}, section 189 of the CAA unambiguously establishes the

major stationary source threshold as 70 tpy in serious nonattainment areas. Also, EPA has the authority to exempt *de minimis* emissions from the reach of a rule. See Alabama Power, 636 F.2d at 360–61. Previously, EPA has defined the PM_{10} significant emission rate (that is, *de minimis* cut-off level) as at or above 15 tpy for purposes of determining which modifications are insignificant and thus exempt from PSD review (52 FR 24672, 24694–96; July 1, 1987). We believe it is reasonable to use the same significant emission rate in the nonattainment NSR program. This is consistent with our past practice of applying the same significant emissions rates for each pollutant in the PSD and nonattainment NSR programs.

We also revised appendix S to incorporate the requirements of the 1990 CAA Amendments to part D of title I of the CAA. These changes are necessary to make appendix S consistent with part D. As we discuss in section V.B.3.b of this preamble, we have determined that Congress intended for permitting equivalent to the part D NSR provisions to apply during the SIP development period through the use of appendix S (subject to the limited section VI exemption). In light of this determination, there is no reasonable basis for declining to implement the NSR requirements in the 1990 CAA Amendments during that period.[96] Additionally, appendix S provides on its face that it is an interpretation of the NSR permitting rules in 40 CFR subpart I, including § 51.165. Therefore, it is necessary to have appendix S reflect substantially the same requirements as are in § 51.165.[97] Thus, we proposed to amend appendix S in this manner in the 1996 NSR proposal. We also are mindful of the Supreme Court's decision in *American Trucking Associations.* Although the decision did not directly address NSR implementation during the SIP development period, the Court emphasized the importance of creating a role for subpart 2 in implementation of the 8-hour ozone NAAQS. We believe this suggests the need to create a role for subpart 2 in appendix S, in contrast to the exclusive subpart 1 scheme currently embodied in appendix S.

2. Final Action and Legal Basis for Changes to Criteria for Emission Reduction Credits From Shutdowns and Curtailments

a. Final Changes to Criteria for Emission Reduction Credits From Shutdowns and Curtailments

The final revisions lift the requirement to have an approved attainment plan before using preapplication credits from shutdowns or curtailments as offsets. They also facilitate the availability of creditable offsets, consistent with the requirements of section 173 of the CAA. We revised the provisions at § 51.165(a)(3)(ii)(C) and appendix S concerning emission reduction credits generated from shutdowns and curtailments as proposed in Alternative 2 of the 1996 proposal, with one exception. We agree with the commenter who found the regulatory term ''most recent emissions inventory'' confusing. We have revised § 51.165(a)(3)(C)(1) accordingly, specifying that the shutdown or curtailment must have occurred after ''the last day of the base year for the SIP planning process.'' For the 8-hour ozone NAAQS, the base year is 2002.[98] Additionally, today's final provisions allow a reviewing authority to consider a prior shutdown or curtailment to have occurred ''after the last day of the base year if the projected emission inventory used to develop the attainment demonstration explicitly includes the emissions from such previously shutdown or curtailed emissions unit.'' This provision is consistent with the previous regulation which also allowed the reviewing authority to treat prior shutdowns or curtailments as occurring after the date of the most recent emissions inventory, but we have modified the regulatory language to clarify the appropriate emissions inventory. This regulatory language is consistent with our previous guidance on how emission reduction credits from shutdowns and curtailments are used in attainment planning.[99] The base year inventory includes actual emissions from existing sources and would not reflect emissions from units that were shutdown or curtailed before the base year, as these emissions are not ''in the air.'' To the extent that these emission reduction credits are considered available for use as offsets and are thus ''in the air'' for purposes of demonstrating attainment, they must be included in the projected emissions inventory used in the attainment demonstration along with other growth in emissions over the base year inventory. This step assures that emissions from shutdown and curtailed units are accounted for in attainment planning.[100] As with the prior rules, reviewing authorities thus retain the ability to consider a prior shutdown or curtailment to have occurred after the last day of the base year if emissions from the shutdown or curtailment are accounted for in the attainment demonstration. However, in no event may credit be given for shutdowns that occurred before August 7, 1977, a provision carried over from the previous regulation.

The other changes to the proposed rule text also are nonsubstantive and instead clarify the restrictions on credits from shutdowns or curtailments. Specifically, the proposed rule retained the requirement for an approved attainment demonstration, but made that requirement inapplicable where the credits occurred after the last day of the base year for the SIP planning process or where they were included in the most recent emissions inventory. The final rule recognizes there is no requirement for an approved attainment demonstration in those circumstances, and thus deletes the reference to that former requirement.

We note that the requirements for emissions reductions used as offsets and for netting differ from those for emission reduction credits used for RFP and ROP.

[96] The 1991 NSR transitional guidance issued to address implementation of the 1990 CAA Amendments acknowledged that appendix S did not contain at that time the newly enacted part D provisions, and further provided that the new requirements of part D to title I did not apply until November 15, 1992 for the ozone nonattainment areas; June 30, 1992, for the PM_{10} nonattainment areas; and 3 years from designation for most CO nonattainment areas. NSR Program Transitional Guidance, at A5 (March 11, 1991). We later clarified that the 1990 CAA Amendments did apply to all permits after those deadlines passed. NSR Supplemental Program Transitional Guidance on Applicability of New Part D NSR Requirements at 3 (September 3, 1992).

[97] Thus, EPA has typically conformed appendix S to the part D nonattainment NSR permitting provisions governing SIPs at 40 CFR § 51.165 (originally codified at § 51.18) whenever those regulations were revised. See, for example, 45 FR 52676 (August 7, 1980); 47 FR 27554 (June 25, 1982); 49 FR 43210 (October 26, 1984); 54 FR 27274 (June 28, 1989); 57 FR 3941 (February 3, 1992).

[98] 68 FR 32833. See also ''2002 Base Year Emission Inventory SIP Planning: 8-hr Ozone, PM2.5 and Regional Haze Programs,'' U.S. EPA, pg. 1 (November 18, 2002).

[99] See 57 FR 13553. After the 1990 CAA Amendments were enacted, 1990 was the base year for 1-hour ozone NAAQS attainment planning purposes. See 57 FR 13502. The EPA encouraged States to allow sources to use pre-enactment banked emissions reductions credits for offsetting purposes. States have been allowed to do so if the restored credits meet all other offset creditability criteria, and States consider such credits as part of the attainment emissions inventory when developing their post-enactment attainment demonstration.

[100] For a discussion of emission inventories for the 8-hour ozone standard, see our emission inventory guidance, ''Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations—Final,'' at *http://www.epa.gov/ttn/chief/eidocs/eiguid/index.html.* For a discussion of emission projections used in attainment demonstrations, see Emission Inventory Improvement Program, Volume X, Emission Projections, December 1999, available at *http://www.epa.gov/ttn/chief/eiip/techreport/.*

Section IV.E.14. of this preamble discusses requirements for emission reduction credits used for RFP and ROP. For a more detailed discussion of emission reduction credits for offsets and netting under the 8-hour ozone NAAQS, see section V.D.5. of this preamble.

b. Legal Basis for Changes to Criteria for Emission Reduction Credits From Shutdowns and Curtailments

The revisions to the rules governing use of emissions reductions from shutdowns/curtailments as offsets are warranted by the more detailed attainment planning and sanction provisions of the 1990 CAA Amendments. These provisions specifically address air quality concerns in nonattainment areas lacking EPA-approved attainment demonstrations. As a threshold matter, we note that CAA section 173 does not mandate the prior restrictions on shutdown credits, specifically, the requirement to have an approved attainment demonstration. (See 48 FR 38742, 38751; August 25, 1983). Rather, in promulgating these restrictions in 1989, EPA recognized that it had a large degree of discretion under the CAA to shape implementing regulations, as well as the need to exercise that discretion such that offsets are consistent with RFP as required in CAA section 173. (See 54 FR 27286, 27292; June 28, 1989). Originally, EPA believed that areas without approved attainment demonstrations lacked adequate safeguards to ensure that shutdown/curtailment credits would be consistent with RFP. We thus subjected those areas to more restrictive requirements to ensure a link between the new source and the source being shutdown/curtailed (that is, shutdown/curtailment must occur after application for a new or modified major source is filed).

The 1990 CAA Amendments changed the considerations involved. As discussed above, for areas subject to subpart 2, Congress emphasized the emission inventory requirement in section 172(c)(3) as a fundamental tool in air quality planning. Congress also added new provisions keyed to the inventory requirement, including specific reduction strategies and Amilestones@ that measure progress toward attainment from the base year emissions inventory or subsequent revised inventories. Where the emission reduction credits pre-date the base year, State and local agencies must include the credits from the shutdown/curtailment in the projected emissions inventory used to develop the attainment demonstration. Subpart 4 sets forth specific reduction strategies and milestones for attainment of the PM_{10} standards. Additionally, there are now several adverse consequences where States fail to meet the planning or emissions reductions requirements of the CAA. For example, the CAA contains mandatory increased new source offset sanctions at a 2:1 ratio where the Administrator finds that a State failed to submit a required attainment demonstration. In areas that are subject to subpart 2 and subpart 4, failure to attain the air quality standard by the attainment deadline results in the area being bumped up to a higher classification. Additional regulatory requirements are imposed as a result of the higher classification. These statutory changes justify shifting the focus of the current regulations from individual offset transactions between a specific new source and shutdown source and towards a systemic approach. Considering the changes to the 1990 CAA Amendments, we now believe that continuing the prohibition on the use of shutdown/curtailment credits generated where there is no approved attainment demonstration is not warranted. We believe that use of emission reduction credits from shutdowns/curtailments will be consistent with RFP towards attainment under CAA section 173, even in the absence of an approved attainment demonstration, if they occur after the last day of the base year for the SIP planning process or are included in the projected emissions inventory used to develop the attainment demonstration. From an air quality planning perspective, emissions from the shutdown source actually impacted the measurements of air quality used in determining the nonattainment status of an area. Subsequently, emissions reductions from such source shutdowns/curtailments are actual emissions reductions, and their use as emission offsets at a ratio of 1:1 or greater is consistent with RFP towards improved air quality as set forth in CAA section 173(a)(1)(A).

3. Final Action and Legal Basis for Changes to the Construction Ban Provisions

a. Final Action for Changes to the Construction Ban Provisions

We are promulgating final changes to § 52.24 to implement the construction ban provisions and other changes, as proposed in 1996 and 2003.[101] We believe these changes are beneficial to conform the regulatory text with the requirements that apply under the 1990 CAA Amendments.

As noted in our June 2003 proposal, we are retaining the provision in § 52.24(k) that specifies that appendix S governs permits to construct and operate applied for during the SIP development period. Although the regulatory text proposed in 1996 omitted § 52.24(k), the 1996 preamble also explained that the changes to § 52.24 were intended only to update and clarify the regulation with regard to the changes to the construction ban made by the 1990 CAA Amendments. (61 FR 38250, 38305). The preamble did not in any manner indicate that EPA believed that NSR permits complying with appendix S were not required during the SIP development period where necessary. Additionally, it did not contemplate nonattainment major NSR permitting in light of the situation that today's final action addresses, which is the need to permit nonattainment area sources during a transition period in which a substantial number of new nonattainment areas are being created. Therefore, we are retaining § 52.24(k).

As we proposed in the 8-hour ozone NAAQS implementation rule (68 FR 32846), we made one change to the regulatory language in § 52.24(k). The previous language at § 52.24(k) only allowed States to issue permits under appendix S for a maximum period of 18 months after designation. This language was consistent with the previous SIP development period and construction ban under the 1977 CAA, which no longer apply under the 1990 CAA Amendments. We have revised § 52.24(k) to allow States to issue permits under appendix S from designation until the SIP is approved, even if this exceeds 18 months. As we noted in our proposal, this change implements the removal of the construction ban from the 1990 CAA Amendments and is consistent with our 1991 policy memo, ''New Source Review (NSR) Program Transitional Guidance,'' John S. Seitz, March 11, 1991.

b. Legal Basis for Changes to the Construction Ban Provisions

Section 110(a)(2)(c) of the CAA establishes a general duty on States to include a program in their SIP that regulates the modification and construction of any stationary source as necessary to assure that the NAAQS are achieved. This general duty, often referred to as ''minor NSR,'' exists during all periods, including before a

[101] We note that we are changing the cross-reference in § 52.24(f) to ''§ 51.165'' instead of the definitions section at § 51.165(a), to ensure that all of the provisions of ''51.165 apply in interpreting the terms of § 52.24.

State has an approved part D NSR permit program.

Section 110(a)(2)(c) of the CAA does not define specific requirements States must follow for issuing major source permits during the interim period between nonattainment designation and EPA approval of a part D nonattainment NSR SIP (''interim period''). However, EPA's regulations at § 52.24(k) require States to follow EPA's Emission Offset Interpretative Ruling, 40 CFR part 51, appendix S, during this time.

This approach is consistent with Congressional intent, as indicated in the 1977 CAA Amendments providing for major NSR permitting during the SIP development period in accordance with appendix S. [See Public Law No. 95–95, section 129(a), 91 Statute 685 (1977)]. Specifically, Congress enacted a moratorium on construction in any area lacking an approved part D NSR SIP, with a delayed effective date of July 1, 1979. Congress also provided that appendix S, as modified by rule of the Administrator, govern permitting of sources constructing in such areas before that date, subject to a limited waiver by the Administrator. *Id.* 108(b), 129(a). We subsequently codified the use of appendix S as the interim major NSR program in 40 CFR § 52.24(k), reasoning (in the context of implementing a delay in the construction ban for then-recently designated nonattainment areas) that Congress had provided that appendix S should remain in effect to protect air quality while State plans were being designed (45 FR 65209). When Congress removed the construction ban [(except as provided in section 110(n)(3)), it left in place 40 CFR § 52.24(k)], implementing the interim major NSR program under appendix S.

Accordingly, we have historically recognized that the SIP development period provided for in section 172(b) leaves a gap in part D major NSR permitting and have determined that this gap is to be filled with an interim major NSR program that is substantially similar to the requirements of part D. This includes the LAER and offset requirements from part D (57 FR 18070, 18076). Appendix S has been used by EPA and the States as this interim major NSR program.[102]

Our regulations at 40 CFR 52.24(k) require permits issued during this period to be consistent with the requirements in appendix S. The continued application of appendix S through § 52.24(k) is also supported by the purpose of the CAA, specifically, section 101(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.'' This provision was the basis for the original judicial finding that the CAA imposed an obligation to prevent significant deterioration in areas that meet the NAAQS, prior to Congress' enactment of the PSD program at part C of the CAA.[103] This policy of non-degradation applies with even greater force in areas that fail to meet the NAAQS. Thus, we believe that an interim major NSR program for the SIP development period—as codified at appendix S and updated to reflect CAA amendments—is supported by section 110(a)(2)(C), section 101(b)(1), Congressional intent, and our gapfilling authority under section 301(a).

4. Final Action and Legal Basis for Changes on Applicability of Appendix S and the Transitional NSR Program

a. Final Changes on Applicability of Appendix S and the Transitional NSR Program

We are not finalizing the transitional NSR program under section VI of appendix S as proposed, which would have established limited criteria for determining in which nonattainment areas section VI could apply. Upon consideration of public comments, we decided to retain the original eligibility conditions, but added a procedural requirement that the Administrator determine whether section VI applies for a specific situation.

As we noted at 68 FR 32848, on its surface section VI could apply in any nonattainment area where the dates for attainment have not passed if the source meets all applicable SIP emission limitations and would not interfere with the area's ability to meet its attainment date, without providing any specific safeguards for such noninterference. We noted at proposal, however, that States generally would not be able to show that a nonattainment area would continue to meet its attainment date if it does not apply LAER or offsets to major new sources and major modifications in the absence of safeguards (68 FR 32848).

We continue to believe, as stated in the proposal, that States should not interpret section VI as allowing a blanket exemption from LAER and offsets for all major new sources and major modifications in a given area before attainment dates have passed for that area. However, based on public comment, we now believe that the program as proposed at 69 FR 32846 is not implementable. As many commenters noted, the April 15, 2004 deadline for submission of attainment plans and December 31, 2004 deadline for implementation of all necessary attainment controls were impracticable. We agree with the many commenters who supported flexible NSR requirements under section VI for some areas and maintained that attainment would not be in jeopardy due to such programs. While we do not identify any such particular instances in today's final rule, we believe that participation in programs such as the NO_X SIP Call and the CAIR (70 FR 25162, May 12, 2005) will achieve significant emissions reductions across broad geographical areas. Certainly, we want to encourage development of programs that address transported air pollution. We recognize that these and other programs may prove to be more effective and practical in assuring that there is no interference with an area's ability to meet its attainment deadline than relying on offsets from a single source.

For these reasons, we have retained the original eligibility conditions for determining when section VI applies, but added a procedural requirement that the Administrator provide public notice that section VI applies for a specific situation. This requirement will achieve the proposal's purpose of assuring that States do not interpret section VI to provide a broad exemption to all major new sources and major modifications in any nonattainment area for which the attainment date has not passed.

We also are taking final action to remove the 50 tpy exemption from appendix S. As discussed in section V.A.2.f of this preamble, we proposed this change in 1979 and finalized it in

[102] Appendix S was originally promulgated in 1976 to address whether, and to what extent, new and modified sources would be allowed to construct in nonattainment areas whose attainment deadlines had already passed, in light of the regulatory requirement that new or modified sources be disapproved where the source would interfere with attainment of the NAAQS (41 FR 55524; December 21, 1976). It required, *inter alia*, compliance with the LAER and offsetting emissions reductions in excess of the new source's emissions. At that time, part D NSR was not part of the CAA.

When the part D NSR provisions were added in the 1977 CAA Amendments, Congress added the requirement that SIPs contain nonattainment NSR provisions as set forth in CAA section 173, including LAER and the requirement to either offset the increase in new source emissions or ensure that emissions fell within a growth allowance. (The growth allowance provision was repealed in 1990). Additionally, Congress provided that appendix S, as modified by rule of the Administrator, would govern preconstruction permitting in areas lacking approved part D SIPs before a construction ban went into effect, as discussed in more detail above.

[103] See Alabama Power Co. v. Costle, 636 F. 3d 323, 346–047 (D.C. Circuit, 1980) (discussing Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972), aff'd per curiam 4 ERC 1815 (D.C. Circuit, 1972), aff'd by an equally divided court, sub nom Fri v. Sierra Club, 412 U.S. 541 (1973).

most respects in 1980. However, we inadvertently did not remove the exemption in all the places in appendix S where it was located, specifically footnotes 5 and 8 to IV.D. We are now finalizing the 1979 proposal to the extent it remained incomplete, by removing these last two references to the 50 tpy exemption in appendix S.

b. Legal Basis for Changes to Applicability of Appendix S and the Transitional NSR Program

The legal basis for appendix S itself, including section VI, is discussed in detail in section V.B.3.b. of this preamble. We have historically recognized that the SIP development period provided for in section 172(b) leaves a gap in part D major NSR permitting and have determined that this gap is to be filled with an interim major NSR program that is substantially similar to the requirements of part D, including the LAER and offset requirements from part D, subject to a limited exemption where the attainment deadline will be met (57 FR 18070, 18076). This interim NSR program has been implemented to date through appendix S.

We also believe that, contrary to objections made by some commenters, appendix S—and in particular, section VI—has not been superseded by the 1990 CAA Amendments to title I of the CAA. In short, appendix S only applies where a NSR permitting program for the new or revised NAAQS is not otherwise in effect, and thus does not replace any part D NSR SIP provisions, as many commenters erroneously believed. That is, it applies only in newly designated or redesignated nonattainment areas lacking approved part D programs for a new or revised NAAQS, such as the 8-hour ozone NAAQS. Thus, the evasion of subpart 2 requirements posited by commenters and the anti-backsliding concerns they raise are not triggered, as nothing in the SIP is replaced. Our detailed response to those comments is set forth in section V.C.4. of this preamble.

The section VI exemption, as limited by this final rule, is consistent with the section 110(a)(2)(C) requirement that the preconstruction permitting is implemented ''as necessary to assure that the [NAAQS] are achieved.'' We are not adopting the eligibility criteria that were proposed to ensure satisfaction of the original section VI conditions. However, we have added a requirement that the Administrator determine that sources exempted from LAER and offsets under section VI will meet those conditions, in particular, noninterference with the attainment deadline. Section VI also is consistent with the exercise of our gapfilling authority under section 301, as informed by the legislative history. That is, appendix S reflects Congressional intent that standards equivalent to part D govern the issuance of NSR permits, subject to a limited degree of flexibility under conditions where attainment of the NAAQS by the attainment deadline is assured.

The removal of the 50 tpy exemption from appendix S is based on *Alabama Power Co.* v. *Costle*, 636 F. 3d 323, 356–57 (D.C. Circuit, 1980), in which the court held that EPA had exceeded its authority to establish the exemption, as discussed in more detail in section V.A.2.f. above.

5. Final Action and Legal Basis for Changes to Identify NO_X as an Ozone Precursor in Attainment and Unclassifiable Areas

a. Final Changes to Identify NO_X as an Ozone Precursor in Attainment and Unclassifiable Areas

Our existing PSD regulations in § 51.166 and § 52.21 define regulated NSR pollutants, which includes any pollutant for which we promulgate a NAAQS and any constituents or precursors for such pollutants as identified by the Administrator. [See § 51.166(b)(49)(i) and § 52.21(b)(50)(i)]. Today, the Administrator is identifying NO_X as an ozone precursor in attainment and unclassifiable areas. Accordingly, as proposed, we amended our PSD regulations in § 51.166 and § 52.21 to expressly include NO_X as an ozone precursor. Specifically, we have amended the definitions of major stationary source, major modification, significant, and regulated NSR pollutant to include NO_X as an ozone precursor. [See § 51.166(b)(1)(ii), (b)(2)(ii), (b)(23), and (b)(49). See also § 52.21(b)(1)(ii), (b)(2)(ii), (b)(23), and (b)(50)]. We have also amended the footnote to § 51.166(i)(5)(i)(*e*) and § 52.21(i)(5)(i) to require sources with a net increase of 100 tpy or more of NO_X to perform an ambient impact analysis.

b. Legal Basis To Identify NO_X as an Ozone Precursor in Attainment and Unclassifiable Areas

The nonattainment provisions of the CAA, as amended in 1990, recognize NO_X as an ozone precursor; section 182(f) of the CAA established nonattainment requirements for NO_X. The definition of air pollutant under section 302(g) of the CAA includes, ''* * * any precursors to the formation of any air pollutant * * *'' Also, the definition of regulated NSR pollutant in § 51.166 and § 52.21 specifically recognizes that a regulated NSR pollutant is ''any pollutant for which a national ambient air quality standard has been promulgated and any constituents or precursors for such pollutant identified by the Administrator (e.g., volatile organic compounds are precursors for ozone).''

The EPA has recognized NO_X as an ozone precursor in several national rules because of its contribution to ozone transport and the ozone nonattainment problem. The EPA's recognition of NO_X as an ozone precursor is supported by scientific studies, which have long recognized the role of NO_X in ozone formation and transport.[104] Such formation and transport is not limited to nonattainment areas. Therefore, we believe NO_X should be treated consistently as an ozone precursor in both our PSD and nonattainment NSR regulations. For these reasons we have promulgated final regulations providing that NO_X is an ozone precursor in attainment areas.

6. Final Changes and Legal Basis for Changes to Emission Offset Provisions of Appendix S

a. Final Changes to Emission Offset Provisions of Appendix S

We are revising certain provisions in appendix S to reflect requirements of the 1990 CAA Amendments concerning offsets and RFP. Specifically, we have conformed appendix S at IV.D. to the 1990 CAA Amendments by replacing the interim policy on offsetting emissions with the statutory language at section 173(c)(1). We also have removed the language concerning reasonable progress in section IV.E. of appendix S and replaced it with the statutory requirements at 173(a)(1)(A).

Also, we note that the definition of net emissions increase at § 51.165(a)(1)(vi)(E) requires that a decrease in actual emissions is creditable only to the extent that the State has not relied on it in demonstrating attainment or RFP. This requirement has never been codified in appendix S. However, the 1990 CAA Amendments at sections 172(b)(1) and 182 codifies the requirements concerning RFP. State and local agencies should consider the effect of creditable decreases from permitting under appendix S in their planning for demonstrating attainment and RFP.

We are also restating our policy on offsets from resource recovery facilities

[104] See 68 FR 32805–06, 32840, footnote 58 (discussing national rules for controlling VOC and NO_X emissions); and 68 FR 32840 footnote 57.

under appendix S. Appendix S at IV.B.(i) exempts resource recovery facilities from permitting under certain circumstances. Our 1988 policy memo indicates that as a matter of policy, EPA no longer adheres to the offset exemption for resource recovery facilities in appendix S.[105] As we did not propose to change this provision, we are not revising the final rules today regarding resource recovery facilities. However, we plan to remove this exemption in a future rulemaking.

b. Legal Basis for Changes to Emission Offset Provisions of Appendix S

Because we have not revised the regulatory text in appendix S since the latest revision to the statute, the 1990 CAA Amendments provisions limiting the use of offsets are not explicitly included in appendix S. Nonetheless, these requirements apply to sources permitted using appendix S because appendix S is intended to reflect the same offset requirements contained in part D of the CAA. These provisions relate to offsets and RFP.

We are revising appendix S to incorporate the statutory restrictions on offsets and remove the existing regulatory text that is outdated. The 1977 CAA is silent concerning the location of offsetting emissions. As we noted in footnote 9 to section IV.D. of appendix S, in the absence of specific statutory language, we developed an interim policy on offset locations. The 1990 CAA Amendments at section 173(c)(1), however, placed specific limits on the location of offsets and therefore superceded the interim policy in appendix S. Accordingly, we conformed appendix S at IV.D. to the 1990 CAA Amendments by replacing the interim policy on offsetting emissions with the statutory language at section 173(c)(1).

Appendix S at section IV.E. contains provisions regarding the relationship between offsets, reasonable progress towards attainment, and RFP. Under the 1990 CAA Amendments, section 173(a)(1)(A) was revised to set forth the extent to which offsets must represent RFP, as defined in section 171. Therefore, we removed the language concerning reasonable progress in section IV.E. of appendix S and replaced it with the statutory requirements at 173(a)(1)(A).

C. Comments and Responses

1. Comments on Proposed Changes to Incorporate the 1990 CAA Amendments

In today's final action, we have revised § 51.165 and appendix S to incorporate the major stationary source thresholds, significant emission rates, and offset ratios pursuant to part D of title I of the 1990 CAA Amendments for major stationary sources of ozone precursors. As we noted in section V.A.2.a. of this preamble, now that the designations and classifications have been made, the provisions of subpart 1 and subpart 2 determine the NSR program requirements. Those requirements are codified in this rulemaking. For a summary of comments and responses related to when subpart 1 or subpart 2 applies, please see the preamble to those final rules at 69 FR 23961.

Commenters on both the 1996 and 2003 proposals generally supported applying the nonattainment major NSR requirements applicable to major stationary sources of VOC (including provisions regarding major modifications, significant emission rates, and offsets) to NO_X emissions, except where the Administrator determines pursuant to section 182(f) that NO_X requirements for major stationary sources, including NSR requirements, would not apply or would be limited (''NO_X waiver''). A few commenters opposed waivers under section 182(f) for exemptions from NO_X requirements, due to their effect on NO_X emissions in downwind States.

We agree with the commenters supporting NO_X as an ozone precursor for nonattainment major NSR applicability, and have retained it in the final rule. We note that whether a NO_X waiver applies in a particular area and the effects of NO_X waivers on RACT are discussed in section IV.H. of this preamble.

2. Comments on Proposed Revisions to Criteria for Emission Reduction Credits From Shutdown and Curtailments

Many commenters generally supported EPA's conclusion that emission reduction credits from shutdowns and curtailments can be used for NSR offsets. These commenters believed the safeguards in the 1990 CAA Amendments justified removing the previous requirement for an approved attainment plan before such credits can be used as offsets. One commenter opposed lifting the restrictions, believing that the cited 1990 CAA Amendment provisions, including submittal of SIP attainment demonstrations, have not been implemented.

While no commenters supported the adoption of Alternative 1 exclusively, a few commenters supported both proposed Alternatives. However, many commenters strongly supported Alternative 2. These commenters asserted that the safeguards in the 1990 CAA Amendments address progress in nonattainment areas and that an approved attainment demonstration is no longer necessary to ensure shutdown/curtailment credits are accounted for in the attainment demonstration. These commenters also believed Alternative 2 was more flexible and would encourage stable banking programs. Many commenters believed that State agencies would be unable to meet the deadlines in Alternative 1. They also believed that Alternative 1 was unnecessarily restrictive, and would cause confusion.

We agree with the commenters who supported Alternative 2. We have promulgated final regulations that allow emission reduction credits to be used as offsets in the absence of an approved attainment demonstration, provided that these emission reduction credits were generated from shutdowns or curtailments that are included in the base year emission inventory as current actual emissions.

One commenter stated that the regulatory language concerning the ''most recent emissions inventory'' is confusing. The commenter believed this language could be mistaken to mean that the base year would continue to shift. The commenter noted that it would be more accurate to state that the base year emissions inventory is the starting point and all creditable emissions reductions must have been reported in the base year inventory or a subsequent emissions inventory. We agree with the commenter that the terminology ''most recent emissions inventory'' is confusing and have revised § 51.165(a)(3)(C)(1) accordingly, specifying the cutoff date as ''the last day of the base year if the projected emissions inventory used to develop the attainment demonstration explicitly includes the emissions from such previously shutdown or curtailed emission units.'' As we discussed in section V.B.2.a. of this preamble, this regulatory language is consistent with our previous guidance on how emission reduction credits from shutdowns and curtailments are used in attainment planning. Most importantly, it assures that emissions from shutdown and curtailed units are accounted for in attainment planning.

We disagree with the commenter who opposed the revisions. Since the submission of this comment in 1997, States have made substantial progress in implementing the 1990 CAA Amendments. This progress includes submitting the required inventories to which attainment planning is keyed, along with the required attainment

[105] See *Emission Offset Exemptions for Resource Recovery Facilities* from Gerald A. Emison, Director, Office of Air Quality Planning and Standards, December 28, 1988.

demonstrations.[106] We believe that implementation of the 1990 CAA Amendments to date supports the conclusion that emission inventories have been effective in attainment planning, and will continue to be effective in implementing the 8-hour standard. Therefore, we disagree with the commenter that the 1990 CAA Amendments do not justify the revisions due to inadequate implementation.

3. Comments on Construction Ban Provisions

We received comments on the following procedural issue. In the proposal, we stated our intent to issue determinations of inadequate SIP implementation under section 173(a)(4) by letter, followed by publication in the **Federal Register**, and explained that such determinations would result in a prohibition on construction in the area pursuant to that provision (61 FR 38305). We also solicited comment on whether an opportunity for public notice and comment should be provided. A few State commenters believed that EPA should provide such notice and comment, but did not state a basis for their position.

The text of § 52.24(b) as proposed tracked the language of section 173(a)(4) and did not include a provision on the process to be used for issuing a determination of inadequate SIP implementation. We have finalized § 52.24(b) in substantially the same form as we proposed. The Agency is still considering the appropriate process to use in issuing a determination under CAA section 173(a)(4).

4. Comments on Applicability of Appendix S and the Transitional Program

Many commenters opposed our proposed Transitional NSR Program, stating that it would not be protective of air quality. Many other commenters supported the proposed program, believing that it would provide needed flexibility and would not interfere with achieving attainment. Many commenters, including some who supported the Transitional Program, believed the schedule for submitting attainment plans and control requirements was impracticable. Some commenters opposed the Transitional NSR Program on legal grounds, arguing that section VI does not authorize any NSR flexibility or that appendix S has been superseded in its entirety by various sections of the CAA.

We agree with commenters that the schedule in the proposed rule for submitting attainment plans to be eligible for Transitional NSR was impracticable. On the other hand, however, we do agree with the many commenters who urged us to provide flexible NSR requirements for some areas. While we have not promulgated specific criteria for when such flexibility would apply, we have promulgated final regulations specifying that section VI applies where the original conditions are met (that is, the attainment deadline has not passed, the source would not interfere with attainment by the deadline, and the source meets all applicable SIP emissions limitations) and the Administrator has determined and provided public notice that section VI applies.

Regarding the objections to our legal authority to implement flexible NSR under appendix S, some commenters argued that the section VI exemption is potentially applicable only where an attainment date for the secondary standards has not yet passed. However, this comment ignores the plain language of section VI, which references primary standards. It states: ''In some cases, the dates for attainment of primary standards have not yet passed due to the delay in the promulgation of a plan under this section of the Act.'' It then goes on to note that the attainment deadlines for the secondary standards may also not yet have passed. It then states: ''In such cases [a reference to attainment dates that have not passed for both primary and second standards], a new source locating in an area designated in 40 CFR 81.3000 *et seq.* as nonattainment may be exempt from the conditions of Section IV.A'' [107] where certain requirements are met. Thus, the section VI exemption is applicable where the attainment date for the primary standard has not passed.

Other commenters argued that appendix S and 40 CFR 52.24(k) have been superseded by or prohibited by various sections of the CAA. (The EPA will use the term ''appendix S'' in this section of the preamble to refer to these collectively). Although commenters made this argument in the context of opposing the proposed revisions to section VI of appendix S, this comment applies to any use of appendix S for permitting, including the LAER and offset requirements of section IV, and the existing version of section VI. First, the commenter contended that appendix S has been superseded by section 181(b)(1) within subpart 2 of the CAA, under which it believes a newly designated nonattainment area receives its nonattainment classification by operation of law and immediately becomes subject to all of the requirements—including section 110, subpart 1, and subpart 2—that apply to that classification. The EPA disagrees with the commenter. As a threshold matter, even if the commenter were correct that both subpart 1 and subpart 2 applied upon an area's nonattainment classification, the statute provides that the area may have a period of time to develop and submit a SIP or SIP revision meeting the preconstruction permitting requirements of section 173. See CAA sections 172(b)(5) and 182(a)(2)(C). For the SIP development period, part D leaves a gap as to the NSR requirements applicable to the newly designated nonattainment area (if the state's part D NSR SIP does not automatically cover the area). This gap exists even if EPA were to accept the commenter's contention that subpart 2 applies. Pursuant to 40 CFR 52.24(k), this gap is filled by appendix S, which requires NSR permitting that mirrors part D, subject to the section VI exemption.

Additionally, EPA disagrees with the commenter's contention that subpart 2 must apply to all newly designated nonattainment areas. As discussed in more detail in the preamble to the Phase 1 8-hour ozone implementation rule (69 FR 23951), EPA has determined that it has discretion in determining whether subpart 2 applies to these areas because subpart 2 does not dictate whether it applies where the 1-hour design value falls below the lowest value in the subpart 2 classification table. The EPA has described in that rule the circumstances in which subpart 2 applies.

The commenter also contends that section 193 has superseded appendix S. The EPA disagrees. The commenter relies on the following language in section 193: ''No control requirement in effect, or required to be adopted by a[] * * * [implementation] plan in effect before November 15, 1990, in any area which is a nonattainment area for any air pollutant may be modified after November 15, 1990, in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.'' However, this part of section 193 is of no relevance to appendix S because

[106] Of the 135 areas designated as nonattainment for the 1-hour ozone NAAQS in 1991, 69 have been redesignated as attainment. See *hhtp://www.epa.gov/oar/oaqps/greenbk/onsum2.html.* Of the 55 nonattainment areas with classifications of moderate and higher that were required to submit SIPs and attainment demonstrations, all but 4 have an approved SIP or have requested redesignation to attainment.

[107] Designations are in 40 CFR 81.300. This citation has been corrected in today's final rule.

appendix S does not replace any existing SIP requirements. An area is only required to apply appendix S where it does not have a part D NSR SIP covering permitting for the 8-hour standard. In other words, it covers only the gap in the SIP caused by the lack of a part D NSR program for the relevant NAAQS, and is supplemental to any existing SIP requirements.[108]

The commenter also believes that use of appendix S for permitting would violate section 110(l), which provides, in relevant part, that: ''The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress * * *'' The commenter states that nonattainment preconstruction permitting requirements ''concern[] attainment and reasonable further progress,'' so if a SIP is already written such that nonattainment NSR will apply in an area as soon as it is designated nonattainment under the 8-hour standard, then any revision that would thwart the automatic effectiveness of those requirements would violate section 110(l). Again, appendix S is not an amendment to a SIP, and does not replace any existing SIP requirements. Rather, it covers the gap caused by the lack of a part D NSR SIP for the newly designated nonattainment area. If a SIP applies the nonattainment NSR program to a newly designated nonattainment area, appendix S does not apply to that area. [See 40 CFR 52.24(k) and appendix S, section I.] For these same reasons, the commenter is incorrect that NSR permitting under appendix S violates Congressional intent not to relax pollution control requirements when the NAAQS are revised, as expressed in section 172(e). One commenter stated that any major revisions to appendix S should be subject to additional notice-and-comment because such revisions could not be a logical outgrowth of the June 2, 2003 proposal. We disagree that the public lacked adequate notice and opportunity to comment. The changes to incorporate the 1990 CAA Amendments to part D of title I of the CAA (for example, major stationary source thresholds, significant emission rates, and offset ratios) and the revisions to the rule governing creditable emissions reductions from shutdowns and curtailments were proposed in 1996 for the major NSR program, including appendix S (61 FR 38252). The method for making designations and classifications specific to the 8-hour standard under subparts 1 and 2 was proposed on June 2, 2003 (68 FR 32802). Although rule language was not proposed specifically for appendix S, the rule language could be discerned from the rule language proposed for § 51.165, as appendix S states it is an interpretation of 40 CFR subpart I, which includes § 51.165. Additionally, the CAA does not require that the Agency provide notice of the exact rule language that will be finalized, but rather that the Agency provide a statement of basis, including, among other things, the major legal interpretations and policy considerations underlying the proposal. These were provided by the 1996 and 2003 proposals and, in the case of the removal of the 50 tpy exemption, in the 1979 proposal.

With regard to the changes to section VI of appendix S, the Agency notes that because it declined to adopt the extensive revisions proposed, the changes are minimal. The additional condition regarding approval by the Administrator is a logical outgrowth of the proposed revisions to section VI, which explained that the Agency's goal was to limit the applicability of section VI to situations where the new source would comply with all of the conditions in section VI, most notably, not interfering with an area's ability to meet its attainment deadline.

5. Comments on Changes To Identify NO_X as an Ozone Precursor in Attainment and Unclassifiable Areas

Commenters supported our proposal to amend our PSD regulations to expressly include NO_X as an ozone precursor. We agree with these commenters.

6. Comments on Removing the 50-Ton Exemption

For comments on removing the 50-ton exemption, see the discussion in the 1980 final rules at 45 FR 52689–90.

D. NSR Implementation Under the 8-Hour Ozone NAAQS

As promulgated at 69 FR 23858, the designation and classifications for the 8-hour NAAQS became effective June 15, 2004. The transition to NSR under the 8-hour NAAQS raises multiple implementation questions, which are discussed below. We intend to address additional issues in the future.

1. Areas That Have Never Been Nonattainment for Ozone

If an area has never been nonattainment for ozone and is nonattainment for the 8-hour ozone NAAQS, it became subject to nonattainment major NSR under the 8-hour standard on June 15, 2004. Permits for new or modified major stationary sources in such areas issued on or after June 15, 2004 must reflect NSR requirements under the 8-hour ozone NAAQS. Some States may already have in place a part D major source permitting program applicable to newly designated 8-hour ozone nonattainment areas. For nonattainment areas in States whose SIPs contain a generic requirement to issue part D major source NSR permits in areas designated as nonattainment, the State can continue to issue nonattainment NSR permits for new and modified major stationary sources under the part D NSR SIP on or after June 15, 2004. For a nonattainment area in a State with a SIP that specifically lists the areas in which part D NSR applies, or in an area that currently has no nonattainment plan or otherwise lacks authority to implement NSR for the 8-hour ozone NAAQS through a SIP-approved permitting program, there will be an interim period between June 15, 2004 and the date that the State amends its SIP either to list any new nonattainment area(s) or to include a part D plan. During this interim period, pursuant to § 52.24(k), permits for new and modified major stationary sources in such areas must be consistent with the requirements in appendix S. Where a State or local agency lacks authority to issue permits consistent with appendix S, EPA is the reviewing authority.

States may not issue PSD permits to address major NSR obligations arising from nonattainment classifications. As we stated at 69 FR 23992, PSD permits may not be issued after June 14, 2004, to satisfy permitting obligations under the 8-hour nonattainment designation. We clarify here that States are not precluded from issuing PSD permits based on the 1-hour attainment classifications, but such actions do not relieve States or sources from addressing nonattainment NSR obligations based on the 8-hour classification.

2. Areas That Are Nonattainment for the 1-Hour NAAQS and the 8-Hour NAAQS

New source review under the 8-hour NAAQS became effective in 8-hour nonattainment areas on June 15, 2004.

[108] Although EPA did state in the proposal that States with already applicable part D NSR SIPs may choose to amend their SIPs to allow them to take advantage of the proposed revisions to section VI (68 FR 32844 n.67), the decision not to go forward with the section VI revisions as proposed makes that issue moot. New source review under section VI, as finalized, will involve notification by the Administrator that it applies for new sources meeting the section VI criteria in areas lacking approved part D NSR programs, rather than replacement of a NSR program in the SIP with an alternative NSR program.

Currently, the 1-hour NAAQS remains in effect. Thus, there is a period of time when major NSR requirements for both the 1-hour and 8-hour NAAQS applies in an area or parts of an area. During this period, different major stationary source thresholds and offset ratios may apply in a given nonattainment area under the 1-hour and 8-hour ozone NAAQS, due to a change in its classification. Permits issued during this transition period will assure compliance with both programs if the permit requirements are based on the highest classification that applies to the area. If the area's 1-hour classification is higher than its 8-hour classification, the NSR SIP program under the 1-hour NAAQS will satisfy the requirements of both programs. If the 8-hour classification is higher, then the NSR program under the 8-hour classification will determine the NSR requirements. For example, suppose a source is locating in an area that is now classified as moderate nonattainment under the 8-hour ozone NAAQS but was previously classified as a serious ozone nonattainment area under the 1-hour NAAQS. Any permit the State issues during the transition would be based on the 50 tpy major stationary source threshold and at least 1.2:1 offset ratio that apply to serious ozone nonattainment areas under the 1-hour ozone NAAQS.

Pursuant to 40 CFR 50.9(b), EPA revoked the 1-hour NAAQS effective June 15, 2005 for areas designated for the 8-hour ozone standard effective June 15, 2004. We anticipate that, upon revocation of the 1-hour ozone NAAQS, States will submit requests for approval of SIP revisions removing NSR requirements based on the 1-hour classifications, where such SIP revisions are necessary to achieve this result. At 69 FR 23985, we stated that upon revocation of the 1-hour ozone NAAQS, for any area that was designated nonattainment for the 1-hour ozone NAAQS, the area's implementation plan provisions satisfying sections 172(c)(5) and 173 (including provisions satisfying section 182) based on the area's previous 1-hour ozone NAAQS classification are no longer required elements of an approvable implementation plan. We also indicated that a State may request approval of a SIP revision to remove its 1-hour nonattainment NSR program from its SIP. We further stated that we will approve such changes to a state's SIP because we have determined based on 110(l) of the CAA that such changes will not interfere with any state's ability to reach attainment of the 8-hour standard and will be consistent with RFP.

On June 29, 2004, we received a Petition for Reconsideration from Earthjustice concerning these statements on removing the 1-hour NSR SIP and on the 110(l) determination related to removing the 1-hour NSR SIP. You can find a copy of this Petition for Reconsideration at *http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/materials.html.* We have granted reconsideration on these two narrow NSR issues in the Phase 1 Ozone Implementation Rule. We published a proposed rule on these issues on April 4, 2005 (70 FR 17018). We published a final rule on these two issues on July 8, 2005 (70 FR 39413).

As we stated at 69 FR 23986 (Column 1), emission limitations and other requirements in major NSR permits issued under 1-hour NSR programs will continue to be in force when the 1-hour NAAQS is revoked. For example, suppose an existing source is located in an area classified as serious nonattainment under the 1-hour ozone NAAQS and has a nonattainment major NSR permit based on its potential to emit 75 tpy VOC. That major NSR permit (including emission limitations and other requirements) remains in force on and after June 15, 2005 even if the area that the source is located in is now classified moderate nonattainment (with a major stationary source threshold of 100 tpy) under the 8-hour ozone NAAQS.

3. Part D NSR SIP Submittals

Today's final action on the regulations at § 51.165 establishes the minimum requirements for part D SIPs implementing major NSR under the 8-hour NAAQS. Some States may find it unnecessary to revise their SIPs to implement NSR under the 8-hour NAAQS. This can happen when the approved part D NSR and ozone classification scheme SIP applies to any areas designated as nonattainment under section 107 of the CAA or listed in 40 CFR 81.300 et seq. In States that do not have authority to implement a part D program for the 8-hour NAAQS, a SIP revision for major NSR under the 8-hour NAAQS must be submitted.[109] The revised implementation plan must include requirements to implement the provisions of sections 172(c)(5) and 173 of the CAA based on the area's 8-hour ozone NAAQS classification under 40 CFR part 81, and the provisions of § 51.165 as amended in today's final action.

States must submit SIP provisions incorporating today's final rules at § 51.165 no later than June 15, 2007, which is 3 years after designation. This schedule is consistent with the schedule set forth in CAA sections 172(b) and 110(a)(1).[110] This date facilitates coordination of NSR program changes with the submission of the attainment plan, which is also due within 3 years. Part D NSR SIPs to implement the 8-hour NAAQS should reflect the requirements of today's final action, as well as the requirements in subpart X of part 51 promulgated on April 30, 2004 at 69 FR 23951. Before EPA can approve a program into the SIP to implement a nonattainment major NSR program for the 8-hour ozone NAAQS, State and local agency programs implementing part D (nonattainment NSR permit program in § 51.165) must include today's changes as minimum program elements. States must also submit SIP provisions incorporating today's final rules at § 51.166 no later than June 15, 2007.

4. Effective Date for Today's Requirements

All of these changes will take effect in the NSR permitting programs for nonattainment areas codified at appendix S of part 51 and § 52.24 on January 30, 2006. This means that appendix S as amended in today's final action will apply on January 30, 2006 in any nonattainment area without an approved part D NSR SIP that applies to major sources in the nonattainment area for the nonattainment pollutant. These changes will take effect in the Federal PSD program (codified at 40 CFR 52.21) on January 30, 2006 in any area without an approved PSD program, for which we are the reviewing authority, or for which we have delegated our authority to issue permits to a State or local reviewing authority. The provisions of § 51.165 and § 52.24, as amended in today's final action, also apply on January 30, 2006. State and local agency programs implementing part C (PSD permit program in § 51.166) and part D (nonattainment NSR permit program in § 51.165) are effective when they are approved by us.

5. Requirements for Offsets

Offsets under CAA section 173 are typically based on emissions reductions

[109] As noted in section V.D.2 of this preamble, we will complete our reconsideration on issues related to NSR SIP submittals and announce our final action by May 20, 2005.

[110] CAA Section 182(a)(2)(C)(i) requires NSR SIPs to meet the 1-hour ozone NAAQS to be submitted within 2 years after the date of the enactment of the 1990 CAA Amendments. This requirement has been met by the submission of NSR SIPs due on November 15, 1992, which EPA requested on April 16, 1992 at 57 FR 13499. We have interpreted the 2-year schedule not to apply for the NSR SIPs implementing the 8-hour ozone NAAQS.

achieved through installation of control technology, shutdown of a source, or curtailment of production or operating hours below baseline levels. Offsets must meet several requirements set forth in section 173 of the CAA, including the following:

- Offsets must be obtained by the time the source is to commence operation [CAA section 173(a)(1)(A)].
- Offsets must be consistent with RFP [CAA section 173(a)(1)(A)].
- Offsets must be federally enforceable before permit issuance [CAA section 173(a)].
- Offsets must be in effect and enforceable by the time a new or modified source commences operation [CAA section 173(c)(1)(B)].
- Emissions reductions that are otherwise required under the CAA cannot be creditable as offsets [CAA section 173(c)(2)].
- Offsets must come from a source in the same nonattainment area, unless it comes from an area that has an equal or higher nonattainment classification and the emissions from such other area contribute to a violation of the national in the nonattainment area in which the source is located [CAA section 173(c)(1)].

If an emission reduction credit (including an emission reduction credit generated from a shutdown or curtailment) has been used to meet ROP or RFP milestones, it is not available for use as an offset or in netting. This is because section 173(c)(2) of the CAA prohibits use of emissions reductions as offsets where the reductions are ''otherwise required by the Act.'' Thus, reductions that are used to meet Federal requirements, including SIP-approved ROP and RFP obligations under CAA section 182, are not creditable. Where emissions reductions pre-dating 2002 have not been used to meet ROP and RFP obligations, or other Federal requirements, CAA section 173(c)(2) does not prohibit their use. Thus, EPA believes that such credits may be used as offsets consistent with the CAA. The EPA encourages States to allow sources to use pre-2002 banked emissions reductions credits (that is, those that were generated before January 1, 2002, which is the first day of the emissions inventory base year for the base year inventory used to develop the attainment demonstration) for offsetting purposes. States may do so as long as the banked credits meet all other offset creditability criteria and such credits are included by States as growth in developing the attainment demonstration as discussed elsewhere in this preamble. See also 57 FR 13508–09. The credits must be certified and approved for such purposes.

Additional requirements apply to credits generated from shutdowns or curtailments. Pursuant to today's final rule, States may revise their SIPs to remove the requirement for an approved attainment demonstration as a condition of using shutdown/curtailment credits pre-dating the new source application. Under the revised rule, emissions from the shutdown/curtailed source can be creditable if they are included in the projected emissions inventory used to develop the attainment demonstration. For emissions reductions from shutdowns or curtailments to be creditable for offset purposes, the State must also certify that emissions from the shutdown or curtailed source have not been used and are not necessary to meet any other requirement under the CAA, including RFP or ROP.

Use of emission reduction credits banked before the base year (that is, those generated before January 1, 2002) for netting continues to be available to the extent allowed under State rules. However, because these emission reduction credits represent emissions that are not included in the 2002 base year inventory, States should consider net emission increases occurring on or after January 1, 2002 as growth even though, for applicability purposes, the source does not have a significant net emissions increase.

VI. Final Rule for RFG

A. Introduction

This portion of the rule addresses what effect the transition to the 8-hour NAAQS will have on certain aspects of the federal RFG program. Under the CAA, the RFG requirements apply in certain areas of the country. First, there are nine areas that Congress identified pursuant to section 211(k)(10)(D) of the CAA as mandatory RFG areas. Second, there are five RFG areas that are mandatory areas based on their reclassification to a severe ozone classification. These areas are typically called ''bump-up'' areas. See CAA section 211(k)(10)(D), 211(k)(6), and 211(k)(5). Finally, there are a number of areas that have voluntarily opted in to the RFG program. The purpose of the RFG program is to improve air quality through the use in certain areas of gasoline that is reformulated to reduce motor vehicle emissions of tropospheric ozone-forming compounds and toxics, as set forth in section 211(k)(1) of the CAA.

B. Background

In the Phase 1 Rule, EPA addressed two key issues regarding the transition from the 1-hour NAAQS to the 8-hour NAAQS. First, when will the 1-hour NAAQS no longer apply (i.e., be ''revoked'')? Second, what protections are in place to ensure that, once the 1-hour NAAQS is revoked, air quality will not degrade and that progress toward attainment will continue as areas transition from implementing the 1-hour NAAQS to implementing the 8-hour NAAQS?

On the first issue, EPA decided that the 1-hour NAAQS will be revoked in full, including the associated designations and classifications, 1 year following the effective date of the designations for the 8-hour NAAQS. Most areas were designated effective June 15, 2004, and for those areas the 1-hour NAAQS and the related designation and classification will no longer apply as of June 15, 2005.

On the second issue, the anti-backsliding portion of the Phase 1 rule established that all areas designated nonattainment for the 8-hour ozone NAAQS, that were designated nonattainment for the 1-hour NAAQS at the time of designation for the 8-hour NAAQS, remain subject to mandatory control measures that applied by virtue of the area's classification for the 1-hour NAAQS. These control measures are called ''applicable requirements.'' [111] Also, EPA decided that areas designated nonattainment for the 8-hour NAAQS, that were designated attainment subject to a section 175A maintenance for the 1-hour NAAQS at the time of designation for the 8-hour NAAQS, must continue to implement all applicable requirements that have been approved into the SIP.[112]

In the June 2003 proposal, EPA identified Federal RFG as an applicable requirement (68 FR 32867). In the final rule, however, EPA did not include RFG in the list of applicable requirements. The EPA instead clarified that RFG is required under a Federal program, and thus differs significantly from the other programs on the list of applicable requirements, which are developed and adopted by States for inclusion in the

[111] In the Phase 1 Rule, EPA defined applicable requirements as those control measures in place as of the date of signature of the Phase 1 Rule, (i.e., April 15, 2004). The EPA recently reconsidered this issue and changed this date to the effective date of the 8-hour designations—for most areas this would be June 15, 2004 (70 FR 30596).

[112] While the Phase 1 Rule also addressed the transition to the 8-hour NAAQS for areas recently designated as attainment for the 8-hour NAAQS, all relevant RFG areas are designated as 8-hour nonattainment areas (69 FR 23858).

SIP. The EPA recognized that various issues exist regarding the scope and applicability of the RFG program during and after implementation of the 8-hour NAAQS that need further clarification. The EPA stated that we were still considering how to treat RFG and that we would address these issues in an action separate from the Phase 1 Rule (69 FR 23973). Thus, EPA did not include RFG in the list of applicable requirements in the Phase 1 Rule, and EPA made no decision at that time concerning RFG treatment in the transition to the 8-hour NAAQS.

C. What action is EPA taking?

As discussed in more detail below, EPA is clarifying today that the nine original mandatory RFG areas, as well as most other areas that have become mandatory RFG areas by being ''bumped up'' to a severe classification, will continue to be required to use RFG at least until they are redesignated to attainment for the 8-hour NAAQS. The EPA is not deciding at this time what will happen when the original nine areas and the bump-up areas covered by this rule are redesignated to attainment for the 8-hour NAAQS. The EPA is also not deciding at this time what RFG requirements apply for any bump-up areas that are redesignated to attainment for the 1-hour NAAQS before the 1-hour NAAQS is revoked. The only such area that was redesignated to attainment prior to revocation of the 1-hour NAAQS is Atlanta, Georgia. That issue will be addressed in an action separate from this final rule.

The RFG areas that opted into the program will continue to be RFG areas unless they opt-out pursuant to EPA's opt-out regulations. The transition to the 8-hour NAAQS does not change the terms and conditions that apply to opting-out of the RFG program. Likewise, EPA's current rules on opting-in to RFG will apply in the same manner under the 8-hour NAAQS as under the 1-hour NAAQS—i.e., 8-hour nonattainment areas that are classified as marginal or above under subpart 2 will be able to opt-in to the RFG program.

D. Why is EPA taking this action?

1. RFG Mandatory Areas

Under section 211(k)(5), RFG is required in any ''''covered area.'' The term ''covered area'' is defined in section 211(k)(10)(D) as:

[t]he 9 ozone nonattainment areas having a 1980 population in excess of 250,000 and having the highest ozone design value during the period 1987 through 1989 shall be ''covered areas'' for purposes of this subsection. Effective one year after the reclassification of any ozone nonattainment area as a severe ozone nonattainment area under section 181(b) of this title, such severe area shall also be a ''covered area'' for purposes of this subsection.

In the June 2003 proposed Phase 1 Rule, EPA proposed that RFG be considered an applicable requirement and treated like the various mandatory control obligations that States remained obligated to adopt and implement after revocation of the 1-hour NAAQS. Under that proposal, the nine original mandatory areas and all bump-up areas would have continued to be covered areas after revocation of the 1-hour NAAQS. For the reasons discussed below, EPA is adopting this basic approach for the nine original mandatory areas as well as those bump-up areas covered by this final rule.

a. Nine Original Mandatory Areas

The first sentence of section 211(k)(10)(D) identifies certain covered areas by reference to their 1980 population and their 1987–1989 ozone design value. The nine areas that meet these criteria are Los Angeles, San Diego, Hartford, New York, Philadelphia, Chicago, Baltimore, Houston, and Milwaukee. It is clear that transition to the 8-hour NAAQS does not change the historical facts that define these areas. In addition, all of these areas are designated as nonattainment areas under the 8-hour NAAQS. Thus, they will continue to be ''ozone nonattainment areas'' until they are redesignated to attainment for the 8-hour NAAQS. Revocation of the 1-hour NAAQS and transition to the 8-hour NAAQS does not change the fact that each of these nine mandatory areas will continue to meet the definition of covered area at least until it is redesignated to attainment for the 8-hour NAAQS. As discussed below, EPA is not deciding at this time whether these areas will continue to be covered areas upon redesignation to attainment for the 8-hour NAAQS. The EPA reserves any determination on that issue for a future action.

The EPA believes that this is a straightforward and clear application of the plain language of the statute. However, even if the statutory terms were considered ambiguous on this issue, EPA believes that the same statutory interpretation and policy considerations described below for the ''bump-up'' areas covered by this final rule apply to the nine mandatory areas and would lead EPA to require continued use of RFG in the nine areas at least until they are redesignated to attainment for the 8-hour NAAQS.

Since EPA regulations at 40 CFR 80.70 currently define the term ''covered area'' to include the original nine mandated areas, no change in EPA regulations is needed at this time. The EPA will address in a future action what RFG requirements, if any, apply to the original nine RFG covered areas when they are redesignated to attainment for the 8-hour NAAQS.

b. Bump-Up Areas

The second sentence of section 211(k)(10)(D) identifies areas that become covered areas because they have been reclassified as a severe area under CAA section 181(b). These are called ''bump-up'' areas. To date, five areas have been reclassified to severe for the 1-hour NAAQS. They became RFG covered areas 1 year after their reclassification—Baton Rouge, Atlanta, Sacramento, San Joaquin Valley, and Washington, DC—which was already an opt-in area.

The areas that are RFG covered areas based on the bump-up provision were designated as ozone nonattainment areas and classified by operation of law at the time of the 1990 CAA Amendments, and their bump-up to severe occurred by operation of law based on EPA's determination under section 181(b) that the areas failed to attain the 1-hour NAAQS by the applicable attainment date. Thus, their reclassification to severe was not based on a determination that their air quality met the severe area design value. Instead, reclassification was based on their failure to meet the applicable attainment date. The bump-up to severe has two effects—a later attainment date is set for the area, and a variety of additional control measures become mandatory for the area. The Federal RFG program becomes a mandatory control measure in an area 1 year after it is bumped up to a severe classification.

There are two ways that a bump-up area classified as severe could lose its severe classification. First, it could do so through redesignation to attainment for the 1-hour NAAQS. (This is no longer an option for areas where the 1-hour NAAQS was revoked on June 15, 2005.) Second, since the 1-hour NAAQS is revoked, a bump-up area will no longer be classified as severe under the 1-hour NAAQS and may have a lower classification (i.e., subpart 1, marginal, moderate or serious) for the 8-hour NAAQS. This rule only addresses the second situation.

The bump-up areas in this second situation are all designated as 8-hour ozone nonattainment areas, with classifications under the 8-hour NAAQS that are a lower classification than severe. This raises the issue of whether the bump-up areas that lose their severe classification through revocation of the

1-hour NAAQS should continue to be covered areas once the 1-hour NAAQS and the areas' related severe classifications are revoked.

The EPA believes that section 211(k)(10)(D) is ambiguous on the issue of whether a bump-up area continues to be a covered area when it is no longer classified as severe. The text of the provision could be read to set the defining criteria as the occurrence of reclassification to severe, a historical fact that does not change based on subsequent changes in classification. It could also be read as identifying areas that are reclassified to severe, but as leaving unresolved what happens when they are no longer so classified. Given this ambiguity, EPA has discretion to determine whether section 211(k)(10)(D) authorizes removal of a bump-up area from the RFG program when it is no longer classified as severe, and to set appropriate criteria for such removal.[113]

For a bump-up area covered by this rule, it is instructive to consider what would happen if EPA had never revised the 1-hour NAAQS. In that case, the area would continue to be a covered area at least until it was redesignated to attainment for the 1-hour NAAQS. While section 211(k)(10)(D) does not directly address whether a bump-up area would continue to be a covered area after redesignation, it is clear that if EPA had never revised the 1-hour NAAQS, the area would continue to be a covered area at least as long as it was a severe area, and it would be a severe area as long as it was still designated as an ozone nonattainment area.

The EPA does not believe that Congress would have intended that removal of the severe classification based solely on revocation of the less protective 1-hour NAAQS should result in backsliding of the RFG requirement. For example, as noted above, if EPA had not adopted a more protective 8-hour NAAQS, with the related revocation of the 1-hour NAAQS and removal of the severe classification, then the bump-up areas covered by this rule would remain covered areas at least until they were redesignated to 1-hour attainment, at which point they would no longer be designated as ozone nonattainment areas. Here, the removal of the severe classification is through revocation of the 1-hour NAAQS, not through redesignation to 1-hour attainment. These bump-up areas are still designated as ozone nonattainment areas. The EPA believes the removal of the severe classification for these areas as a result of revocation of the 1-hour standard should not lead to removal of the RFG requirement. The EPA believes the RFG requirement should continue beyond revocation of the 1-hour NAAQS, and it should continue at least until the areas are redesignated to attainment for the 8-hour NAAQS. This does not change or affect any discretion EPA may otherwise have under the RFG provisions to modify or remove RFG requirements.

This is consistent with the approach taken in the Phase 1 Rule for the mandatory obligations that EPA identified there as ''applicable requirements.'' In that rule, EPA determined that a number of provisions of the CAA evidence Congress' intent that certain obligations that applied to an area by virtue of the area's classification for the 1-hour NAAQS should continue to apply despite EPA's determination the 1-hour NAAQS is no longer necessary to protect public health. While some of these various statutory provisions do not have direct bearing on Federal RFG and section 211(k), the issues are closely analogous. For example, the inclusion of a bump-up area in the RFG program is integrally tied to the subpart 2 provisions that establish the original classification and attainment date for an area and its later reclassification as severe under section 181(b). The Supreme Court cautioned in *Whitman* v. *American Trucking Assn.*, 531 U.S. 457 (2001), against EPA making subpart 2 ''abruptly obsolete.'' Although the RFG requirement itself is not set forth in subpart 2, the requirement to use it in severe bump-up areas is tied directly to the classifications that arise by operation of subpart 2. Thus, it would appear that the Supreme Court's caution should be as relevant for RFG bump-up areas as it is for the subpart 2 control obligations. For further discussion of the reasoning behind anti-backsliding provisions in the Phase 1 Rule, see 69 FR 23951, 23972. The reasoning presented there also supports EPA's interpretation of section 211(k)(10)(D) regarding RFG requirements for bump-up areas covered by today's rule.

One issue addressed in the Phase 1 Rule involved setting the trigger date for determining what 1-hour SIP-related requirements would continue as mandatory ''applicable requirements'' after revocation of the 1-hour NAAQS. The EPA considered three possible trigger dates for the Phase 1 Rule—the date of signature of the Phase 1 Rule, the effective date of the 8-hour nonattainment designation, and the date of revocation of the 1-hour NAAQS.[114] For purposes of this final rule, it is not necessary to decide on a similar date for determining the continued applicability of RFG for these bump-up areas. Under all potential trigger date options, RFG would be a requirement on the trigger date for the bump-up areas covered by this rule, as they would all be classified as severe areas on any of the trigger dates that were considered.

Based on the above, EPA has determined that bump-up areas that lose their severe classification based solely on revocation of the 1-hour NAAQS should remain RFG covered areas at least until they are redesignated to attainment for the 8-hour NAAQS. As indicated above, this does not change or affect any discretion EPA may otherwise have under the RFG provisions to modify or remove RFG requirements.

2. RFG Opt-In Areas

Under section 211(k)(6) of the CAA, certain ozone nonattainment areas may opt-in to the RFG program. That provision limits opt-ins to areas ''classified under subpart 2 of part D of title I as a marginal, moderate, serious, or severe Area.'' The EPA's regulation implementing this provision is at 40 CFR 80.70(j), which states that ''[a]ny * * * area classified under 40 CFR part 81, subpart C as a marginal, moderate, serious, or severe ozone nonattainment area may be included as a covered area on petition of the Governor of the State in which the area is located.''

Some areas designated nonattainment for the 8-hour NAAQS are subject only to the planning requirements of subpart 1, while others are also subject to the planning requirements of subpart 2 of part D of title I. The 8-hour nonattainment areas subject to the planning requirements of subpart 2 were all classified as marginal, moderate, serious, or severe (69 FR 23951, 23954; April 30, 2004). The 8-hour nonattainment areas subject only to subpart 1 are not subject to those classifications. Thus the only 8-hour nonattainment areas that would be able to opt-in under the terms of section 80.70(j) are areas classified under subpart 2 as marginal, moderate, serious, or severe, consistent with the terms of section 211(k)(6).

In a prior rulemaking, EPA initially expanded the scope of this opt-in provision, interpreting section 211(k)(6) as authorizing opt-in for any current or prior 1-hour ozone nonattainment area,

[113] While this final rule only addresses bump-up areas that lose their severe classification based upon revocation of the 1-hour NAAQS, the ambiguity in section 211(k)(10)(D) extends to all bump-up areas, including those not covered by this final rule. As noted above, EPA intends to address and resolve this ambiguity for any bump-up areas not covered by this rule in an action separate from this final rule.

[114] May 26, 2005 (70 FR 30596).

including areas that were not classified marginal or above. In that rulemaking, EPA reserved judgment on whether it would apply the same expanded interpretation to areas designated as nonattainment for the then recently adopted 8-hour NAAQS (63 FR 52094, 52101; September 29, 1998). The EPA's expanded view of the scope of section 211(k)(6) was subject to judicial review and was rejected as inconsistent with the terms of section 211(k)(6), as ''Congress provided for opt-in only for areas classified as marginal, moderate, serious, or severe.'' *API and NPRA* v. *EPA*, 198 F. 3d 275, 281 (D.C. Cir. 2000).

The text of EPA's current opt-in regulation is limited as a result, is consistent with the limitation in section 211(k)(6), and only allows opt-in for areas classified under subpart 2 as marginal or above. The EPA interprets the current opt-in regulation as allowing opt-in for those 8-hour nonattainment areas that are classified as marginal or above under subpart 2. The EPA believes this is consistent with section 211(k)(6) and with the *API and NPRA* case, and therefore sees no need to revise the current regulation.

E. Future Proceedings

Today, EPA is reserving for future consideration what RFG requirements, if any, should apply to the nine mandatory areas and the bump-up areas covered by this final rule when they are redesignated to attainment for the 8-hour NAAQS. The Phase 1 Rule provides that upon redesignation to attainment for the 8-hour NAAQS, SIP measures may be moved to the contingency measure portion of the SIP if the State demonstrates in accordance with section 110(l) that doing so will not interfere with maintenance of the 8-hour NAAQS or any other applicable requirement of the CAA (69 FR 23951, 23998; April 30, 1994)(40 CFR 51.905(b)). This SIP process does not apply to RFG, since it is not a SIP measure. However, EPA will need in the future to consider whether it should develop a similar scheme for RFG. Specifically, EPA will consider the following issues. Should a State be allowed to drop the RFG requirement when a covered area is redesignated to attainment for the ozone NAAQS, or should the requirement remain in place? If it can be dropped, under what conditions? Once dropped, would the requirement to use it spring back if a State backslides into nonattainment? If it springs back, what lead time should be provided? If it does not spring back automatically, should EPA nevertheless reserve the discretion to require a former covered area to use RFG if it slips back into nonattainment? The EPA anticipates considering these and related issues in a future notice-and-comment proceeding. The EPA is not soliciting comment on these issues at this time.

As noted above, EPA is not deciding at this time what RFG requirements apply for any bump-up areas that are redesignated to attainment for the 1-hour NAAQS before the 1-hour NAAQS is revoked. The only such area that was redesignated to attainment prior to revocation of the 1-hour NAAQS is Atlanta, Georgia. That issue will be addressed in an action separate from this final rule.

F. Miscellaneous Administrative Changes to the RFG Regulations

Today, EPA is making a non-substantive formatting change to its RFG regulations. The regulations are currently structured to envision a complete list of all bump-up areas required to use RFG. However, EPA has not made timely amendments to these regulations to keep the list of bump-up areas up to date, so the regulations may appear to be misleading. Although EPA could take the opportunity to revise the list at this time to include all current bump-up areas, EPA believes that it would be best to amend the regulations to omit the list. The EPA will maintain a list of bump-up areas on its RFG Web site: *http://www.epa.gov/otaq/rfg/whereyoulive.htm.* This list can more quickly and easily be amended in the future to be kept up-to-date.

G. Comments and Responses

Comment: One commenter noted EPA has proposed that all areas designated 8-hour nonattainment remain subject to control measures that apply by virtue of the area's classification for the 1-hour standard. For control measures that the State has not adopted, the State remains obligated to adopt and submit such controls. The commenter believes that such a policy may have unintended negative consequences for the few areas that recently bumped-up as the result of EPA's failed transport policy. Specifically, most of these areas will bump-up to either the serious or severe subpart 2 classification triggering higher classification controls. Some of these controls, and in particular VOC controls and RFG, may not benefit and/or may even be counterproductive to attaining the 8-hour standard. The commenter believes that for these few areas that recently bumped-up as the result of the failed transport policy, EPA should allow those States to evaluate the relative ozone reduction benefits of the higher classification controls and, where appropriate, substitute for more effective ozone controls. The commenter believes this is important to ensure continued progress towards attainment in the most cost-effective manner.

Response: Congress specified use of RFG for areas bumped up to severe nonattainment status without providing an opportunity for such areas to substitute other controls that may be more effective. Specifying mandated controls for areas that have failed to achieve timely attainment is one of the specific provisions added by Congress in the 1990 CAA Amendments. The EPA does not believe that the transition to a more protective 8-hour standard should result in less restrictive requirements for RFG, such as allowing substitution of other control measures for RFG, than would apply if EPA had never revised the 1-hour standard. Substitution was not allowed under the 1-hour standard.

However, EPA notes that Congress established a mechanism to address adverse impacts of the RFG program on attainment of the NAAQS by authorizing EPA to waive the RFG oxygen content requirement where it is clearly demonstrated that the oxygen content requirement prevents or interferes with NAAQS attainment [section 211(k)(2)(B)]. This provides additional support for the view that the transition to the 8-hour standard should not establish a right to substitute other measures for RFG as the statute provides a different way to address potential concerns over the effectiveness of RFG in addressing ozone attainment.

Comment: The local experts have estimated that RFG will cost consumers in the 5-parish nonattainment area an additional $48 to $72 million annually. The Department of Environmental Quality, using MOBILE6 modeling has projected that RFG will provide no measurable benefits for NO_X and less than 2 tons per day of VOC reductions. Recent UAM–V modeling for the Baton Rouge area shows an ozone benefit for RFG of around 0.26 ppb. Earlier UAM–V sensitivity modeling showed only a 1 ppb reduction in ozone with a 30 percent reduction in local anthropogenic VOC emissions from all sources. Thus, for an expenditure of up to $72 million annually, we can expect a negligible ozone benefit. Employing the usual cost-benefit analysis for cost per ton of pollutant removed, we arrive at a cost of around $36 million per daily ton removed or around $100,000 per annual ton removed. Since the reduction would be expected to produce no measurable ozone benefit anyway, wouldn't this qualify as an ''absurd result'' and be subject to consideration

for waiver as discussed in the proposed 8-hour implementation rules? (p.3–4).

Response: Baton Rouge has submitted requests for an RFG waiver and for a waiver of the RFG oxygen content requirement, which are currently before the Agency. With respect to EPA's authority to grant a waiver of the entire RFG requirement for bump-up areas on the basis of claims of ''absurd results'' allegedly caused by the oxygen content requirement of RFG, please see EPA's September 30, 2004, response to Georgia's request for an RFG waiver, which is available at: *www.epa.gov/otaq/regs/fuels/rfg/420s04006.pdf.* As noted above, EPA does not believe that the transition to the more protective 8-hour standard should result in less restrictive requirements for RFG than would apply if EPA had never revised the 1-hour standard. The appropriate mechanism to address Baton Rouge's concerns is therefore in the context of Baton Rouge's petitions for relief under the RFG program, and not by establishing different, less restrictive RFG requirements as part of the transition to the 8-hour standard.

Comment: Several commenters oppose any attempts to liberalize procedures allowing for voluntary opt-ins to the Federal RFG program. Simply stated, further fuels restrictions are not an appropriate local control strategy. There is little justification for automatic proliferation of RFG. The industry is currently working hard to implement far-reaching fuels regulations that will result in significant environmental improvement. It does not need additional fuel reformulation requirements while this implementation work is going forward.

The commenter notes under section 211(k)(6)(A) of the CAA, only areas classified under subpart 2 of Part D of Title I as a marginal, moderate, serious or severe area (without regard to whether or not the 1980 population of the area exceeds 250,000) can opt-in to RFG. Therefore, ''Gap'' Areas—those attaining the 1-hour, but not the 8-hour standard—would be subject to implementation under subpart 1 of the CAA. Those areas not attaining the 1-hour standard and reclassified as 8-hour nonattainment areas would be subject to implementation procedures under subpart 2.

Response: Section 211(k)(6)(A) specifies which ozone nonattainment areas may opt-in to the RFG program. The EPA's implementation plan for the 8-hour standard does not change or liberalize this statutory provision or EPA's regulations implementing it, but rather provides for continued availability of opt-ins consistent with the statutory scheme. After revocation of the 1-hour standard, opt-ins will be possible for areas classified under subpart 2 as marginal, moderate, serious or severe ozone nonattainment areas under the 8-hour standard. The EPA will continue after transition to the 8-hour standard to use its existing regulations at 40 CFR 80.70(j) and 80.72 regarding procedures for opt-ins and opt-outs.

Comment: The American Road and Transportation Builders Association (ARTBA) believes States should be able to choose their own devices for improving air quality. As a result, ARTBA would like EPA to liberalize its procedures for allowing a voluntary opt-in for the Federal RFG program. While ARTBA understands new national fuel standards are in the developmental process, the transportation conformity requirement often mandates short-term solutions with a limited number of options. We believe the RFG opt-in should be one of the tools available for States.

Response: Section 211(k)(6) of the CAA specifies which ozone nonattainment areas are eligible to opt-in to the RFG program and the procedures (petition by governor of the State) for opting in. Opt-in is limited to areas classified under subpart 2 as marginal, moderate, serious or severe ozone nonattainment areas. The EPA does not have the authority to ''liberalize'' these provisions in a manner inconsistent with the statute. See *American Petroleum Institute* v. *EPA,* 198 F. 3d 275 (D.C. Cir. 2000)(RFG opt-ins limited to areas classified under subpart 2 as marginal, moderate, serious or severe nonattainment areas).

Comment: One commenter believes EPA's proposed incentive feature undercuts controls aimed at reducing ozone precursor emissions from mobile sources. For example, areas that are bumped down from severe to serious will no longer need to sell less-polluting reformulated gas.

Response: The EPA's final rule does not provide for areas to be ''bumped down'' after final designation and thereby drop the requirement to use RFG. On the contrary, the original nine mandated RFG covered areas, and any other nonattainment area bumped up to a severe classification, will be required to use RFG at least until redesignated to attainment of the 8-hour ozone NAAQS.

Comment: One commenter notes that, in the proposed rule, EPA includes the requirement for RFG in severe areas in its list of applicable requirements that will remain in effect after full revocation of the 1-hour standard (68 FR 32802 appendix B). This commenter requests that EPA remove the RFG requirement from appendix B before promulgation of the final implementation plan.

The commenter notes that within 1 year of reclassification as a ''severe'' nonattainment area under the 1-hour standard, gasoline distributors in the 13-county Metro Atlanta nonattainment area will be required to distribute reformulated gasoline. [42 U.S.C. 7545(k)(10)(D)]. Reformulated gasoline, however, will not be as beneficial to the air quality in Atlanta as other types of fuel. After significant study, the Georgia Environmental Protection Division (EPD) has implemented a fuel program tailored to the atmospheric conditions and air quality problems in the metro area that are primarily related to NO_X emissions and not VOC emissions. House Hearing (July 22, 2003). Reformulated gasoline, however, is designed to reduce VOC emissions rather than NO_X emissions. Therefore, EPD's fuel program that requires the distribution of fuel that is specifically designed to reduce NO_X will do more to clean the air in Atlanta than RFG. If Atlanta is ''bumped up'' to a ''severe'' nonattainment area, it will lose the benefits of its beneficial fuel program in place of the less effective RFG.

The commenter requests EPA to remove RFG as an applicable requirement that will remain in effect after implementation of the 8-hour standard. The requirement for RFG under the 1-hour standard is flawed in that it does not address the specific ozone nonattainment issues of areas such as Atlanta in which NO_X rather than VOCs is the pollutant of concern. Therefore, the commenter urges EPA to allow the revocation of the RFG requirement associated with areas classified as severe and higher under the 1-hour standard to allow areas that will be classified as a lower designation under the new, more stringent 8-hour standard the flexibility to utilize a gasoline formulated specifically to address the air quality issues in those particular areas.

Response: The final rule adopted today specifies that areas bumped up to a severe classification under the 1-hour standard that are designated nonattainment for the 8-hour standard must continue to use RFG at least until redesignated as attainment for the 8-hour standard. The reasons for this approach are described in the preamble and do not change or affect any discretion EPA may otherwise have under the RFG provisions to modify or remove RFG requirements. The EPA did remove RFG from the list of applicable requirements identified in the Phase 1 Rule, because the applicable

requirements provision in the Phase 1 Rule addresses State controls and SIP requirements. The final rule adopted today treats RFG, a Federal control, in basically the same manner as applicable requirements are treated in the Phase 1 Rule.

With respect to the specific comments regarding the impact of using RFG in the Atlanta area, please see EPA's analysis of these issues in its September 30, 2004, response to Georgia's request for an RFG waiver for Atlanta.

VII. Other Considerations

A. How will EPA's implementation of the 8-hour ozone NAAQS affect funding under the congestion mitigation and air quality improvement (CMAQ) program?

1. Background

In the proposal, we noted that the Transportation Equity Act for the 21st Century (TEA–21) established eligibility for the use of CMAQ program funds in certain nonattainment and maintenance areas, designated under section 107(d) of the CAA (42 U.S.C. 7407(d)), provided the area is, or was, also classified in accordance with CAA subpart 2, sections 181, 186, and 188. All areas designated nonattainment after December 31, 1997 were also eligible, but without regard to classification.

2. Current Position

Since the proposal, new transportation legislation was passed by Congress and signed into law. The amount of CMAQ funds available to States is now set at levels authorized by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU). The funds are still apportioned to States through the statutory formula contained in section 104(b) of title 23. The formula is still based on the designations and classifications of ozone and CO nonattainment and maintenance areas, and the population in such areas.

The formula for determining the amount of funds apportioned to the States takes into account the areas that are designated under both subpart 1 and subpart 2 of part D of title I, of the CAA. How funding is affected for any specific area is determined by the U.S. DOT in accordance with SAFETEA–LU.

3. Comments and Responses

Comments: The EPA received several comments expressing concern that implementation of the 8-hour ozone standard may negatively impact an area's eligibility for CMAQ Program funds and/or the amount of CMAQ funding the State would receive. The comments indicated that projects and programs to reduce air pollution in their area was supported through CMAQ funding. Some stated that their area was attaining the 8-hour ozone standard, and thus would become ineligible for CMAQ funding when the 1-hour ozone standard is revoked. Others expressed concern that any increases to the number of nonattainment areas or changes to classifications of nonattainment areas could reduce the amount of CMAQ funds available to the area.

Response: The impact of the implementation of the 8-hour standard and enactment of SAFETEA–LU result in the geographic eligibility and apportionment of funds for the CMAQ programs as follows:

CMAQ Eligible Areas

- Designated 8-hour nonattainment and maintenance areas.
- Former 1-hour ozone nonattainment and maintenance areas, that are attaining the 8-hour standard, but must submit a section 110(a)(1) maintenance plan in compliance with EPA's anti-backsliding provisions.
- CO, PM_{10} and $PM_{-2.5}$ nonattainment and maintenance areas. Additionally, Nashville, TN; Greensboro, NC; and Denver, CO are Early Action Compact areas under the 8-hour ozone standard that were excepted from the revocation of the 1-hour standard. As a result, their CMAQ eligibility and apportionment are based on their status as maintenance areas under the 1-hour ozone standard.
- If the State does not have, and has never had, a nonattainment area designated under the CAA (42 U.S.C. 7401 et seq.), the State may use the funds for any project in the State that would otherwise be eligible under the CMAQ program as if the project were carried out in a nonattainment or maintenance area, or is eligible under section 133 of the surface transportation program. This flexibility is in reference to the CMAQ Program's minimum apportionment provision.

Apportionment (ozone-based)

- Nonattainment areas designated under subpart 1 receive a weighting factor of 1.0
- Nonattainment areas designated and classified under subpart 2 retain the same apportionment weighting factors as under TEA–21
- Maintenance areas receive a weighting factor of 1.0.

Apportionment of CMAQ funds is carried out yearly and varies according to the severity of air pollution and changes in nonattainment and maintenance area population as estimated by the U.S. Census for each affected county. The program is administered by the U.S. DOT with EPA in a consultative role. The EPA is only taking action to implement the 8-hour ozone standard and has no authority to make changes to the eligibility criteria or apportionment formula contained in SAFETEA–LU. We understand the importance of CMAQ funding to States and nonattainment areas and are prepared to work with the U.S. DOT to minimize any unintended impact of the 8-hour ozone NAAQS on transportation programs in those areas.

B. What is the relationship between implementation of the 8-hour standard and the CAA's title V permits program?

1. Background

The interrelationship between implementation of the 8-hour ozone standard and the title V permits program was not discussed in the proposed rule. However, various questions have been raised about the interface between the implementation of the 8-hour ozone standard and the title V operating permits program. The following questions and answers address these questions.

Question 1: How is title V applicability affected by the new 8-hour ozone standard and the revocation of the 1-hour ozone standard? [115]

Response: Section 502(a) of the CAA and 40 CFR 70.3 and 71.3 establish specific criteria for determining whether a source is subject to the title V operating permits program. A source that meets one or more of these criteria is subject to title V: title IV affected sources, major sources, sources subject to standards or regulations under

[115] The 1-hour standard was revoked for most areas, including the associated area designations and classifications, on June 15, 2005, 1 year following June 15, 2004, the effective date of designations for the 8-hour standard. The 1-hour standard was revoked for most areas, including the associated area designations and classifications, on June 15, 2005, 1 year following June 15, 2004, the effective date of designations for the 8-hour standard. However, for early action compact areas that were not designated attainment for the 8-hour standard, the effective date of 8-hour designations and classifications was deferred, and the 1-hour standard remains applicable and will not be revoked until 1 year after the effective date of the 8-hour designations for these areas. As a result, although this section of the preamble continually refers to the June 15, 2004, and June 15, 2005, dates, the title V major source thresholds are currently determined only by the 1-hour standard in areas where the 8-hour designations and classifications are not effective and the 1-hour standard has not been revoked. The scenarios described in this preamble section will not begin to be applicable to these areas until the effective date of the 8-hour designations in these areas.

section 111 or 112,[116] sources required to have a permit under part C or D of title I, or any other stationary source in a category designated by the Administrator. Although a source is required to obtain a title V permit if it meets one or more of these criteria, only sources which are brought into title V as a result of their major source status and/or the requirement to obtain a part C or D permit may be directly affected by the transition from the 1-hour ozone standard to the 8-hour ozone standard.

For example, a source subject to title V *solely* because it was major for VOCs under a 1-hour ozone classification is no longer subject to title V after the revocation of the 1-hour ozone standard (on June 15, 2005) if its actual and potential emissions of VOCs under an 8-hour ozone designation or classification are minor. However, if the same source was also subject to title V for other reasons, the source would remain subject to title V. See question 4 for further information. In addition, the source's title V applicability could also be affected by future changes, such as becoming subject to PSD or major nonattainment NSR.

Question 2: When do the 8-hour major source thresholds apply for determining major source status under title V?

Response: For purposes of title V, section 501(2) of the CAA defines ''major source'' in part as ''a major stationary source as defined in section 302 or part D of title I.'' The part 70 and part 71 regulations incorporate this definition and the part D major source thresholds. ''Major source'' for ozone nonattainment areas include sources which emit or which have the potential to emit 100 tpy or more of VOCs or oxides of nitrogen in areas classified as ''marginal'' or ''moderate,'' 50 tpy or more of these ozone precursors in areas classified as ''serious,'' 25 tpy or more of these ozone precursors in areas classified as ''severe,'' and 10 tpy or more of these ozone precursors in areas classified as ''extreme.''

On or after June 15, 2004, until June 15, 2005, the major source thresholds for the 1-hour ozone designations and classifications *and* the 8-hour ozone designations and classifications were in effect under part D of title I, and therefore under title V as well. Since revocation of the 1-hour ozone standard and the corresponding area designations and classifications on June 15, 2005, only the major source thresholds for the 8-hour ozone designations and classifications continue to determine whether a source is major for ozone precursors under title V. Our review of the 1-hour and 8-hour designations and nonattainment classifications indicates that no additional sources became subject to title V on June 15, 2004 (the effective date of the 8-hour ozone NAAQS designations and classifications (40 CFR part 81, subpart C)) based solely on the 8-hour designations and classifications and corresponding major source thresholds. This is because the 8-hour designations and classifications effective on June 15, 2004 did not result in a lowering of the title V major source threshold for any area compared to the 1-hour designations and classifications. Rather, the title V major source thresholds either stayed the same or were raised to a higher threshold in all cases, e.g., 50 tpy to 100 tpy.

Question 3: Are title V permits required for sources that trigger the major source applicability cut-offs for RACT in 40 CFR 51.900(f)(3) due to the 8-hour ozone anti-backsliding provisions in 40 CFR part 51, subpart X?

Example: An area is classified as extreme under the 1-hour ozone standard. In an extreme area, the major source threshold for ozone precursors is 10 tpy. Under the 8-hour standard in this example, this same area is classified as a severe-17 area. In a severe-17 area, the major source threshold for ozone precursors is 25 tpy. Under the anti-backsliding provisions, this area would be required to continue its application of RACT to sources with potential emissions of 10 or more tpy of ozone precursors. However, is the title V major source threshold for ozone precursors in this area 10 tpy or 25 tpy since June 15, 2005?

Response: Since revocation of the 1-hour ozone standard on June 15, 2005, the title V major source thresholds for ozone are now based solely on the 8-hour designations and classifications and thus in the above example will be 25 tpy for ozone precursors. As discussed in Question 1 above, section 502(a) and 40 CFR §§ 70.3 and 71.3 include criteria for determining title V applicability. These criteria do not specifically include sources subject to RACT, but do include major sources. As discussed in Question 2 above, section 501(2) defines a title V ''major source'' in part as ''a major stationary source as defined in section 302 or part D of title I'' and 40 CFR 70.2 and 71.2 incorporate this definition.

In terms of the language in 40 CFR 51.900(f)(3) regarding ''major source applicability cut-offs for purposes of RACT,'' this provision does not apply for purposes of defining a ''major source'' under title V (nor could it, since major source is statutorily defined and cannot be revised by regulation). Rather, the cut-offs referenced in this anti-backsliding provision apply in determining which 1-hour nonattainment requirements are ''applicable requirements'' for an area—requirements which will be continued in implementing the 8-hour standard. Additionally, 40 CFR 51.900 specifies that the definition of ''applicable requirements'' and other definitions in this section only ''apply for purposes of this subpart [subpart X].'' Thus, in short, the major source applicability cut-offs for purposes of RACT referenced in 40 CFR 51.900(f)(3) are not relevant in determining whether a source is a major source under title V.

Question 4: In many nonattainment areas, the major stationary source threshold under the 8-hour ozone standard is currently higher than the major stationary source threshold for the same area under the 1-hour ozone standard.

Example: Under the 1-hour ozone standard, an area is classified as serious with a 50 tpy major stationary source threshold for ozone precursors. Under the 8-hour standard, this same area is classified as moderate with a 100 tpy major stationary source threshold for ozone precursors. If a source in this area has a potential to emit VOCs at 75 tpy, but also has a part D permit obtained under the 1-hour standard, is this source subject to title V since revocation of the 1-hour ozone standard on June 15, 2005?[117]

Response: Yes. Under the 1-hour standard, this source was subject to title V both because it was a major source and also because it was required to have a part D permit. Under the 8-hour standard, this source remains subject to title V because it was required to have a part D permit under the 1-hour standard even though it is no longer subject to title V due to its major source status.

Sources that are, at any time, required to have a permit under part C or D of title I must obtain a title V permit. This interpretation is consistent with the CAA and EPA's implementation policy history. See the Vastar letter discussed below. Section 502(a) states in part that ''any other source required to have a permit under part C or D of title I'' is required to have a title V permit. We interpret the phrase ''required to have a permit under part C or D of title I'' to include any source required to obtain a

[116] 40 CFR 70.3(b) and 71.3(b) provide for certain area source deferrals and exemptions, which are not detailed here.

[117] A source with a part D permit obtained under the 1-hour standard must retain its part D permit under the 8-hour standard even though it is now in an area with a higher major stationary source threshold.

permit under part C or D of title I regardless of whether the permit was actually obtained by the source. This interpretation is consistent with the legislative history which indicates Congress intended that sources ''subject to * * * requirements'' from PSD and NSR be required to have a title V permit. H.R. Rep. No. 101–490, 101st Congress, 2nd Session, at 344 (May 17, 1990); see also S. Rep. 101–228, 101st Congress, 1st Session, at 349 (December 20, 1989).

Note that the exemption in 40 CFR 70.3(b)(1) and 71.3(b)(1) for nonmajor sources does not apply to sources required to have a part C or D permit. As EPA has previously stated: ''* * * section 70.3(b)(1) cannot be appropriately interpreted as allowing title V permitting authorities to exempt nonmajor part C or D sources from title V, especially in light of the explicit requirement in sections 71.5(a)(1)(ii) and 70.5(a)(1)(ii) that these sources obtain title V permits.'' See letter from R. Long, EPA Region 8, to M. Tarrillion, Vastar Resources, Inc., September 10, 1999. See also 66 FR 59161, 59163; November 27, 2001 (''A source required to have a part C or D permit but considered nonmajor for part 70 would be subject to part 70 * * *'')

Title V permit content may be affected for sources in the above-noted situation because, pursuant to 40 CFR 70.3(c)(2) and 71.3(c)(2), for any nonmajor source subject to title V, the permit is required at a minimum to include the applicable requirements for the emissions units that cause the source to be subject to the part 70 or part 71 programs. If an emissions unit at the nonmajor source did not trigger the requirement to apply for a title V permit, then none of that unit's applicable requirements are required to be included in the source's title V permit. See 66 FR 59163 and footnote 2. However, nothing in 40 CFR 70.3(c)(2) or 71.3(c)(2) precludes States from including Federal applicable requirements for other emissions units at a nonmajor source in the source's title V permit if States require it.

2. Summary of Final Rule

There has been no change in the final rule as a result of the above clarifications regarding the interface between the 8-hour ozone standard and the title V operating permits program.

3. Comments and Responses

Comment: One commenter stated support of the anti-backsliding regulations to maintain the requirements established under the 1-hour standard nonattainment area classifications when 8-hour classification requirements would be less stringent. However, the commenter requested that EPA consider using the major source thresholds as defined by the 8-hour standard classifications for title V permitting purposes. The commenter further suggested that EPA evaluate whether a lower title V major source threshold provides sufficient protections to justify the added costs involved, especially in areas such as that of the commenter's where 75 percent of the reactive organic gases (ROG) and NO_X emissions are from mobile sources, which are not subject to control under title V.

Response: We agree that, since revocation of the 1-hour ozone standard, the title V major stationary source thresholds are only determined by the 8-hour designations and classifications. Additionally, as stated in response to question 3 in the above questions and answers, the language in 40 CFR 51.900(f)(3) regarding ''major source applicability cut-offs for purposes of RACT'' does not apply for purposes of defining a ''major source'' under title V (nor could it, since major source is statutorily defined and cannot be revised by regulation). Rather, the cut-offs referenced in this anti-backsliding provision apply in determining which 1-hour nonattainment requirements are ''applicable requirements'' for an area—requirements which will be continued in implementing the 8-hour standard. Additionally, 40 CFR 51.900 specifies that the definition of ''applicable requirements'' and other definitions in this section only ''apply for purposes of this subpart [subpart X].'' Thus, in short, the major source applicability cut-offs for purposes of RACT referenced in 40 CFR 51.900(f)(3) are not relevant in determining whether a source is a major source under title V.

C. What Action Is EPA Taking on the Overwhelming Transport Classification for Subpart 1 Areas?

The Phase 1 Rule created an overwhelming transport classification that would be available to subpart 1 areas that demonstrate they are affected by overwhelming transport of ozone and its precursors and demonstrate they meet the definition of a rural transport area in section 182(h) of the CAA [40 CFR 51.904(a)]. We received a petition for reconsideration of the overwhelming transport classification from Earthjustice,[118] who claimed that our final rule of April 30, 2004, relied on guidance that was not publicly available during the comment period and was still unavailable at the time of final rulemaking. In addition, we noted in the Phase 1 Rule that we were considering the comments we received on the issue of applicable requirements for these subpart 1 areas and that we would address this issue after we issue guidance on how areas should assess whether they are subject to overwhelming transport. We granted the Earthjustice petition concerning the overwhelming transport classification on January 10, 2005. In a separate rulemaking action, we are inviting comment on the overwhelming transport classification, the draft overwhelming transport guidance, and the requirements that would apply to such areas.

We will address any comments on the applicable control requirements for an area that receives an overwhelming transport classification in the context of the reconsideration action.

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 the Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

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

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

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

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

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a ''significant regulatory action'' because it raises novel legal or policy issues arising out of legal mandates. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or

[118] Filed June 29, 2004 by Earthjustice on behalf of American Lung Association, Environmental Defense, Natural Resources Defense Council, Sierra Club, Clean Air Task Force, Conservation Law Foundation, and Southern Alliance for Clean Energy.

recommendations are documented in the public record.

B. Paperwork Reduction Act

The information collection requirements in this rule will be submitted for approval to OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The information collection requirements are not enforceable until OMB approves them other than to the extent required by statute.

This rule provides the framework for the States to develop SIPs to achieve a new or revised NAAQS. This framework reflects the requirements prescribed in CAA sections 110 and part D, subparts 1 and 2 of title I. In that sense, the present final rule does not establish any new information collection burden on States. Had this rule not been developed, States would still have the legal obligation under law to submit nonattainment area SIPs under part D of title I of the CAA within specified periods after their nonattainment designation for the 8-hour ozone standard, and the SIPs would have to meet the requirements of part D.

A SIP contains rules and other requirements designed to achieve the NAAQS by the deadlines established under the CAA, and also contains a demonstration that the State's requirements will in fact result in attainment. The SIP must meet the CAA requirements in subparts 1 or 2 to adopt RACM, RACT, and provide for RFP toward attainment for the period prior to the area's attainment date. After a State submits a SIP, the CAA requires EPA to approve or disapprove the SIP. If EPA approves the SIP, the rules in the SIP become federally enforceable. If EPA disapproves the SIP (or if EPA finds that a State fails to submit a SIP), the CAA requires EPA to impose sanctions (2:1 offsets for major new or modified sources and restrictions on Federal highway funding) within specified timeframes; additionally, EPA must prepare and publish a FIP within 2 years after a disapproval or finding of failure to submit. The SIP must be publicly available. States must maintain confidentiality of confidential business information, however, if used to support SIP analyses. The SIP is a one-time submission, although the CAA requires States to revise their SIPs if EPA requests a revision upon a finding that the SIP is inadequate to attain or maintain the NAAQS. The State may revise its SIP voluntarily as needed, but in doing so must demonstrate that any revision will not interfere with attainment or RFP or any other applicable requirement under the CAA (see section 110(l)).

This rule does not establish requirements that directly affect the general public and the public and private sectors, but, rather, interprets the statutory requirements that apply to States in preparing their SIPs. The SIPs themselves will likely establish requirements that directly affect the general public, and the public and private sectors.

The EPA has not yet projected cost and hour burden for the statutory SIP development obligation but has started that effort and will shortly prepare an Information Collection Request (ICR) request. However, EPA did estimate administrative costs at the time of promulgation of the 8-hour ozone standard in 1997. See Chapter 10 of U.S. EPA 1997, Regulatory Impact Analyses for the Particulate Matter and Ozone National Ambient Air Quality Standards, Innovative Strategies and Economics Group, Office of Air Quality Planning and Standards, Research Triangle Park, N.C., July 16, 1997. Assessments of some of the administrative cost categories identified as a part of the SIP for an 8-hour standard are already conducted as a result of other provisions of the CAA and associated ICRs (e.g. emission inventory preparation, air quality monitoring program, conformity assessments, NSR, I/M program).

The burden estimates in the ICR for this rule are incremental to what is required under other provisions of the CAA and what would be required under a 1-hour standard. 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. 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. However, the failure to have an approved ICR for this rule does not affect the statutory obligation for the States to submit SIPs as required under part D of the CAA.

The information collection requirements associated with NSR permitting for ozone are covered by EPA's request to renew the approval of the ICR for the NSR program, ICR 1230.17, which was approved by OMB on January 25, 2005. The information collection requirements associated with NSR permitting were previously covered by ICR 1230.10 and 1230.11. The OMB previously approved the information collection requirements contained in the existing NSR regulations at 40 CFR parts 51 and 52 under the provisions of the Paperwork Reduction Act, and assigned OMB control number 2060–0003. A copy of the approved 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.

For the portion of this rulemaking on RFG, this action does not add any new requirements under the provisions of the Paperwork Reduction Act. The OMB has approved the information collection requirements contained in the final RFG/anti-dumping rulemaking (see 59 FR 7716, February 16, 1994) and has assigned OMB control number 2060–0277 (EPA ICR No. 1951.08).

C. Regulatory Flexibility Act

The 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 rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administrations' 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 Phase 2 Rule for implementation of the 8-hour ozone standard on small entities, EPA has concluded that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any new

or additional requirements on small entities.

Concerning the NSR portion of this rule, a Regulatory Flexibility Act Screening Analysis (RFASA) was developed as part of a 1994 draft Regulatory Impact Analysis (RIA) and incorporated into the September 1995 ICR renewal. This analysis showed that the changes to the NSR program due to the 1990 CAA Amendments would not have an adverse impact on small entities. This analysis encompassed the entire universe of applicable major sources that were likely to also be small businesses (approximately 50 ''small business'' major sources). Because the administrative burden of the NSR program is the primary source of the NSR program's regulatory costs, the analysis estimated a negligible ''cost to sales'' (regulatory cost divided by the business category mean revenue) ratio for this source group. The incorporation of the major source thresholds and offset ratios from the 1990 CAA Amendments in § 51.165 and appendix S for the purpose of implementing NSR for the 8-hour standard does not change this conclusion. Under section 110(a)(2)(C), all States must implement a preconstruction permitting program ''as necessary to assure that the [NAAQS] are achieved,'' regardless of changes to today's regulations. Thus, small businesses continue to be subject to regulations for construction and modification of stationary sources, whether under State and local agency minor NSR programs, SIPs to implement § 51.165, or appendix S, to ensure that the 8-hour standard is achieved.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any 1 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.

The RFG-related portions of this rule contain no new Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local or Tribal governments or the private sector. The rule imposes no new enforceable duty, since it merely clarifies that in the transition to the 8-hour ozone standard the pre-existing opt-in rules remain in place, as does the pre-existing requirement that RFG be used in mandatory RFG-covered areas within the scope of this rule until such areas are redesignated to attainment for the ozone standard. Although EPA does not believe that UMRA imposes requirements regarding the RFG-related portions of this rulemaking, EPA notes that the environmental and economic impacts of the RFG program were assessed in EPA's RIA for the 1994 RFG rules.

The EPA has determined that all other portions of this rule do not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any 1 year. The estimated administrative burden hour and costs associated with implementing the 8-hour, 0.08 ppm NAAQS were developed upon promulgation of the NAAQS and presented in Chapter 10 of U.S. EPA 1997, Regulatory Impact Analyses for the Particulate Matter and Ozone National Ambient Air Quality Standards, Innovative Strategies and Economics Group, Office of Air Quality Planning and Standards, Research Triangle Park, NC, July 16, 1997. The estimated costs presented there for States in 1990 dollars totaled $0.9 million. The corresponding estimate in 1997 dollars is $1.1 million. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA. At the time EPA proposed its Implementation Rule, EPA noted that if it chose a classification option that classified all areas under subpart 2 of part D, these costs may increase modestly, but would not reach $100 million. However, in promulgating the Phase 1 Rule, EPA adopted a classification scheme that resulted in approximately half of the areas designated nonattainment being subject only to the subpart 1 requirements.

The CAA imposes the obligation for States to submit SIPs to implement the 8-hour ozone NAAQS; in this rule, EPA is merely fleshing out those requirements. However, even if this rule did establish a requirement for States to submit SIPs, it is questionable whether a requirement to submit a SIP revision would constitute a Federal mandate in any case. The obligation for a State to submit a SIP that arises out of section 110 and part D of the CAA is not legally enforceable by a court of law, and at most is a condition for continued receipt of highway funds. Therefore, it is possible to view an action requiring such a submittal as not creating any enforceable duty within the meaning of section 421(5)(9a)(I) of UMRA [2 U.S.C. 658(a)(I)]. Even if it did, the duty could be viewed as falling within the exception for a condition of Federal assistance under section 421(5)(a)(i)(I) of UMRA [2 U.S.C. 658(5)(a)(i)(I)]. As noted below under ''L. Petitions for Judicial Review,'' this rule is covered under section 307(d) of the CAA.

The EPA has determined that this rule contains no regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments. Nonetheless, EPA carried out consultations with governmental entities affected by this rule.

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 rule does not have federalism implications. It will not have substantial direct effects on the States, on the

relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The RFG-related portions of the rule impose requirements on certain refiners and other entities in the gasoline distribution system, and not on States. In addition, as described in section D, above (on UMRA), EPA previously determined the costs to States to implement the 8-hour ozone NAAQS to be approximately $1 million. The CAA establishes the scheme whereby States take the lead in developing plans to meet the NAAQS. This rule would not modify the relationship of the States and EPA for purposes of developing programs to implement the NAAQS. In the non-RFG portions of this rule, EPA is interpreting the statutory SIP submission requirements that apply to areas designated. As described above, EPA has generally adopted the more flexible options proposed in the June 2003 proposal. Thus, Executive Order 13132 does not apply to this rule.

Although section 6 of Executive Order 13132 does not apply to this rule, EPA actively engaged the States in the development of this rule. The EPA held regular calls with representatives of State and local air pollution control agencies. Also, EPA held three public meetings at which it described the approaches it was considering and provided an opportunity for States and various other governmental officials to comment on the options being considered. Finally, EPA held three public hearings after the proposed rule was published to obtain public comments.

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.''

The portions of this rulemaking that relate to RFG do not create a mandate for any Tribal government. The rule does not impose any enforceable duties on these entities. Rather, the rule will affect only those refiners, importers or blenders of gasoline that choose to produce or import RFG for sale in the nonattainment areas addressed in the rule, and the gasoline distributors and retail stations in those areas. The following discussion relates to the non-RFG portions of the rule.

This rule concerns the implementation of the 8-hour ozone NAAQS in areas designated nonattainment for that NAAQS. The CAA provides for States and Tribes to develop plans to regulate emissions of air pollutants within their jurisdictions. The non-RFG portions of this rule flesh out the statutory obligations of States and Tribes that develop plans to implement the 8-hour ozone NAAQS. The TAR and the CAA give Tribes the opportunity to develop and implement CAA programs such as the 8-hour ozone NAAQS, but it leaves to the discretion of the Tribe whether to develop these programs and which programs, or appropriate elements of a program, they will adopt.

This rule does not have Tribal implications as defined by Executive Order 13175. There are 126 designated nonattainment areas. Although there are 61 Tribes estimated to be in one or more of those nonattainment areas, this rule does not have a substantial direct effect on one or more Indian Tribes, since no Tribe is required to implement a CAA program to attain the 8-hour ozone NAAQS. See: *http://www.epa.gov/oar/oaqps/glo/designations/tribaldesig.htm* for the list of Tribes included as part of a designated nonattainment area. Furthermore, this rule does not affect the relationship or distribution of power and responsibilities between the Federal government and Indian Tribes. The CAA and the TAR establish the relationship of the Federal government and Tribes in developing plans to attain the NAAQS, and this rule does nothing to modify that relationship. Because this rule does not have Tribal implications, Executive Order 13175 does not apply.

Although Executive Order 13175 does not apply to this rule, EPA did consult with Tribal leaders and environmental staff in developing this rule and encouraged Tribal input at an early stage. The EPA supports the national ''Tribal Designations and Implementation Work Group'' which provided an open forum for all Tribes to voice concerns to EPA about the designation and implementation process for the 8-hour ozone NAAQS. These discussions have given EPA valuable information about Tribal concerns regarding implementation of the 8-hour ozone NAAQS. The work group sent issue summaries and suggestions for addressing them to the newly formed National Tribal Air Association (NTAA), which in turn sent them to Tribal leaders. The project lead for this rule informed interested Tribal leaders about progress on the rule and invited input. The EPA encouraged Tribes to participate in the national public meetings held to take comment on early approaches to the rule. Several Tribes made public comments at the April 2002 public meeting in Tempe, Arizona.

Furthermore, EPA sent individualized letters to all federally-recognized Tribes inviting Tribal leaders to consult with EPA on the proposed implementation rule. The EPA received comment from the NTAA on several questions: (1) the NTAA asked for clarification on the nature of EPA's support for Tribes without TAS status and asked if EPA would provide technical assistance in interpreting SIP documentation to a Tribe without TAS approval; (2) the NTAA asked EPA to explain how it envisions its role in continuing consultation with Tribes throughout the execution of SIPs. We respond to these comments in the technical support document. The NTAA's final comment cited concerns with the impact of NSR requirements on the Tribes. The EPA acknowledges that offsets are a concern for Tribes. We are currently evaluating potential options for addressing this concern.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045: ''Protection of Children From Environmental Health and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it implements a previously promulgated health-based Federal standard—the 8-hour ozone NAAQS—and contains a non- health-based determination of the extent to which the existing RFG program remains in place under the 8-hour standard. We have evaluated the environmental health and safety effects of the 8-hour ozone NAAQS on children as part of this previously promulgated Federal standard. The results of this evaluation are contained in 40 CFR part 50, National Ambient Air Quality Standards for Ozone, Final Rule (62 FR 38855–38896, July 18, 1997;

specifically, 62 FR 38855, 62 FR 38860 and 62 FR 38865).

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 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.

At the time of proposal, information on the methodology and data regarding the assessment of potential energy impacts regarding implementation of the 8-hour standard was addressed in Chapter 6 of U.S. EPA 2003, Cost, Emission Reduction, Energy, and Economic Impact Assessment of the Proposed Rule Establishing the Implementation Framework for the 8-Hour, 0.08 ppm Ozone National Ambient Air Quality Standard, prepared by the Innovative Strategies and Economics Group, Office of Air Quality Planning and Standards, Research Triangle Park, NC, April 24, 2003. Subsequently, EPA issued an Addendum 1 to that analysis for the Phase 1 final rule and designated nonattainment areas. For purposes of this final rule, EPA has issued Addendum 2. By adopting the more flexible approaches while providing for attainment and maintenance of the 8-hour NAAQS as required by the CAA, additional energy cost associated with more extensive use of less flexible approaches would be averted. The portions of this rule that relate to RFG merely clarify that the existing program continues under the 8-hour standard in the areas addressed by the rule, so the rule does not have a significant affect on energy supply, distribution or use. The EPA evaluated energy impacts of the RFG program in the RIA for the 1994 rulemaking establishing the RFG program.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer Advancement Act of 1995 (NTTAA), Public Law No. 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) 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 VCS bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable VCS.

This rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any VCS.

The EPA will encourage the States and Tribes to consider the use of such standards, where appropriate, in the development of the implementation plans.

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, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations.

The EPA believes that this rule does not raise any environmental justice concerns. Today's rule helps establish a framework for bringing all areas of the country into attainment with the 8-hour ozone standards, an important environmental justice goal. The health and environmental risks associated with ozone were considered in the establishment of the 8-hour, 0.08 ppm ozone NAAQS, and the standard was set at a level requisite to protect public health with an adequate margin of safety. In setting this standard, EPA considered the effects on sensitive subpopulations, such as those with respiratory problems.

The EPA has designated as nonattainment these areas of the country that are not meeting the 8-hour ozone standard. This rule will assist States as they develop plans to bring these nonattainment areas into attainment in accordance with the CAA schedule. By establishing guidelines for bringing these areas into attainment with the 8-hour ozone standard, the Phase 2 Rule advances an important environmental justice goal and will help make significant progress in providing for the fair treatment of all people with respect to air pollution.

In the preamble to the proposed rule, EPA took comment on the Clean Air Development Communities (CADC) concept (regarding possible State adoption of land use planning as a pollution reduction strategy) and noted that it might raise environmental justice concerns. Public comments were submitted that raised environmental justice concerns with this concept. As noted earlier in the preamble to this Phase 2 Rule, EPA is not finalizing the CADC concept and has therefore not responded to these (or any other) comments on the CADC concept.

The RFG program is designed to reduce vehicle emissions of toxic and ozone-forming substances. This rule will not alter the air quality benefits associated with the RFG program.

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. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective January 30, 2006.

L. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit by January 30, 2006. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. See CAA section 307(b)(2).

M. Determination Under Section 307(d)

Pursuant to sections 307(d)(1)(E) and 307(d)(1)(V) of the CAA, the Administrator determines that this action is subject to the provisions of section 307(d). Section 307(d)(1)(V) provides that the provisions of section 307(d) apply to ''such other actions as the Administrator may determine.'' While the Administrator did not make this determination earlier, the Administrator believes that all of the procedural requirements, e.g., docketing, hearing and comment periods, of section 307(d) have been complied with during the course of this rulemaking.

Appendix A to Preamble—Methods to Account for Non-Creditable Reductions When Calculating ROP Targets for the 2008 and Later ROP Milestone Years

The following methods properly account for the non-creditable emissions reductions when calculating ROP targets for the 2008 and later ROP milestone years.[119] They are consistent with requirements of sections 182(b)(1)(C) and (D) and 182(c)(2)(B) of the CAA.

(1) Method 1: For areas that must meet a 15 percent VOC reduction requirement by 2008:

(A) Estimate the actual anthropogenic base year VOC inventory in 2002 with all 2002 control programs in place for all sources.

(B) Using the same highway vehicle activity inputs used to calculate the actual 2002 inventory, run the appropriate motor vehicle emissions model for 2002 and for 2008 with all post-1990 CAA measures turned off. Any other local inputs for vehicle inspection and maintenance (I/M) programs should be set according to the program that was required to be in place in 1990. Fuel Reid Vapor Pressure (RVP) should be set at 9.0 or 7.8 depending on the RVP required in the local area as a result of fuel RVP regulations promulgated in June, 1990.

(C) Calculate the difference between the 2002 and 2008 VOC emission factors calculated in Step B and multiply by 2002 vehicle miles traveled (VMT). The result is the VOC emissions reductions that will occur between 2002 and 2008 without the benefits of any post-1990 CAA measures. These are the non-creditable reductions that occur over this period.

(D) Subtract the non-creditable reductions calculated in Step C from the actual anthropogenic 2002 inventory estimated in Step A. This adjusted VOC inventory is the basis for calculating the target level of emissions in 2008.

(E) Reduce the adjusted VOC inventory calculated in Step D by 15 percent. The result is the target level of VOC emissions in 2008 in order to meet the 2008 ROP requirement. The actual projected 2008 inventory for all sources with all control measures in place and including projected 2008 growth in activity must be at or lower than this target level of emissions.

(2) Method 2: For areas covered under 40 CFR 51.910(a)(1)(ii)(C) and that meet an 18 percent VOC emission reduction requirement by 2008 with NO_X substitution allowed, following EPA's NO_X Substitution Guidance:

(A) Estimate the actual anthropogenic base year inventory for both VOC and NO_X in 2002 with all 2002 control programs in place.

(B) Using the same highway vehicle activity inputs used to calculate the actual 2002 inventory, run the appropriate motor vehicle emissions model for 2002 and for 2008 with all post-1990 CAA measures turned off. Any other local inputs for I/M programs should be set according to the program that was required to be in place in 1990. Fuel RVP should be set at 9.0 or 7.8 depending on the RVP required in the local area as a result of fuel RVP regulations promulgated in June, 1990.

(C) Calculate the difference between 2002 and 2008 VOC emissions factors calculated in Step B and multiply by 2002 VMT. The result is the VOC emissions reductions that will occur between 2002 and 2008 without the benefits of any post-1990 CAA measures. These are the non-creditable VOC reductions that occur over this period. Calculate the difference between 2002 and 2008 NO_X emissions factors calculated in Step B and multiply by 2002 VMT. This result is the NO_X emissions reductions that will occur between 2002 and 2008 without the benefits of any post-1990 CAA measures. These are the non-creditable NO_X reductions that occur over this period.

(D) Subtract the non-creditable VOC reductions calculated in Step C from the actual anthropogenic 2002 VOC inventory estimated in Step A. Subtract the non-creditable NO_X reductions calculated in Step C from the actual anthropogenic 2002 NO_X inventory estimated in Step A. These adjusted VOC and NO_X inventories are the basis for calculating the target level of emissions in 2008.

(E) The target level of VOC and NO_X emissions in 2008 needed to meet the 2008 ROP requirement is any combination of VOC and NO_X reductions from the adjusted inventories calculated in Step D that total 18 percent. For example, the target level of VOC emissions in 2008 could be a 10 percent reduction from the adjusted VOC inventory in Step D and an 8 percent reduction from the adjusted NO_X inventory in Step D. The actual projected 2008 VOC and NO_X inventories for all sources with all control measures in place and including projected 2008 growth in activity must be at or lower than the target levels of VOC and NO_X emissions.

(3) Method 3: For all areas that have used Method 1 above (and therefore do not have a NO_X target level of emissions for 2008) and must meet an additional reduction VOC requirement of 9 percent every 3 years after 2008 with NO_X substitution allowed, following EPA's NO_X Substitution Guidance. Each subsequent target level of emissions should be calculated as an emission reduction from the previous target.

(A) Estimate the actual anthropogenic base year NO_X inventory in 2002 with all 2002 control programs in place for all sources.

(B) Using the same highway vehicle activity inputs used to calculate the actual 2002 inventory, run the appropriate emissions model for VOC and NO_X in 2002 and 2008 (previously done in Step B in Method 1 for VOC but not necessarily for NO_X) and 2011 with all post-1990 CAA measures turned off. Any other local inputs for I/M programs should be set according to the program that was required to be in place in 1990. Fuel RVP should be set at 9.0 or 7.8 depending on the RVP required in the local area as a result of fuel RVP regulations promulgated in June, 1990.

(C) Calculate the difference between 2008 and 2011 VOC emission factors calculated in Step B and multiply by 2002 VMT. The result is the VOC emissions reductions that will occur between 2008 and 2011 without the benefits of any post-1990 CAA measures. These are the non-creditable VOC reductions that occur over this period. Calculate the difference between 2002 and 2011 NO_X emission factors calculated in Step B and multiply by 2002 VMT. The result is the NO_X emissions reductions that will occur between 2002 and 2011 without the benefits of any post-1990 CAA measures. These are the non-creditable NO_X reductions that occur over this period.

(D) Subtract the non-creditable VOC reductions calculated in Step C from the 2008 VOC target level of emissions calculated previously. Subtract the non-creditable NO_X reductions calculated in Step C from the actual 2002 NO_X inventory of emissions calculated in Step A. These adjusted VOC and NO_X inventories are the basis for calculating the target level of emissions in 2011.

[119] These methods assume the use of EPA's on-road motor vehicle emissions model in all States other than California. All of the methods given here require the user to turn off all post-1990 CAA measures as part of the calculation. In EPA's current motor vehicle emissions model, MOBILE6.2, this is accomplished using the NO CLEAN AIR ACT command as described in the MOBILE6.2 User's Guide (found at *http://www.epa.gov/otaq/m6.htm*). Users of future versions of EPA's motor vehicle emissions model should consult the appropriate User's Guide for the version of the model they are using for instructions on what model command to use. For California nonattainment areas, the current motor vehicle emissions model is EMFAC2002. Users modeling California nonattainment areas should consult with the EPA Regional Office for information on doing equivalent calculations in that model and in future versions.

(E) The target level of VOC and NO_X emissions in 2011 needed to meet the 2011 ROP requirement is any combination of VOC and NO_X reductions from the adjusted inventories calculated in Step E that total 9 percent. For example, the target level of VOC emissions in 2011 could be a 4 percent reduction from the adjusted VOC inventory in Step C and a 5 percent reduction from the adjusted NO_X inventory in Step C. The actual projected 2011 VOC and NO_X inventories for all sources with all control measures in place and including projected 2011 growth in activity must be at or lower than the target levels of VOC and NO_X emissions.

(F) For subsequent 3-year periods until the attainment date, repeat the process for VOC. For subsequent 3-year periods, the adjusted NO_X inventory should be based on the difference in NO_X emissions during that 3-year period when all post-1990 CAA measures are turned off, subtracted from the previous NO_X target level of emissions. For example, for 2014, take the difference in NO_X emissions reductions that will occur between 2011 and 2014 without the benefits of any post-1990 CAA measures. This value is subtracted from the 2011 target level of NO_X emissions calculated in Step D to get the adjusted NO_X inventory to be used as the basis for calculating the target level of NO_X emissions in 2014.

(4) Method 4: For all areas that have used Method 2 above (and therefore do have a NO_X target level of emissions for 2008) and must meet an additional reduction VOC requirement of 9 percent every 3 years after 2008 with NO_X substitution allowed, following EPA's NO_X Substitution Guidance. Each subsequent target level of emissions should be calculated as an emissions reductions from the previous target.

(A) Using the same highway vehicle activity inputs used to calculate the actual 2002 inventory, run the appropriate emissions model for VOC and NO_X in 2008 (previously done in Step B in Method 2) and 2011 with all post-1990 CAA measures turned off. Any other local inputs for I/M programs should be set according to the program that was required to be in place in 1990. Fuel RVP should be set at 9.0 or 7.8 depending on the RVP required in the local area as a result of fuel RVP regulations promulgated in June 1990.

(B) Calculate the difference between 2008 and 2011 VOC emission factors calculated in Step A and multiply by 2002 VMT. The result is the VOC emissions reductions that will occur between 2008 and 2011 without the benefits of any post-1990 CAA measures. These are the non-creditable VOC reductions that occur over this period. Calculate the difference between 2008 and 2011 NO_X emission factors calculated in Step A and multiply by 2002 VMT. The result is the NO_X emissions reductions that will occur between 2008 and 2011 without the benefits of any post-1990 CAA measures. These are the non-creditable NO_X reductions that occur over this period.

(C) Subtract the non-creditable VOC reductions calculated in Step B from the 2008 VOC target level of emissions calculated previously. Subtract the non-creditable NO_X reductions calculated in Step B from the 2008 NO_X target level of emissions calculated previously. These adjusted VOC and NO_X inventories are the basis for calculating the target level of emissions in 2011.

(D) The target level of VOC and NO_X emissions in 2011 needed to meet the 2011 ROP requirement is any combination of VOC and NO_X reductions from the adjusted inventories calculated in Step E that total 9 percent. For example, the target level of VOC emissions in 2011 could be a 4 percent reduction from the adjusted VOC inventory in Step C and a 5 percent reduction from the adjusted NO_X inventory in Step C. The actual projected 2011 VOC and NO_X inventories for all sources with all control measures in place and including projected 2011 growth in activity must be at or lower than the target levels of VOC and NO_X emissions.

(E) Repeat entire process for subsequent 3-year periods until the attainment date.

Appendix B to Preamble—Glossary of Terms and Acronyms

ACT—Alternative Control Techniques
ARTBA—American Road and Transportation Builders Association
BACT—Best Available Control Technology
BART—Best Available Retrofit Technology
CAA—Clean Air Act
CAAAC—Clean Air Act Advisory Committee
CADCs—Clean Air Development Communities
CAIR—Clean Air Interstate Rule
CERR—Consolidated Emissions Reporting Rule
CFR—Code of Federal Regulations
CMAQ—Congestion Mitigation and Air Quality
CMSA—Consolidated Metropolitan Statistical Area
CO—Carbon Monoxide
CTG—Control Technique Guideline
DOT—Department of Transportation
EMFAC—EMissions FACtors (a mobile emissions model)
ESRP—Emissions Statement Reporting Program
CTG—Control Technique Guidelines
EGUs—Electricity Generating Units
EPA—Environmental Protection Agency
FIP—Federal Implementation Plan
FMVCP—Federal Motor Vehicle Control Program
HON—Hazardous Organic NESHAP
ICR—Information Collection Requirement
I/M—Inspection and Maintenance Area
km—Kilometers
LADCO—Lake Michigan Air Directors Consortium
LAER—Lowest Achievable Emission Rate
MACT—Maximum Achievable Control Technology
MCR—Mid-course Review
MPO—Metropolitan Planning Organization
MSA—Metropolitan Statistical Area
NAA—Nonattainment Area
NAAMS—National Ambient Air Modeling Strategy
NAAQS—National Ambient Air Quality Standards
NAMS/SLAMS—National Air Monitoring Stations/State and Local Air Monitoring Stations
NAS—National Academy of Sciences
NCore—National Core Monitoring Stations
NESHAP—National Emission Standards for Hazardous Air Pollutants
NO_X—Nitrogen Oxides
NO_y—Reactive Oxides of Nitrogen
NPRM—Notice of Proposed Rulemaking
NSR—New Source Review
NTAA—National Tribal Air Association
NTTAA—National Technology Transfer Advancement Act of 1995
OMB—Office of Management and Budget
OTAG—Ozone Transport Assessment Group
OTR—Ozone Transport Region
PAMS—Photochemical Assessment Monitoring Stations
PM—Particulate Matter
$PM_{2.5}$—Fine Particulate Matter
PM_{10}—Particulate Matter Having a Nominal Aerodynamic Diameter Less than or Equal to 10 Microns
ppb—Parts per Billion
ppm—Parts per Million
PSD—Prevention of Significant Deterioration
psi—Pounds Per Square Inch
RACM—Reasonably Available Control Measures
RACT—Reasonably Available Control Technology
RFASA—Regulatory Flexibility Act Screening Analysis
RFP—Reasonable Further Progress
RIA—Regulatory Impact Analysis
ROG—Reactive Organic Gases
ROP—Rate of Progress
RPOs—Regional Planning Organizations
RVP—Reid Vapor Pressure
SBA—Small Business Administration
SCR—Selective Catalytic Reduction
SIPs—State Implementation Plans
SO_2—Sulfur Dioxide
TAR—Tribal Authority Rule
TAS—(Treatment in the Same Manner as a State ''Treatment as State'')
TEA–21—Transportation Equity Act for the Twenty-first Century
TIPs—Tribal Implementation Plans
tpy—Tons Per Year
TSP—Total Suspended Particulates
TTN/SCRAM—Technical Transfer Network/Support Center for Regulatory Air Models

UMRA—Unfunded Mandates Reform Act of 1995
U.S. DOT—United States Department of Transportation
VCS—Voluntary Consensus Standards
VMT—Vehicle Miles Traveled
VOC—Volatile Organic Compound

List of Subjects

40 CFR Part 51

Air pollution control, Carbon monoxide, Intergovernmental relations, Ozone, Particulate matter, Transportation, Volatile organic compounds.

40 CFR Part 52

Air pollution control, Carbon monoxide, Intergovernmental relations, Ozone, Particulate matter.

40 CFR Part 80

Fuel additives, Gasoline, Motor vehicle pollution, Ozone.

Authority: 42 U.S.C. 7408; 42 U.S.C. 7410; 42 U.S.C. 7501–7511f; 42 U.S.C. 7601(a)(1); 42 U.S.C. 7401.

Dated: November 9, 2005.

Stephen L. Johnson,

Administrator.

■ For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 51 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

Subpart I—[Amended]

■ 2. Section 51.165 is amended as follows:
■ a. By revising paragraphs (a)(1)(iv)(A)(*1*) and (*2*).
■ b. By adding paragraph (a)(1)(iv)(A)(*3*).
■ c. By adding paragraphs (a)(1)(v)(E) and (F).
■ d. By revising paragraph (a)(1)(x).
■ e. By revising paragraph (a)(3)(ii)(C).
■ f. By adding paragraphs (a)(8), (a)(9), and (a)(10).

§ 51.165 Permit requirements.

(a) * * *
(1) * * *
(iv) * * *
(A) * * *

(*1*) Any stationary source of air pollutants that emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant, except that lower emissions thresholds shall apply in areas subject to subpart 2, subpart 3, or subpart 4 of part D, title I of the Act, according to paragraphs (a)(1)(iv)(A)(*1*)(*i*) through (*vi*) of this section.

(*i*) 50 tons per year of volatile organic compounds in any serious ozone nonattainment area.

(*ii*) 50 tons per year of volatile organic compounds in an area within an ozone transport region, except for any severe or extreme ozone nonattainment area.

(*iii*) 25 tons per year of volatile organic compounds in any severe ozone nonattainment area.

(*iv*) 10 tons per year of volatile organic compounds in any extreme ozone nonattainment area.

(*v*) 50 tons per year of carbon monoxide in any serious nonattainment area for carbon monoxide, where stationary sources contribute significantly to carbon monoxide levels in the area (as determined under rules issued by the Administrator).

(*vi*) 70 tons per year of PM–10 in any serious nonattainment area for PM–10;

(*2*) For the purposes of applying the requirements of paragraph (a)(8) of this section to stationary sources of nitrogen oxides located in an ozone nonattainment area or in an ozone transport region, any stationary source which emits, or has the potential to emit, 100 tons per year or more of nitrogen oxides emissions, except that the emission thresholds in paragraphs (a)(1)(iv)(A)(*2*)(*i*) through (*vi*) of this section shall apply in areas subject to subpart 2 of part D, title I of the Act.

(*i*) 100 tons per year or more of nitrogen oxides in any ozone nonattainment area classified as marginal or moderate.

(*ii*) 100 tons per year or more of nitrogen oxides in any ozone nonattainment area classified as a transitional, submarginal, or incomplete or no data area, when such area is located in an ozone transport region.

(*iii*) 100 tons per year or more of nitrogen oxides in any area designated under section 107(d) of the Act as attainment or unclassifiable for ozone that is located in an ozone transport region.

(*iv*) 50 tons per year or more of nitrogen oxides in any serious nonattainment area for ozone.

(*v*) 25 tons per year or more of nitrogen oxides in any severe nonattainment area for ozone.

(*vi*) 10 tons per year or more of nitrogen oxides in any extreme nonattainment area for ozone; or

(*3*) Any physical change that would occur at a stationary source not qualifying under paragraphs (a)(1)(iv)(A)(*1*) or (*2*) of this section as a major stationary source, if the change would constitute a major stationary source by itself.

* * * * *

(v) * * *

(E) For the purpose of applying the requirements of (a)(8) of this section to modifications at major stationary sources of nitrogen oxides located in ozone nonattainment areas or in ozone transport regions, whether or not subject to subpart 2, part D, title I of the Act, any significant net emissions increase of nitrogen oxides is considered significant for ozone.

(F) Any physical change in, or change in the method of operation of, a major stationary source of volatile organic compounds that results in any increase in emissions of volatile organic compounds from any discrete operation, emissions unit, or other pollutant emitting activity at the source shall be considered a significant net emissions increase and a major modification for ozone, if the major stationary source is located in an extreme ozone nonattainment area that is subject to subpart 2, part D, title I of the Act.

* * * * *

(x)(A) *Significant* means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant Emission Rate

Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Ozone: 40 tpy of volatile organic compounds or NO_X
Lead: 0.6 tpy
PM–10: 15 tpy PM–10

(B) Notwithstanding the significant emissions rate for ozone in paragraph (a)(1)(x)(A) of this section, significant means, in reference to an emissions increase or a net emissions increase, any increase in actual emissions of volatile organic compounds that would result from any physical change in, or change in the method of operation of, a major stationary source locating in a serious or severe ozone nonattainment area that is subject to subpart 2, part D, title I of the Act, if such emissions increase of volatile organic compounds exceeds 25 tons per year.

(C) For the purposes of applying the requirements of paragraph (a)(8) of this section to modifications at major stationary sources of nitrogen oxides located in an ozone nonattainment area or in an ozone transport region, the significant emission rates and other requirements for volatile organic compounds in paragraphs (a)(1)(x)(A),

(B), and (E) of this section shall apply to nitrogen oxides emissions.

(D) Notwithstanding the significant emissions rate for carbon monoxide under paragraph (a)(1)(x)(A) of this section, significant means, in reference to an emissions increase or a net emissions increase, any increase in actual emissions of carbon monoxide that would result from any physical change in, or change in the method of operation of, a major stationary source in a serious nonattainment area for carbon monoxide if such increase equals or exceeds 50 tons per year, provided the Administrator has determined that stationary sources contribute significantly to carbon monoxide levels in that area.

(E) Notwithstanding the significant emissions rates for ozone under paragraphs (a)(1)(x)(A) and (B) of this section, any increase in actual emissions of volatile organic compounds from any emissions unit at a major stationary source of volatile organic compounds located in an extreme ozone nonattainment area that is subject to subpart 2, part D, title I of the Act shall be considered a significant net emissions increase.

* * * * *

(3) * * *

(i) * * *

(ii) * * *

(C)(*1*) Emissions reductions achieved by shutting down an existing emission unit or curtailing production or operating hours may be generally credited for offsets if they meet the requirements in paragraphs (a)(3)(ii)(C)(*1*)(*i*) through (*ii*) of this section.

(*i*) Such reductions are surplus, permanent, quantifiable, and federally enforceable.

(*ii*) The shutdown or curtailment occurred after the last day of the base year for the SIP planning process. For purposes of this paragraph, a reviewing authority may choose to consider a prior shutdown or curtailment to have occurred after the last day of the base year if the projected emissions inventory used to develop the attainment demonstration explicitly includes the emissions from such previously shutdown or curtailed emission units. However, in no event may credit be given for shutdowns that occurred before August 7, 1977.

(*2*) Emissions reductions achieved by shutting down an existing emissions unit or curtailing production or operating hours and that do not meet the requirements in paragraph (a)(3)(ii)(C)(*1*)(*ii*) of this section may be generally credited only if:

(*i*) The shutdown or curtailment occurred on or after the date the construction permit application is filed; or

(*ii*) The applicant can establish that the proposed new emissions unit is a replacement for the shutdown or curtailed emissions unit, and the emissions reductions achieved by the shutdown or curtailment met the requirements of paragraph (a)(3)(ii)(C)(*1*)(*i*) of this section.

* * * * *

(8) The plan shall provide that the requirements of this section applicable to major stationary sources and major modifications of volatile organic compounds shall apply to nitrogen oxides emissions from major stationary sources and major modifications of nitrogen oxides in an ozone transport region or in any ozone nonattainment area, except in ozone nonattainment areas or in portions of an ozone transport region where the Administrator has granted a NO_X waiver applying the standards set forth under section 182(f) of the Act and the waiver continues to apply.

(9)(i) The plan shall require that in meeting the emissions offset requirements of paragraph (a)(3) of this section for ozone nonattainment areas that are subject to subpart 2, part D, title I of the Act, the ratio of total actual emissions reductions of VOC to the emissions increase of VOC shall be as follows:

(A) In any marginal nonattainment area for ozone—at least 1.1:1;

(B) In any moderate nonattainment area for ozone—at least 1.15:1;

(C) In any serious nonattainment area for ozone—at least 1.2:1;

(D) In any severe nonattainment area for ozone—at least 1.3:1 (except that the ratio may be at least 1.2:1 if the approved plan also requires all existing major sources in such nonattainment area to use BACT for the control of VOC); and

(E) In any extreme nonattainment area for ozone—at least 1.5:1 (except that the ratio may be at least 1.2:1 if the approved plan also requires all existing major sources in such nonattainment area to use BACT for the control of VOC); and

(ii) Notwithstanding the requirements of paragraph (a)(9)(i) of this section for meeting the requirements of paragraph (a)(3) of this section, the ratio of total actual emissions reductions of VOC to the emissions increase of VOC shall be at least 1.15:1 for all areas within an ozone transport region that is subject to subpart 2, part D, title I of the Act, except for serious, severe, and extreme ozone nonattainment areas that are subject to subpart 2, part D, title I of the Act.

(iii) The plan shall require that in meeting the emissions offset requirements of paragraph (a)(3) of this section for ozone nonattainment areas that are subject to subpart 1, part D, title I of the Act (but are not subject to subpart 2, part D, title I of the Act, including 8-hour ozone nonattainment areas subject to 40 CFR 51.902(b)), the ratio of total actual emissions reductions of VOC to the emissions increase of VOC shall be at least 1:1.

(10) The plan shall require that the requirements of this section applicable to major stationary sources and major modifications of PM–10 shall also apply to major stationary sources and major modifications of PM–10 precursors, except where the Administrator determines that such sources do not contribute significantly to PM–10 levels that exceed the PM–10 ambient standards in the area.

* * * * *

■ 3. Section 51.166 is amended as follows:

■ a. By revising paragraph (b)(1)(ii).

■ b. By revising paragraph (b)(2)(ii).

■ c. By revising the entry for ''ozone'' in the list in paragraph (b)(23)(i).

■ d. By revising paragraph (b)(49)(i).

■ e. By revising footnote 1 to paragraph (i)(5)(i)(*e*).

§ 51.166 Prevention of significant deterioration of air quality.

* * * * *

(b) * * *

(1) * * *

(ii) A major source that is major for volatile organic compounds or NO_X shall be considered major for ozone.

* * * * *

(2) * * *

(ii) Any significant emissions increase (as defined at paragraph (b)(39) of this section) from any emissions units or net emissions increase (as defined in paragraph (b)(3) of this section) at a major stationary source that is significant for volatile organic compounds or NO_X shall be considered significant for ozone.

* * * * *

(23)(i) * * *

* * * * *

Ozone: 40 tpy of volatile organic compounds or NO_X

* * * * *

(49) * * *

(i) Any pollutant for which a national ambient air quality standard has been promulgated and any constituents or precursors for such pollutants identified by the Administrator (*e.g.*, volatile

organic compounds and NO_X are precursors for ozone);

* * * * *

(i) * * *

(5) * * *

(i) * * *

(e) * * *

[1] No *de minimis* air quality level is provided for ozone. However, any net emissions increase of 100 tons per year or more of volatile organic compounds or nitrogen oxides subject to PSD would be required to perform an ambient impact analysis, including the gathering of air quality data.

Subpart X [Amended]

■ 4. Section 51.906 is added to read as follows:

§ 51.906 Redesignation to nonattainment following initial designations for the 8-hour NAAQS.

For any area that is initially designated attainment or unclassifiable for the 8-hour NAAQS and that is subsequently redesignated to nonattainment for the 8-hour ozone NAAQS, any absolute, fixed date applicable in connection with the requirements of this part is extended by a period of time equal to the length of time between the effective date of the initial designation for the 8-hour NAAQS and the effective date of redesignation, except as otherwise provided in this subpart.

■ 5. Section 51.908 is amended as follows:

■ a. By revising the section heading.

■ b. By designating the existing text as paragraph (d).

■ c. By adding paragraphs (a), (b), and (c).

§ 51.908 What modeling and attainment demonstration requirements apply for purposes of the 8-hour ozone NAAQS?

(a) *What is the attainment demonstration requirement for an area classified as moderate or higher under subpart 2 pursuant to § 51.903?* An area classified as moderate or higher under § 51.903 shall be subject to the attainment demonstration requirement applicable for that classification under section 182 of the Act, except such demonstration is due no later than 3 years after the area's designation for the 8-hour NAAQS.

(b) *What is the attainment demonstration requirement for an area subject only to subpart 1 in accordance with § 51.902(b)?* An area subject to § 51.902(b) shall be subject to the attainment demonstration under section 172(c)(1) of the Act and shall submit an attainment demonstration no later than 3 years after the area's designation for the 8-hour NAAQS.

(c) *What criteria must the attainment demonstration meet?* An attainment demonstration due pursuant to paragraph (a) or (b) of this section must meet the requirements of § 51.112; the adequacy of an attainment demonstration shall be demonstrated by means of a photochemical grid model or any other analytical method determined by the Administrator, in the Administrator's discretion, to be at least as effective.

* * * * *

■ 6. Section 51.910 is added to read as follows:

§ 51.910 What requirements for reasonable further progress (RFP) under sections 172(c)(2) and 182 apply for areas designated nonattainment for the 8-hour ozone NAAQS?

(a) *What are the general requirements for RFP for an area classified under subpart 2 pursuant to § 51.903?* For an area classified under subpart 2 pursuant to § 51.903, the RFP requirements specified in section 182 of the Act for that area's classification shall apply.

(1) *What is the content and timing of the RFP plan required under sections 182(b)(1) and 182(c)(2)(B) of the Act for an area classified as moderate or higher pursuant to § 51.903 (subpart 2 coverage)?*

(i) *Moderate or Above Area.* (A) Except as provided in paragraph (a)(1)(ii) of this section, for each area classified as moderate or higher, the State shall submit a SIP revision consistent with section 182(b)(1) of the Act no later than 3 years after designation for the 8-hour NAAQS for the area. The 6-year period referenced in section 182(b)(1) of the Act shall begin January 1 of the year following the year used for the baseline emissions inventory.

(B) For each area classified as serious or higher, the State shall submit a SIP revision consistent with section 182(c)(2)(B) of the Act no later than 3 years after designation for the 8-hour NAAQS. The final increment of progress must be achieved no later than the attainment date for the area.

(ii) *Area with Approved 1-hour Ozone 15 Percent VOC ROP Plan.* An area classified as moderate or higher that has the same boundaries as an area, or is entirely composed of several areas or portions of areas, for which EPA fully approved a 15 percent plan for the 1-hour NAAQS is considered to have met section 182(b)(1) of the Act for the 8-hour NAAQS and instead:

(A) If classified as moderate, the area is subject to RFP under section 172(c)(2) of the Act and shall submit no later than 3 years after designation for the 8-hour NAAQS a SIP revision that meets the requirements of paragraph (b)(2) of this section, consistent with the attainment date established in the attainment demonstration SIP.

(B) If classified as serious or higher, the area is subject to RFP under section 182(c)(2)(B) of the Act and shall submit no later than 3 years after designation for the 8-hour NAAQS an RFP SIP providing for an average of 3 percent per year of VOC and/or NO_X emissions reductions for

(*1*) the 6-year period beginning January 1 of the year following the year used for the baseline emissions inventory; and

(*2*) all remaining 3-year periods after the first 6-year period out to the area's attainment date.

(iii) *Moderate and Above Area for Which Only a Portion Has an Approved 1-hour Ozone 15 Percent VOC ROP Plan.* An area classified as moderate or higher that contains one or more areas, or portions of areas, for which EPA fully approved a 15 percent plan for the 1-hour NAAQS as well as areas for which EPA has not fully approved a 15 percent plan for the 1-hour NAAQS shall meet the requirements of either paragraph (a)(1)(iii)(A) or (B) below.

(A) The State shall not distinguish between the portion of the area that previously met the 15 percent VOC reduction requirement and the portion of the area that did not, and

(*1*) The State shall submit a SIP revision consistent with section 182(b)(1) of the Act no later than 3 years after designation for the 8-hour NAAQS for the entire area. The 6-year period referenced in section 182(b)(1) of the Act shall begin January 1 of the year following the year used for the baseline emissions inventory.

(*2*) For each area classified as serious or higher, the State shall submit a SIP revision consistent with section 182(c)(2)(B) of the Act no later than 3 years after designation for the 8-hour NAAQS. The final increment of progress must be achieved no later than the attainment date for the area.

(B) The State shall treat the area as two parts, each with a separate RFP target as follows:

(*1*) For the portion of the area without an approved 15 percent VOC RFP plan for the 1-hour standard, the State shall submit a SIP revision consistent with section 182(b)(1) of the Act no later than 3 years after designation for the 8-hour NAAQS for the area. The 6-year period referenced in section 182(b)(1) of the Act shall begin January 1 of the year following the year used for the baseline emissions inventory. Emissions reductions to meet this requirement may

come from anywhere within the 8-hour nonattainment area.

(*2*) For the portion of the area with an approved 15 percent VOC plan for the 1-hour NAAQS, the State shall submit a SIP as required under paragraph (b)(2)of this section.

(2) *What restrictions apply on the creditability of emission control measures for the RFP plans required under this section?* Except as specifically provided in section 182(b)(1)(C) and (D) and section 182(c)(2)(B) of the Act, all SIP-approved or federally promulgated emissions reductions that occur after the baseline emissions inventory year are creditable for purposes of the RFP requirements in this section, provided the reductions meet the requirements for creditability, including the need to be enforceable, permanent, quantifiable and surplus, as described for purposes of State economic incentive programs in the requirements of § 51.493 of this part.

(b) *How does the RFP requirement of section 172(c)(2) of the Act apply to areas subject to that requirement?* (1) An area subject to the RFP requirement of subpart 1 pursuant to § 51.902(b) or a moderate area subject to subpart 2 as covered in paragraphs (a)(1)(ii)(A) of this section shall meet the RFP requirements of section 172(c)(2) of the Act as provided in paragraph (b)(2) of this section.

(2) The State shall submit no later than 3 years following designation for the 8-hour NAAQS a SIP providing for RFP consistent with the following:

(i) For each area with an attainment demonstration requesting an attainment date of 5 years or less after designation for the 8-hour NAAQS, the attainment demonstration SIP shall require that all emissions reductions needed for attainment be implemented by the beginning of the attainment year ozone season.

(ii) For each area with an attainment demonstration requesting an attainment date more than 5 years after designation for the 8-hour NAAQS, the attainment demonstration SIP—

(A) Shall provide for a 15 percent emission reduction from the baseline year within 6 years after the baseline year.

(B) May use either NO_X or VOC emissions reductions (or both) to achieve the 15 percent emission reduction requirement. Use of NO_X emissions reductions must meet the criteria in section 182(c)(2)(C) of the Act.

(C) For each subsequent 3-year period out to the attainment date, the RFP SIP must provide for an additional increment of progress. The increment for each 3-year period must be a portion of the remaining emission reductions needed for attainment beyond those reductions achieved for the first increment of progress (e.g., beyond 2008 for areas designated nonattainment in June 2004). Specifically, the amount of reductions needed for attainment is divided by the number of years needed for attainment after the first increment of progress in order to establish an ''annual increment.'' For each 3-year period out to the attainment date, the area must achieve roughly the portion of reductions equivalent to three annual increments.

(c) *What method should a State use to calculate RFP targets?* In calculating RFP targets for the initial 6-year period and the subsequent 3-year periods pursuant to this section, the State shall use the methods consistent with the requirements of sections 182(b)(1)(C) and (D) and 182(c)(2)(B) to properly account for non-creditable reductions.

(d) *What is the baseline emissions inventory for RFP plans?* For the RFP plans required under this section, the baseline emissions inventory shall be determined at the time of designation of the area for the 8-hour NAAQS and shall be the emissions inventory for the most recent calendar year for which a complete inventory is required to be submitted to EPA under the provisions of subpart A of this part or a more recent alternative baseline emissions inventory provided the State demonstrates that the baseline inventory meets the CAA provisions for RFP and provides a rationale for why it is appropriate to use the alternative baseline year rather than 2002 to comply with the CAA's RFP provisions.

■ 7. Section 51.912 is added to read as follows:

§ 51.912 What requirements apply for reasonably available control technology (RACT) and reasonably available control measures (RACM) under the 8-hour NAAQS?

(a) *What is the RACT requirement for areas subject to subpart 2 in accordance with § 51.903?* (1) For each area subject to subpart 2 in accordance with § 51.903 of this part and classified moderate or higher, the State shall submit a SIP revision that meets the NO_X and VOC RACT requirements in sections 182(b)(2) and 182(f) of the Act.

(2) The State shall submit the RACT SIP for each area no later than 27 months after designation for the 8-hour ozone NAAQS.

(3) The State shall provide for implementation of RACT as expeditiously as practicable but no later than the first ozone season or portion thereof which occurs 30 months after the RACT SIP is due.

(b) *How do the RACT provisions apply to a major stationary source?* Volatile organic compounds and NO_X are to be considered separately for purposes of determining whether a source is a major stationary source as defined in section 302 of the Act.

(c) *What is the RACT requirement for areas subject only to subpart 1 pursuant to § 51.902(b)?* Areas subject only to subpart 1 pursuant to § 51.902(b) are subject to the RACT requirement specified in section 172(c)(1) of the Act.

(1) For an area that submits an attainment demonstration that requests an attainment date 5 years or less after designation for the 8-hour NAAQS, the State shall meet the RACT requirement by submitting an attainment demonstration SIP demonstrating that the area has adopted all control measures necessary to demonstrate attainment as expeditiously as practicable.

(2) For an area that submits an attainment demonstration that requests an attainment date more than 5 years after designation for the 8-hour NAAQS, the State shall submit a SIP consistent with the requirements of § 51.912(a) and (b) except the State shall submit the RACT SIP for each area with its request pursuant to Clean Air Act section 172(a)(2)(A) to extend the attainment date.

(d) *What is the Reasonably Available Control Measures (RACM) requirement for areas designated nonattainment for the 8-hour NAAQS?* For each nonattainment area required to submit an attainment demonstration under § 51.908, the State shall submit with the attainment demonstration a SIP revision demonstrating that it has adopted all RACM necessary to demonstrate attainment as expeditiously as practicable and to meet any RFP requirements.

■ 8. Section 51.913 is added to read as follows:

§ 51.913 How do the section 182(f) NO_X exemption provisions apply for the 8-hour NAAQS?

(a) A person may petition the Administrator for an exemption from NO_X obligations under section 182(f) for any area designated nonattainment for the 8-hour ozone NAAQS and for any area in a section 184 ozone transport region.

(b) The petition must contain adequate documentation that the criteria in section 182(f) are met.

(c) A section 182(f) NO_X exemption granted for the 1-hour ozone standard does not relieve the area from any NO_X

obligations under section 182(f) for the 8-hour ozone standard.

■ 9. Section 51.914 is added to read as follows:

§ 51.914 What new source review requirements apply for 8-hour ozone nonattainment areas?

The requirements for new source review for the 8-hour ozone standard are located in § 51.165 of this part.

■ 10. Section 51.915 is added to read as follows:

§ 51.915 What emissions inventory requirements apply under the 8-hour NAAQS?

For each nonattainment area subject to subpart 2 in accordance with § 51.903, the emissions inventory requirements in sections 182(a)(1) and 182(a)(3) of the Act shall apply, and such SIP shall be due no later 2 years after designation. For each nonattainment area subject only to title I, part D, subpart 1 of the Act in accordance with § 51.902(b), the emissions inventory requirement in section 172(c)(3) of the Act shall apply, and an emission inventory SIP shall be due no later 3 years after designation. For purposes of defining the data elements for the emissions inventories for these areas, the ozone-relevant data element requirements under 40 CFR part 51 subpart A apply.

■ 11. Section 51.916 is added to read as follows:

§ 51.916 What are the requirements for an Ozone Transport Region under the 8-hour NAAQS?

(a) In General. Sections 176A and 184 of the Act apply for purposes of the 8-hour NAAQS.

(b) RACT Requirements for Certain Portions of an Ozone Transport Region.

(1) The State shall submit a SIP revision that meets the RACT requirements of section 184 of the Act for each area that is located in an ozone transport region and that is—

(i) Designated as attainment or unclassifiable for the 8-hour standard;

(ii) Designated nonattainment and classified as marginal for the 8-hour standard; or

(iii) Designated nonattainment and covered solely under subpart 1 of part D, title I of the CAA for the 8-hour standard.

(2) The State is required to submit the RACT revision no later than September 16, 2006 and shall provide for implementation of RACT as expeditiously as practicable but no later than May 1, 2009.

■ 12. Section 51.917 is added to read as follows:

§ 51.917 What is the effective date of designation for the Las Vegas, NV, 8-hour ozone nonattainment area?

The Las Vegas, NV, 8-hour ozone nonattainment area (designated on September 17, 2004 (69 FR 55956)) shall be treated as having an effective date of designation of June 15, 2004, for purposes of calculating SIP submission deadlines, attainment dates, or any other deadline under this subpart.

■ 13. Section 51.918 is added to read as follows:

§ 51.918 Can any SIP planning requirements be suspended in 8-hour ozone nonattainment areas that have air quality data that meets the NAAQS?

Upon a determination by EPA that an area designated nonattainment for the 8-hour ozone NAAQS has attained the standard, the requirements for such area to submit attainment demonstrations and associated reasonably available control measures, reasonable further progress plans, contingency measures, and other planning SIPs related to attainment of the 8-hour ozone NAAQS shall be suspended until such time as: the area is redesignated to attainment, at which time the requirements no longer apply; or EPA determines that the area has violated the 8-hour ozone NAAQS.

Appendix S to Part 51—[Amended]

■ Appendix S to part 51 is amended as follows:

■ 1. By revising the second sentence of paragraph I and the the fourth sentence of paragraph.

■ 2. By revising paragraph II.A.4(i)(*a*) and (*b*).

■ 3. By adding paragraph II.A.4(i)(*c*).

■ 4. By revising paragraph II.A.4(ii).

■ 5. By revising paragraph II.A.5 (ii).

■ 6. By adding paragraphs II.A.5(iv) through (v).

■ 7. By revising paragraph II.A.6(v)(*c*).

■ 8. By revising the table in paragraph II.A.10(i).

■ 9. By adding paragraphs II.A.10(ii) through (v).

■ 10. By amending paragraph IV.A Condition 1 by removing footnote 5.

■ 11. By amending paragraph IV.A Condition 3 by redesignating footnote 6 as footnote 5 and by redesignating footnote 7 as footnote 6.

■ 12. By amending paragraph IV.A Condition 4 by removing footnote 8.

■ 13. By revising paragraph IV.C.3.

■ 14. By revising paragraph IV.D.

■ 15. By revising paragraph IV.E.

■ 16. By adding paragraphs IV.G through H.

■ 17. By amending paragraph V.A by redesignating footnote 10 as footnote 7.

■ 18. By revising the last sentence of paragraph VI and adding paragraphs VI.A, VI.B and VI.C.

The revisions and additions read as follows:

Appendix S to Part 51—Emission Offset Interpretative Ruling

I.

* * * A major new source or major modification which would locate in any area designated under section 107(d) of the Act as attainment or unclassifiable for ozone that is located in an ozone transport region or which would locate in an area designated in 40 CFR part 81, subpart C, as nonattainment for a pollutant for which the source or modification would be major may be allowed to construct only if the stringent conditions set forth below are met. * * *

For each area designated as exceeding a NAAQS (nonattainment area) under 40 CFR part 81, subpart C, or for any area designated under section 107(d) of the Act as attainment or unclassifiable for ozone that is located in an ozone transport region, this Interpretative Ruling will be superseded after June 30, 1979 (a) by preconstruction review provisions of the revised SIP, if the SIP meets the requirements of Part D, Title 1, of the Act; or (b) by a prohibition on construction under the applicable SIP and section 110(a)(2)(I) of the Act, if the SIP does not meet the requirements of Part D. * * *

* * * * *

II. * * *

A. * * *

4.(i) * * *

(*a*) Any stationary source of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act, except that lower emissions thresholds shall apply in areas subject to subpart 2, subpart 3, or subpart 4 of part D, title I of the Act, according to paragraphs II.A.4(i)(*a*)(*1*) through (*6*) of this Ruling.

(*1*) 50 tons per year of volatile organic compounds in any serious ozone nonattainment area.

(*2*) 50 tons per year of volatile organic compounds in an area within an ozone transport region, except for any severe or extreme ozone nonattainment area.

(*3*) 25 tons per year of volatile organic compounds in any severe ozone nonattainment area.

(*4*) 10 tons per year of volatile organic compounds in any extreme ozone nonattainment area.

(*5*) 50 tons per year of carbon monoxide in any serious nonattainment area for carbon monoxide, where stationary sources contribute significantly to carbon monoxide levels in the area (as determined under rules issued by the Administrator)

(*6*) 70 tons per year of PM–10 in any serious nonattainment area for PM–10;

(*b*) For the purposes of applying the requirements of paragraph IV.H of this Ruling to stationary sources of nitrogen oxides located in an ozone nonattainment area or in an ozone transport region, any stationary source which emits, or has the potential to emit, 100 tons per year or more of nitrogen oxides emissions, except that the emission thresholds in paragraphs II.A.4(i)(*b*)(*1*) through (*6*) of this Ruling apply in areas

subject to subpart 2 of part D, title I of the Act.

(*1*) 100 tons per year or more of nitrogen oxides in any ozone nonattainment area classified as marginal or moderate.

(*2*) 100 tons per year or more of nitrogen oxides in any ozone nonattainment area classified as a transitional, submarginal, or incomplete or no data area, when such area is located in an ozone transport region.

(*3*) 100 tons per year or more of nitrogen oxides in any area designated under section 107(d) of the Act as attainment or unclassifiable for ozone that is located in an ozone transport region.

(*4*) 50 tons per year or more of nitrogen oxides in any serious nonattainment area for ozone.

(*5*) 25 tons per year or more of nitrogen oxides in any severe nonattainment area for ozone.

(*6*) 10 tons per year or more of nitrogen oxides in any extreme nonattainment area for ozone; or

(*c*) Any physical change that would occur at a stationary source not qualifying under paragraph II.A.4(i)(*a*) or (*b*) of this Ruling as a major stationary source, if the change would constitute a major stationary source by itself.

(ii) A major stationary source that is major for volatile organic compounds or nitrogen oxides is major for ozone.

* * * * *

5. * * *

(ii) Any net emission increase that is considered significant for volatile organic compounds shall be considered significant for ozone.

* * * * *

(iv) For the purpose of applying the requirements of paragraph IV.H of this Ruling to modifications at major stationary sources of nitrogen oxides located in ozone nonattainment areas or in ozone transport regions, whether or not subject with respect to ozone to subpart 2, part D, title I of the Act, any significant net emissions increase of nitrogen oxides is considered significant for ozone.

(v) Any physical change in, or change in the method of operation of, a major stationary source of volatile organic compounds that results in any increase in emissions of volatile organic compounds from any discrete operation, emissions unit, or other pollutant emitting activity at the source shall be considered a significant net emissions increase and a major modification for ozone, if the major stationary source is located in an extreme ozone nonattainment area that is subject to subpart 2, part D, title I of the Act.

6. * * *

(v) * * *

(*c*) The reviewing authority has not relied on it in issuing any permit under regulations approved pursuant to 40 CFR 51.165;

* * * * *

10. (i) * * *

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Ozone: 40 tpy of volatile organic compounds or NO_X
Lead: 0.6 tpy
Particulate matter: 25 tpy of particulate matter emissions
PM–10: 15 tpy PM–10

(ii) Notwithstanding the significant emissions rate for ozone in paragraph II.A.10(i) of this Ruling, significant means, in reference to an emissions increase or a net emissions increase, any increase in actual emissions of volatile organic compounds that would result from any physical change in, or change in the method of operation of, a major stationary source locating in a serious or severe ozone nonattainment area that is subject to subpart 2, part D, title I of the Act, if such emissions increase of volatile organic compounds exceeds 25 tons per year.

(iii) For the purposes of applying the requirements of paragraph IV.H of this Ruling to modifications at major stationary sources of nitrogen oxides located in an ozone nonattainment area or in an ozone transport region, the significant emission rates and other requirements for volatile organic compounds in paragraphs II.A.10(i), (ii), and (v) of this Ruling shall apply to nitrogen oxides emissions.

(iv) Notwithstanding the significant emissions rate for carbon monoxide under paragraph II.A.10(i) of this Ruling, significant means, in reference to an emissions increase or a net emissions increase, any increase in actual emissions of carbon monoxide that would result from any physical change in, or change in the method of operation of, a major stationary source in a serious nonattainment area for carbon monoxide if such increase equals or exceeds 50 tons per year, provided the Administrator has determined that stationary sources contribute significantly to carbon monoxide levels in that area.

(v) Notwithstanding the significant emissions rates for ozone under paragraphs II.A.10(i) and (ii) of this Ruling, any increase in actual emissions of volatile organic compounds from any emissions unit at a major stationary source of volatile organic compounds located in an extreme ozone nonattainment area that is subject to subpart 2, part D, title I of the Act shall be considered a significant net emissions increase.

* * * * *

IV. * * *

C. * * *

3. Emission Reduction Credits from Shutdowns and Curtailments.

(i) Emissions reductions achieved by shutting down an existing source or curtailing production or operating hours may be generally credited for offsets if they meet the requirements in paragraphs IV.C.3.i.1. through 2 of this section.

(1) Such reductions are surplus, permanent, quantifiable, and federally enforceable.

(2) The shutdown or curtailment occurred after the last day of the base year for the SIP planning process. For purposes of this paragraph, a reviewing authority may choose to consider a prior shutdown or curtailment to have occurred after the last day of the base year if the projected emissions inventory used to develop the attainment demonstration explicitly includes the emissions from such previously shutdown or curtailed emission units. However, in no event may credit be given for shutdowns that occurred before August 7, 1977.

(ii) Emissions reductions achieved by shutting down an existing source or curtailing production or operating hours and that do not meet the requirements in paragraphs IV.C.3.i.1. through 2 of this section may be generally credited only if:

(1) The shutdown or curtailment occurred on or after the date the new source permit application is filed; or

(2) The applicant can establish that the proposed new source is a replacement for the shutdown or curtailed source, and the emissions reductions achieved by the shutdown or curtailment met the requirements of paragraphs IV.C.3.i.1. through 2 of this section.

D. *Location of offsetting emissions.* The owner or operator of a new or modified major stationary source may comply with any offset requirement in effect under this Ruling for increased emissions of any air pollutant only by obtaining emissions reductions of such air pollutant from the same source or other sources in the same nonattainment area, except that the reviewing authority may allow the owner or operator of a source to obtain such emissions reductions in another nonattainment area if the conditions in IV.D.1 and 2 are met.

1. The other area has an equal or higher nonattainment classification than the area in which the source is located.

2. Emissions from such other area contribute to a violation of the national ambient air quality standard in the nonattainment area in which the source is located.

E. *Reasonable further progress.* Permits to construct and operate may be issued if the reviewing authority determines that, by the time the source is to commence operation, sufficient offsetting emissions reductions have been obtained, such that total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities, and from the proposed source will be sufficiently less than total emissions from existing sources prior to the application for such permit to construct or modify so as to represent (when considered together with the plan provisions required under CAA section 172) reasonable further progress (as defined in CAA section 171).

* * * * *

G. *Offset Ratios.* 1. In meeting the emissions offset requirements of paragraph IV.A, Condition 3 of this Ruling for ozone nonattainment areas that are subject to subpart 2, part D, title I of the Act, the ratio of total actual emissions reductions of VOC to the emissions increase of VOC shall be as follows:

(i) In any marginal nonattainment area for ozone—at least 1.1:1;

(ii) In any moderate nonattainment area for ozone—at least 1.15:1;

(iii) In any serious nonattainment area for ozone—at least 1.2:1;

(iv) In any severe nonattainment area for ozone—at least 1.3:1 (except that the ratio may be at least 1.2:1 if the State also requires all existing major sources in such nonattainment area to use BACT for the control of VOC); and

(v) In any extreme nonattainment area for ozone—at least 1.5:1 (except that the ratio may be at least 1.2:1 if the State also requires all existing major sources in such nonattainment area to use BACT for the control of VOC); and

2. Notwithstanding the requirements of paragraph IV.G.1 of this Ruling for meeting the requirements of paragraph IV.A, Condition 3 of this Ruling, the ratio of total actual emissions reductions of VOC to the emissions increase of VOC shall be at least 1.15:1 for all areas within an ozone transport region that is subject to subpart 2, part D, title I of the Act, except for serious, severe, and extreme ozone nonattainment areas that are subject to subpart 2, part D, title I of the Act.

3. In meeting the emissions offset requirements of paragraph IV.A, Condition 3 of this Ruling for ozone nonattainment areas that are subject to subpart 1, part D, title I of the Act (but are not subject to subpart 2, part D, title I of the Act, including 8-hour ozone nonattainment areas subject to 40 CFR 51.902(b)), the ratio of total actual emissions reductions of VOC to the emissions increase of VOC shall be at least 1:1.

H. *Additional provisions for emissions of nitrogen oxides in ozone transport regions and nonattainment areas.* The requirements of this Ruling applicable to major stationary sources and major modifications of volatile organic compounds shall apply to nitrogen oxides emissions from major stationary sources and major modifications of nitrogen oxides in an ozone transport region or in any ozone nonattainment area, except in ozone nonattainment areas where the Administrator has granted a NO_X waiver applying the standards set forth under 182(f) and the waiver continues to apply.

* * * * *

VI. Policy Where Attainment Dates Have Not Passed

* * * In such cases, a new source locating in an area designated in 40 CFR 81.300 *et seq.* as nonattainment (or, where section III of this Ruling is applicable, a new source that would cause or contribute to a NAAQS violation) may be exempt from the Conditions of section IV.A if the conditions in paragraphs VI.A through C are met.

A. The new source meets the applicable SIP emission limitations.

B. The new source will not interfere with the attainment date specified in the SIP under section 110 of the Act.

C. The Administrator has determined that conditions A and B of this section are satisfied and such determination is published in the **Federal Register**.

PART 52—[Amended]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart A—[Amended]

■ 2. Section 52.21 is amended as follows:

■ a. By revising paragraph (b)(1)(ii).

■ b. By revising paragraph (b)(2)(ii).

■ c. By revising the entry for ''ozone'' in list to paragraph (b)(23)(i).

■ d. By revising paragraph (b)(50)(i).

■ e. By revising the second sentence of footnote 1 to paragraph (i)(5)(i).

§ 52.21 Prevention of significant deterioration of air quality.

* * * * *

(b) * * *

(1) * * *

(ii) A major source that is major for volatile organic compounds or NO_X shall be considered major for ozone.

* * * * *

(2) * * *

(ii) Any significant emissions increase (as defined at paragraph (b)(40) of this section) from any emissions units or net emissions increase (as defined in paragraph (b)(3) of this section) at a major stationary source that is significant for volatile organic compounds or NO_X shall be considered significant for ozone.

* * * * *

(23)(i) * * *

* * * * *

Ozone: 40 tpy of volatile organic compounds or NO_X

* * * * *

(50) * * *

(i) Any pollutant for which a national ambient air quality standard has been promulgated and any constituents or precursors for such pollutants identified by the Administrator (e.g., volatile organic compounds and NO_X are precursors for ozone);

* * * * *

(i) * * *

(5) * * *

(i) * * *

[1] No *de minimis* air quality level is provided for ozone. However, any net emissions increase of 100 tons per year or more of volatile organic compounds or nitrogen oxides subject to PSD would be required to perform an ambient impact analysis, including the gathering of ambient air quality data.

* * * * *

■ 3. Section 52.24 is revised to read as follows:

§ 52.24 Statutory restriction on new sources.

(a) Any area designated nonattainment pursuant to section 107(d) of the Act to which, immediately prior to the enactment of the Amendments to the Act of 1990 (November 15, 1990), a prohibition of construction or modification of major stationary sources was applied, shall retain that prohibition if such prohibition was applied by virtue of a finding of the Administrator that the State containing such an area:

(1) Failed to submit an implementation plan meeting the requirements of an approvable new source review permitting program; or

(2) Failed to submit an implementation plan that provided for timely attainment of the national ambient air quality standard for sulfur dioxide by December 31, 1982. This prohibition shall apply until the Administrator approves a plan for such area as meeting the applicable requirements of part D of title I of the Act as amended (NSR permitting requirements) or subpart 5 of part D of title I of the Act as amended (relating to attainment of the national ambient air quality standards for sulfur dioxide), as applicable.

(b) Permits to construct and operate as required by permit programs under section 172(c)(5) of the Act may not be issued for new or modified major stationary sources proposing to locate in nonattainment areas or areas in a transport region where the Administrator has determined that the applicable implementation plan is not being adequately implemented for the nonattainment area or transport region in which the proposed source is to be constructed or modified in accordance with the requirements of part D of title I of the Act.

(c) Whenever, on the basis of any information, the Administrator finds that a State is not in compliance with any requirement or prohibition of the Act relating to the construction of new sources or the modification of existing sources, the Administrator may issue an order under section 113(a)(5) of the Act prohibiting the construction or modification of any major stationary source in any area to which such requirement applies.

(d) The restrictions in paragraphs (a) and (b) of this section apply only to major stationary sources of emissions that cause or contribute to concentrations of the pollutant (or precursors, as applicable) for which the transport region or nonattainment area was designated such, and for which the applicable implementation plan is not being carried out in accordance with, or does not meet, the requirements of part D of title I of the Act.

(e) For any transport region or any area designated as nonattainment for any national ambient air quality standard, the restrictions in paragraphs (a) and (b) of this section shall apply to any major stationary source or major modification that would be major for the pollutant (or precursors, where applicable) for which the area is designated nonattainment or a transport region, if the stationary source or major

modification would be constructed anywhere in the designated nonattainment area or transport region.

(f) The provisions in § 51.165 of this chapter shall apply in interpreting the terms under this section.

(g) At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then:

(1) If the construction moratorium imposed pursuant to this section is still in effect for the nonattainment area or transport region in which the source or modification is located, then the permit may not be so revised; or

(2) If the construction moratorium is no longer in effect in that area, then the requirements of § 51.165 of this chapter shall apply to the source or modification as though construction had not yet commenced on the source or modification.

(h) This section does not apply to major stationary sources or major modifications locating in a clearly defined part of a nonattainment area or transport region (such as a political subdivision of a State), where EPA finds that a plan which meets the requirements of part D of title I of the Act is in effect and is being implemented in that part.

(i) [Reserved]

(j) [Reserved]

(k) For an area designated as nonattainment after July 1, 1979, the Emission Offset Interpretative Ruling, 40 CFR part 51, appendix S shall govern permits to construct and operate applied for during the period between the date of designation as nonattainment and the date the NSR permit program meeting the requirements of part D is approved. The Emission Offset Interpretative Ruling, 40 CFR part 51, appendix S, shall also govern permits to construct and operate applied for in any area designated under section 107(d) of the CAA as attainment or unclassifiable for ozone that is located in an ozone transport region prior to the date the NSR permitting program meeting the requirements of part D is approved.

PART 80—[AMENDED]

■ 1. The authority citation for part 80 continues to read as follows:

Authority: 42 U.S.C. 7414, 7545, and 7601(a).

Subpart D—[Amended]

■ 2. Section 80.70 is amended as follows:

■ a. In the second sentence of paragraph (m) introductory text remove the words ''included in'' and add in their place the words ''identified pursuant to''.

■ b. In the third sentence of paragraph (m) introductory text remove the words ''listed in'' and add in their place the words ''identified pursuant to''.

■ c. By revising paragraphs (m)(1) and (2).

§ 80.70 Covered areas.

* * * * *

(m) * * *

(1) An area identified as a covered area pursuant to this paragraph (m), whose classification as a severe nonattainment area under the 1-hour ozone NAAQS is removed as a result of removal of the 1-hour ozone NAAQS, remains a covered area as follows:

(i) Prior to redesignation as attainment for the 8-hour ozone NAAQS the area remains a covered area;

(ii) After redesignation as attainment for the 8-hour ozone NAAQS—[RESERVED].

(2) An area identified as a covered area pursuant to this paragraph (m), whose classification as a severe nonattainment area under the 1-hour ozone NAAQS is removed as a result of redesignation to attainment for the 1-hour ozone NAAQS, remains a covered area as follows: [RESERVED]

[FR Doc. 05–22698 Filed 11–28–05; 8:45 am]

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Part III

Department of Agriculture

Food and Nutrition Service

7 CFR Part 246

Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Vendor Cost Containment; Interim Rule

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 246

RIN 0584–AD71

Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Vendor Cost Containment

AGENCY: Food and Nutrition Service, USDA.

ACTION: Interim rule.

SUMMARY: This interim rule amends the regulations governing the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) to strengthen vendor cost containment. The rule incorporates into program regulations new legislative requirements that affect the selection, authorization, and reimbursement of retail vendors. These requirements are contained in the Child Nutrition and WIC Reauthorization Act of 2004, enacted on June 30, 2004. The rule reflects the statutory provisions that require State agencies to implement a vendor peer group system, competitive price criteria, and allowable reimbursement levels in a manner that ensures that the WIC Program pays authorized vendors competitive prices for supplemental foods. It also requires State agencies to ensure that vendors that derive more than 50 percent of their annual food sales revenue from WIC food instruments do not result in higher food costs to the program than do other vendors. The intent of these provisions is to maximize the number of eligible women, infants, and children served with available Federal funding.

DATES: Effective Date: This rule is effective December 29, 2005.

Implementation Date: State agencies must implement the provisions of this rule no later than December 30, 2005.

Comment Date: To be assured of consideration, comments on this interim rule must be received by the Food and Nutrition Service (FNS) on or before November 29, 2006.

ADDRESSES: FNS invites interested persons to submit comments on this interim rule. Comments may be submitted by any of the following methods:

- Mail: Send comments to Patricia Daniels, Director, Supplemental Food Programs Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Room 528, Alexandria, Virginia 22302, (703) 305–2746.
- Web Site: Go to *http://www.fns.usda.gov/wic.* Follow the online instructions for submitting comments through the link at the Supplemental Food Programs Division Web site.
- E-Mail: Send comments to *WICHQ-SFPD@fns.usda.gov.* Include Docket ID Number 0584–AD71, Vendor Cost Containment Interim Rule, in the subject line of the message.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.

All comments submitted in response to this interim rule will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identities of the individuals or entities submitting the comments will be subject to public disclosure. All written submissions will be available for public inspection at the address above during regular business hours (8:30 a.m. to 5 p.m.), Monday through Friday.

FNS also plans to make the comments publicly available by posting a copy of all comments on the FNS Web site at *http://www.fns.usda.gov/wic*.

FOR FURTHER INFORMATION CONTACT: Debra Whitford, Chief of the Policy and Program Development Branch, Supplemental Food Programs Division, at the address indicated above or at (703) 305–2746, during regular business hours (8:30 a.m.–5 p.m.), Monday through Friday.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This rule has been determined to be Significant and was reviewed by the Office of Management and Budget under Executive Order 12866.

Regulatory Impact Analysis

As required for all rules that have been designated as Significant by the Office of Management and Budget, a Regulatory Impact Analysis was developed for the WIC Vendor Cost Containment Interim Rule. A complete copy of the Impact Analysis appears in the appendix to this rule.

Need for Action

This action is needed to implement the vendor cost containment provisions of the Child Nutrition and WIC Reauthorization Act of 2004, Public Law 108–265. The rule requires WIC State agencies to operate vendor management systems that effectively contain food costs by ensuring that prices paid for supplemental foods are competitive. The rule also responds to data which indicate that WIC food expenditures increasingly include payments to a type of vendor whose prices are not governed by the market forces that affect most retail grocers. As a result, the prices charged by these vendors tend to be higher than those of other retail grocery stores participating in the program. To ensure that the program pays competitive prices, this rule codifies the new statutory requirements for State agencies to use in evaluating vendor applicants' prices during the vendor selection process and when paying vendors for supplemental foods following authorization.

While the Child Nutrition and WIC Reauthorization Act mandates that States establish peer groups, competitive price criteria and allowable reimbursement levels and states that these requirements must result in the outcome of paying above-50-percent vendors no more than regular vendors, the Act does not specify particular criteria for peer groups or acceptable methods of setting competitive price criteria and allowable reimbursement levels. FNS considered mandating specific means of developing peer groups, competitive price criteria and allowable reimbursement levels in order to ensure that the outcome of this legislation was achieved. However, given State agencies' responsibility to manage WIC as a discretionary grant program, the varying retail food market conditions in each State, and the wide variations in current vendor cost containment systems operated by State agencies, FNS believes that State agencies need flexibility to develop their own peer groups, competitive price criteria and allowable reimbursement levels.

Thus, the rule gives State agencies flexibility to design cost containment practices that would be effective in their own markets and would ensure adequate participant access. In addition, there is little information about the effectiveness of particular cost containment practices in the variety of markets represented by the 89 State agencies. Mandating more specific means of developing peer groups, competitive price criteria and allowable reimbursement levels could have unintended, negative consequences on participant access, food costs and administrative burden.

As State agencies gain experience and the results of their vendor cost containment practices become apparent, FNS may develop further regulations and guidance to improve WIC vendor cost containment. In the interim, FNS believes that the current rule will substantially accomplish the goal of the Act of containing food costs and ensuring that above-50-percent vendors

do not result in higher costs to the program than regular vendors.

As noted previously, FNS believes that State agencies need flexibility to develop their own peer groups, competitive price criteria and allowable reimbursement levels. Given State agencies' responsibility to manage WIC as a discretionary grant program, the varying retail food market conditions in each State, the wide variations in current vendor cost containment systems operated by State agencies, the limited amount of information about the effectiveness of particular cost containment practices in the variety of markets represented by the 89 State agencies, and the need to minimize administrative burden, this is the most appropriate approach for the interim final rule.

In order to better assess the effectiveness of specific cost containment strategies, FNS will be collecting and analyzing data from State agencies, in anticipation of issuing a final rule. This will enable the agency to analyze the effect of particular vendor peer group systems, competitive price criteria, and allowable reimbursement levels on WIC food prices, participant access, the vendor community and a range of other measures. FNS will also be collecting information on administrative burden associated with the new requirements. This will enable FNS to identify and consider a reasonable number of regulatory alternatives when considering the final rule and adopt the most cost-effective or least burdensome alternative that achieves the objectives of the rule. While we expect the final rule to be promulgated within three years, it is important that sufficient time be allowed to assess the impacts of this interim final rule before moving to alter any of its provisions.

Benefits

The WIC Program will benefit from the provisions of this rule by reducing unnecessary food expenditures, which increases the potential to serve more eligible women, infants, and children for the same cost. The rule should have the effect ensuring that payments to vendors, particularly vendors that derive more than 50 percent of their annual food sales revenue from WIC food instruments reflect competitive prices for WIC foods. Currently, the WIC Program pays vendors whose food sales consist primarily of WIC transactions substantially more for supplemental foods than it pays other authorized vendors. Under this rule, State agencies that choose to authorize these vendors will demonstrate that payments to them do not exceed the competitive prices paid to other vendors. FNS conservatively estimates that implementation of the rule will result in a cost savings of approximately $75 million annually.

Costs

In order to comply with this rule, State agencies will need to make one-time changes in their vendor cost containment systems. Some State agencies may already be in full or partial compliance with the rule, while others may demonstrate that they meet the conditions for an exemption from the vendor peer group system requirement. Many State agencies, particularly those that choose to authorize vendors that rely predominantly on WIC food instruments for food sales revenue, will incur additional costs and administrative burden to achieve compliance with its provisions. These costs are associated with establishing or restructuring vendor peer groups, revising competitive price criteria and allowable reimbursement levels for those peer groups, collecting and monitoring vendor shelf prices for supplemental foods, and evaluating payments to vendors. Variations in State agency vendor management systems and staffing resources make it difficult to derive a cost estimate. State agencies will not receive additional funds to administer the program with these new requirements.

Some WIC vendors, particularly smaller stores that are not also authorized by the Food Stamp Program, may incur costs to compile data on their total annual food sales. State agencies will require this data in order to determine, as required by law, whether a vendor derives more than 50 percent of their total annual food sales revenue from WIC food instruments.

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). FNS does not believe this rule will have a significant economic impact on a substantial number of small entities. With the high degree of State flexibility allowable under this rule, small entities will be impacted differently in each State depending upon how that State chooses to meet the requirements set forth here. It is therefore not feasible to accurately estimate the rule's impact on small entities. As FNS is concerned about these impacts, we plan to collect data on the implementation of this interim final rule and the options States select in order to better assess the impact for the final rulemaking and the Final Regulatory Flexibility Analysis and publish it for comments.

In fulfilling the intent of the Child Nutrition and WIC Reauthorization Act of 2004, the rule may have a significant economic impact on a small number of vendors that have been authorized to participate in the WIC Program. These vendors tend to be smaller grocery stores that serve WIC participants exclusively or predominantly, have a large volume of WIC transactions, and are not subject to the retail market forces that keep food prices at competitive levels. In accordance with the law, the rule requires that State agencies implement effective competitive price criteria in selecting and reimbursing vendors, including assurance that payments to vendors that derive more than 50 percent of their annual food sales revenue from WIC food instruments do not result in higher food costs to the program than other vendors. Only those vendors that are able to meet competitive pricing requirements will be able to continue participating in the program. Currently FNS estimates that between three and four percent of the approximately 45,000 authorized vendors will need to make changes in the prices that they offer the WIC Program in order to be deemed competitive.

Public Law 104–4

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and tribal governments and the private sector. Under section 202 of the UMRA, FNS generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures by State, local or tribal governments, in the aggregate, or the private sector, of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives and adopt the most cost-effective or least burdensome alternative that achieves the objectives of the rule.

This interim rule contains no Federal mandates (under the provisions of Title II of the UMRA) for State, local and tribal governments or the private sector of $100 million or more in any one year. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

The Special Supplemental Nutrition Program for Women, Infants and Children (WIC) is listed in the Catalog of Federal Domestic Assistance under 10.557. For the reasons set forth in the final rule in 7 CFR part 3015, subpart V and related Notice (48 FR 29115), this program is included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

Federalism Summary Impact Statement

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the following three categories called for under section (6)(b)(2)(B) of Executive Order 13132.

Prior Consultation With State Officials

State agencies have expressed concerns and shared information regarding implementation of the new vendor cost containment legislative requirements. Because the WIC Program is a State-administered, federally funded program, our regional offices have formal and informal discussions with State agencies on an ongoing basis regarding program implementation and policy issues. This arrangement allows State agencies to raise questions and provide comments that form the basis for many of the implementation detail decisions in this and other WIC Program rules. Following the enactment of Public Law 108–265, several regional offices convened meetings with State WIC staff that included discussion of the vendor cost containment provisions of this law. As a result of these meetings, FNS continues to receive State agency requests for policy guidance on the vendor cost containment requirements. These questions have helped us make the rule responsive to State agency concerns.

In addition, in October 2004, the Supplemental Food Programs Division (SFPD) convened a meeting of WIC State agency representatives, USDA headquarters and regional office staff, and an outside expert on competitive pricing systems, to obtain more information on State agencies' current vendor cost containment systems. During the meeting, participants identified salient issues that State agencies are likely to confront in implementing the new competitive pricing requirements. Following the meeting, FNS received input from additional State agencies on their current competitive pricing policies, as well as from representatives of retail grocers.

Nature of Concerns and the Need To Issue This Rule

State agencies have inquired about the intent of the vendor cost containment provisions, particularly as amended by Public Law 108–265. They have asked whether these provisions require State agencies to improve the effectiveness of their competitive pricing systems, or whether they primarily address the competitiveness of prices charged by a comparatively small number of stores that derive their revenue from WIC food instruments predominantly and that generally charge higher prices than other authorized vendors. State agencies also have requested clarification of the term ''comparable vendors;'' guidance on how to determine a vendor's revenue from food sales; criteria for developing effective vendor peer groups and for obtaining an exemption from the vendor peer group requirement; and criteria for identifying, grouping, and setting allowable reimbursement levels for stores that are likely to derive more than 50 percent of their annual revenue from food sales from WIC transactions. Some State agencies have expressed concern over the potential cost of implementing changes to their automated systems for editing and payment of WIC food instruments. Many have indicated that the regulations should allow them maximum flexibility to define the competitive pricing approaches that best suit their individual circumstances.

Extent to Which We Will Meet Those Concerns

FNS has considered the impact of this interim rule on WIC State and local agencies. This rule makes changes required by law that became effective October 1, 2004. Through the rulemaking process, FNS has attempted to balance the need for State agencies to meet the new competitive pricing requirements against the administrative challenges that State agencies are likely to encounter in meeting them. These challenges include the commitment of adequate resources to configuring vendor peer groups and allowable reimbursement methodologies, ongoing monitoring of vendors' prices, and maintaining competitive pricing over time.

There is limited information available on proven competitive pricing approaches. Variations in State agency vendor populations, geography, and other characteristics also preclude the use of a standardized approach. Therefore, this rule sets forth principles to guide State agency efforts, while allowing State agencies the flexibility to meet the legislative requirements through a variety of acceptable approaches. The inclusion of competitive pricing principles in this interim rule responds to State agency requests for criteria for developing effective peer groups and allowable reimbursement levels, so that foods can be purchased at the lowest prices consistent with maintaining adequate participant access to vendors.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform, and is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions, otherwise impede its full implementation, or result in any delay of implementation of provisions beyond the statutory implementation date established in the Child Nutrition and WIC Reauthorization Act of 2004, Public Law 108–265. Section 203(e)(10) of Public Law 108–265 amends section 17(h) of the Child Nutrition Act of 1966 by adding the new paragraph 17(h)(11) which specifies that the State agencies shall comply with the provisions of the paragraph not later than 18 months after the date of enactment. Since the amendment was enacted on June 30, 2004, State agencies must be in compliance by December 30, 2005. This rule is not intended to have retroactive effect unless so specified in the **DATES** paragraph of this preamble. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted.

Civil Rights Impact Analysis

FNS has reviewed this interim rule in accordance with Departmental Regulation 4300–4, ''Civil Rights Impact Analysis,'' to identify and address any major civil rights impacts the rule might have on minorities, women, and persons with disabilities. FNS has determined that the rule's intent and provisions will not adversely affect access to WIC services by eligible persons. All data available to FNS indicate that protected individuals have the same opportunity to participate in the WIC Program as non-protected individuals. FNS specifically prohibits State and local government agencies that administer the WIC Program from engaging in actions that discriminate based on race, color, national origin, sex, age or disability. Section 246.8 of the WIC regulations (7

CFR part 246) indicates that Department of Agriculture regulations on non-discrimination (7 CFR parts 15, 15a and 15b) and FNS instructions ensure that no person shall on the grounds of race, color, national origin, age, sex, or disability, be excluded from participation in, be denied benefits of, or be otherwise subjected to discrimination under the Program.

Discrimination in any aspect of program administration is prohibited by Department of Agriculture regulations on non-discrimination (7 CFR parts 15, 15a, and 15b), the Age Discrimination Act of 1975 (Pub. L. 94–135), the Rehabilitation Act of 1973 (Pub. L. 93–112, section 504), and title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d). Enforcement action may be brought under any applicable Federal law. Title VI complaints shall be processed in accordance with 7 CFR part 15. Where State agencies have options, and they choose to implement a particular provision, they must implement it in such a way that it complies with the § 246.8 of the WIC regulations.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR 1320) requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. This interim rule contains new information collections that are subject to review and approval by the Office of Management and Budget. FNS is submitting for public comment the information collection burden that would result from the implementation of the provisions in this rule.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to Debra R. Whitford, Chief, Policy and Program Development Branch, Supplemental Food Programs Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 522, Alexandria, Virginia 22302. Comments may also be submitted via the FNS Web site at *http://www.fns.usda.gov/wic,* by following the online instructions. In all cases, please label your comments as ''Proposed Collection of Information: WIC Vendor Cost Containment Interim Rule.'' All written comments will be open for public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5 p.m. Monday through Friday) at 3101 Park Center Drive, Room 522, Alexandria, Virginia 22302. All responses to this notice will be summarized and included in the request for OMB approval. All comments will be a matter of public record.

OMB Number: 0584–0043.

Expiration Date: March 31, 2007.

Type of Request: Revision of a currently approved collection.

Abstract: The information collection and reporting burden associated with this interim rule meets new vendor cost containment requirements contained in the Child Nutrition and WIC Reauthorization Act of 2004, Public Law 108–265. These requirements affect the selection, authorization, and reimbursement of WIC vendors. The rule requires State agencies to report on a number of factors so that FNS can meet the goals of effectively containing food costs by ensuring that the WIC Program pays competitive prices for WIC foods and providing guidance to State agencies on best competitive pricing practices. These include new State Plan components, collection of information to identify vendors that derive more than 50 percent of their food sales revenue from WIC food instruments, and collection of vendor shelf prices for WIC foods. FNS deems this information collection and reporting burden to be necessary in order to fulfill the legislative requirements and ensure State agency compliance with the interim rule.

Section 246.4(a)(14)(xv) is a new section on vendor cost containment. It requires a State agency to include in the State Plan a description of the vendor peer group system and allowable reimbursement levels that demonstrates that the State agency is in compliance with WIC cost containment provisions. The vendor peer group description will include the criteria used to classify vendors into groups, the number and types of vendors in each peer group, identification of peer groups with vendors that derive more than 50 percent of their annual food sales revenue from WIC food instruments and comparable vendor peer groups, and the competitive price criteria and maximum reimbursement levels applicable to each peer group. The State Plan also must include the information specified in § 246.12(g)(4)(iv) of the interim rule on non-profit vendors that the State agency plans to exempt from the competitive price criteria and allowable reimbursement levels that are applicable to other vendors. State agencies seeking an exemption from the vendor peer group requirement based on the conditions stated in § 246.12(g)(4)(v) of the interim rule must submit a justification with documentation supporting their request. The justification will consist largely of a detailed description of how the State agency's alternative vendor cost containment system operates, with shelf price and/or redemption data to demonstrate that the system is as effective as a vendor peer group system. Under § 246.12(g)(4)(vi) of the rule, State agencies that authorize vendors that derive more than 50 percent of their annual food sales revenue from WIC food instruments must describe their methodology for ensuring that average payments per food instrument to such vendors do not exceed average payments per food instrument to comparable vendors in order to obtain vendor cost containment certification. To demonstrate that their competitive price criteria and allowable reimbursement levels meet regulatory requirements, State agencies will provide the following data for selected food instruments redeemed by vendors that derive more than 50 percent of their annual food sales from WIC food instruments and regular vendors: The number of food instruments redeemed; average food instrument redemption amounts and standard deviations by peer group; and the average variance in redemption amounts; the total dollar amount of WIC redemptions by peer group; and statewide weighted average redemption prices to demonstrate whether vendors that derive more than 50 percent of their annual food sales from WIC food instruments resulted in higher costs than would have occurred if participants had used other vendors. State agencies using EBT systems must make similar comparisons between the prices paid to vendors that derive more than 50 percent of their annual food sales revenue from WIC food instruments and the prices paid to comparable vendors. FNS will require annual updating of selected food

instrument redemption data.—874 hours

Section 246.12(g)(4)(i) requires a State agency to collect annual food sales data from authorized vendors and vendor applicants in order to identify the vendors that derive, or that may be expected to derive, more than 50 percent of their food sales revenue from WIC food instruments. A State agency that elects to authorize vendors that meet the above-50-percent criterion must identify these vendors annually using a methodology approved by FNS. A State agency that chooses not to authorize such vendors must use an approved methodology to identify vendor applicants that would be expected to meet the more than 50 percent criterion if authorized.—45,178 hours.

Section 246.12(g)(4)(ii)(B) requires State agencies to collect the shelf prices for WIC-approved foods from authorized retail vendors twice annually. In meeting this requirement, a State agency may limit data collection to prices that have changed from a vendor's previous submission. A State agency also may collect prices from a random sample of authorized vendors and/or for selected supplemental foods.—90,178 hours.

Respondents: WIC State agencies and vendors.

Estimated Number of Respondents: 89 State agencies and 45,000 vendors.

Estimate of Burden: Estimates of the information collection and reporting burden contained in this interim rule are detailed below.

ESTIMATED ANNUAL REPORTING BURDEN

Section of interim rule	Estimated number of respondents	Data collections or reports required annually	Estimated average burden hours per response	Estimated annual burden hours
246.4(a)(14)(xv)				
• Description of vendor peer group system and allowable reimbursement levels; average redemption amounts for selected food instruments.	89	1	4	356
• Notification of exemption of non-profit vendors	5	1	1	5
• Request for exemption from vendor peer group requirement	30	1—every three years.	8	80
• Information required for certification of vendor cost containment system and to monitor ongoing compliance with certification requirements.	65	1—every three years.	8	173
	65	1	4	260
246.12(g)(4)(i)	89	1	2	178
	45,000	1	1	45,000
246.12(g)(4)(ii)(B)	89	2	1	178
	45,000	2	1	90,000
Burden hours due to program changes				136,230
Total adjustments *				203
Currently Approved WIC Reporting and Recordkeeping Burden Hours				2,817,091
Total Proposed WIC Reporting and Recordkeeping Burden Hours				2,953,524

* Adjustments are due to an increase in the number of State agencies from 88 to 89.

FNS also plans an information collection to assess the impact of this regulation on State agencies at a later time.

Government Paperwork Elimination Act

FNS is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. This interim rule encourages WIC State agencies to collect data from retail vendors using electronic methods.

Good Cause Determination

As discussed above, section 203(e)(10) of the Child Nutrition and WIC Reauthorization Act of 2004, Public Law 108–265, contained provisions that significantly impact vendor cost containment in the WIC Program, particularly the costs of vendors that derive more than 50 percent of their food sales revenue from WIC food instruments. Section 501 of Public Law 108–265 requires that guidance to implement section 203(e)(10) of the law be issued as soon after the date of enactment as practicable, and authorizes the issuance of interim final regulations. Therefore, Under Secretary Eric M. Bost has determined, in accordance with 5 U.S.C. 553(b), that prior notice and comment would be unnecessary, and that good cause exists for making this rule effective without first publishing a proposed rule.

Background

Retail vendors make a major contribution to the success of the WIC Program by providing supplemental foods to program participants as an extension of their normal business practices. FNS recognizes that State agencies must balance multiple objectives when authorizing vendors, *i.e.,* they must ensure adequate participant access to supplemental foods; maintain effective program management within available administrative resources; and pay reasonable food costs. Therefore, State agencies have broad authority to authorize only those vendors needed to best serve these objectives. Since WIC is best served if foods are purchased for the lowest prices, while maintaining reasonable access for program participants, this authority includes eliminating vulnerability to excessive food payments by applying competitive price methods during and following vendor selection, so the State agency can serve the maximum number of participants with limited funding.

Major amendments to the WIC Program regulations governing food delivery systems were last published on December 29, 2000, at 65 FR 83248. These amendments, referred to as the WIC Food Delivery Systems Rule, established mandatory vendor selection, training, and monitoring requirements to strengthen State agency vendor management systems and prevent abuse of the program. The WIC Food Delivery

Systems Rule implemented provisions of the William F. Goodling Child Nutrition Reauthorization Act of 1998, Public Law 105–336 (which amended the Child Nutrition Act of 1966, 42 U.S.C. 1786), that required State agencies to identify high-risk vendors, conduct compliance buys on high-risk vendors, and consider food prices in the selection of vendors. State agencies were required to implement the provisions of the WIC Food Delivery Systems Rule no later than October 1, 2002.

The use of a price criterion in the vendor selection process has been a critical first step in ensuring that the WIC Program pays competitive prices for supplemental foods. Appropriate application of this criterion, coupled with price limitations on the amount that the State agency will pay vendors subsequent to authorization, is essential to successful food cost containment. The WIC Food Delivery Systems Rule authorized State agencies to make price adjustments to the purchase price on food instruments submitted by the vendor for redemption to ensure compliance with the price limitations applicable to the vendor.

The Child Nutrition and WIC Reauthorization Act of 2004 (Pub. L. 108–265) amended the Child Nutrition Act of 1966 (CNA) to reinforce and strengthen the use of competitive price criteria and price limitations for vendor cost containment. It expanded the competitive pricing requirement of the WIC Food Delivery Systems Rule to address the application of competitive pricing methods to vendors that derive their revenue from food sales predominantly, if not exclusively, from WIC food instruments. The prices that such stores (often referred to as ''WIC-only stores'') charge for supplemental foods are generally higher than prices of other authorized retailers. Recent trends showing an annual increase in the number of WIC-only stores and in the percentage of the total WIC redemptions that they receive were a primary factor in the development of the vendor cost containment provisions of Public Law 108–265. Congress intended that the authorization of WIC-only stores should not result in higher food costs than if program participants used their food instruments in regular grocery stores.

Section 203(e)(10) of Public Law 108–265 amended section 17(h)(11) of the CNA to address the emergence of such vendors in the WIC Program because of their potential adverse impact on the future cost of the program particularly if these trends continue. The vendor cost containment provisions of this interim rule will promote sound stewardship of taxpayer dollars; help ensure that the WIC Program continues to rely on market forces to contain food costs; and protect the program's ability to serve the greatest number of eligible women, infants, and children.

Overview of the New Vendor Cost Containment Requirements

In accordance with section 203(e)(10) of Public Law 108–265, this interim rule requires State agencies to implement competitive pricing systems that foster financial integrity and the most efficient use of their food funds. When State agencies craft these systems properly, they will not pay higher prices than necessary for supplemental foods. While State agencies have the discretion to determine many of the details of their competitive pricing approaches, section 203(e)(10) of Public Law 108–265 now requires them to establish a vendor peer group system, and competitive price criteria and allowable reimbursement levels for each vendor peer group. Previously, the use of peer groups in competitive pricing systems was optional under § 246.12(g)(4)(i) of the WIC regulations.

This rule also implements new legislative requirements for State agencies that choose to authorize for-profit vendors that derive more than 50 percent of their revenue from food sales from WIC food instruments. It requires State agencies to ensure that vendors that meet, and vendor applicants that are expected to meet, the more than 50 percent criterion are cost neutral to the program. (**Note:** This preamble will refer to vendors that meet or are expected to meet the more than 50 percent criterion as ''above-50-percent vendors.'') The first cost neutrality requirement in section 203(e)(10) of Public Law 108–265 is that payments to above-50-percent vendors may not result in higher food costs than if program participants purchased their WIC foods at regular vendors. The second cost neutrality requirement is that average payments per food instrument to above-50-percent vendors may not be higher than average payments per food instrument to comparable vendors. Comparable vendors cannot be other vendors that meet the above-50-percent criterion.

To achieve the cost neutrality requirements, section 203(e)(10) of Public Law 108–265 requires State agencies that authorize above-50-percent vendors to distinguish between these vendors and regular vendors when establishing vendor peer groups, competitive price criteria, and allowable reimbursement levels. In determining competitive prices for WIC foods and establishing allowable reimbursement levels, State agencies would be required to compare above-50-percent vendors with regular vendors, *i.e.*, vendors that set their prices based on market forces and that compete for non-WIC customers. Since the WIC Program receives a finite amount of funding annually to serve as many participants as this funding allows, it is necessary for each State agency to implement a system that ensures foods are acquired at the most economical cost consistent with participant access needs. Clearly, reducing the costs to the program of vendors that have historically charged high prices for supplemental foods is imperative. Consistent with section 203(e)(10) of Public Law 108–265, this rule reflects the fact that State agencies have clear authority not to authorize any above-50-percent vendors.

As set forth in section 203(e)(10) of Public Law 108–265, this rule allows FNS to exempt a State agency, under certain conditions, from the requirement to establish a vendor peer group system. It would also allow State agencies to exempt from competitive price criteria and allowable reimbursement levels pharmacies that supply only exempt infant formula or medical foods under the program; non-profit vendors that derive more than 50 percent of their revenue from food sales from WIC food instruments; and non-profit vendor applicants that are likely to meet the above-50-percent criterion.

Implementation of This Interim Rule

Section 203(e)(10) of Public Law 108–265 requires State agencies to implement the provisions included in this interim rule by December 30, 2005. Therefore, State agencies must take all steps that are necessary, including compliance with any applicable State rulemaking or legislative requirements, in order to establish policies to comply with the requirements of this rule by December 30, 2005. To facilitate implementation of the interim rule, this preamble addresses comments and questions that State agencies have presented regarding the requirements to establish vendor peer groups, competitive price criteria, and allowable reimbursement levels. This preamble also discusses criteria for developing effective vendor peer groups and for obtaining an exemption from the vendor peer group requirement. It also clarifies the meaning of key concepts, such as ''comparable vendors,'' and describes appropriate ways to identify above-50-percent vendors.

This preamble recognizes that applying competitive pricing techniques to contain food costs remains a

challenge for some State agencies. Recently, several State agencies have conducted formal analyses of their competitive pricing systems and, as a result, are in the process of planning or implementing changes to enhance system performance. FNS believes that State agencies will continue learning and adopting more efficient ways of containing food costs through competitive pricing systems. Therefore, this preamble offers principles to assist State agencies in assessing the performance of their competitive pricing systems as they make modifications to comply with the mandatory changes covered by this interim rule.

Vendor Peer Group System

General Requirement

Section 203(e)(10)(A) of Public Law 108–265 added section 17(h)(11)(A) to the CNA to require each State agency to establish a vendor peer group system, except in certain circumstances. This interim rule incorporates the legislative requirement into § 246.12(g)(4) of the WIC regulations. A vendor peer group system is a means of classifying authorized vendors into groups based on common characteristics that affect food prices. The purpose of peer groups is to facilitate the application of competitive price criteria at vendor authorization and during the food instrument redemption process. When a vendor peer group system is properly constructed, the prices that vendors within a peer group charge for WIC foods will be more similar internally than they are to the prices charged by other peer groups; and the peer group system should account for most of the food price variations. A State agency that did not have a vendor peer group system at the time Public Law 108–265 was enacted in June 2004 must implement such a system by December 30, 2005.

Many State agencies already have a vendor peer group system. The structure and use of peer groups varies widely. Vendor peer groups are often established based on a combination of two factors—vendor size and vendor location. Vendor size may be determined through a variety of factors, such as total business volume, WIC business volume, square footage of store, number of cash registers (or point of sale devices), or type of store (*e.g.*, supermarket, grocery store, convenience store, military commissary, nonprofit co-op, or pharmacy). Vendor location is often divided into geographic categories, such as urban, suburban, and rural, which may also include a number of subcategories within the State. Some State agencies use three criteria in establishing peer groups.

Some State agencies use peer groups to set the competitive price range for WIC foods, assess whether a vendor applicant's prices are competitive, and to establish maximum reimbursement levels for WIC food instruments. Others use vendor peer groups to assess the competitiveness of a vendor applicant's prices, but they do not limit reimbursements based on a vendor's peer group. Instead, these State agencies apply a single statewide maximum reimbursement level for each food instrument type to all peer groups. Section 246.12(g)(4) of the interim rule, in implementing section 17(h)(11)(A)(i) of the CNA, clarifies that a State agency must establish competitive price criteria and allowable reimbursement levels that are applicable to each peer group.

Because characteristics of the retail grocery marketplace vary from State to State, this interim rule continues to allow State agencies broad latitude in establishing peer groups. To ensure that vendor peer group systems continue to be effective, § 246.12(g)(4)(ii) of this rule requires State agencies to assess their peer groupings at least every three years and to modify them as necessary. It also indicates that a State agency may change the peer group into which it places a vendor whenever it determines that such action is warranted.

Specific Requirements

Section 17(h)(11)(A)(III) of the CNA requires a State agency that chooses to authorize for-profit vendors that derive or are expected to derive more than 50 percent of their annual revenue from food sales from WIC food instruments to distinguish between the above-50-percent vendors and regular retail vendors for cost containment purposes. Accordingly, § 246.12(g)(4)(i) of this rule requires a State agency that chooses to authorize any above-50-percent vendors to distinguish between these vendors and regular vendors in its peer group system. In meeting this requirement, a State agency may establish separate peer groups for above-50-percent vendors or place them in peer groups with regular vendors, but establish distinct competitive price criteria and allowable reimbursement levels for the above-50-percent vendors within the peer groups. Both approaches require a State agency to compare the prices of above-50-percent vendors against the prices of regular retail vendors for vendor selection and reimbursement purposes. A State agency's vendor peer group system must meet this requirement unless the State agency chooses not to authorize any above-50-percent vendors.

In the past, State agencies that authorized a specific type of vendor known as WIC-only stores have tended to place them into separate peer groups where their prices were compared with other WIC-only stores. This practice generally has resulted in the payment of higher prices to WIC-only vendors than to regular retail vendors. In many instances, payment of higher prices to WIC-only vendors was unnecessary because other competitively-priced vendors were accessible to WIC participants. In implementing this rule, a State agency that authorizes any above-50-percent vendors would be required to determine whether it is more effective, from a cost containment perspective, to group them with regular retail vendors than by themselves, and if so, how to group them with regular vendors without inflating the peer group's prices.

Some State agencies have expressed the view that grouping above-50-percent vendors with regular vendors would increase a State agency's ability to monitor their prices; provide an incentive for such vendors to offer competitive prices; and help a State agency hold them to the same pricing standard as regular retail vendors. State agency arguments against this approach include the likelihood that the prices of above-50-percent vendors would be too high to allow them to be grouped with regular vendors. State agencies also thought that above-50-percent vendors would skew the average prices for the peer group. Section 246.12(g)(4)(i) of this interim rule states that State agencies must ensure that the prices of above-50-percent vendors do not inflate the competitive price criteria and allowable reimbursement levels applicable to each peer group.

When a State agency assigns above-50-percent vendors to a peer group with regular vendors, it must use the prices of the regular vendors within the peer group to establish the competitive price criteria and allowable reimbursement level for the above-50-percent vendors. If a State agency assigns above-50-percent vendors to separate peer groups, the State agency may not reimburse them at a higher level than that for peer groups consisting of comparable regular vendors.

In identifying vendors that are comparable to above-50-percent vendors, the State agency must consider geographic area; however, the State agency has the discretion to determine how much weight to give to geographic considerations. The State agency may interpret comparability differently for regular retail vendors than for above-50-percent vendors. For example, a State

agency might determine that geographic location and number of cash registers adequately define peer groups for regular vendors, but that it must utilize an additional criterion, such as WIC sales volume, to identify stores that are comparable to the above-50-percent vendors.

Identifying Above-50-Percent Vendors

In order to comply with requirements of section 17(h)(11)(A)(III) of the CNA with regard to above-50-percent vendors, § 246.12(g)(4)(i) of this interim rule requires each State agency to determine on an annual basis whether any authorized vendors meet the more than 50 percent criterion and whether each new vendor applicant is expected to meet it. In making its determination, the State agency would be required to consider a vendor's annual revenue from the sale of food items. Under this rule, revenue from the sale of food items means the sum of all payments (including, cash, Food Stamp Program and WIC redemptions, and credit/debit transactions) received by the vendor for the sale of foods that can be purchased under the Food Stamp Program (FSP). Currently, there is no standard definition of ''food sales'' used in the retail food industry. Since approximately 85 percent of current WIC vendors are authorized by the Food Stamp Program, most vendors are familiar with the eligible food items and there would be a consistent definition of food sales between WIC and the FSP. Vendors that utilize scanning equipment during the checkout process are able to flag foods that are eligible for purchase with food stamp benefits and, thus, to capture the total sales amount.

Eligible food sales include sales of foods intended for home preparation and consumption, including meat, fish, and poultry; bread and cereal products; dairy products; and fruits and vegetables. Items such as condiments and spices, coffee, tea, cocoa, and carbonated and noncarbonated drinks may be included in food sales when they are offered for sale along with the abovementioned foods. Items that cannot be purchased using food stamp benefits include, but are not limited to, hot foods and food that will be eaten in the store. This rule does not require that a vendor be authorized by the Food Stamp Program.

State agencies must use the following approach to identify above-50-percent vendors. State agencies may use additional methods, if approved by FNS.

1. Current Vendors

To determine whether a currently authorized vendor meets the more than 50 percent criterion, the State agency must calculate WIC redemptions as a percent of the vendor's total foods sales for the same period. If WIC redemptions are more than 50 percent of the total food sales, the vendor must be deemed to be an above-50-percent vendor. As an initial step in identifying above-50-percent vendors, the State agency should compare each vendor's WIC redemptions to FSP redemptions for the same period. If more than one WIC State agency authorizes a particular vendor, then each State agency must obtain and add the WIC redemptions for each State agency that authorizes the vendor to derive the total WIC redemptions. Most WIC vendors also have FSP authorization and, consequently, have FSP redemptions. If FSP redemptions exceed WIC redemptions, no further assessment would be required. The vendor clearly would not be an above-50-percent vendor.

For vendors whose WIC redemptions exceed their FSP redemptions, further assessment would be required. The State agency should ask these vendors to provide the total amount of revenue obtained from the sale of foods that could be purchased using food stamp benefits. The State agency should request documentation (such as tax documents or other verifiable documentation) to support the amount of food sales claimed by the vendor. After evaluating the documentation received from the vendor, the State agency must calculate WIC redemptions as a percent of total food sales and classify the vendor as meeting or not meeting the more than 50 percent criterion.

For vendors that are not authorized by the FSP, the State agency should clarify the types of foods that may be included in food sales, using the list of eligible and ineligible food items that applies to FSP retailers. The State agency should request and evaluate verifiable documentation on the store's revenue from food sales and classify the vendor as appropriate.

2. Vendor Applicants

As part of the vendor application process, the State agency must ask vendor applicants whether they expect to derive more than 50 percent of their annual revenue from the sale of food items from transactions involving WIC food instruments. This question applies whether or not the State agency chooses to authorize above-50-percent vendors. Vendor applicants include a new store location for any ownership entity that currently has a WIC authorized store, as well as an entirely new vendor applicant. If the vendor applicant's answer is ''yes,'' no further assessment would be necessary. The State agency would treat this vendor as likely to meet the more than 50 percent criterion, if the vendor were authorized.

The State agency would further assess all other vendor applicants using the following indicators to determine whether they would be expected to meet the more than 50 percent criterion if authorized. First, the State agency must calculate WIC redemptions as a percent of total food sales in existing WIC-authorized stores owned by the vendor applicant. Secondly, the State agency must calculate or request from the vendor applicant the percentage of anticipated food sales by type of payment, *i.e.*, cash, FSP, WIC, and credit/debit card. Thirdly, the State agency must request and review inventory invoices to determine if the vendor will offer for sale on a continuous basis a variety of meats, poultry or fish; breads or cereals; vegetables or fruits; and dairy products. Fourthly, the State agency must determine whether WIC authorization is required in order for the store to open for business. To the extent possible, the State agency should validate information received from the vendor applicant against other data sources.

Use of the percent of anticipated food sales by payment type provides information on WIC as a percentage of total food sales. Having a variety of foods other than supplemental foods would indicate that the vendor has or expects to have non-WIC sales. If the vendor is already operating a viable business without WIC transactions, this might indicate that the vendor will not be dependent upon WIC as a primary source of revenue. These indicators should provide the State agency with sufficient information on which to base its assessment of a vendor applicant. At its discretion, the State agency may use additional data sources and methodologies.

The State agency must maintain documentation indicating the basis for its determination as to whether a current vendor or vendor applicant meets or is expected to meet the more than 50 percent criterion. Section 246.12(g)(4)(i) of the interim rule requires the State agency to assess the accuracy of its determination within six months of authorizing the new vendor to determine whether the vendor should have been authorized, and/or to ensure that the State agency is applying the appropriate competitive price criteria

and allowable reimbursement level to the new vendor. If necessary, the State agency would terminate the vendor agreement or reassign the vendor to the appropriate peer group based on this assessment.

Acceptable Vendor Peer Group Methodologies

Structuring an effective vendor peer group system involves an ongoing process of monitoring the prices vendors charge for supplemental foods and adjusting the peer groups as needed for better cost containment. FNS believes State agencies should not view peer groups as permanent or fixed designations; rather, they should be prepared to modify the vendor peer group structure when needed based on price data (*i.e.*, shelf prices, bid prices, food instrument redemption data, and market surveys) and other information.

For example, a State agency that fails to distinguish between different types of vendors (*e.g.*, chain stores, large independent stores, and small neighborhood grocery stores) in a particular geographic area might be overlooking pricing variations or characteristics that are apparent when these vendors are further classified by type or size of store. While a State agency might find it easier to manage peer groups constructed solely on the basis of geographic location, creating peer groups that further differentiate between vendors could improve cost containment by allowing the State agency to replace a single high allowable reimbursement level for a geographic area with several lower allowable reimbursement levels tailored to the prices of each subgroup of vendors in the area. A State agency should consider the effectiveness of such alternative approaches in implementing a vendor peer group system.

Available information on the effective design of vendor peer groups for cost containment purposes suggests that State agencies could benefit from applying two principles to this process.

1. Peer Group Criteria

A State agency should use a sufficient number of criteria to differentiate between vendors and account for variations in price. Criteria used by one State agency may not have the same effect when used by another State agency. Available data suggest that State agencies benefit from using geographic location as a criterion in establishing peer groups, and that the use of two or more criteria is preferable to using a single criterion. Therefore, § 246.12(g)(4)(ii) of the interim rule requires a State agency to use at least two criteria in establishing peer groups, one of which must be a measure of geographic location. Under § 246.12(g)(4)(ii), a State agency may receive FNS approval to use a single criterion to establish vendor peer groups. FNS approval will be based on a State agency's demonstration that the use of a single criterion significantly accounts for variations in prices among vendors, and that using a second criterion would not further contain food costs. The State agency's peer group criteria, including its criteria for identifying above-50-percent vendors and vendors that are comparable to above-50-percent vendors, are not subject to administrative review under § 246.18(a)(1)(iii) of the interim rule. The public has an opportunity to comment on these criteria as part of the State Plan process; thus interested parties should use this process to provide input. FNS must review and approve peer group-related criteria as part of the State Plan process.

2. Periodic Assessment of Peer Group Structure

To ensure that vendor peer groups remain effective, § 246.12(g)(4)(ii) of this interim rule requires the State agency to assess its peer groupings at least every three years and make adjustments as necessary. This process would include using statistical methods to verify the appropriateness of the peer group criteria and the methodology for establishing competitive price. The State agency is encouraged to work with its vendor advisory group in this process.

Exemptions From Peer Group Requirements

In accordance with section 17(h)(11)(A)(ii) of the CNA, the interim rule (§ 246.12(g)(4)(v)) establishes two conditions under which FNS may grant a State agency an exemption from the peer group requirements. The first condition applies to a State agency that elects not to authorize any above-50-percent vendors. The State agency must demonstrate to FNS that establishing a vendor peer group system would be inconsistent with efficient and effective operation of the program, or that its alternative cost containment system would be as effective as a peer group system.

The second condition for an exemption applies to a State agency that authorizes above-50-percent vendors. The WIC redemptions of above-50-percent vendors authorized by the State agency must be less than five percent of the State agency's total WIC redemptions (dollars) in the year preceding a year in which the exemption is effective. By law, the State agency must demonstrate that its alternative vendor cost containment system would be as effective as a vendor peer group system and would not result in higher costs if program participants transact their food instruments at above-50-percent vendors rather than at regular vendors.

1. Request for Exemption

A State agency that believes it meets either of the conditions for an exemption may request from FNS an exemption from the vendor peer group system requirement. A State agency proposing an alternative cost containment system must support its request with a detailed description of the alternative cost containment system, including documentation that compares the potential costs and benefits of a peer group system with the costs and benefits of the State agency's alternative cost containment system. Justifications based solely on insufficient time or resources to implement a vendor peer group system would not be acceptable. If the State agency elects to authorize any above-50-percent vendors, the State agency's alternative cost containment system justification must include a detailed description of how the State agency will establish competitive price criteria and allowable reimbursement levels for above-50-percent vendors as compared to regular vendors. The justification must include the average payments that the State agency would make to above-50-percent vendors and to regular vendors for either the standard food packages or the most frequently issued food instrument types for women, infants, and children.

Rather than presenting an alternative cost containment system, a State agency that elects not to authorize any above-50-percent vendors may request an exemption from the vendor peer group system requirement by providing a detailed explanation of why implementation of a peer group system would be inconsistent with the efficient and effective operation of the program in the State. The State agency's explanation might address such factors as the number of WIC participants served, the degree of variability in food prices and types of vendors, the number of vendors authorized, the State agency's average food package costs, and previous experience with a vendor peer group system.

If the State agency seeks an exemption because payments to above-50-percent vendors comprise less than five percent of total WIC redemptions, the State

agency's submission to FNS must also include redemption data. The data must include the total dollar amount of all WIC redemptions and the dollar amount and percentage of WIC redemptions attributable to above-50-percent vendors in the fiscal year preceding the year for which an exemption is sought.

FNS will review the information submitted by the State agency and determine whether the State agency qualifies for an exemption. A State agency that obtains an exemption from the peer group requirement still must establish competitive pricing criteria for vendor selection and allowable reimbursement levels.

2. Term of Exemption

An exemption from the peer group requirement would remain in effect until the State agency no longer meets the conditions in § 246.12(g)(4)(v) on which the exemption was based (*e.g.*, redemptions to above-50-percent vendors comprise more than five percent of the total annual WIC redemptions); until FNS notifies the State agency that it has revoked the exemption for cause; or for three years, whichever occurs first. During the period of the exemption, the State agency must provide to FNS annually documentation that it either authorizes no above-50-percent vendors or that such vendors' redemptions continue to represent less than five percent of total WIC redemptions, depending on the terms of the exemption.

Competitive Pricing

General Requirement

The use of price criteria in vendor authorization and reauthorization is a primary mechanism in vendor cost containment. In accordance with section 17(h)(11)(B) of the CNA, § 246.12(g)(4) of this rule requires the State agency to establish competitive price criteria for each peer group for the selection of vendors for participation in the program. Competitive price criteria allow the State agency to determine whether the prices charged by a vendor applicant are competitive with prices charged by other vendors. In determining whether a vendor applicant's prices are competitive, the State agency is required to consider either the vendor's shelf prices or the prices the vendor bid for supplemental foods, which may not exceed the vendor's shelf prices.

The competitive pricing requirement in section 17(h)(11)(B) of the CNA largely restates the requirement established by section 203(l) of the Goodling Act (Pub. L. 105–336) and implemented through the WIC Food Delivery Rule at § 246.12(g)(3)(i). WIC regulations, as amended by the WIC Food Delivery Rule, require the State agency to apply a competitive price criterion during the vendor selection process by comparing the prices a vendor applicant charges for supplemental foods to the prices charged by other vendor applicants and authorized vendors. State agencies have implemented this provision in different ways. For example, some use historical data, such as average prices of redeemed food instruments, to establish dollar limits against which they evaluate a vendor applicant's prices. Other State agencies use the prices for WIC food items submitted by a vendor applicant to calculate the amount the applicant would charge for a standard combination of WIC foods or for selected WIC food packages. They then compare this result with what other vendor applicants and currently authorized vendors in the same peer group would charge for the same foods or food packages. Some State agencies apply multiple criteria when assessing the competitiveness of a vendor applicant's prices, for example, requiring a vendor's prices to be within a certain percentage of the average food instrument redemption prices of authorized vendors in its peer group and within a certain percentage of the average retail price for individual WIC foods.

The competitive price range also varies among State agencies. State agencies that compare a vendor applicant's prices against an average redemption price for selected food instruments or against average prices for individual WIC foods have allowed the applicant's prices to exceed the peer group average by amounts ranging from 5 percent to 30 percent. In addition, State agencies differ regarding whether they consider factors such as transportation costs or current wholesale costs of WIC foods when assessing a vendor applicant's prices.

Under this interim rule State agencies retain flexibility in establishing competitive price selection criteria. FNS encourages State agencies, in implementing this rule, to re-examine the standards that they use to assess the prices of vendor applicants and currently authorized vendors to determine if they are paying competitive prices for supplemental foods. In this process, State agencies should ensure that they are paying the lowest prices for WIC foods by authorizing vendors whose prices fall at the lower end of the State agency's competitive range and that are needed to ensure participant access to WIC foods. Section 246.12(g)(1) of the WIC regulations has been amended to clarify the cost containment emphasis in addition to authorizing an appropriate number and distribution of vendors in order to ensure participant access to supplemental foods and effective State agency management, oversight, and review of its authorized vendors. This requirement, in combination with the competitive pricing requirement, should enable the State agency to select a vendor population that is manageable both administratively and from a cost perspective.

Specific Requirements

In accordance with section 17(h)(11)(B) of the CNA, this interim rule requires State agencies to establish and apply appropriate competitive price criteria in keeping with several specific requirements.

1. Participant Access

Under § 246.12(g)(4) of this rule, the State agency must consider participant access by geographic area in establishing competitive price criteria. This means that the State agency may not deny authorization to a vendor that is needed to ensure participant access to supplemental foods because that vendor's prices do not meet the competitive price criteria for the vendor's peer group. The assumption is that there are no alternative vendors in the area with prices that meet the State agency's competitive price selection criteria and that, bearing in mind where participants typically shop, there is no other practical way to provide WIC foods. In such instances, FNS would encourage the State agency to negotiate with the vendor, if possible, to secure lower prices for WIC participants than the prices the vendor charges other customers. The authorization of vendors whose prices exceed the competitive price selection criteria, but that are needed for participant access, should be the exception and not the rule. The State agency has sole discretion to make participant access determinations. The validity or appropriateness of the State agency's participant access criteria and the State agency's participant access determinations are not subject to appeal (§ 246.18(a)(1)(iii)(B)).

2. Vendors that Meet the More-than-50-Percent Criterion

If a State agency chooses to authorize above-50-percent vendors, § 246.12(g)(4)(i) of the interim rule requires the State agency to establish distinct competitive price selection criteria for such vendors. To comply

with the competitive pricing requirement in section 17(h)(11)(B) of the CNA, the State agency would not necessarily have to achieve lower program costs when food instruments are transacted at above-50-percent vendors, rather than at regular retail vendors. The State agency would, however, be required to demonstrate to FNS that its competitive price criteria and allowable reimbursement levels for above-50-percent vendors do not result in average payments per food instrument that are higher than average payments per food instrument to comparable vendors that do not meet the more-than-50-percent criterion. In addition, competitive price criteria may not result in higher total food costs if participants use their food instruments at above-50-percent vendors rather than at regular vendors. This means that the total payments to above-50-percent vendors for supplemental foods may not exceed the total amount that the State agency would have paid to regular vendors for the same types and quantities of supplemental foods.

To determine whether a State agency is meeting the requirement that above-50-percent vendors do not result in higher food costs than regular vendors, the State agency must compare the average cost per food instrument redeemed at above-50-percent vendors to the average cost per food instrument redeemed at regular vendors. The State agency must compute statewide average redemption amounts for each type of food instrument redeemed or for each distinct combination of foods on redeemed food instruments, depending on whether or not the State agency uses standardized food instrument types. The average cost per food instrument must be weighted to reflect the relative proportion of food instruments redeemed by each vendor peer group.

By using a weighted average, the State agency takes into account the frequency with which vendors redeem food instruments of varying redemption amounts. If a State agency makes more payments to vendors that offer the lowest prices for WIC foods, a weighted average will reflect this fact more than a simple average. The weighted average correlates with WIC participants' shopping patterns by giving the most weight to redemption prices of stores with the largest number of WIC transactions. The following charts display the weighted average redemption amounts for an infant formula food instrument (type ABC) redeemed by regular vendors and above-50-percent vendors.

Chart 1: Weighted Average Redemption Amounts for Regular Vendors

CHART 1.—WEIGHTED AVERAGE REDEMPTION AMOUNTS FOR REGULAR VENDORS

Peer group number	Average redemption amount (dollars) FI Type ABC	Number and percent of redeemed food instruments Type ABC		Weight
		Number	%	
1	$ 81.51	8,481	0.82	0.008
2	111.56	54,748	4.99	0.050
3	113.89	217,684	21.01	0.210
4	110.93	758,175	73.18	0.732
Total		1,036,088	100.00	1.000
Weighted average redemption amount				$113.66
Simple average of all 1,036,088 redemption amounts				$108.26

CHART 2.—WEIGHTED AVERAGE REDEMPTION AMOUNTS FOR ABOVE-50-PERCENT VENDORS

Peer group number	Average redemption amount (dollars) FI Type ABC	Number and percent of redeemed food instruments Type ABC		Weight
		Number	%	
1	$130.68	43	0.03	0.000
2	128.94	513	0.34	0.003
3	125.09	10,242	6.82	0.068
4	127.96	139,314	92.81	0.928
Total		150,112	100.00	1.000
Weighted average redemption amount				$128.38
Simple average of all 150,112 redemption amounts				$127.35

The weighted average redemption amounts for food instrument type ABC shown in the preceding charts were calculated using a standard statistical formula. (The formula derives the weighted average by multiplying each food instrument redemption amount by the corresponding weight, adding these individual sums, and dividing this total by the sum of the weights used in the calculation.) In Chart 1 the weighted average redemption amount of $113.66 for food instrument ABC redeemed by regular vendors is $5.40 more than the simple average redemption amount of $108.26. The weighted average more accurately reflects the cost of these food instruments to the State agency than does the simple average. The weighted average indicates that the State agency paid substantially more food

instruments at higher redemption prices than at lower prices. In Chart 2 the weighted average redemption amount of $128.38 for food instrument ABC redeemed by above-50-percent vendors exceeds the simple average redemption amount by $1.03. In this instance the difference between the simple average and the weighted average cost of food instrument ABC is not as large as it was for the same food instrument redeemed by regular vendors because 93 percent of the food instruments were redeemed by vendors in the same peer group. There was also less variation in the individual food instrument redemption amounts. The weighted average captures the impact of this redemption pattern.

Charts 1 and 2 show the disparity in payments for infant formula made to regular vendors and above-50-percent vendors. When State agencies implement competitive price criteria and allowable reimbursement levels as required in this interim rule, weighted average redemption amounts of food instruments redeemed by above-50-percent vendors should not exceed weighted average redemption amounts for the same food instruments redeemed by regular vendors. In general, for above-50-percent vendors to not result in higher costs to the program than regular vendors, the State agency's payments to these vendors should resemble payments to regular vendors in dollar amount and distribution among peer groups. A State agency that consistently reimburses above-50-percent vendors at or near the highest food instrument redemption amounts, while reimbursing most regular vendors at lower levels, would have difficulty meeting the cost neutrality requirement that above-50-percent vendors not result in higher costs to the program than regular vendors. If the average food instrument cost for above-50-percent vendors does not exceed the average food instrument cost for all regular vendors, then the State agency has assurance that above-50-percent vendors do not cost the program more than regular vendors. The average food instrument cost for above-50-percent vendors need not be less than that for regular vendors. The average costs may be equal or statistically equivalent.

A State agency must monitor average redemption amounts at least quarterly, and more frequently for newly-authorized above-50-percent vendors, and if necessary adjust payment levels, recoup excess payments, or take other actions to ensure compliance. Appropriate action may include terminating vendor agreements with above-50-percent vendors whose prices are least competitive, unless a vendor is needed to ensure participant access to WIC foods. If FNS determines that a State agency has failed to meet the requirements in § 246.12(g)(4)(i)(A) to ensure that above-50-percent vendors do not result in higher costs to the program than if participants redeem their food instruments at regular vendors, FNS will establish a claim against the State agency to recover excess food funds expended and will require appropriate remedial action.

3. Maintaining Competitive Prices After Authorization

In amending section 17(h)(11) of the CNA, Public Law 108–265 retained the requirement that State agencies establish procedures to ensure that a retail store selected for participation in the WIC Program does not increase its prices subsequent to selection to levels that would make the store ineligible for selection. Section 246.12(g)(4)(iii) of the interim rule contains this legislative requirement, which also applies to State agencies under current regulations. To meet the requirement, the State agency must hold authorized vendors accountable for maintaining prices at a level consistent with the selection criteria applied to the vendors at authorization. For example, if a vendor's prices must be within a certain range of the peer group's average shelf prices in order for the vendor to be authorized, then the vendor's prices must remain within this range subsequent to authorization. By using competitive price criteria to establish allowable payment levels for redeemed food instruments, State agencies can ensure that vendors remain eligible for selection. They also avoid excessive payments for food instruments with prices that are below a statewide not-to-exceed amount, but outside of the competitive price range for the vendor's peer group. A vendor's failure to remain price competitive is cause for termination of the vendor agreement, even if actual payments to the vendor are within the not-to-exceed amount. One example of a failure to remain price competitive would occur if a vendor, or vendors, raised the price for a WIC food with no basis in wholesale price or handling costs.

Currently, State agencies use different approaches to monitor the food prices of vendors subsequent to redemption. Some are more rigorous than others, particularly in terms of whether the State agency reviews shelf prices or redemption data to assess a vendor's continued compliance with the competitive price selection criteria, and the action the State agency takes if it determines that a vendor is not meeting the competitive price selection criteria. Some State agencies require authorized vendors to submit shelf price surveys at regular intervals during the year; others collect price data during store visits. Some State agencies collect price data on all WIC foods; others collect price data only on selected foods and/or from a subset of authorized vendors. At least one State agency monitors prices on a monthly basis to determine if vendors still meet selection criteria; others have no clearly defined protocol for assessing continued compliance with competitive price criteria. State agencies with EBT systems can monitor prices of individual WIC foods using data scanned into the system at the point of sale. State agencies vary in the extent to which they monitor wholesale price fluctuations and can anticipate and estimate the impact of these fluctuations on WIC food prices and food instrument redemption amounts.

Acceptable Competitive Price Selection Methodologies

State agencies are acutely aware of the staff time and other costs involved in administering their vendor cost containment system. They look for ways to streamline procedures and reduce the level of effort and paperwork required for vendor selection, without compromising the system's effectiveness. Investing careful and thoughtful effort in improving the selection of vendors based on competitive price can yield substantial cost savings. Some ways to enhance current competitive price selection approaches are outlined in this section.

1. Standards for Evaluating Vendors' Prices

Setting appropriate quantitative standards for determining whether a vendor's prices are competitive is critical. The State agency develops these standards by reviewing the prices of applicant and authorized vendors and price data from the larger retail marketplace. The standards should not be so flexible or loose that no vendor is denied authorization; rather they should influence vendor participation by allowing the State agency to differentiate between store prices. Allowing a small range of variation in prices produces a better standard than allowing a wide range of variation. State agency standards preferably should be expressed in terms of the number of standard deviations above the mean redemption amount (or other amount used for determining competitive price), rather than as a percentage, unless the percentage is linked to the standard deviation.

2. Linking Competitive Price Determinations to Participant Access Requirements

Authorizing a sufficient number of vendors in appropriate locations throughout the State is critical to competitive price selection. Although a State agency is not required to limit the number of vendors it will authorize, it has the authority to do so and should use information on the number of vendors required to ensure participant access to WIC foods when establishing competitive prices. For example, if a State agency has 100 vendor applicants, including currently authorized vendors in a particular geographic area, but only needs 80 vendors to ensure participant access, then the State agency should determine competitive prices based on the 80 stores with the lowest prices. The State agency need not authorize the twenty additional stores. However, if the State agency has the administrative resources to manage the additional vendors, it may choose to give these vendors the opportunity to submit new price lists for consideration.

Some State agencies can improve their methodologies for determining competitive price by improving their participant access criteria, including participant-to-vendor ratios. Having participant-to-vendor ratios that are too low could result in a State agency authorizing higher-priced stores for participant access reasons. If enough of these higher-priced stores are authorized in a geographic area, they will inflate the competitive price criteria used to select and reimburse vendors. Having a high participant-to-vendor ratio, that is based on a realistic assessment of the capacity of vendors to serve WIC participants, could increase competition for WIC authorization and result in more competitive prices.

When a particular vendor (or small number of vendors) that is needed to ensure participant access has prices that are higher than the State agency's competitive price criteria, the State agency should treat this vendor as an exception, and exclude the vendor's prices from its calculation of competitive price criteria in order to avoid raising the competitive range for all vendors.

3. Monitoring Shelf Prices After Authorization

At least every six months following authorization, the State agency must collect and review vendors' shelf prices. FNS believes that State agencies should not rely on redemption data alone to ensure that vendors have not, subsequent to authorization, raised their prices to a level that would exceed the competitive price selection criteria under which they were authorized. Monitoring of shelf prices should help the State agency interpret changes in average redemption amounts of food instruments. A State agency could also use shelf price data to detect partial redemptions and possible overcharging.

In monitoring prices, the State agency should observe the overall rate of increase in prices within and between peer groups, and whether any vendors have increased their prices at a higher rate than other vendors in their peer group during the monitoring period. State agencies should identify methods of collecting price data that are least burdensome, such as the use of electronic data collection via the Internet or an electronic spreadsheet; random sampling of vendors and/or WIC food items; and allowing vendors to submit only those prices that have changed or will change.

Allowable Reimbursement Levels

General Requirements

Section 17(h)(11)(C) of the CNA requires State agencies to establish allowable reimbursement levels for supplemental foods for each vendor peer group, taking into consideration participant access in a geographic area. Allowable reimbursement levels ensure that payments to vendors in the peer group reflect competitive retail prices, and that the State agency does not reimburse a vendor for supplemental foods at a level that would make the vendor ineligible for authorization under its competitive price selection criteria.

Since October 1, 2002, WIC regulations have required State agencies to establish price limitations on the amount they pay vendors. State agencies typically refer to the price limits as maximum values or not-to-exceed amounts for redeemed food instruments. State agencies currently establish these amounts in different ways. These include, but are not limited to, the use of a rolling average redemption price for each food instrument type; an average redemption price for each food instrument for a fixed period of time; the average of the highest prices charged by vendors in the peer group for a particular WIC food; the highest price charged by a vendor in the peer group for a particular food instrument type; and average prices charged by a selected group of the smallest vendors in the State increased by a designated percent. One State agency uses the prices that vendors bid for supplemental foods to establish a maximum reimbursement amount per food instrument type. FNS believes that basing maximum reimbursement levels on the highest prices charged by some or all vendors in a peer group does not effectively contain costs. While this rule allows State agencies to continue using different approaches to establish allowable reimbursement levels, it directs State agencies to choose among the more effective approaches.

Because food price data available to State agencies can lag behind changes in the retail marketplace, many State agencies allow for price increases in setting allowable reimbursement limits in order to minimize the number of rejected food instruments. Under section 17(h)(11)(C)(ii) of the CNA, State agencies may continue the practice of factoring wholesale price fluctuations into the calculation of allowable reimbursement levels. Section 246.12(h)(3)(viii) of the interim rule incorporates this provision. Section 17(h)(11)(D) of the CNA also gives State agencies the option of exempting from competitive price criteria and allowable reimbursement levels pharmacies that supply only exempt infant formula and medical foods under the program and non-profit vendors that meet or are likely to meet the more than 50 percent criterion. This option also is reflected in § 246.12(g)(4)(iv) and 246.12(h)(3)(viii) of the interim rule.

Under § 246.12(g)(4)(iv) of this rule, a State agency that chooses to exempt a non-profit vendor from competitive price criteria and/or allowable reimbursement levels must have a compelling reason for doing so. The State agency must notify FNS, in writing, prior to granting this exemption. The State agency's notification must indicate the reason for the exemption (*e.g.*, the vendor is needed to ensure participant access), the benefits to the program of exempting the non-profit vendor from the competitive price criteria and/or allowable reimbursement levels, and how the State agency will establish an appropriate reimbursement level for the non-profit vendor. State agencies are not required to notify FNS of exemptions of non-profit health and/or human service agencies or organizations that provide supplemental foods to WIC participants.

Specific Requirement

Section 246.12(h)(3)(viii) of this rule requires the State agency to consider participant access in a geographic area in establishing allowable reimbursement levels. A State agency must set allowable reimbursement levels that allow WIC participants to purchase all of the foods prescribed on the food

instrument from any authorized vendor. This requirement does not mean that the State agency must print a statewide maximum reimbursement level on the food instrument or set maximum reimbursement levels based on the highest supplemental food prices among authorized vendors. Rather, the requirement to consider participant access makes this a priority in establishing allowable reimbursement levels. It works in tandem with the competitive price criteria requirement to contain costs and while meeting participants' needs.

Acceptable Approaches To Establishing and Using Allowable Reimbursement Levels

1. Current Price Limitation Methods

Under current regulations, State agencies use food instrument redemption procedures to ensure that each vendor is not paid more than the price limitations applicable to the vendor. The following examples illustrate how State agencies should link competitive price criteria and allowable reimbursement levels. Since they describe methods currently used by State agencies, the examples do not embody all of the requirements and recommendations of this interim rule (such as using standard deviations rather than percentages to define the competitive range).

- *Scenario #1:* At authorization, a vendor's price for each WIC food item may not exceed the average shelf prices of other authorized vendors in the peer group by more than five percent. The State agency sets the maximum payment for any food instrument at five percent above the average cost of the peer group for the specific food items on the food instrument, or at five percent above the vendor's reported shelf prices, whichever is less. To allow for wholesale price fluctuations, the State agency sets food instrument not-to-exceed amounts in its redemption system at 110 percent above the average food instrument prices. It generates a monthly report that identifies all food instruments redeemed for prices between 105 and 110 percent of the peer group's average prices by food instrument type. The State agency follows up with the vendors after evaluating the information on these food instruments.
- *Scenario #2:* The State agency authorizes any qualified vendor with prices at or below the average redemption amount for selected food instruments redeemed by the peer group. The State agency's redemption system sets the maximum allowable reimbursement level for each type of WIC check and for each peer group based on a statistical formula that uses the average redemption prices of vendors in the peer group during the preceding three months, known as a rolling average. Maximum allowable reimbursement levels do not include an inflation factor. If the price on a food instrument exceeds the maximum allowable reimbursement level, the State agency pays the vendor the maximum allowable reimbursement amount.

2. Printing Maximum Reimbursement Amounts on Food Instruments

Currently, some State agencies print maximum allowable reimbursement (or not-to-exceed) amounts on all of their food instruments; some print maximum amounts on most, but not all food instruments; others do not print maximum amounts on any food instruments. Under this rule, State agencies may continue using any of these approaches as long as printed maximum reimbursement amounts do not prohibit the State agency from applying the allowable reimbursement levels established for each peer group, which may be lower than the printed maximum. State agencies that print statewide not-to-exceed amounts on food instruments should notify vendors in the vendor agreement, vendor handbook, and training sessions, that they will be held to a peer group maximum reimbursement level that is linked to the competitive price criteria applied to the vendor at authorization.

3. Calculating Average Payments per Food Instrument

If a State agency authorizes above-50-percent vendors, it must ensure that average payments per food instrument to such vendors do not exceed average payments per food instrument to comparable vendors. When calculating average payments per food instrument, the State agency must include either all food instruments redeemed by all authorized vendors or a representative sample (constructed using appropriate sampling techniques) of the redeemed food instruments. To calculate the average payments per food instrument, a State agency should add the redemption amounts for all redeemed food instruments of the same type and divide the total by the number of food instruments of that type. If the State agency does not use pre-determined types of food instruments, it should calculate the average payment to above-50-percent vendors and regular vendors for each food item or distinct combination of foods prescribed on the food instrument. For comparison purposes, the State agency may calculate average payments per food instrument for above-50-percent vendors and comparable groups of regular vendors.

Cost Containment Certification

If a State agency elects to authorize any above-50-percent vendors, section 17(h)(11)(E) of the CNA requires the State agency to demonstrate to FNS that its competitive price criteria and allowable reimbursement levels do not result in average payments per food instrument to these vendors that are higher than average payments per food instrument to comparable vendors that do not meet the more than 50 percent criterion. Accordingly, § 246.12(g)(4)(vi) of the rule requires a State agency that authorizes above-50-percent vendors to submit to FNS every three years information which indicates that the State agency has an effective methodology for establishing competitive price criteria and allowable reimbursement levels. The information provided by the State agency will include data on the average payments per food instrument to above-50-percent vendors as compared to regular vendors, submitted in accordance with guidance developed by FNS.

If FNS determines, based on its review of the information provided by the State agency and any other relevant data, that the requirements of § 246.12(g)(4)(vi) have been met, FNS will certify that the State agency's competitive price criteria and allowable reimbursement levels do not result in higher average payments per food instrument for above-50-percent vendors than for other comparable vendors. If the State agency's methodology for establishing competitive price criteria and allowable reimbursement levels fails to meet the requirements in § 246.12(g)(4)(i) of the interim rule, FNS will disapprove the State agency's request to authorize above-50-percent vendors.

Limitation on Private Rights of Action

As required by section 17(h)(11)(F) of the CNA, the competitive pricing provisions of this interim rule do not create a private right of action. Individuals do not have the right to seek administrative or judicial redress for the standards set by the State agency with respect to vendor selection criteria and cost containment provisions. Section 246.12(g)(4)(vii) of this interim rule reflects this limitation on the private rights of action.

State Plan

Section 203(e)(10)(B) of Public Law 108–265 amends section 17(f) of the CNA to require a State agency to include in the State Plan a description of its vendor peer group system, competitive price criteria, and allowable reimbursement levels that demonstrates that the State agency is in compliance with the cost containment provisions in section 17(h)(11) of the CNA.

Accordingly, § 264.4 of the interim rule incorporates this requirement.

In § 246.4(a)(14)(xv) of the interim rule, the State Plan also must include information on non-profit above-50-percent vendors that the State agency has exempted from competitive price criteria and allowable reimbursement levels under § 246.12(g)(4)(iv); a justification and documentation supporting the State agency's request for an exemption from the vendor peer group requirement in § 246.12(g)(4), if applicable; and, if the State agency authorizes any above-50-percent vendors, information required by FNS to determine whether the State agency's vendor cost containment system meets the requirements in § 246.12(g)(4)(i).

List of Subjects in 7 CFR Part 246

Food assistance programs, Food donations, Grant programs—Social programs, Infants and children, Maternal and child health, Nutrition education, Public assistance programs, WIC, Women.

■ Accordingly, 7 CFR part 246 is amended as follows:

PART 246—SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS AND CHILDREN

■ 1. The authority citation for part 246 continues to read as follows:

Authority: 42 U.S.C. 1786.

■ 2. In § 246.2:

■ a. Add in alphabetical order the definitions of *Above-50-percent vendors, Food sales,* and *Vendor peer group system;* and

■ b. Remove the reference ''§ 246.12(g)(3)'' from the definition of *Vendor selection criteria* and add in its place the reference ''§ 246.12(g)(3) and (g)(4)''.

The additions read as follows:

§ 246.2 Definitions.

Above-50-percent vendors means vendors that derive more than 50 percent of their annual food sales revenue from WIC food instruments, and new vendor applicants expected to meet this criterion under guidelines approved by FNS.

* * * * *

Food sales means sales of all Food Stamp Program eligible foods intended for home preparation and consumption, including meat, fish, and poultry; bread and cereal products; dairy products; fruits and vegetables. Food items such as condiments and spices, coffee, tea, cocoa, and carbonated and noncarbonated drinks may be included in food sales when offered for sale along with foods in the categories identified above. Food sales do not include sales of any items that cannot be purchased with food stamp benefits, such as hot foods or food that will be eaten in the store.

* * * * *

Vendor peer group system means a classification of authorized vendors into groups based on common characteristics or criteria that affect food prices, for the purpose of applying appropriate competitive price criteria to vendors at authorization and limiting payments for food to competitive levels.

* * * * *

■ 3. In § 246.4:

■ a. Remove the reference ''§ 246.12(g)(3)'' and from paragraph (a)(14)(ii) and add in its place the reference ''§ 246.12(g)(3) and (g)(4)''.

■ b. Revise the heading and the first sentence of paragraph (a)(14)(x); and

■ c. Add new paragraphs (a)(14)(xv) and (a)(14)(xvi).

The revision and additions read as follows:

§ 246.4 State plan.

(a) * * *

(14) * * *

(x) *Infant formula cost containment.* A description of any infant formula cost containment system.* * *

* * * * *

(xv) *Vendor cost containment.* A description of the State agency's vendor peer group system, competitive price criteria, and allowable reimbursement levels that demonstrates that the State agency is in compliance with the cost containment provisions in § 246.12(g)(4); information on non-profit above-50-percent vendors that the State agency has exempted from competitive price criteria and allowable reimbursement levels in § 246.12(g)(4)(iv); a justification and documentation supporting the State agency's request for an exemption from the vendor peer group requirement in § 246.12(g)(4), if applicable; and, if the State agency authorizes any above-50-percent vendors, information required by FNS to determine whether the State agency's vendor cost containment system meets the requirements in § 246.12(g)(4)(i).

(xvi) *Other cost containment systems.* A description of any other food cost containment systems (such as juice and cereal rebates and food item restrictions).

* * * * *

■ 4. In § 246.12:

■ a. Revise paragraph (g)(1);

■ b. Remove paragraph (g)(3)(i) and redesignate paragraphs (g)(3)(ii) through (g)(3)(iv) as paragraphs (g)(3)(i) through (g)(3)(iii);

■ c. Redesignate paragraphs (g)(4) through (g)(8) as paragraphs (g)(5) through (g)(9), and add a new paragraph (g)(4); and

■ d. Add six sentences to the end of paragraph (h)(3)(viii).

The revision and additions read as follows:

§ 246.12 Food delivery systems.

* * * * *

(g) * * *

(1) *General.* The State agency must authorize an appropriate number and distribution of vendors in order to ensure the lowest practicable food prices consistent with adequate participant access to supplemental foods and to ensure effective State agency management, oversight, and review of its authorized vendors.

* * * * *

(4) *Vendor selection criteria: competitive price.* The State agency must establish a vendor peer group system and distinct competitive price criteria and allowable reimbursement levels for each peer group. The State agency must use the competitive price criteria to evaluate the prices a vendor applicant charges for supplemental foods as compared to the prices charged by other vendor applicants and authorized vendors, and must authorize vendors selected from among those that offer the program the most competitive prices. The State agency must consider a vendor applicant's shelf prices or the prices it bids for supplemental foods, which may not exceed its shelf prices. In establishing competitive price criteria and allowable reimbursement levels, the State agency must consider participant access by geographic area.

(i) *Vendors that meet the above-50-percent criterion.* Vendors that derive more than 50 percent of their annual food sales revenue from WIC food instruments, and new vendor applicants expected to meet this criterion under guidelines approved by FNS, are defined as above-50-percent vendors. Each State agency annually must implement procedures approved by FNS to identify authorized vendors and vendor applicants as either above-50-percent vendors or regular vendors. The State agency must receive FNS certification of its vendor cost containment system under section 246.12(g)(4)(vi) prior to authorizing any above-50-percent vendors. The State agency that chooses to authorize any above-50-percent vendors:

(A) Must distinguish these vendors from other authorized vendors in its peer group system or its alternative cost

containment system approved by FNS by establishing separate peer groups for above-50-percent vendors or by placing above-50-percent vendors in peer groups with other vendors and establishing distinct competitive price selection criteria and allowable reimbursement levels for the above-50-percent vendors;

(B) Must reassess the status of new vendors within six months after authorization to determine whether or not the vendors are above-50-percent vendors, and must take necessary follow-up action, such as terminating vendor agreements or reassigning vendors to the appropriate peer group;

(C) Must compare above-50-percent vendors' prices against the prices of vendors that do not meet the above-50-percent criterion in determining whether the above-50-percent vendors have competitive prices and in establishing allowable reimbursement levels for such vendors; and

(D) Must ensure that the prices of above-50-percent vendors do not inflate the competitive price criteria and allowable reimbursement levels for the peer groups or result in higher total food costs if program participants transact their food instruments at above-50-percent vendors rather than at other vendors that do not meet the above-50-percent criterion. To comply with this requirement, the State agency must compare the average cost of each type of food instrument redeemed by above-50-percent vendors against the average cost of the same type of food instrument redeemed by regular vendors. The average cost per food instrument must be weighted to reflect the relative proportion of food instruments redeemed by each category of vendors in the peer group system. The State agency must compute statewide average costs per food instrument at least quarterly to monitor compliance with this requirement. If average payments per food instrument for above-50-percent vendors exceed average payments per food instrument to regular vendors, then the State agency must take necessary action to ensure compliance, such as adjusting payment levels, recouping excess payments, or terminating vendor agreements with above-50-percent vendors whose prices are least competitive and that are not needed to ensure participant access. Where EBT systems are in use, it may be more appropriate to compare prices of individual WIC food items to ensure that average payments to above-50-percent vendors do not exceed average payments for the same food item to comparable vendors. If FNS determines that a State agency has failed to ensure that above-50-percent vendors do not result in higher costs to the program than if participants transact their food instruments at regular vendors, FNS will establish a claim against the State agency to recover excess food funds expended and will require remedial action.

(ii) *Implementing effective peer groups*. The State agency's methodology for establishing a vendor peer group system must include the following:

(A) At least two criteria for establishing peer groups, one of which must be a measure of geography, such as metropolitan or other statistical areas that form distinct labor and products markets, unless the State agency receives FNS approval to use a single criterion;

(B) Routine collection and monitoring of vendor shelf prices at least every six months following authorization; and

(C) Assessment of the effectiveness of the peer groupings and competitive price criteria at least every three years and modification, as necessary, to enhance system performance. The State agency may change a vendor's peer group whenever the State agency determines that placement in an alternate peer group is warranted.

(iii) *Subsequent price increases*. The State agency must establish procedures to ensure that a vendor selected for participation in the program does not, subsequent to selection, increase prices to levels that would make the vendor ineligible for authorization.

(iv) *Exceptions to competitive price criteria*. The State agency may except from the competitive price criteria and allowable reimbursement levels pharmacy vendors that supply only exempt infant formula and/or WIC-eligible medical foods, and non-profit vendors for which more than 50 percent of their annual revenue from food sales consists of revenue derived from WIC food instruments. A State agency that elects to exempt non-profit vendors from competitive price criteria and/or allowable reimbursements levels must notify FNS, in writing, at least 30 days prior to the effective date of the exemption. The State agency's notification must indicate the reason for the exemption, including whether the vendor is needed to ensure participant access, why other vendors that are subject to competitive price criteria and allowable reimbursement levels cannot provide the required supplemental foods, the benefits to the program of exempting the non-profit vendor from the competitive price criteria and/or allowable reimbursement levels, the criteria the State agency used to assess the competitiveness of the non-profit vendor's prices, and how the State agency will determine the reimbursement level for the non-profit vendor. This notification requirement does not apply to State agency contracts and agreements with non-profit health and/or human service agencies or organizations.

(v) *Exemptions from the vendor peer group system requirement*. With prior written approval from FNS, a State agency may use a vendor cost containment approach other than a peer group system if it meets certain conditions. A State agency that obtains an exemption from the peer group requirement still must establish competitive pricing criteria for vendor selection and allowable reimbursement levels. An exemption from the peer group requirement would remain in effect until the State agency no longer meets the conditions on which the exemption was based, until FNS revokes the exemption, or for three years, whichever occurs first. During the period of the exemption, the State agency must provide annually to FNS documentation that it either authorizes no above-50-percent vendors, or that such vendors' redemptions continue to represent less than five percent of total WIC redemptions, depending on the terms of the exemption. The conditions for obtaining an exemption from the vendor peer group system are as follows:

(A) The State agency chooses not to authorize any vendors that derive more than 50 percent of their revenue from food sales from WIC food instruments, and the State agency demonstrates to FNS that establishing a vendor peer group system would be inconsistent with efficient and effective operation of the program, or that its alternative cost containment system would be as effective as a peer group system; or

(B) The State agency determines that food instruments redeemed by vendors that meet the above-50-percent criterion comprise less than five percent of the total WIC redemptions in the State in the fiscal year prior to a fiscal year in which the exemption is effective; and the State agency demonstrates to FNS that its alternative vendor cost containment system would be as effective as a vendor peer group system and would not result in higher costs if program participants redeem food instruments at vendors that meet the above-50-percent criterion rather than at vendors that do not meet this criterion.

(vi) *Cost containment certification*. If a State agency elects to authorize any above-50-percent vendors, the State agency must submit information, in accordance with guidance provided by

FNS, to demonstrate that its competitive price criteria and allowable reimbursement levels do not result in average payments per food instrument to these vendors that are higher than average payments per food instrument to comparable vendors that are not above-50-percent vendors. To calculate average payments per food instrument, the State agency must include either all food instruments redeemed by all authorized vendors or a representative sample of the redeemed food instruments. The State agency must add the redemption amounts for all redeemed food instruments of the same type and divide the sum by the number of food instruments of that type. If the State agency does not designate food instruments by type, it must calculate the average payment for each distinct combination of foods prescribed on the food instrument. The State agency may calculate average payments per food instrument type for groups of vendors that meet the above-50-percent criterion and comparable vendors, or the State agency may calculate average payments for each food instrument type for each vendor. State agencies with EBT systems must compare the average cost of each WIC food purchased by participants at above-50-percent vendors with the average cost of each food purchased from comparable vendors. If FNS determines, based on its review of the information provided by the State agency and any other relevant data, that the requirements in this paragraph have been met, FNS will certify that the State agency's competitive price criteria and allowable reimbursement levels established for above-50-percent vendors do not result in higher average payments per food instrument (or higher costs for each WIC food item in EBT systems). If the State agency's methodology for establishing competitive price criteria and allowable reimbursement levels fails to meet the requirement of this section regarding average food instrument payments to above-50-percent vendors, FNS will disapprove the State agency's request to authorize above-50-percent vendors. At least every three years following initial certification, the State agency must submit information which demonstrates that it continues to meet the requirements of this section relative to average payments to above-50-percent vendors. FNS may require annual updates of selected food instrument redemption data.

(vii) *Limitation on private rights of action.* The competitive pricing provisions of this paragraph do not create a private right of action based on facts that arise from the impact or enforcement of these provisions.

* * * * *

(h) * * *

(3) * * *

(viii) * * * As part of the redemption procedures, the State agency must establish and apply limits on the amount of reimbursement allowed for food instruments based on a vendor's peer group and competitive price criteria. In setting allowable reimbursement levels, the State agency must consider participant access in a geographic area and may include a factor to reflect fluctuations in wholesale prices. In establishing allowable reimbursement levels for above-50-percent vendors the State agency must ensure that reimbursements do not result in higher food costs than if participants transacted their food instruments at vendors that are not above-50-percent vendors, or in higher average payments per food instrument to above-50-percent vendors than average payments to comparable vendors. The State agency may make price adjustments to the purchase price on food instruments submitted by the vendor for redemption to ensure compliance with the allowable reimbursement level applicable to the vendor. A vendor's failure to remain price competitive is cause for termination of the vendor agreement, even if actual payments to the vendor are within the maximum reimbursement amount. The State agency may exempt vendors that supply only exempt infant formula and/or WIC-eligible medical foods and non-profit above-50-percent vendors from the allowable reimbursement limits.

* * * * *

■ 5. In § 246.18, redesignate paragraphs (a)(1)(iii)(B) through (a)(1)(iii)(G) as paragraphs (a)(1)(iii)(C) through (a)(1)(iii)(H) and add a new paragraph (a)(1)(iii)(B) to read as follows:

§ 246.18 Administrative review of State agency actions.

(a) * * *

(1) * * *

(iii) * * *

(B) The validity or appropriateness of the State agency's vendor peer group criteria and the criteria used to identify vendors that are above-50-percent vendors or comparable to above-50-percent vendors;

* * * * *

Dated: November 22, 2005.

Kate Coler,

Deputy Under Secretary, Food, Nutrition, and Consumer Services.

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

Appendix: Regulatory Impact Analysis

1. *Title:* 7 CFR 246: Special Supplemental Nutrition Program for Women, Infants, and Children (WIC): Vendor Cost Containment

2. *Action:*

(a) *Nature:* Interim Rule

(b) *Need:* This rule is needed to implement the vendor cost containment provisions of the Child Nutrition and WIC Reauthorization Act of 2004, Public Law 108–265. Overall, the WIC program must ensure that program foods are acquired at the most competitive prices consistent with ensuring reasonable program participant access. This rule requires WIC State agencies to operate vendor management systems that effectively contain food costs by ensuring that prices paid for supplemental foods are competitive. The rule also responds to data which indicate that WIC food expenditures increasingly include payments to a type of vendor whose prices are not governed by the market forces that affect most retail grocers. This rule incorporates new statutory requirements for State agencies to use in evaluating vendor applicants' prices during the vendor selection process and when paying vendors for supplemental foods following authorization.

(c) *Affected Parties:* The program affected by this rule is the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC). The parties affected by this regulation are the USDA's Food and Nutrition Service (FNS), State agencies that administer the WIC Program, and retail vendors that are authorized to accept WIC food instruments.

Effects: The following analysis describes the potential economic impact of this interim final regulation. Due to the importance of keeping food costs competitive and using program funds to serve recipients as effectively as possible, in section 501(b) of Pub. L. 108–265, Congress provided authority to implement these changes on an interim final basis. The changes in this rule are significant to the costs or overall operations to the program. The potential effects of these changes are highlighted below.

Discussion: Over the past five years, the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) has experienced an increase in the number of vendors whose prices are not governed by market forces, and as a result are generally higher than the prices of other authorized vendors. These stores, often referred to as ''WIC-only'' stores, stock only WIC food items and serve only WIC customers; thus they operate outside the commercial retail market. Because WIC is a discretionary grant program, the continued growth of WIC-only stores could drive up food costs and compromise the program's ability to respond to the nutritional needs of at-risk women and children, unless effective cost-containment

measures are instituted by State agencies. In addition, this rule is intended to cause greater focus on cost containment for WIC food from all sources with the expectation that it is likely to lead to food cost savings which can be used to serve more eligibles.

Under the WIC retail food delivery system in most states, participants receive food instruments that they use to purchase specific food items that have been prescribed for them. They generally can purchase these items at any authorized retailer, regardless of the shelf price of these foods. As a result, participants are indifferent to the prices stores charge for WIC foods. In the past this has not been a problem for program costs, since to maintain a wide customer base, commercial retail food stores need to maintain competitive prices to maintain their business with price-sensitive non-WIC customers, usually the preponderance of their customers. The emergence and growth of WIC-only stores has been problematic because these stores are not constrained by the need to maintain a wide customer base; WIC participants are their customer base. The growth of these stores, an increase from about 800 stores in 18 States in 2000 to over 1,200 stores in 20 States in 2004, appears to have increased WIC food costs. It is estimated that in 2004 WIC-only vendors represented about 2.5 percent of all WIC vendors but comprised nearly 12 percent of total WIC redemptions.[1]

While current WIC regulations have required all State agencies to use vendor authorization and reimbursement policies to control the costs paid to authorized vendors, FNS and Congress have become increasingly concerned that the WIC program cannot afford the prices charged by WIC-only stores. For example, FNS sent a letter to the State of California (the State with the most WIC-only stores) imposing a temporary moratorium on the authorization of new WIC vendors in California unless the vendors have a history of competitive prices or are needed to ensure participant access to WIC foods. In the FY 2005 appropriations act for USDA, Congress prohibited all State agencies from authorizing any new stores that derive more than 50 percent of their annual food sales revenue from WIC food instruments, unless such stores are needed for participant access.[2] Additionally, FNS sent a letter to all State Health Officers requesting them to review WIC vendor selection policies to ensure that only those vendors who offer competitive prices receive WIC authorization. In addition to concerns about WIC-only pricing, it is the intent of Congress and USDA that more competitive food pricing be achieved.

The Child Nutrition and WIC Reauthorization Act of 2004 (Pub. L. 108–265) included new legislative requirements to strengthen vendor cost containment by requiring State agencies to implement a vendor peer group system, competitive price criteria, and allowable reimbursement levels in a manner that ensures the WIC Program pays competitive prices for supplemental foods. This rule implements the vendor cost containment provisions of this Act. The main provisions of the rule can be grouped into three categories: peer group requirements for all vendors, requirements on vendors that derive more than 50 percent of their annual food sales revenue from WIC food instruments, and exemptions from the requirements of the rule.

Competitive Price Requirements

• For all vendors, State agencies are required to create peer groups, establish competitive price criteria for peer groups, and set allowable reimbursement levels for each peer group. Additionally, State agencies are required to collect and monitor shelf price data at least every 6 months and assess the effectiveness of peer groupings and competitive price criteria at least every three years.

• Peer groups are required to be based on at least two criteria, one of which must be geography. The second peer group criterion is not specified and is left to the discretion of the State agency to decide.

• State agencies must establish price criteria that (1) ensure prices charged by vendor applicants are competitive with prices charged by other vendors and (2) consider vendor's shelf prices or vendor's bid prices, which may not exceed shelf prices. State agencies must also consider participant access by geographic area in establishing competitive price criteria and establish procedures to ensure authorized vendors do not raise prices to levels that would make them ineligible for selection.

• The rule requires State agencies to establish allowable reimbursement levels for each vendor peer group that ensure that payments to vendors in peer groups reflect competitive prices and ensure that no vendors receive reimbursement at a level that would make them ineligible for authorization under the competitive price criteria requirements. State agencies may include a factor to reflect wholesale price fluctuations and consider participant access in a geographic area in establishing such levels.

Above-50-Percent Vendors

• The rule contains additional provisions regarding vendors who derive more than 50 percent of their food sales from WIC redemptions (above-50-percent vendors). State agencies must distinguish these vendors from other vendors in the peer group system—either by using separate peer groups or by using distinct competitive price criteria and allowable reimbursement levels for above-50-percent vendors that are grouped with regular vendors.

• Moreover, State agencies must ensure that use of these vendors 1) does not result in higher food costs than if participants used regular vendors and 2) does not result in higher average payments per food instrument than if participants used comparable vendors. It interprets this requirement to mean that above-50-percent vendors must be cost neutral to the program, and that average payments to above-50-percent vendors for each type of redeemed food instrument may not exceed average payments to regular vendors for the same type of food instruments.

Exemptions

• Additionally, the rule allows for two types of exemptions from the requirements. State agencies can be exempt from the peer group system requirement and State agencies can exempt certain vendors from competitive price criteria and allowable reimbursement levels.

Peer Group System Exemptions

• To be exempted from the peer group system requirement, a State agency must elect not to authorize any above-50-percent vendors and demonstrate that compliance with the peer group system requirement is inconsistent with effective operation of the program or that an alternative cost containment system would be as effective.

• Alternately, a State agency can also be exempt from the peer group system requirement if it derived less than 5 percent of its total WIC sales in the prior year from above-50-percent vendors and demonstrates that an alternative cost containment system would be as effective as a vendor peer group system and would not result in higher food costs if participants transact food instruments at above-50-percent vendors, rather than at other vendors.

Exemptions From Competitive Price Criteria and Allowable Reimbursement Levels:

• State agencies can exempt vendors from competitive price criteria and allowable reimbursement levels, if they are pharmacies that supply only exempt infant formula or medical foods, or if they are non-profit above-50-percent vendors or non-profit vendor applicants likely to meet the above-50-percent criterion.

Costs: This rule places new requirements on State agencies; therefore, the cost implications of this rule relate primarily to administrative burden for States agencies. These cost implications are partially dependent on the current practices of State agencies relative to the requirements of the rule. A discussion of these costs follows.

Administrative Burden

In order to comply with this rule, State agencies will need to make changes in their vendor cost containment systems. Some State agencies may already be in full or partial compliance with the rule, while others may demonstrate that they meet the conditions for an exemption from the vendor peer group requirement. For State agencies that are not already in full compliance, there may be costs associated with forming or restructuring peer groups, establishing competitive prices and allowable reimbursement levels for those peer groups, monitoring shelf prices, and evaluating payments to above-50-percent vendors.

Peer Groups

Under the new rule, State agencies will be required to establish peer groups that utilize at least two peer grouping criteria, one of which is geography. State agencies that already have peer groups that meet this requirement will incur no costs to comply with this provision of the regulation.

[1] Data on the number, location and redemptions of WIC-only stores is reported to FNS annually in The Integrity Profile (TIP).

[2] Pub. L. 108–447, Consolidated Appropriations Act, 2005.

Additionally, State agencies that already have peer groups of some type will incur fewer costs than State agencies that do not have any peer groups in place. Complete data about current practices used in all State agencies are not available, but the extent to which some State agencies use peer groups and how many will be affected by this provision can be gauged from data that 32 State agencies provided FNS in September 2004. The main findings from this data are displayed below in Table 1.

TABLE 1.—CURRENT USE OF PEER GROUPS IN 32 STATE AGENCIES, AS REPORTED TO FNS IN SEPTEMBER 2004

	Number of State agencies
Currently uses a peer group system	25
Uses two or more criteria for peer groups	22
Geography is one of the peer group criteria	12
Peer groups are being developed	3

Based on this data, it appears that as many as 77 of the 89 state agencies could incur some level of costs to develop peer groups consistent with this rule.[3]

Some of these State agencies may not have in-house resources to do the analysis necessary to group vendors into peer groups and would have to contract out. One State agency that has used an outside contractor paid about $130,000 for their peer group analysis, not including the cost of overtime in local agencies to gather the data necessary for the analysis.

Evaluating Peer Groups

In addition to developing peer groups, State agencies are also required to evaluate the effectiveness of these peer groups. The cost of doing so may depend on the availability and capability of staff in State agencies to evaluate the peer groups. Assuming that State agencies that currently have peer groups in place assess the effectiveness of their peer groups, evaluating peer groups will not result in any new costs. Based on the data provided above, up to 64 State agencies could incur some level of cost to conduct statistical analysis to determine whether their peer groups are having the desired and expected effect. State agencies may not have the staff capabilities, time, and resources to do this analysis and may need to work with outside contractors to complete this work.

Establishing Competitive Price Levels and Allowable Reimbursement Levels

Additionally, the extent that State agencies currently use peer groups to determine competitive price criteria or allowable reimbursement levels will impact their costs. While many of the State agencies that provided data to FNS had peer group systems in place, these peer groups were not always utilized in the manner required in this rule. The majority of the reporting State agencies with peer groups did not use peer groups to determine competitive price criteria or allowable reimbursement levels in the manner specified in the rule (See Table 2).

TABLE 2.—PEER GROUPS USED FOR COMPETITIVE PRICE LEVELS AND ALLOWABLE REIMBURSEMENT LEVELS AS REPORTED BY 32 STATE AGENCIES IN SEPTEMBER 2004

	Number of State agencies
Currently has a peer group system	25
Peer group is used to set allowable reimbursement level	14
Peer group is used to determine competitive price criteria	17
Current peer group system is structured according to rule (*i.e.* one criteria is geography)	12
Peer group is used to set allowable reimbursement level	8
Peer group is used to determine competitive price criteria	7

This suggests that although many of the State agencies that have peer groups may not incur significant costs to establish peer group systems, they may incur additional costs to craft the use of these peer groups in compliance with the rule. Looking more closely at the State agencies with peer groups that are structured according to the rule (two criteria, one being geography) in Table 2, it appears that even some of these State agencies will incur some costs complying with this rule.

The costs of complying will be composed of the staff time necessary to calculate the optimal competitive price level and allowable reimbursement levels for each peer group, the time required to disseminate this information to the vendors, and the time and effort required to enforce and monitor the application of these criteria. For State agencies that do not have the staff resources to assess and, if necessary, modify competitive price criteria and allowable reimbursement levels, this work will need to be contracted, which could pose a significant expense to State agencies. Any costs incurred will be higher during the start-up period, but other USDA-sponsored research suggests that the on-going administrative costs of cost-containment practices can be quite low on a per participant basis.[4]

Lastly, the stipulation that State agencies must set allowable reimbursement levels at the peer group level may cause more food instruments to be rejected for exceeding the allowable reimbursement levels. State agencies may need to develop new administrative procedures to manage these issues and may incur some administrative costs in doing so.

Monitoring Shelf Prices

In addition to stipulating how peer groups should be structured and utilized, the rule also specifies that State agencies must monitor shelf prices at least every six months. The cost impact of monitoring shelf prices every six months is dependent on current State monitoring practices. These practices are outlined below in Table 3.

[3] All calculations in this document are based on 89 State agencies, but it is important to note three State agencies currently use a direct distribution or home delivery system exclusively and could be exempt from the provisions set forth in this rule. Direct distribution and home delivery systems are also used in parts of an additional eight State agencies.

[4] U.S. Department of Agriculture, Economic Research Service, Assessment of WIC Cost-Containment Practices: Final Report, by John A. Kirlin, Nancy Cole, and Christopher Logan. ERS project representative: Phil Kaufman. E–FAN No. (03–005) 342 pp, February 2003.

TABLE 3.—SUMMARY OF STATE MONITORING OF VENDOR SHELF PRICES AS REPORTED TO FNS IN MAY 2005

[57 Agencies responding, including 5 ITOs]

	Number of State agencies reporting	Percent of State agencies reporting (percent)
Frequency of Data Collection:		
Only at authorization	4	7.0
Annually	5	8.8
Semiannually	15	26.3
Quarterly	18	31.6
Monthly	5	8.8
Other	10	17.5

Of the 57 State agencies that provided data to FNS, about 67 percent currently monitor shelf prices at least semiannually, if not more frequently. The requirements of the new rule will likely result in no significant change from costs that they currently incur. For the remaining 33 percent of State agencies and an unknown number of those for which FNS lacks data on frequency of shelf price collection, additional monitoring costs may be incurred. It is estimated that 89 State agencies and 45,000 vendors will be affected by this provision, incurring an estimated total of 90,178 burden hours annually. The majority of these burden hours (90,000) will be borne by vendors. Applying appropriate wage rates to these burden hours result in a cost of nearly $1.4 million for vendors and about $5,500 for State agencies.[5]

Evaluating Above-50 Percent-Vendors

Beyond developing peer groups, State agencies will have to determine whether a vendor derives more than 50 percent of its annual food sales revenue from WIC food instruments. In order to determine whether a vendor is an above-50-percent vendor, State agencies are required to consider a vendor's annual revenue from the food sales, defined in the rule as the sum of all payments received by the vendor for the sale of all foods that would be eligible items under the Food Stamp Program (FSP). Currently, WIC vendors are not required to report annual food sales to State agencies. It is unclear how many State agencies collect this data. State agencies that do not already collect this data will incur new costs in order to comply with this rule. Vendors also are likely to incur administrative costs to provide annual food sales data to State agencies. It is estimated that 89 State agencies and 45,000 vendors will be affected by this provision, incurring an estimated total of 45,178 burden hours to complete this task annually. Again, as above, the bulk of these costs will be incurred by vendors (45,000). Applying appropriate wage rates to these burden hours results in a cost of about $.7 million for vendors and about $5,500 for State agencies.[6]

For current vendors, once State agencies have data on the annual sales of all FSP eligible foods, they will need to calculate WIC redemptions as a percent of a vendor's total food sales for the same period. If WIC redemptions are more than 50 percent of total food sales, the vendor is then deemed an above-50-percent vendor. The preamble of the rule states that as an initial step in this process, State agencies should compare each vendor's WIC redemptions to FSP redemptions for the same period and for those vendors whose WIC redemptions exceed their FSP redemptions, conduct further assessment using the total amount of revenue obtained from the sale of FSP eligible foods. After evaluating the total revenue obtained from the sale of FSP eligible foods, the State agency should calculate WIC redemptions as a percent of total food sales and classify the vendor as an above-50-percent vendor if appropriate.

To help States determine how many of these vendors might exist, FNS compared fiscal year 2004 WIC redemptions to annual Food Stamp (FS) redemptions as reported in the FS database (STARS). Stores in which WIC sales exceeded FS sales were identified as potentially being above-50-percent vendors. Table 4 displays how many of the over 42,000 WIC vendors that are also Food Stamp vendors appear to have WIC sales that exceed 50 percent of total annual food sales.

TABLE 4.—NUMBER OF WIC AND FS AUTHORIZED VENDORS FOR WHICH WIC SALES MAY CONSTITUTE MORE THAN 50 PERCENT OF TOTAL FOOD SALES, FY 2004

	Number of State agencies	Percent of State agencies	Number of vendors	Percent of all vendors
Potential Above-50-Percent WIC Vendors	59	66.3%	5,177	11.5%

Source: FNS Administrative Data. A listing of potential WIC and FS authorized above-50-percent vendors was generated by matching data reported to FNS in 2004 in The Integrity Profile (TIP) system and the FS STARS database. There are 89 State Agencies and about 45,000 WIC authorized vendors.

This analysis shows that at least 59 of the 89 WIC State agencies may have above-50-percent vendors. The total number of potential above-50-percent vendors identified through this match (5,177) is 11.5 percent of all vendors. However, while these stores may be above-50-percent WIC vendors because they have annual WIC sales that exceed FS sales, these stores may have non-WIC and non-FS sales that are larger than their WIC or FS sales, and so may not qualify as above-50-percent vendors upon further investigation.

In addition to these 5,177 vendors, there are about 3,000 additional WIC vendors that do not have FS authorization or that could not be matched with the FS authorization number in STARS. Most of the stores that states currently identify as WIC-only vendors fall into this category. Therefore, at least about 1,200 of these 3,000 stores may be above-50-percent vendors.

Combining the information on potential above-50-percent vendors from FNS' match of WIC and FSP authorized stores and the self-identified WIC-only vendors provides an estimate of how many vendors potentially have WIC redemptions that are more than 50 percent of their total food sales. Currently, there are about 1,200 WIC-only vendors in 20

[5] U.S. Department of Labor, Bureau of Labor Statistics. ''May 2004 National Occupational and Employment Wage Estimates'' and ''Employer Costs for Employee Compensation, March 2005.''

[6] U.S. Department of Labor, Bureau of Labor Statistics. ''May 2004 National Occupational and Employment Wage Estimates'' and ''Employer Costs for Employee Compensation, March 2005.''

State Agencies. Together, this means that about 6,400 vendors in 64 State agencies are potentially above-50-percent vendors, since all but 5 of the 20 State agencies with WIC-only vendors had other stores that were potentially above-50-percent vendors. Consequently, between 1,200 and 8,200 vendors could be identified as having WIC redemptions that are more than 50 percent of total food sales.

State agencies must ask new vendor applicants if they expect to derive more than 50 percent of their annual revenue from the sale of food items from transactions involving WIC food instruments. If the vendor applicant responds ''yes'', the State agency does not need to do any further verification and should treat this vendor as an above-50-percent vendor. The preamble specifies that all other vendor applicants should be assessed to determine whether they are likely to meet the more than 50 percent criteria. To do so, State agencies should calculate WIC redemptions as a percent of total food sales in any existing WIC-authorized stores owned by the vendor applicants, calculate the percentage of anticipated food sales by type of payment, request and review inventory invoices to determine if a variety of foods will be offered for sale on a continuous basis, and determine whether WIC authorization is necessary for the store to open for business. Since we do not have data on the number of stores that apply for WIC authorization in any given year, we cannot estimate the impact of this provision of the rule.

State agencies will also have to determine how to place above-50-percent vendors in peer groups so that these vendors do not result in WIC paying more to these vendors than to comparable vendors. State agencies must develop and apply a definition of comparable vendors and may incur costs defending their application of comparable vendor criteria for the above-50-percent vendors. However, under the rule, neither the validity nor the appropriateness of the State agency's vendor peer group criteria or the criteria used to identify above-50-percent vendors and comparable vendors would be subject to appeal by a vendor.

The rule requires FNS to certify that the State agency's competitive price criteria and allowable reimbursement levels do not result in higher average payments per food instrument for above-50-percent vendors than for other comparable vendors. This certification will entail reviewing information provided by the State agency and other relevant data to determine that the requirements have been met. FNS will need to do this potentially for at least 64 of the State agencies identified above, if not all 89 State agencies, without additional resources.

In summary, most of the administrative burden/costs of this rule will be incurred at the State level. As outlined above, some State agencies will be affected less than others because they already have a peer group system that is based on the criteria specified in the rule, while others may incur significant, one-time start up costs because they will need to develop peer groups, competitive price levels, and allowable reimbursement levels for the peer groups. Some vendors will incur administrative costs to provide State agencies with total food sales information annually and to submit shelf prices semiannually. Most of these costs are difficult to determine given the current data that we have, but it is important to note that many State agencies already do this work within their existing NSA funds and the NSA allocations will not change to provide additional funds to administer the program with these new requirements.

Benefits: The WIC Program will benefit from the provisions of this rule by reducing unnecessary food expenditures, which increases the potential to serve more eligible women, infants, and children for the same cost. This rule should have the effect of ensuring that payments to vendors, particularly vendors that derive more than 50 percent of their annual food sales from WIC food instruments, reflect competitive prices for WIC foods.

To estimate the rule's cost savings, FNS estimated the annual difference in food instrument redemption values between WIC-only versus non-WIC-only stores. FNS reviewed redemption data from 12 State agencies that have 97 percent of the ''WIC-only'' vendors. Since State agencies currently are in the process of identifying above-50-percent vendors (and thus do not have data available on such vendors), FNS relied on data on stores that stock only WIC food items and serve only WIC customers; these stores are primarily self-identified as WIC-only. State agencies provided data on their total food redemptions, WIC-only store food redemptions, the total number of vendors and number of WIC-only vendors, and the average redemption values of the five most frequently redeemed WIC food instruments in September 2004.[7]

Using these data, FNS examined the cost differential between the average redemption amounts for the five food instruments most frequently redeemed at non-WIC-only and WIC-only vendors (see column labeled ''Ratio of Average Redemption Amounts of Non-WIC-Only to WIC-Only Vendors'' in Table 5 below). By applying the average cost ratio for these five food instruments to all redemptions for WIC-only vendors, FNS determined what the redemptions would have been at WIC-only vendors if the prices were the same as those at non-WIC-only vendors. The resulting cost savings was about $6 million monthly, $75 million annually, or about $377 million (assuming no inflation) over the course of five years for the 12 States. Table 5 summarizes this analysis.

It is also worth considering that the number of WIC-only stores had been growing rapidly before the California moratorium, the FY 2005 appropriations act, and Pub. L. 108–265. It is reasonable to project that there could be substantially more of these high-cost stores in the program absent these measures and this rule. If the number of stores continued to grow at the rate they were growing, the excess costs (and thus potential savings) could be far greater than what is estimated here. From this perspective, our cost savings estimate may be lower than what would occur if these limitations on the growth of WIC-only stores had not been imposed.

TABLE 5.—POTENTIAL COST SAVINGS BY IMPLEMENTING RULE

[Dollars in millions]

State	Total redemptions (Sept. 2004)	Estimated non-WIC-only redemptions (Sept. 2004)	Estimated WIC-only redemptions (Sept. 2004)	Ratio of average redemption amounts of non-WIC-only to WIC-only vendors	Total redemptions if all at non-WIC-only level	Monthly cost savings
1	$5.99	$5.73	$.26	.82	$5.94	$.05
2	4.79	3.59	1.20	.75	4.50	.29
3	97.33	66.47	30.86	.87	93.27	4.06
4	18.53	16.40	2.13	.81	18.13	.40
5	3.49	3.38	.11	.80	3.47	.02
6	9.67	9.29	.38	.80	9.59	.08
7	3.17	2.86	.31	1.19	3.23	−.06
8	12.56	11.46	1.10	.67	12.20	.36
9	4.51	4.14	.37	.78	4.43	.08
10	43.51	37.49	6.02	.83	42.52	1.00

[7] September 2004 was deemed to be a representative month because there were no significant or unusual spikes in food prices during that month.

TABLE 5.—POTENTIAL COST SAVINGS BY IMPLEMENTING RULE—Continued

[Dollars in millions]

State	Total redemptions (Sept. 2004)	Estimated non-WIC-only redemptions (Sept. 2004)	Estimated WIC-only redemptions (Sept. 2004)	Ratio of average redemption amounts of non-WIC-only to WIC-only vendors	Total redemptions if all at non-WIC-only level	Monthly cost savings
11	6.85	6.78	.07	.69	6.83	.02
12	14.44	13.22	1.22	1.02	1.24	−.03
Total	$210.40	$167.59	$42.81	.....	$204.11	$6.27

Source: States reported total redemptions to FNS and calculated non-WIC-only and WIC-only redemptions. All other figures calculated by FNS based on this and other data supplied by the States.

This analysis assumes that September 2004 is a representative month and can be used to calculate annual cost savings. It also assumes that the mix of items within each redemption and the rate of full versus partial redemptions are the same for both vendor types. However, there is some evidence that WIC-only stores require full redemption of vouchers, resulting in higher redemption values compared with other vendors. This could overstate the impact of the rule. This analysis also excludes State agencies with smaller numbers of WIC-only stores and does not account for any impact on other types of vendors, which would tend to make this estimate lower than what actual savings might be. To realize some level of savings, State agencies would need to develop effective peer group systems. As noted below, there is uncertainty about the degree to which State agencies will be able to develop such systems initially, given the data collection and analysis needed.

Uncertainty: Because the vendor peer group provisions in the Child Nutrition and WIC Reauthorization Act of 2004 and this rule provide for some flexibility in implementation, and because there is a wide degree of variation in food prices and current vendor cost containment practices across State agencies, the impact of many of the provisions of this rule is uncertain. Uncertainties include the administrative burden State agencies will incur and the savings that can be realized nationally or in any State agency. The major uncertainties for administrative burden were discussed previously in the analysis; the following is a discussion of the uncertainties regarding program savings.

Program Savings

Peer Groups

Three issues introduce uncertainty regarding the impact of peer groups, as defined in the rule, on program costs. These issues center on the requirements for including geography as one of the criteria, choosing a second peer group criteria, and establishing an effective peer group. These issues are outlined below.

Peer groups must be based on two criteria, one of which is geography. A state-sponsored analysis of WIC peer group practices suggest that geography is an important criterion for defining peer groups, but the findings also suggest that the way geography is defined and applied also matters.[8] For example, study findings show that in some cases, grouping geographic entities (*i.e.*, cities and counties) by price level was more effective than relying on contiguous geographic groupings, such as administrative program areas or geographic regions. Additionally, rule of thumb definitions of geography, such as one major metropolitan area versus the rest of the State, may result in geographic peer groups that are too large and heterogeneous to be effective. Conversely, using the county as the measure of geography might result in peer groups that are too small and whose average price is influenced by the prices of a single outlying vendor.

Additionally, the measure selected for the second peer group criterion could influence the effectiveness of the peer group structure. FNS's preliminary analysis of redemption data in two large States suggests that measures of sales volume (number of registers, market share, amount of redemptions) seem to have a bigger effect on price than type of ownership (sole proprietorship, partnership, corporation), but that no one measure of sales volume is consistently the best measure to group vendors once broken down by geography.

To examine different scenarios, FNS obtained data from two large State agencies and developed hypothetical peer groups based on geographic area, number of registers, and monthly redemption amounts for vendors. Four sets of hypothetical peer groups were developed. All four used the same geographic criterion for the first criterion. For two sets of peer groups, the second criterion was based on the number of registers. For the other two sets of peer groups, the second criterion was based on the WIC redemption amounts for the vendor. The peer groups were formed by analyzing the distribution of number of registers or amount of WIC redemptions and dividing the vendors such that the same number of vendors fell into each of the five groups. Average prices for each group were calculated and tested to ensure they were statistically different from each other. In each scenario below, the two types of peer groups are compared (number of registers versus WIC redemptions) based on the method used to calculate the groups. For scenario one, the peer groups were calculated excluding the WIC-only vendors in the State data file. For scenario two, the peer groups were calculated including all vendors in the file. Analysis on average price was calculated for all non-WIC-only vendors since WIC-only vendors are most likely to be above-50-percent vendors and as such, could be put into separate peer groups under the rule.

Tables 6 and 7 below compare the mean price for a food instrument using two different second criteria. For comparison purposes, only the range of categories in one geographic grouping is displayed here.

TABLE 6.—SCENARIO 1, MEAN PRICE OF FOOD INSTRUMENT, GROUPINGS BASED ON NON-WIC ONLY VENDORS

2nd Peer group criterion	Number of registers		WIC redemption amounts	
Group	Number of registers	Mean price of food instrument	WIC redemption amounts	Mean price of food instrument
1	1 to 3	$3.5316	Up to $3,835	$3.5404

[8] State of Texas, Department of Health, Bureau of Nutrition Services, Retailer Peer Grouping Study for Competitive Pricing: Deliverable 3, Non-Commercial Vendor Recommendations. Prepared by Burger, Carroll and Associates, December 30, 2003.

TABLE 6.—SCENARIO 1, MEAN PRICE OF FOOD INSTRUMENT, GROUPINGS BASED ON NON-WIC ONLY VENDORS—Continued

2nd Peer group criterion	Number of registers		WIC redemption amounts	
Group	Number of registers	Mean price of food instrument	WIC redemption amounts	Mean price of food instrument
2	4 to 7	3.5116	$3,836 to $130,318	3.5172
3	8 to 10	3.3428	$130,319 to $1,943,825	3.3051
4	11 to 12	3.3368	$1,943,826 to $3,205,592	3.3885
5	13 or more	3.3082	$3,205,593 or more	3.2293

In scenario 1, all but one of the group averages are statistically equal, regardless of whether the number of registers or monthly WIC redemption amounts is used as the second peer group criterion. This result suggests that it would not matter which measure is used as the second criterion; both would have about the same outcome. But, when the same characteristics are applied to all vendors (scenario 2), the average prices in almost all of the categories are statistically different, indicating that the groupings are different from one another and may result in different outcomes. It is obviously difficult to definitively assess the effect of the peer groups when there is so much variation in how peer groups could be defined and how the vendors could be grouped.

TABLE 7.—SCENARIO 2, MEAN PRICE OF FOOD INSTRUMENT, GROUPINGS BASED ON ALL VENDORS

2nd Peer group criterion	Number of registers		WIC redemption amounts	
Group	Number of registers	Mean price of food instrument	WIC redemption amounts	Mean price of food instrument
1	1 to 2	$3.5418	Up to $5,628	$3.5395
2	3 to 5	3.5119	$5,628 to $80,442	3.5131
3	6 to 9	3.4337	$80,443 to $1,872,819	3.3539
4	10 to 12	3.3064	$1,872,820 to $2,973,459	3.3669
5	13 or more	3.3082	$2,973,460 or more	3.2293

Further, the rule provides State agencies considerable flexibility and few specific requirements for constructing peer groups. The rule focuses more on the intended outcome (*i.e.*, cost neutrality of above-50-percent vendors) than on how State agencies achieve this outcome. FNS assumes that State agencies will perform sufficient analysis and will select the most effective criteria to contain vendor costs. The inability or failure of State agencies to do so could undermine or minimize the success of this rule. For example, State agencies will need to prevent peer groups from having wide price variation or non-normal distributions, or from being so large or so small that they are ineffective.

Since State agencies could choose a strategy that is effective or ineffective for their particular needs and characteristics, and since an effective strategy for one State agency may not be an effective strategy for another State agency, the impact of the vendor peer group requirement on cost savings is uncertain. If implemented effectively, the peer group requirement as specified in the rule should ensure that above-50-percent vendors do not result in higher costs to the program than regular vendors.

Establishing Competitive Price Criteria and Allowable Reimbursement Levels

The degree to which cost savings can be achieved also depends on the effectiveness of a state's method for assessing the prices of new vendor applicants relative to others in a peer group. Currently, many states either apply a percentage or a standard deviation measure to set a maximum competitive price criteria or a maximum reimbursement level. For example, some states may set their competitive price criteria at 5 percent above the average peer group price and others may set their competitive price criteria at 1 or 2 standard deviations above the average peer group price.

Either method could control costs effectively depending on the size of the peer group, the distribution of prices within that peer group and the percentage or number of standard deviations applied. For example, a standard deviation measure might be more effective in a peer group of a given size with a relatively small distribution of prices. But, a percentage might be more effective in a peer group with a relatively large distribution. Consequently, State agencies have been given flexibility to determine their competitive price criteria.

2. Alternatives: This rule implements the vendor peer group provisions of the Child Nutrition and WIC Reauthorization Act of 2004, which FNS believes is an effective means of controlling WIC food costs. While this Act mandates that States establish peer groups, competitive price criteria and allowable reimbursement levels and states that these requirements must result in the outcome of paying above-50-percent vendors no more than regular vendors, the Act does not specify particular criterion for peer groups or acceptable methods of setting competitive price criteria and allowable reimbursement levels. FNS considered mandating specific means of developing peer groups, competitive price criteria and allowable reimbursement levels in order to ensure that the outcome of this legislation was achieved.

However, given States' responsibility to manage WIC as a discretionary grant program and the varying market conditions in each state, FNS believes that states need flexibility to develop their own peer groups, competitive price criteria and allowable reimbursement levels. At the October 2004 meeting that FNS convened to gain input for this rule, States indicated that they needed the ability to design cost containment practices that would be effective in their own markets and would ensure participant access. In addition, there is little information about the effectiveness of particular cost containment practices in the variety of markets represented by the 89 state agencies. Mandating more specific means of developing peer groups, competitive price criteria and allowable reimbursement levels could have unintended, negative consequences on participant access, food costs and administrative burden.

As States gain experience and the results of their vendor cost containment practices become apparent, FNS may develop further regulations and guidance to improve achievement of the WIC vendor cost containment goals of the Child Nutrition and WIC Reauthorization Act of 2004. In the interim, FNS believes that the current rule will substantially accomplish the goal of the Act of containing food costs and ensuring that above-50-percent vendors do not result

in higher costs to the program than regular vendors.

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Federal Register

Tuesday,
November 29, 2005

Part IV

Department of Agriculture

Agricultural Marketing Service

7 CFR Parts 916 and 917

Nectarines and Peaches Grown in California; Recommended Decision and Opportunity To File Written Exceptions To Proposed Amendments To Marketing Agreement Nos. 124 and 85 and Order Nos. 916 and 917; Proposed Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 916 and 917

[Docket No. AO–90–A7; FV05–916–1]

Nectarines and Peaches Grown in California; Recommended Decision and Opportunity To File Written Exceptions To Proposed Amendments To Marketing Agreement Nos. 124 and 85 and Order Nos. 916 and 917

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and opportunity to file exceptions.

SUMMARY: This recommended decision invites written exceptions on proposed amendments to Marketing Agreement Nos. 124 and 85 and Order Nos. 916 and 917 (orders), which regulate the handling of nectarines and peaches grown in California. The Nectarine Administrative Committee (NAC), the Peach Commodity Committee (PCC), and the Control Committee (part of M.O. No. 917) (Committees), which are responsible for local administration of orders 916 and 917, jointly proposed the amendments. The proposed amendments to order 917 only apply to peaches. The amendments included in this recommended decision would: Update definitions for ''handle'', ''grower'', and the commodities covered in both orders; add a definition for ''pure grower''; increase committee membership of the NAC from eight to thirteen members and modify sections of the order to conform to the increased membership; eliminate the Shippers Advisory Committee (order 916); allow the Control Committee under order 917 to be suspended if the provisions of one commodity are suspended and transfer applicable duties and responsibilities to the remaining Commodity Committee; and authorize interest and late payment charges on assessments paid late; and other related amendments. All of the proposals are intended to streamline and improve the administration, operation, and functioning of the orders.

DATES: Written exceptions must be filed by December 19, 2005.

ADDRESSES: Written exceptions should be filed with the Hearing Clerk, U.S. Department of Agriculture, Room 1081–S, Washington, DC 20250–9200, Facsimile number (202) 720–9776 or *http://www.regulations.gov.* All comments should reference the docket number and the date and page number of this issue of the **Federal Register**. Comments will be made available for public inspection in the Office of the Hearing Clerk during regular business hours, or can be viewed at: *http://www.ams.usda.gov/fv/moab.html.*

FOR FURTHER INFORMATION CONTACT: Melissa Schmaedick, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 1035, Moab, Utah; telephone: (435) 259–7988, Fax: (435) 259–4945; or Kathleen M. Finn, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., Stop 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, fax (202) 720–8938.

Small businesses may request information on this proceeding by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., Stop 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, fax: (202) 720–8938.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of Hearing issued on January 25, 2005 and published in the January 28, 2005 issue of the **Federal Register** (70 FR 4041).

This 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.

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to the proposed amendment of Marketing Agreements Nos. 124 and 85 and Order Nos. 916 and 917, which regulate the handling of nectarines and peaches grown in California, and the opportunity to file written exceptions thereto. Copies of this decision can be obtained from Melissa Schmaedick, whose address is listed above.

This recommended decision is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), hereinafter referred to as the ''Act,'' and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900).

The proposed amendments are based on the record of a public hearing held on February 15 and 16, 2005, in Fresno, California. Notice of this hearing was published in the **Federal Register** on January 28, 2005 (70 FR 4041). The notice of hearing contained proposed order changes jointly proposed by the Nectarine Administrative Committee, the Peach Commodity Committee, and the Control Committee (part of order 917), which are responsible for local administration of orders 916 and 917. The proposed amendments to order 917 only apply to peaches. The pear provisions of the order have been suspended since 1994. Because the Pear Commodity Committee and the pear provisions are suspended, the Pear Commodity Committee did not participate in any amendment discussions.

The proposed recommendations are the result of a task force appointed by the Committees to conduct a review of the orders. The task force met several times in 2003 and drafted proposed amendments to the orders and presented the recommendations at industry meetings. The recommendations were then forwarded to the Commodity Committees and the Control Committee, each of which unanimously approved the proposed amendments. The Nectarine Administrative Committee, the Peach Commodity Committee, and the Control Committee believe that the proposed changes would improve the administration, operation, and functioning of the programs in effect for nectarines and peaches grown in California. The Committees' request for a hearing was submitted to USDA on January 5, 2004.

The Committees' proposed amendments are summarized below. This recommended decision makes modifications to some of the proposals and does not recommend one proposal.

The Committees' proposed amendments to marketing orders 916 and 917 would:

1. Allow hybrid fruit that exhibits the characteristics of nectarines or peaches and is subject to cultural practices common to such fruit be subject to marketing order regulations.
2. Specify that the act of packing be considered a handling function.
3. Change the marketing season for nectarines from May 1 through November 30 to April 1 through November 30.
4. Allow the duties and responsibilities of the Control Committee under the peach order to be transferred to one Commodity Committee if the provisions for the other commodity are suspended.
5. Increase membership on the nectarine committee from eight to thirteen members and revise the procedures that constitute quorum and voting requirements to conform to the increased Committee size. The proposal would also add to both orders that the Committees may vote by facsimile and set forth voting requirements for video conferencing.

6. Eliminate the Shippers' Advisory Committee under the nectarine order.

7. Modify the definitions of grower to clarify that officers of grower corporations are eligible to serve as grower members the Committee.

8. Add a definition of ''pure grower'' for purposes of eligibility for membership on the Committees. This proposal would also allow alternative methods to conduct nominations, change the date for holding nominations, authorize positions for pure growers and add tenure requirements for Committee members.

9. Authorize nominees to state their willingness to serve on the Committees prior to the selection.

10. Change the district boundaries under the nectarine order and redefine the peach districts.

11. Change the names and the composition of the districts of the Peach Commodity Committee.

12. Allow for interest and/or late payments for assessments not paid timely and authorize the Peach Committee to borrow money.

13. Provide authority to recommend different regulations for specific market destinations (not recommended herein).

14. Clarify that subcommittees may be established by the Peach Commodity Committee.

Twenty-two witnesses testified at the hearing. These witnesses represented fresh nectarine and peach growers and handlers. All witnesses with the exception of one supported the Committees' recommended changes. The one opposing witness spoke against proposal 13 which would allow the Committees to recommend different regulation for different market destinations of peaches and nectarines.

Witnesses speaking in favor of the proposed changes addressed the need to improve the administration, operation, and functioning of the programs in effect for nectarines and peaches grown in California. The California nectarine and peach industries are regulated under federal marketing orders 916 and 917, respectively. Both programs were established over 70 years ago and were most recently amended in the 1970's.

Marketing orders 916 and 917 are administered by marketing order administrative committees, each of which have contracted with the California Tree Fruit Agreement (CTFA) for management of marketing, promotion and certain administrative functions. CTFA also manages the California State Marketing Order for plums.

Witnesses at the hearing stated that the amendments being considered were designed to streamline the operation of the orders based on accepted business procedures in the 21st century. Witnesses also stated that many of the proposed amendments would provide the programs with the necessary flexibility for the future. Most importantly, the proposed amendments, if implemented, would result in improved consistency between and more efficient administration of the orders.

At the conclusion of the hearing, the Administrative Law Judge stated that the final date for interested persons to file proposed findings and conclusions or written arguments and briefs based on the evidence received at the hearing would be April 12, 2005. The deadline was subsequently extended to May 12, 2005. One hundred and forty six briefs and comments were filed. The majority of comments filed were in opposition to Proposal 13, which would add authority to orders 916 and 917 for the Committees to recommend different regulations for different market destinations for California peaches and nectarines. The Committees also filed a joint brief requesting that Proposal 13 be withdrawn. Accordingly, Proposal 13 has been removed from consideration and will not be discussed further in this decision.

Material Issues

The material issues presented on the record of hearing are as follows:

1a. Whether to amend the order to allow hybrid fruit that exhibits the characteristics of nectarines and is subject to cultural practices common to nectarines to be subject to marketing order regulations;

1b. Whether to amend the order to allow hybrid fruit that exhibits the characteristics of peaches and is subject to cultural practices common to peaches to be subject to marketing order regulations;

2a. Whether to amend the order by specifying that the act of packing nectarines be considered a handling function;

2b. Whether to amend the order by specifying that the act of packing peaches be considered a handling function;

3. Whether to amend the nectarine order by changing the marketing season from May 1 through November 30 to April 1 through November 30;

4. Whether to amend the provisions relating to the Control Committee under marketing order No. 917 by allowing the duties and responsibilities of the Control Committee to be transferred to one Commodity Committee if the provisions of the other Commodity Committee are suspended;

5a. Whether to amend the nectarine order by increasing membership from 8 members to 13 members and revising the procedures that constitute quorum and voting requirements to conform to the increased Committee size. The proposal would also add that the Committee may vote by facsimile and would specify that voting requirements for video conferencing would be the same as those for assembled meetings;

5b. Whether to amend the peach order by adding that the Peach Commodity Committee may vote by facsimile or video teleconference;

6. Whether to amend the nectarine order by eliminating the Shippers' Advisory Committee;

7a. Whether to amend the nectarine order by modifying the definition of grower to clarify that officers of corporations would be eligible to serve in grower positions on the Committee;

7b. Whether to amend the order by modifying the definition of grower to clarify that, for peaches, officers of corporations would be eligible to serve in grower positions on the Committees;

8a. Whether to amend the order by adding a definition of ''pure producer'' and ''pure grower'' for purposes of eligibility for membership on the Committee;

8b. Whether to amend the order by adding a definition for peaches of ''pure producer'' and ''pure grower'' for purposes of eligibility for membership on the Committee;

8c. Whether to amend the nectarine order by allowing alternative methods to conduct nominations, changing the date by which the nomination procedure should be held from February 15 to January 31, requiring at least 50 percent of the positions be held by pure growers and adding tenure requirements for Committee members;

8d. Whether to amend the peach provisions of the order by allowing alternative methods to conduct nominations, changing the date by which the nomination procedure should be held from February 15 to January 31, requiring at least 50 percent of the positions be held by pure growers, and adding tenure requirements for Committee members;

9a. Whether to amend the order by authorizing the nominees to state their willingness to serve on the Committee prior to the selection;

9b. Whether to amend the order by authorizing the peach nominees to state their willingness to serve on the Committees prior to the selection;

10a. Whether to amend the order by changing the district boundaries under the nectarine order;

10b. Whether to amend the order by redefining the peach growing Fresno and Tulare districts under the order;

11. Whether to amend the order by changing the names and the composition of the districts of the Peach Commodity Committee;

12a. Whether to amend the order to allow for interest and/or late payments for assessments not paid timely;

12b. Whether to amend the order to allow for interest and/or late payments for peach assessments not paid timely and to authorize the Committee to borrow money for administration of peach provisions of the order;

13a. Whether to amend the order to provide authority to recommend specific regulations for specific market destinations of the product;

13b. Whether to amend the order to provide authority to recommend specific regulations for specific market destinations of peaches; and,

14. Whether to amend the order to clarify that subcommittees may be established by the Peach Commodity Committee.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof.

Material Issue Number 1a and 1b—Hybrid Fruit

Sections 916.5 and 917.4 of the orders should be amended to allow hybrid fruit that exhibits the characteristics of nectarines (916.5) or peaches (917.4) and is subject to cultural practices common to nectarines or peaches be subject to marketing order regulations.

Currently, nectarines are defined in marketing order number 916 as all varieties of *Prunus Amygdalus Nectarina,* commonly called nectarines, grown in the production area. Peaches are defined in marketing order number 917 as the edible portion of all varieties of peach trees.

These proposed amendments would provide a procedure for the Committees to recommend to USDA specific hybrids to be included under the definitions and become subject to order provisions.

The proposed definitions provide that the hybrids must exhibit the characteristics of a nectarine or peach and be subject to cultural practices common to nectarines and peaches to be considered for inclusion under the orders.

According to the hearing record, the cultivation of hybrids has been a practice in the nectarine and peach industry. Hybrid crosses between peaches and nectarines already exist. This technology provides for the development of fruit and fruit trees with more favorable characteristics, such as disease resistance. As breeding technology becomes more sophisticated, it is anticipated that nectarines and peaches will be crossbred with other tree fruit, such as apricots or plums.

The proposal would require that in order to be subject to order requirements, all hybrids would need to be recommended to USDA by the Committees for inclusion under the orders. If these amendments are adopted, the Committees would identify hybrids currently in production that have characteristics of nectarines or peaches. The characteristics of the fruit would help determine whether the hybrids should be regulated. The Committees would also consider the cultural practices used on that specific hybrid, as cultural practices differ among various fruit trees. USDA would then proceed with rulemaking, as appropriate, as to what hybrids would be included under the orders.

It is recommended that the definitions of the products regulated under the orders be amended to include hybrids. The procedure for the Committees to recommend to USDA the inclusion of hybrids would allow for industry deliberations on what hybrids should be included. The proposed amendments would provide flexibility in including hybrids as they are developed and provides sufficient safeguards to ensure compliance with order provisions. For the reasons above, it is recommended that sections 916.5 and 917.4 be amended to provide that all hybrids exhibiting the characteristics of nectarines or peaches be classified as a nectarine or peach under the respective marketing order program, if recommended by the Committees and approved by USDA. There was no opposition testimony on this issue.

Material Issue Number 2a and 2b—Addition of ''Packing'' as a Handling Function

Section 916.11 of the nectarine marketing order and § 917.6 of the peach marketing order should be amended to specify that the act of packing nectarines and peaches is a handling function.

Currently, ''pack'' is not specified as a handling function in §§ 916.11 and 917.6, the definitions of ''Handle''. The current definitions include selling, consigning, delivering, or transporting fruit between the production area and any point outside, or within the production area. Selling the fruit on the tree, transporting the fruit within the production area from the orchard to the packing facility within the area for preparation for market or the delivery of the fruit to the packing facility are activities that are not considered handling.

In its proposal, the Committees recommended modifications of §§ 916.10 and 917.7, the definitions of ''Handler.'' Currently, these definitions state that ''Handler'' means any person, except a common or contract carrier transporting fruit owned by another person, that handles fruit. USDA is not recommending that these sections of the orders be amended. However, USDA recommends adding the term ''pack'' to the functions that constitute handling as specified in the definitions of ''Handle''. As the evidence established, packing is a function that handlers perform. The addition of the term pack to the definition of handler would clarify which functions are covered. Therefore, by adding ''pack'' as a handling function under the definitions of ''Handle'', the general intent of the Committees' proposal would be met.

Witnesses testified that in the industry, the packer is the party that generally assumes all of the responsibilities of a handler, except the selling of the fruit. In most cases, the packer is responsible for inspecting the product and is responsible for paying assessments and abiding by the regulatory provisions of the orders. While there may be more than one handler involved in the preparation for marketing and marketing the product, the first handler is the party that is responsible for abiding by the provisions of the orders. This proposal would clarify that packing is considered a handling function, and thus, most packers would be considered the first handler and the entity regulated by the orders.

USDA recommends that the proposed amendments be modified. The proposed amendment as presented by the Committees includes the statement that ''Handle'' and ''pack'' are synonymous. Because there could be situations where a handler performs functions other than packing, these terms are not always synonymous. However, ''pack'' is an important function of handlers.

Thus, USDA recommends adding the word ''pack'' as a handling function among the other handling functions of selling, consigning, delivering or transporting under the nectarine order. Specifically, the modification would add the word ''pack'' before ''sell'' and the word ''packed'' before ''sold'' in § 916.11. For peaches, the proposed change cannot impact the pear provisions. Therefore, USDA recommends that a proviso be added to

§ 917.6 to state that packing is a handling function of peaches.

There was no opposition testimony on this issue. For the above reasons, it is recommended that the proposed amendments of §§ 916.11 and 917.6 be modified to specify that ''pack'' is a handling function under the nectarine and peach orders. The proposed amendments to §§ 916.10 and 917.7, as presented by the Committees, are not being recommended in this decision.

Material Issue Number 3—Change in the Nectarine Marketing Season

Section 916.15 of the nectarine marketing order should be amended by changing the marketing season from May 1 through November 30 to April 1 through November 30. Record evidence indicates that this amendment would more accurately reflect the nectarine industry's current marketing season and conform to the current handling regulations.

Witnesses testified that due to new methods used in plant breeding, the industry now has nectarine varieties that mature earlier than the previous generations of nectarines. There are varieties that are harvested earlier than in the past and thus, marketed in early April of each year, rather than May. The current handling regulations in effect for nectarines begins April 1.

Because the current marketing season begins in May, fruit harvested in the month of April is attributed to the prior year's marketing season but is regulated by the present year's regulations. The proposed amendment would conform the term of the marketing season to the regulatory period.

The record supports changing the marketing season for nectarines from May 1 through November 30 to April 1 through November 30. There was no opposition testimony on this issue. For the above reasons, it is recommended that § 916.15 be amended to include an earlier beginning date of April 1 for the order's marketing period.

Material Issue Number 4—Marketing Order 917 Control Committee

Section 917.18, Nomination of Commodity Committee members of the Control Committee of the California peach marketing order should be amended. The proposed amendment would allow the duties and responsibilities of the Control Committee to be transferred to one Commodity Committee if the provisions of the other Commodity Committee are suspended.

Section 917.18 of the marketing order currently provides for the establishment of a Control Committee to oversee and coordinate the joint activities of the Peach and Pear Commodity Committees under Marketing Order 917. The order does not contain, however, provisions for the Control Committee if only one Commodity Committee is operational. Since 1994, when the California pear industry suspended their order provisions, California peaches have been the only active commodity under marketing order 917. This proposed amendment would address the administrative needs of the current situation.

Record evidence indicates that since the pear program has been suspended, the duties of the Control Committee have lessened. In the Pear Commodity Committee's absence, the Peach Commodity Committee has continued to operate in conjunction with the Control Committee. However, in recent years the Control Committee has held meetings infrequently and only to carry out duties that the Peach Commodity Committee cannot perform.

Witnesses testified that the proposed amendment would allow the duties of the Control Committee to be transferred to a Commodity Committee when only one Commodity Committee was operational under marketing order 917. The proposed amendment would not terminate the Control Committee. The Control Committee would become active if the California pear industry were to vote to re-activate the pear provisions of marketing order 917. Thus, the proposed amendment, if adopted, would allow marketing order 917 to operate efficiently, yet would also allow for flexibility if the commodities active under the order were to change.

There was no opposition testimony on this issue and the record supports this change. For the above reasons, it is recommended that § 917.18 be amended to allow the duties and responsibilities of the Control Committee to be transferred to one Commodity Committee if the provisions of the other Commodity Committee are suspended.

Material Issue 5a and 5b—Increase in Membership of the Administrative Committee for Nectarines and Addition of Authority To Vote Via Facsimile for Both the Nectarine and Peach Commodity Committees

Section 916.20 of the nectarine order should be amended to increase the membership on the Nectarine Administrative Committee from 8 members to 13 members. Order provisions relating to quorum and voting requirements should also be amended to conform to the increased Committee size. Section 916.32 of the nectarine order and § 917.29 (d) of the peach order should also be amended to add the authority for the Committees to vote by facsimile, as well as to specify that voting requirements for video conferencing would be the same as those for assembled meetings.

Record evidence supports the increase in the Nectarine Administrative Committee size. Currently, with only a membership of 8, the Nectarine Administrative Committee frequently does not have enough members present at meetings to constitute a quorum or meet the requirements for a super-majority vote. As a result, decision-making is often delayed until the next Committee meeting. Such delays make the functioning of the NAC less efficient, especially when emergency decisions need to be made.

Witnesses testified that the proposal to increase membership would address the quorum shortage by providing for a larger pool of committee members to attend meetings. It would also result in greater industry participation in marketing order activities by allowing more persons to be appointed to the Committee.

Record evidence indicates that if the proposed amendment were implemented, a quorum of 9 out of 13 Committee members would be needed in order to maintain roughly the same ratio that is currently in place. The current Committee requires 6 out of 8 members to constitute a quorum.

This proposed amendment would also provide authority for voting by facsimile and holding meetings via video teleconference for both the Nectarine and Peach Commodity Committees. Use of this technology would result in timesavings while still allowing the Committees to conduct their business. For example, this technology would be helpful in providing flexibility during harvest season when Committee members find it more challenging to take time away from the field.

According to the record, voting requirements for meetings held via videoconference would be the same as those currently in place for conventional committee meetings. Because video conferencing involves technology that allows each member to see the other members in attendance at the meeting, any voting would be verified through visually accounting for the votes made. Votes made by conference call would need to be followed by the submission of signed votes submitted to the Committee offices by mail or fax. Votes made by fax would need to be unanimous.

Record evidence also supports including authority to make use of any

new technology that might be developed in the future as part of this proposed amendment. For this reason, USDA recommends adding the phrase, ''or any other means of communication recommended by the Committee and approved by the Secretary,'' to the proposed amendatory language. The addition of this language would increase the flexibility of this authority and is commonly found in other federal marketing orders.

There was no opposition testimony given against this proposed amendment. For the reasons stated above, it is recommended that § 916.20 be amended to increase the membership on the Nectarine Administrative Committee from 8 members to 13 members. Section 916.32 of the nectarine order and section 917.29 (d) of the peach order should also be amended to add the authority for the Committees to vote by facsimile and to establish voting requirements.

USDA also recommends adding language that would allow the Committees to adopt the usage of any new technology that would be helpful in facilitating committee meetings in the future.

Material Issue Number 6—Elimination of the Shippers' Advisory Committee

Section 916.37, Shipper's Advisory Committee, should be removed from the California nectarine marketing order language.

The Shipper's Advisory Committee (SAC) was originally established to advise the Nectarine Administrative Committee on marketing conditions and to suggest the level of regulation believed to be necessary to affect an orderly marketing of the crop.

Upon implementation, the SAC was intended to have five handler members and five alternate handler members. The role of the SAC was exclusively an advisory one, as the SAC did not have any voting rights under the marketing order. With regard to their role under the marketing order, the industry believed that handlers/shippers would be in a better position to furnish the Committee with information regarding market conditions and preferences than growers.

However, record evidence indicates that the SAC has not been active for over 30 years. According to the record, removal of order language in § 916.37 would remove obsolete language from the order provisions.

There was no opposition testimony given against this proposed amendment. For the reasons stated above, the record supports removing § 916.37 as it currently serves no useful purpose.

Material Issue Number 7a and 7b—Eligibility of Corporate Officers for Committee Membership

Section 916.9, Grower, of the California nectarine order and § 917.5, Grower, of the California peach order, should be amended to clarify that officers of corporations would be eligible to serve in grower positions.

The term ''grower'' under both marketing orders is currently defined as a grower of nectarines or peaches for the fresh market who has a proprietary interest therein. The nomination procedures in § 916.20 and 917.24 specify that employees of growers are eligible to serve as committee members or alternates on the nectarine and peach marketing order administrative committees. However, the nomination procedures and the current definition of grower do not specify that officers of grower corporations are eligible to serve in grower positions. The proposed amendment would clarify that corporate officers, as well as employees of growers, are eligible to serve on the Committee in grower positions.

Witnesses testified that the proposed amendment would specify that that corporate officers would be eligible to serve on the Committees, to participate in nomination procedures as growers, and to cast referenda votes on behalf of their corporations. However, any corporate officer who is also a grower independent of the corporation would be allowed to serve and vote in only one capacity.

Record evidence supports amending the definitions of grower to include officers of corporations for purposes of eligibility for membership in the Nectarine and Peach Committees. These amendments would clarify the definitions of grower when the entity is a corporation.

In order to provide clarity, USDA recommends modifying the proposed definitions to state that both employees of growers and corporate officers of growers are eligible to serve on the Committees in grower positions. The modified definitions would read as follows:

''Grower is synonymous with producer and means any person who produces fruit (or nectarines) for market in fresh form, and who has a proprietary interest therein. Employees of growers and officers of corporations actively engaged in growing peaches are eligible to serve in grower positions on the Committee.''

There was no opposition testimony given against this proposed amendment. For the reasons stated above, it is recommended that § 916.9, Grower, of the California nectarine order and § 917.5, Grower, of the California peach order, should be amended as modified by USDA.

Material Issue Number 8a and 8b—Addition of Definitions for ''Pure Producer'' and ''Pure Grower''

A new § 916.16, Pure grower or pure producer, should be added to the California nectarine order. Additionally, a new § 917.8, Pure grower or pure producer, should be added to the California peach order.

The nectarine and peach marketing orders do not currently distinguish pure growers from all other growers. The proposed definitions of ''pure grower'' would be used in conjunction with the proposed amendments discussed in Material Issue 8(c) and 8(d) that would require a minimum number of pure grower seats on each administrative Committee.

The proposed amendments would identify pure growers as any grower: (1) Who produces his or her own product (and is not an employee or officer of a packing business); or (2) who produces and handles his or her own product, provided that a pure grower can pack the production of other growers as long as the production packed does not exceed 25 percent of the total production packed for that marketing year by that pure grower's packing facility. Regarding the second situation, at least 75 percent of that grower's total amount packed must involve his or her own fruit. This threshold would make allowances for pure growers who pack their own fruit and also pack small quantities of fruit for other growers.

According to the record, witnesses believe that a distinction is needed because pure growers are considered by the industry to be more financially at risk than other growers. The record indicates that a pure grower's total business and financial activities are primarily reliant on their own production.

Witnesses stated that, in the industry, there are growers who handle their own product. Some of these growers also pack other growers' products. The record indicated that growers who also pack a significant amount of fruit from other growers should not be considered pure growers because their risks as a grower are offset by their packing operations. However, some of these grower/packers pack small quantities of fruit for a few other growers. Accordingly, 25 percent (represented as the grower/packer's total pack-out) is considered a reasonable threshold to determine whether a grower/packer

should be considered a pure grower for eligibility purposes on the Committees.

Record evidence also indicates that any grower who also operates as a handler could be eligible to qualify as either a grower member or a handler member on the Committees. However, that person must select and may only participate in one nomination process: either as a grower or as a handler, but not both.

In order to provide clarity, USDA recommends modifying the proposed definition. The modified definition would read as follows:

''Pure grower means any grower: (1) Who produces his or her own product (and is not an employee or officer of a packing business); (2) who produces and handles his or her own product; *Provided that;* a pure grower can pack the production of other growers as long as the production packed does not exceed 25 percent of the total production packed for that marketing year by that pure grower's packing facility. A pure producer is synonymous with pure grower.''

USDA recommends that authority be added to this provision allowing the Committees to recommend to USDA, rules and regulations for the implementation and operation of these sections.

According to the record, the proposed definitions of ''pure grower'' would be used in conjunction with the proposed amendments discussed in Material Issue 8(c) and 8(d) that would require a minimum number of pure growers seats on each administrative committee. Evidence suggests that representation of pure growers on the administrative committees is important to Committee decision-making as they offer a different industry perspective than growers whose financial interests are not limited to growing only.

Record evidence supports the conclusion that the representation of pure grower interests on the orders' administrative committees should be added. No opposition to this proposal was presented at the hearing. Therefore, it is recommended that § 916.16 and § 917.8, Pure grower and pure producer, be added, as modified by USDA, to the marketing orders.

Material Issue Number 8c and 8d—Modification of Nomination Procedures and Addition of Tenure Requirements

Marketing order 916 regulating California nectarines should be amended to allow alternative methods for conducting nominations to be used, to change the date by which the nomination procedure should be held from February 15 to January 31, to require that at least 50 percent of the positions be held by pure growers, and to add tenure requirements for Committee members.

Similarly, the peach provisions under marketing order 917 regulating California peaches should be amended. The proposed amendments would allow alternative methods to conduct nominations for the Peach Commodity Committee, would change the date by which the nomination procedure should be held from February 15 to January 31, would require that at least 50 percent of the positions be held by pure growers, and would add tenure requirements for Peach Commodity Committee members.

Currently, nominations for the nectarine and peach administrative committees are made at grower industry meetings. According to the hearing record, nomination procedures would be modified to provide for mailings of ballots and would change the beginning date of the nomination period from February 15 to January 31. The change in the beginning date would be necessary in order to provide extra time for the mailing of ballots. Mailing of ballots would provide every grower more opportunity to vote in the nomination of members by making it easier for growers to participate.

Witnesses testified that for the past 20 years, many growers do not attend industry nomination meetings. This proposal would modify the nomination process by allowing mail balloting in the nomination process. It is intended that this will result in greater industry participation in the nomination process.

Record evidence also indicated an overriding concern within the industry for representation of pure grower interests in the decision-making functions of the administrative committees. Witnesses contrasted pure-grower interests with larger corporate grower interests and indicated that meetings are more accessible to corporate growers represented by employees. In contrast, a pure grower would likely attend industry meetings him or herself.

Nomination ballots would be mailed to all growers based on the district where their primary production base is located. While growers would be allowed to exchange their ballot for those of another district if they had production in said district (regardless of the volume that they produced in each district), they would be limited to filing just one ballot in the selection process. This would afford all growers the opportunity to vote for the nomination of Committee members regardless of whether they could attend industry meetings. Since the mailing of ballots would extend the balloting process, this amendment would also move the deadline for nominations from February 15 to January 31.

If implemented, the proposed amendment would also require that 50 percent of the grower membership seats of each Committee be allocated to pure grower seats. This requirement would ensure that pure nectarine and peach growers are participating in marketing order program deliberations. This proposal would be implemented in conjunction with the proposed amendments discussed above in Material Issue 8a and 8b, the addition of a definition for ''pure grower.''

Record evidence also supports the implementation of tenure requirements on the nectarine and peach administrative committees. The proposed tenure requirements would limit the amount of time a Committee member could serve to 2 consecutive 3-year terms. This provision would allow for broader industry participation in the Committees and would allow new industry leaders to be developed. The involvement of new members would allow for the introduction of new ideas and innovation in the direction of the nectarine and peach programs.

If implemented, any past time served on the Committee prior to this amendment being implemented would not count toward the tenure requirements. USDA recommends modifying the proposal to specify that tenure does not apply to time served prior to the effective date of this amendment. If a member were appointed to fill a vacancy or unexpired term, that time in service would not count toward the six-year limit. Also, once a member has completed his or her third term, it would be possible for that person to be nominated into an alternate's position. After one term as an alternate, that person would be eligible to be appointed as a member again.

Record evidence supports the conclusion that the above-proposed amendments would assist the Nectarine and Peach Committees in generating broader industry participation in Committee nominations, would provide for representation of pure grower interests on the Committees, would promote rotation in the service of Committee members, and would encourage participation of new members on the Committee. Record evidence also indicates that changing the deadline for nominations from February 15 to January 31 is necessary since the mailing of ballots would extend the balloting process.

No opposition to the above proposals was received at the hearing. For the

reasons outlined in this material issue, §§ 916.20 and 916.22 should be amended. Similarly, the peach provisions in § 917.24 should be amended, as modified by USDA.

Material Issue Number 9a and 9b—Modification of the Acceptance Procedure for Persons Nominated To Serve on the Nectarine and Peach Committees

Section 916.25, Acceptance, of the California nectarine order should be amended to authorize nominees to the Nectarine Administrative Committee to state their willingness to serve on the Committee prior to selection by USDA.

Similarly, § 917.25 of the California peach order should be amended to authorize nominees to the Peach Commodity Committee to state their willingness to serve prior to selection.

This proposed amendment would modify the current acceptance procedure for persons nominated to serve on the Nectarine and Peach Committees. Currently, the acceptance procedure for persons nominated and selected to serve on the Committees involves a two-step process. First, persons nominated for consideration and possible appointment to the Committee by USDA are required to complete a form indicating their eligibility to sit as a member of the Committee. Once appointed by USDA, nominees must then sign an additional form indicating their acceptance of the appointment. If this amendment were implemented, the two steps could be combined into one, thus resulting in less paperwork, a shorter acceptance procedure and improved efficiency in the acceptance process.

Record evidence supports this proposed change. No opposition to this proposed amendment was presented at the hearing. For the reasons outlined above, § 916.25, Acceptance, of the California nectarine order should be amended. Section 917.25, Selection of members of various commodity committees, of the California peach order should also be amended.

Material Issue Number 10a and 10b—Modification of Marketing Order 916 District Boundaries and Modification of Marketing Order 917 Fresno and Tulare Representation Area Boundaries

Section 916.12 of the California nectarine order and § 917.14 of the California peach marketing order should be amended. Section 916.12 should be amended to change the district boundaries for Districts 1 and 2 under the nectarine order (referred to as the Fresno and Tulare districts). Section 917.14 should be amended to redefine the Fresno and Tulare Peach Commodity Committee representation areas under the peach provisions of order 917.

Witnesses stated that nectarine and peach production has shifted over time such that current day production patterns are more in line with each other than they were previously. For this reason, district boundaries for nectarines and the Peach Commodity Committee representation areas should be redefined to better reflect current production trends.

According to the hearing record, two key elements would comprise this change. First, the Tulare District (District 2 under the nectarine order) would have as its northern boundary the Tulare County line instead of Avenue 384, which is formally defined as the fourth standard parallel south of the Mount Diablo Baseline of the general land office. This area is currently part of the Fresno District (District 1 under the nectarine order).

Secondly, Kings County would shift from the Fresno District to the Tulare District. This change in the allocation of counties among districts would better reflect current day production within the nectarine and peach production areas, as the Tulare and Kings Counties have been increasing in their peach production in recent years.

According to the record, 2003 nectarine production totaled 21,613,927 containers. Under the current definitions for Districts 1 and 2 (Fresno and Tulare Districts, respectively) the former is credited with a production of 20,716,073 containers (96 percent) and the later is credited with 497,772 containers (2 percent). If the proposed amendment were implemented, 2003 production for the Fresno District would equal 14,602,037 containers (68 percent) and Tulare District production for that year would equal 6,611,808 containers (31 percent).

In 2003, total California peach production equaled 22,534,252 containers. Of that amount, 20,754,501 containers (90 percent) were produced in the current Fresno District and 604,438 containers (3 percent) were produced in the current Tulare District. If the proposed boundary changes were implemented, production attributed to Fresno District would equal 14,602,037 containers (65 percent) and production attributed to Tulare District would equal 6,611,808 containers (30 percent).

The proposed modification in district boundaries would alter the production base used to define the Nectarine and Peach Commodity Committee representation and would result in better representation of grower interests in the Tulare District for each industry. This would result in a more equitable representation of both production and grower interests on the nectarine and Peach Commodity Committees.

Record evidence supports the modification of district boundary lines for Districts 1 and 2 under the nectarine order and the Fresno and Tulare Districts under the peach program. For the reasons stated above, it is recommended that § 916.12 of the California nectarine order and § 917.14 of the California peach marketing order be amended.

Material Issue Number 11—Modification of Marketing Order 917 Peach Commodity Committee Representation Areas

Section 917.22, Nomination of the Peach Commodity Committee members, should be amended to reflect conforming changes in representation that would result if the amendments discussed in Material Issue 10b were implemented. Furthermore, the Peach Commodity Committee representation areas should be renamed so that they are consistent with the district nomenclature of the nectarine order.

The current peach representation area names and the corresponding Committee representation for each peach producing district, or groups of districts, under order 917 are as follows:

(a) South Coast District and Southern California District: one nominee.

(b) Tehachapi District and Kern District: one nominee.

(c) Tulare District: one nominee.

(d) Fresno District: eight nominees.

(e) Stanislaus District and Stockton District: one nominee.

(f) All of the production area not included in the above: one nominee.

If the proposed amendment were implemented, the new distribution would place three member seats in the newly defined Tulare District and would reduce the member seats in the newly defined Fresno District to seven. The representation area defined as, ''(f) All of the production area not included in the above'' in the current language of § 917.22 (above) would be removed. Membership seats for the remaining districts would remain as they are currently allocated, with one seat for each of the following: The combined Tehachapi and Kern Districts, the combined South Coast and Southern California Districts, and the combined Stanislaus and Stockton Districts plus all remaining production. Total membership for the Peach Commodity Committee would remain at 13.

In addition to the redistricting and reallocation, record evidence supports

renaming the peach representation areas with the comparable district nomenclature that is currently used in the nectarine order. While the names for the peach representation areas remain tied to their geographic descriptions, common references to those areas rely on numeric names. Thus, the proposed name change, combined with the proposed reallocation in district representation and redefinition of district boundaries discussed in Material Issue 10b, would result in the following:

(a) *District 1* composed of the Fresno District: seven nominees.

(b) *District 2* composed of the Tulare District: three nominees.

(c) *District 3* composed of the Tehachapi District and Kern District: one nominee.

(d) *District 5* composed of the South Coast District and Southern California District: one nominee.

(e) *District 4* composed of the Stanislaus District, Stockton District and all of the production area not included in paragraphs (a) through (d): One nominee.

The proposed renaming of the above representation areas as published in Notice of Hearing and as presented by witnesses had proposed Districts 4 and 5 reversed. However, with District 4 originally listed as (d) and defined as ''Stanislaus District, Stockton District and all of the production area not included in paragraphs (a) through (d),'' followed by paragraph District 5, or paragraph (e), the definition of District 4 would have been incorrect. USDA recommends reversing the order of paragraphs (d) and (e) published in the Notice so that the language reads as outlined above.

Record evidence supports this amendment. No opposition to these amendments was presented at the hearing. For the reasons outlined above, it is recommended that § 917.22, Nomination of the Peach Commodity Committee members, be amended. Also, USDA recommends modifying the proposed amendatory language for § 917.22 by reversing the order of paragraphs (d) and (e) as published in the Notice.

Material Issue Number 12a and 12b—Addition of Interest and Penalties for Late Payments and Authority To Borrow Funds

Section 916.41 of the nectarine order and § 917.37 of the peach order should be amended to allow for interest and/or late payments for assessments not paid on time. Section 917.37 should be further amended to authorize the Committee to borrow money for administration of peach provisions of the order.

Currently there are no provisions providing for penalties or interest charges on late assessment payments under either the nectarine or peach order.

Record evidence indicates that the proposed amendment would strengthen the assessment collection functions of the orders and, in the case of peaches, allow access to additional funds. Implementation of interest and late payments would serve as an incentive for handlers to pay their assessments in a timely manner. And, adding the authority to borrow funds to marketing order 917 would allow the Control and Peach Committees access to additional funds to administer the order when the carry forward of assessment monies is inadequate.

There was no opposition testimony given against this proposed amendment. For the reasons stated above, it is recommended that § 916.41 and § 917.37 be amended.

Material Issue Number 13a and 13b—Authority To Recommend Regulations by Market Destination

This proposed amendment would have provided authority under the nectarine and peach programs to recommend specific regulations for specific market destinations. Over 100 comments in opposition to this proposed amendment were filed during the briefing period following the public hearing on proposed amendments to marketing orders 916 and 917. Comments stated concerns that the proposed authority would negatively impact the distribution of fruit to certain markets and would unfairly disadvantage certain handlers who ship utility-grade product overseas. The Nectarine and Peach Commodity Committees, in their brief, requested that this proposal be withdrawn. Accordingly, proposal 13 is not being considered in this recommended decision.

Material Issue Number 14—Establishment of Subcommittees Under the Peach Commodity Committee

Section 917.35 of the order should be amended to clarify that the Peach Commodity Committee may establish subcommittees.

Witnesses at the hearing explained that the order does not currently specify that the Peach Commodity Committee can establish subcommittees. However, the language in § 917.35 does state that ''other committees'' can be established. This proposal would specify that ''other committees'' established by Peach Committee could be referred to as ''subcommittees.'' The proposed amendment is intended as a clarifying change needed to update the order. Record evidence indicates that the subcommittee structure is already in place for the peach industry, and that the proposed amendment would result in a simple name change for all sub-groups currently existing under the Control and Peach Commodity Committees.

No opposition to this amendment was presented at the hearing. For the reasons outlined above, it is recommended that § 917.35 be amended.

Conforming Changes

The Agricultural Marketing Service proposed to make such changes as may be necessary to the order to conform with any amendment that may result from the hearing. Necessary conforming changes have been identified and discussed in this Recommended Decision under the pertinent material issues.

Small Business Considerations

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

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions so that small businesses will not be unduly or disproportionately burdened. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own benefit. Thus, both the RFA and the Act are compatible with respect to small entities.

Small agricultural growers are defined by the Small Business Administration (SBA)(13 CFR 121.201) as those having annual receipts of less than $750,000. Small agricultural service firms, which include handlers regulated under the order, were defined at the time of the hearing as those with annual receipts of less than $5,000,000. The definition of small agricultural service firm has subsequently changed to one with annual receipts of $6,000,000.

Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impact on growers and handlers of the proposed amendments, and in particular the impact on small businesses. The record evidence shows that most of the proposed amendments are designed to enhance industry

efficiencies and streamline administrative operations of the marketing order Committees. The amendments are not expected to have any direct cost impacts on growers or handlers, whether small or large. Improved operating efficiencies of the marketing order programs and their administrative committees are expected to positively benefit the nectarine and peach industries.

According to the record, there are approximately 207 California nectarine and peach handlers (combined) and approximately 1,500 growers (combined nectarines and peaches) in the production area, the State of California. A majority of these handlers and growers may be classified as small entities.

Based on calculations made by the Peach and Nectarine Committees' staff, witnesses indicated that about 26 handlers (13 percent) would qualify as large business entities under the SBA definition of a large agricultural service firm ($5,000,000). For the 2004 season, it was estimated that the average handler price received was eight dollars per container or container equivalent of nectarines or peaches. Thus, a handler would have to ship at least 625,000 containers to have annual receipts of 5 million dollars. Given data on shipments presented at the hearing and the estimated eight-dollar average handler price received during the 2004 season, small handlers represented approximately 87 percent of all the handlers within the industry. Under the 6 million dollar definition, more than 87 percent of handlers would qualify as small handler entities.

Record evidence also indicated that less than 20 percent of the combined number of California nectarine and peach growers could be defined as other than small entities. The Committees estimated that the average 2004 grower price received for nectarines and peaches was 5 dollars per container or a container equivalent. A grower would have to produce at least 150,000 containers of nectarines and peaches to have annual receipts of 750,000 dollars. Given data maintained by the Committees' staff and the five dollar estimated average grower price received during the 2004 season, the staff estimates that more than 80 percent of growers can be classified as small growers.

Evidence presented at the hearing indicates an average 2004 grower price of five dollars per container or container equivalent for both nectarines and peaches, and a combined pack-out of approximately 40,422,900 containers. Thus, the value of the 2004 pack-out is estimated to be $202,114,500. Dividing this total estimated grower revenue by the estimated number of combined nectarine and peach growers (1,500) yields an estimate of 2004 average revenue per grower of about $134,743. Because many growers produce both commodities, industry nectarine and peach production statistics were presented at the hearing as combined totals.

National Agricultural Statistical Service (NASS) data presented at the hearing provides the following production profile for California nectarines and peaches, respectively (all numbers are two-year averages for the 2003 crop year and preliminary data for 2004): Bearing acres, 36,500 of nectarines and 37,000 of peaches; yield per acre of utilized production, 7.19 tons and 10.84 tons; annual utilized production, 262,500 tons and 401,000 tons. Utilized production of both nectarines and peaches was less than total production in 2004; utilized production data was therefore used in the computation. Two-year (2003 and 2004) average grower prices per ton for nectarines and peaches were $391 and $309.50 respectively. However, $309.50 is the peach price per ton for both fresh and processed uses. Approximately one third of California freestone peaches are sold for processing at a price lower than growers receive for fresh market sales. Therefore, a better estimate of the price per ton for fresh peach sales is to use the U.S. estimated grower price for fresh peaches of 27 cents per pound ($540 per ton) for 2003, the most recent year for which a U.S. fresh peach price was available from the Economic Research Service of the USDA.

This NASS and ERS data is used to compute an additional estimate of average annual sales revenue per producer. By assuming that growers of nectarines are also growers of peaches, the 2004 average acreage for these crops (dividing the sum of nectarine and peach bearing acres by two) is equal to 36,750 acres. Dividing this number by the number of combined peach and nectarine growers reported by CTFA (1,500) yields an estimate of 24.5 acres as the average size of a sample nectarine or peach farm in 2004. If the sample farm's acreage was split evenly between nectarines and peaches (12.5 acres of each fruit) and production yields equal to the statewide average (reported above), that farm would have produced and sold 89.88 tons of nectarines and 134.42 tons of peaches. The value of production for that sample farm would have been $35,143 for nectarines and $72,587 for peaches, or $107,730 total. This figure is lower than the $134,743 estimate using industry data. However, both computations confirm that the average nectarine or peach grower qualifies as a small grower under the SBA definition.

The proposed amendments would: update definitions and districts in both orders; increase Committee membership of the Nectarine Administrative Committee from eight to thirteen members and modify sections of the order to conform to the increased membership; eliminate the Shippers Advisory Committee (M.O. No. 916); allow the Control Committee under M.O. No. 917 to be suspended if the provisions of one commodity are suspended and transfer applicable duties and responsibilities to the remaining Commodity Committee; and authorize interest and late payment charges on assessments that are paid late.

All of the proposals are intended to streamline and improve the administration, operation, and functioning of the programs. Many of the proposed amendments would update the language of these two orders, thus better representing, and conforming with, current practices in these industries. The proposed amendments are not expected to result in any significant cost increases for growers or handlers. More efficient administration of program activities may result in cost savings for the Peach and Nectarine Committees.

Proposal 1 would amend the order to allow hybrid fruit that exhibits the characteristics of nectarines or peaches and is subject to cultural practices common to nectarines and peaches be subject to marketing order regulations. This proposed amendment provides a procedure for the Committees to recommend to USDA the specific hybrids to be included under the definitions and subject to order provisions.

The cultivation of hybrid fruit has been a practice of the nectarine and peach industries. The improvement in breeding technology provides for the development of fruit and fruit trees with more favorable characteristics, such as disease resistance. As breeding technology becomes more sophisticated, it is anticipated that nectarines and peaches will be crossbred with other tree fruit, such as apricots and plums.

The proposal would require that in order to be subject to order requirements, all hybrids would need to be recommended to USDA by the Committees for inclusion under the order. If this amendment is adopted, the Committees would identify hybrids currently in production that have

characteristics of nectarines or peaches. The characteristics of the fruit would help determine whether the hybrid should be regulated. The Committees would also consider the cultural practices used on that specific hybrid, as cultural practices differ among various fruit trees. USDA would then proceed with rulemaking, as appropriate, as to what hybrids would be included under the order.

The proposed amendment would provide flexibility in including hybrids as they are developed and provides sufficient safeguards to ensure compliance of order provisions. Incorporating specific reference to hybrid fruit into the definitions of ''nectarine'' and ''peach'' is not expected to result in any significant increase in costs to growers or handlers. There may be slight increases in the administration costs of the nectarine and peach orders in terms of program oversight, but it is expected that any increases would be offset by the benefits of including hybrids under the orders provisions.

Proposal 2 would specify that the act of ''packing'' nectarines and peaches would be a handling function under the orders. Most packers already assume all of the responsibilities of a handler, except the selling of the fruit and thus, this proposal is not expected to result in any significant increases in costs and would likely result in efficiencies that would benefit the administration of marketing orders 916 and 917.

Proposal 3, which seeks to extend the marketing season for nectarines, would more accurately reflect the nectarine industry's current marketing season and conform to current handling regulations. The proposed amendment would change the current marketing season from May 1 through November 30 to April 1 through November 30. According to record evidence, aligning the marketing year with current production would not result in any increases in costs.

Proposal 4 would allow for the temporary suspension of the Control Committee, the oversight committee for peaches and pears under marketing order 917, when one of the commodity programs is suspended. Since the pear program has been suspended, the duties of the Control Committee have been lessened, as there is only one Commodity Committee that is active under the marketing order program. In the Pear Commodity Committee's absence, the Peach Commodity Committee has continued to operate in conjunction with the Control Committee. The proposed amendment would also allow the Control Committee to become active again if both commodity groups were to become active under the order. This amendment is not expected to result in any increases in costs to growers or handlers.

Proposal 5 would increase the membership on the NAC from eight to thirteen members and revise quorum requirements. Proposal 5 would also provide for voting by facsimile and holding meetings via video teleconference for both the Nectarine and Peach Commodity Committees. Record evidence indicated that these amendments were necessary in order to update the business practices of the Nectarine and Peach Committees to include current day technology. The increase in Committee members from 8 to 13 would allow for greater industry participation and would provide for a larger pool of committee members to attend meetings and meet quorum requirements. This amendment is not expected to result in any significant increases in costs to growers or handlers.

Regarding the increase in committee membership, this proposal would benefit growers by allowing more growers to be appointed to the Committee, thereby increasing industry participation in the marketing order program functions.

Regarding the use of facsimile and video teleconference, this provision would allow both the Nectarine and Peach Committees to take advantage of technology that is available currently, but was not known when the orders were promulgated. Amendments proposed under this material issue are not expected to result in any significant increases in costs to growers or handlers.

Proposal 6 would eliminate the Shipper's Advisory Committee under the nectarine marketing order and bring the language of the order into conformance with current day operations of the program. Record evidence indicates that the Shipper's Advisory Committee has not been active for over 30 years and, while it once served a function under the marketing order program, it is no longer necessary. This amendment is not expected to result in any increases in costs to growers or handlers.

Proposal 7 would modify the definition of grower to specify that both employees of growers and corporate officers of growers are eligible to serve on the Nectarine and Peach Committees in grower positions. This proposed amendment would be a clarifying change and would bring the language of the order into conformance with current-day operations of the program. This amendment is not expected to result in any increases in costs to growers or handlers.

Proposal 8 would add a definition for pure grower to both the nectarine and peach orders. If implemented, pure growers would be defined as growers that grow their own product (and are not employees or officers of a packing business) or, that grow and pack only their own product. If they do pack for other growers, the total production packed from other growers cannot exceed 25 percent of the total production packed for that marketing season for that pure grower's packing facility. Pure growers, who only pack a limited amount of fruit for other growers, are still essentially dependent on their own production, which is the essential component of being a pure grower.

Proposal 8 would also modify the current nomination procedures for the Committees, as well as modify the deadline for conducting the nominations, add a 50-percent pure grower membership requirement for the Committees and establish tenure requirements for members. According to the hearing record, nomination procedures would be modified to provide for mailings of ballots and would change the beginning date of the nomination period from February 15 to January 31. The change in the beginning date would be necessary in order to provide extra time for the mailing of ballots.

While some increases in administration costs could arise as a result of the mailing of ballots, record evidence indicates that the benefit of increased industry participation would merit that expense.

Proposal 9 would modify the current acceptance procedure for persons nominated to serve on the Nectarine and Peach Committees. Currently, the acceptance procedure for persons nominated and selected to serve on the Committees involves a two-step process. If this amendment were implemented, the two steps could be combined into one, thus resulting in less paperwork, a shorter acceptance procedure and improved efficiency in the acceptance process. This amendment is not expected to result in any increases in costs to growers or handlers.

Proposal 10 would modify the Fresno and Tulare districts under the peach marketing order by moving Kings County from the Fresno district to the Tulare district and by including all of Tulare County in the Tulare district, and would also modify district boundaries under the nectarine order. This change would also serve as the basis for

modifying committee representation for the Tulare district under the peach order, as discussed under Proposal 11. These amendments are not expected to result in any significant increases in costs to growers or handlers.

Proposal 11 would modify the names of the peach producing districts under that marketing order and change district representation on the Peach Committee to reflect the modified districts discussed under Proposal 10. This proposal would provide for more accurate representation of current-day peach production. This amendment is not expected to result in any significant increases in costs to growers or handlers.

Proposal 12 would provide for interest and penalty provisions for late payment of assessments to be added to both the nectarine and peach orders and would authorize the borrowing of funds for administration of the peach order. These amendments would strengthen the assessment collection functions of the orders and, in the case of peaches, allow access to additional funds. The implementation of interest and late payments would serve as an incentive for handlers to pay their assessments in a timely manner. The authority to borrow funds under marketing order 917 would allow the Control and Peach Committees access to additional funds to administer the order when the carry forward of assessment monies is inadequate. While these amendments are expected to result in some costs under the marketing orders, the more timely assessment payments and the authority to borrow funds (for peaches) are expected to benefit the industries.

Lastly, Proposal 14 would clarify that ''other committees'' established by the Peach Committee would be referred to as ''subcommittees.'' This amendment is not expected to result in any increases in costs to growers or handlers.

The proposals put forth at the hearing would streamline program organization, but are not expected to result in a significant change in industry production, handling or distribution activities. In discussing the impacts of the proposed amendments on growers and handlers, record evidence indicates that the changes are expected to be positive because the administration of the programs would be more efficient, and therefore more effective, in executing Committee duties and responsibilities. There would be no significant cost impact on either small or large growers or handlers.

Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impact of the proposed amendments to the order on small entities. The record evidence is that most of the amendments are designed to increase efficiency in the functioning of the orders.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule. These amendments are designed to enhance the administration and functioning of marketing orders 916 and 917 to the benefit the California nectarine and peach industries.

Committee meetings regarding these proposals as well as the hearing dates were widely publicized throughout the California nectarine and peach industries. All interested persons were invited to attend the meetings and the hearing and participate in deliberations on all issues. All Committee meetings (the NAC, the PCC, the Control Committee and the CTFA) and the hearing were public forums and all entities, both large and small, were able to express views on these issues. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

A 20-day comment period is provided to allow interested persons to respond to this proposal. Twenty days is deemed appropriate so that this rulemaking may be completed and nominations can be conducted prior to the next crop year, which begins in March. All written exceptions timely received will be considered and a grower referendum will be conducted before these proposals are implemented.

Paperwork Reduction Act

Current information collection requirements for Parts 916 and 917 have been previously approved by the Office of Management and Budget (OMB) under OMB number 0581–0189, ''Generic Fruit Crops.'' The proposed changes would have an insignificant impact on total burden hours currently approved under this information collection.

Specifically, the proposed amendment to increase the Nectarine Administrative Committee (committee) from 8 to 13 members would require an additional 5 members and 5 alternates to complete existing confidential background and acceptance statements every 2 years. Increasing committee members from 16 (8 members and 8 alternates) to 26 (13 members and 13 alternates) would result in an increase of .43 burden hours, or 26 minutes. In addition, because the Shipper's Advisory Committee is being recommended to be abolished, form FV–75, ''Confidential California Tree Fruit Agreement Questionnaire'', which is currently approved under OMB No. 0581–0189 for 1.99 burden hours, would no longer be needed. Removing this form would result in an overall decrease of 1.56 burden hours.

Also, the proposal would authorize nominees under the nectarine order to state their willingness to serve on the committee prior to their selection, which would result in the combining of Confidential Background statement and the acceptance statement, which are already approved by OMB. There would be no change in the burden hours by combining these forms.

The California Peach Commodity Committee proposed to amend the provisions relating to the Control Committee under marketing order 917 to allow the duties and responsibilities of the Control Committee to be transferred to one commodity committee if the provisions of the other commodity committee are suspended. If this change was implemented, and the Peach Commodity Committee was to assume the duties and responsibilities of the Control Committee, some forms used by the Control Committee would require a modification in the name of the committee using those forms. However, the functioning of the forms and the current burden would remain the same.

In addition, any changes to forms, or increased burden generated in nominating and selecting pure growers on the Committees would be submitted to OMB for approval prior to implementation.

AMS 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.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. Witnesses stated that existing forms could be adequately modified to serve the needs of the nectarine and peach commodity committees.

Civil Justice Reform

The amendments to Marketing Agreement Nos. 124 and 85 and Order Nos. 916 and 917 proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed amendments would not preempt any State or local

laws, regulations, or policies, unless they present an irreconcilable conflict with this proposal.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

Rulings on Briefs of Interested Persons

Briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth in this recommended decision. To the extent that the suggested findings and conclusions filed by interested persons are inconsistent with the findings and conclusions of this recommended decision, the requests to make such findings or to reach such conclusions are denied.

General Findings

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the marketing agreement and order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

(1) The marketing agreements and orders, as amended, and as hereby proposed to be further amended, and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

(2) The marketing agreements and orders, as amended, and as hereby proposed to be further amended, regulate the handling of nectarines and peaches grown in the production area (the State of California) in the same manner as, and are applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing agreements and orders upon which a hearing has been held;

(3) The marketing agreements and orders, as amended, and as hereby proposed to be further amended, are limited in their application to the smallest regional production areas which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production areas would not effectively carry out the declared policy of the Act;

(4) The marketing agreements and orders, as amended, and as hereby proposed to be further amended, prescribe, insofar as practicable, such different terms applicable to different parts of the production areas as are necessary to give due recognition to the differences in the production and marketing of nectarines and peaches grown in the production area; and

(5) All handling of nectarines and peaches grown in the production areas as defined in the marketing agreements and orders, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

List of Subjects

7 CFR Part 916

Marketing agreements, Nectarines, Reporting and recordkeeping requirements.

7 CFR Part 917

Marketing Agreements, Peaches, Pears, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, 7 CFR parts 916 and 917 are proposed to be amended as follows:

PART 916—NECTARINES GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 916 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Revise § 916.5 to read as follows:

§ 916.5 Nectarines.

Nectarines means: (1) All varieties of nectarines grown in the production area; and

(2) Hybrids grown in the production area that exhibit the characteristics of a nectarine and are subject to cultural practices common to nectarines, as recommended by the committee and approved by the Secretary.

3. Revise § 916.9 to read as follows:

§ 916.9 Grower.

Grower is synonymous with producer and means any person who produces nectarines for market in fresh form, and who has a proprietary interest therein. Employees of growers and officers of corporations actively engaged in growing nectarines are eligible to serve in grower positions on the committee.

4. Revise § 916.11 to read as follows:

§ 916.11 Handle.

Handle and ship are synonymous and mean to pack, sell, consign, deliver, or transport nectarines, or to cause nectarines to be packed, sold, consigned, delivered, or transported, between the production area and any point outside thereof, or within the production area: *Provided, That* the term handle shall not include the sale of nectarines on the tree, the transportation within the production area of nectarines from the orchard where grown to a packing facility located within such area for preparation for market, or the delivery of such nectarines to such packing facility for such preparation.

5. Revise paragraphs (a) and (b) of § 916.12 to read as follows:

§ 916.12 District.

* * * * *

(a) *District 1* shall include the counties of Madera and Fresno.

(b) *District 2* shall include the counties of Kings and Tulare.

* * * * *

6. Revise § 916.15 to read as follows:

§ 916.15 Marketing season.

Marketing season means the period beginning on April 1 and ending on November 30 of any year.

7. Add a new § 916.16 to read as follows:

§ 916.16 Pure Grower or Pure Producer.

(a) Pure grower means any grower: (1) Who produces his or her own product (and is not an employee or officer of a packing business); or

(2) Who produces and handles his or her own product; *Provided, That;* A pure grower can pack the production of other growers as long as the production packed does not exceed 25 percent of the total production packed for that marketing year for that pure grower's packing facility. Pure grower is synonymous with pure producer.

(b) The committee may establish, with the approval of the Secretary, rules and regulations for the implementation and operation of this section.

8. Revise § 916.20 to read as follows:

§ 916.20 Establishment and membership.

There is hereby established a Nectarine Administrative Committee consisting of thirteen members, each of whom shall have an alternate who shall

have the same qualifications as the member for whom he/she is an alternate. The members and their alternates shall be growers or authorized employees of growers. Six of the members and their respective alternates shall be growers of nectarines in District 1. Four members and their respective alternates shall be growers of nectarines in District 2; two of the members and their respective alternates shall be growers of nectarines in District 3; and one member and his/her alternate shall be growers of nectarines in District 4; *Provided, That* at least 50% of the nominees from each representation area shall be pure growers. Furthermore, no person shall serve more than three consecutive two-year terms of office or a total of six consecutive years; *Provided further, That* an appointment to fill less than a two-year term of office, or serving one term as an alternate, shall not be included in determining the three consecutive terms of office; *Provided further, That* time served prior to the effective date of this section shall not be counted toward consecutive term limits.

9. Revise paragraph (b) of § 916.22 to read as follows:

§ 916.22 Nomination.

* * * * *

(b) *Successor members.* (1) The committee shall appoint a nominating committee, which will hold or cause to be held, not later than January 31 of each odd numbered year, a nomination procedure or a meeting or meetings of growers in each district for the purpose of designating nominees for successor members and alternate members of the committee. Meetings may be supervised by the nominating committee that shall prescribe such procedure as shall be reasonable and fair to all persons concerned. After the nomination procedure or meetings have concluded, the nominating committee by February 15 will verify consent to place the nominee's name on the ballot and will cause a ballot listing all of the nominees for a given district to be mailed to all growers within the district. Members and their alternates will be chosen based on a descending ranking of votes received. Once ballots have been tabulated, the Nectarine Administrative Committee will announce to the growers the nominees that have been selected and recommended to the Secretary.

(2) Nominations may only be by growers, or by duly authorized employees. At meetings, only growers who are present at such nomination meetings may participate in the nomination of nominees for members and their alternates. All known growers will then receive a ballot for the nominees in the district in which they produce and are entitled to vote accordingly. A grower who produces in multiple districts is allowed to vote only in one district, and may exchange his/her ballot for that of the nominees in another district provided the grower is producing in the district for which he/she wants to participate. Employees of such grower shall be eligible for membership as principal or alternate to fill only one position on the committee.

(3) A particular grower, including authorized employees of such grower, shall be eligible for membership as principal or alternate to fill only one position on the committee.

10. Revise § 916.25 to read as follows:

§ 916.25 Acceptance.

Each person to be selected by the Secretary as a member or as an alternate member of the committee shall, prior to such selection, qualify by advising the Secretary that he/she agrees to serve in the position for which nominated for selection.

11. Revise § 916.32 to read as follows:

§ 916.32 Procedure.

(a) Nine members of the committee, or alternates acting for members, shall constitute a quorum and any action of the committee shall require the concurring vote of the majority of those present: *Provided, That* actions of the committee with respect to expenses and assessments, or recommendations for regulations pursuant to §§ 916.50 to 916.55, shall require at least nine concurring votes.

(b) The committee may vote by telephone, telegraph, or other means of communication, such as facsimile, and any votes so cast shall be confirmed promptly in writing: *Provided, That* if an assembled meeting is held, all votes shall be cast in person. A videoconference shall be considered an assembled meeting and all votes shall be considered as cast in person.

12. Remove § 916.37.

13. Add three new sentences at the end of paragraph (b) of § 916.41 to read as follows:

§ 916.41 Assessments.

* * * * *

(b) * * * Furthermore, any assessment not paid by a handler within a period of time prescribed by the committee may be subject to an interest or late payment charge, or both. The period of time, rate of interest and late payment charge shall be as recommended by the committee and approved by the Secretary. Subsequent to such approval, all assessments not paid within the prescribed period of time shall be subject to an interest or late payment charge or both.

PART 917—FRESH PEARS AND PEACHES GROWN IN CALIFORNIA

14. The authority citation for part 917 continues to read as follows:

Authority: 7 U.S.C. 601–674.

15. Revise § 917.4 to read as follows:

§ 917.4 Fruit.

Fruit means the edible product of the following kinds of trees:

(a) All varieties of peaches grown in the production area;

(b) All hybrids grown in the production area exhibiting the characteristics of a peach and subject to cultural practices common to peaches as recommended by the committee and approved by the Secretary; and

(c) All varieties of pears except Beurre Hardy, Beurre D'Anjou, Bosc, Winter Nelis, Doyenne du Comice, Beurre Easter, and Beurre Clairgeau.

16. Revise § 917.5 to read as follows:

§ 917.5 Grower.

Grower is synonymous with producer and means any person who produces fruit for market in fresh form, and who has a proprietary interest therein. Employees of growers and officers of corporations actively engaged in growing peaches are eligible to serve in grower positions on the committee.

17. Revise § 917.6 to read as follows:

§ 917.6 Handle.

Handle and ship are synonymous and mean to sell, consign, deliver or transport fruit or to cause fruit to be sold, consigned, delivered or transported between the production area and any point outside thereof, or within the production area: *Provided, That* for peaches, packing or causing the fruit to be packed also constitutes handling; *Provided further, That* the term handle shall not include the sale of fruit on the tree, the transportation within the production area of fruit from the orchard where grown to a packing facility located within such area for preparation for market, or the delivery of such fruit to such packing facility for such preparation.

18. Add a new § 917.8 to read as follows:

§ 917.8 Pure Grower or Pure Producer.

(a) For peaches, pure grower means any grower:

(1) Who produces his or her own product (and is not an employee or officer of a packing business); or

(2) Who produces and handles his or her own product; *Provided, That:* A

pure producer can pack the production of other growers as long as the production packed does not exceed 25 percent of the total production packed for that marketing year by that pure grower's packing facility. Pure grower is synonymous with pure producer.

(b) The committee may establish, with the approval of the Secretary, rules and regulations for the implementation and operation of this section.

19. Revise paragraphs (n) and (o) of § 917.14 to read as follows:

§ 917.14 District.

* * * * *

(n) *Fresno District* includes and consists of Madera County, Fresno County, and Mono County.

(o) *Tulare District* includes and consists of Tulare County and Kings County.

* * * * *

20. Revise § 917.18 to read as follows:

§ 917.18 Nomination of commodity committee members of the Control Committee.

Nominations for the 13 members of the Control Committee to represent the commodity committees shall be made in the following manner:

(a) A nomination for one member shall be made by each commodity committee selected pursuant to § 917.25. Nominations for the remaining members shall be made by the respective commodity committees as provided in this section. The number of remaining members which each respective commodity shall be entitled to nominate shall be based upon the proportion that the previous three fiscal periods' shipments of the respective fruit is of the total shipments of all fruit to which this part is applicable during such periods. In the event provisions of this part are terminated as to any fruit, the members of the commodity committee of the remaining fruit shall have all of the powers, duties, and functions given to the Control Committee under this part and sections of this part pertaining to the designation of the Control Committee shall be terminated. In the event provisions of this part are suspended as to any fruit, the members of the commodity committee of the remaining fruit shall have all the powers, duties, and functions given to the Control Committee under this part and sections of this part pertaining to the designation of the Control Committee shall be suspended.

(b) A person nominated by any commodity committee for membership on the Control Committee shall be an individual person who is a member or alternate member of the commodity committee that nominates him/her. Each member of each commodity committee shall have only one vote in the selection of nominees for membership on the Control Committee.

21. Revise § 917.22 to read as follows:

§ 917.22 Nomination of Peach Commodity Committee members.

Nominations for membership on the Peach Commodity Committee shall be made by growers of peaches in the respective representation areas, as follows:

(a) *District 1* composed of the Fresno District: seven nominees.

(b) *District 2* composed of the Tulare District: three nominees.

(c) *District 3* composed of the Tehachapi District and Kern District: one nominee.

(d) *District 5* composed of the South Coast District and Southern California District: one nominee.

(e) *District 4* composed of the Stanislaus District, Stockton District and all of the production area not included in paragraphs (a) through (d) of this section: one nominee.

22. Revise § 917.24 to read as follows:

§ 917.24 Procedure for nominating members of various commodity committees.

(a) The Control Committee shall hold or cause to be held not later than January 31 for peaches and not later than February 15 for pears of each odd numbered year a nomination procedure or a meeting or meetings of the growers of the fruits in each representation area set forth in §§ 917.21 and 917.22 for purposes of designating nominees for successor members and alternate members of the commodity committees. These meetings shall be supervised by the Control Committee, which shall prescribe such procedure as shall be reasonable and fair to all persons concerned.

(b) With respect to each commodity committee only growers of the particular fruit who are present at such nomination meetings or represented at such meetings by duly authorized employees may participate in the nomination and election of nominees for commodity committee members and alternates. For peaches, those who may receive nomination forms if the nominations are conducted via a mail process may also participate in the nomination and election of nominees for Peach Commodity Committee members and alternates. All peach growers, or authorized employees, will receive a ballot for the nominees in the district in which they produce and are entitled to vote accordingly. A peach grower who produces in multiple districts is allowed to vote only in one district, and may exchange his/her ballot for that of nominees in another district provided the grower is producing in the district for which he/she wants to participate. For both commodity committees, each such grower, including employees of such grower, shall be entitled to cast but one vote for each position to be filled for the representation area in which he/she produces such fruit.

(c) A particular grower, including employees of such growers, shall be eligible for membership as principle or alternate to fill only one position on a commodity committee. A grower nominated for membership on the Pear Commodity Committee must have produced at least 51 percent of the pears shipped by him/her during the previous fiscal period, or he/she must represent an organization that produced at least 51 percent of the pears shipped by it during such period. The members and alternates of the Peach Commodity Committee shall be growers, or shall be authorized employees of such growers and at least 50% of the nominees from each representation area shall be pure growers.

(d) For peaches, no person shall serve more than three (3) consecutive two-year terms of office or a total of six (6) consecutive years; *Provided, That* an appointment to fill less than a two-year term of office, or serving one (1) term as an alternate, shall not be included in determining the (3) consecutive terms of office; *Provided further, That* time served prior to the effective date of this section shall not be counted toward consecutive term limits. The members shall serve until their respective successors are selected and have qualified.

23. Revise § 917.25 to read as follows:

§ 917.25 Acceptance.

(a) The Secretary shall select the members of each commodity committee, except for the Peach Commodity Committee, from nominations made by growers, as provided in §§ 917.21 through 917.24, or from among other eligible persons. Any person selected as a member of the Pear Commodity Committee shall qualify by filing with the Secretary a written acceptance of the appointment.

(b) For the Peach Commodity Committee, each person to be selected by the Secretary as a member or as an alternate member of the committee shall, prior to such selection, qualify by advising the Secretary that he/she agrees

to serve in the position for which nominated for selection.

24. Revise paragraph (d) of § 917.29 to read as follows:

§ 917.29 Organization of committees.

* * * * *

(d) The Control Committee or any commodity committee may, upon due notice to all of the members of the respective committee, vote by letter, telegraph or telephone: *Provided, That* any member voting by telephone shall promptly thereafter confirm in writing his/her vote so cast. The Peach Commodity Committee may, upon due notice to all of the members of the respective committee, vote by letter, telegraph, telephone, facsimile, video teleconference, or any other means of communication recommended by the committee and approved by the Secretary; *Provided, That* any member voting by telephone shall promptly thereafter confirm in writing his/her vote so cast.

25. Add a sentence at the end of paragraph (d) of § 917.35 to read as follows:

§ 917.35 Powers and duties of each commodity committee.

* * * * *

(d) * * * To establish subcommittees to aid the Peach Commodity Committee in the performance of its duties under this part as may be deemed advisable.

* * * * *

26. Revise § 917.37 to read as follows:

§ 917.37 Assessments.

(a) As his/her pro rata share of the expenses which the Secretary finds are reasonable and are likely to be incurred by the commodity committees during a fiscal period, each handler shall pay to the Control Committee, upon demand, assessments on all fruit handled by him/her. The payment of assessments for the maintenance and functioning of the committees may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

(b) The Secretary shall fix the respective rate of assessment, which handlers shall pay with respect to each fruit during each fiscal period in an amount designed to secure sufficient funds to cover the respective expenses, which may be incurred during such period. At any time during or after the fiscal period, the Secretary may increase the rates of assessment in order to secure funds to cover any later findings by the Secretary relative to such expenses, and such increase shall apply to all fruit shipped during the fiscal period. Furthermore, any assessment not paid by a peach handler within a period of time prescribed by the Control Committee may be subject to an interest or late payment charge, or both. The period of time, rate of interest and late payment charge shall be as recommended by the committee and approved by the Secretary. Subsequent to such approval, all assessments for peaches not paid within the prescribed period of time shall be subject to an interest or late payment charge or both.

(c) In order to provide funds to carry out the functions of the commodity committee prior to commencement of shipments in any season, shippers may make advance payments of assessments, which advance payments shall be credited to such shippers and the assessments of such shippers shall be adjusted so that such assessments are based upon the quantity of fruit shipped by such shippers during such season. Any shipper who ships fruit for the account of a grower may deduct, from the account of sale covering such shipment or shipments, the amount of assessments levied on said fruit shipped for the account of such grower. The Control Committee may also borrow money for such purposes for peaches.

Dated: November 18, 2005.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

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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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- National oil and hazardous substances contingency plan priorities list; published 9-30-05

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- Illinois; published 11-29-05

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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*.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

H.R. 2490/P.L. 109–107

To designate the facility of the United States Postal Service located at 442 West Hamilton Street, Allentown, Pennsylvania, as the "Mayor Joseph S. Daddona Memorial Post Office". (Nov. 22, 2005; 119 Stat. 2289)

H.R. 2862/P.L. 109–108

Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006 (Nov. 22, 2005; 119 Stat. 2290)

H.R. 3339/P.L. 109–109

To designate the facility of the United States Postal Service located at 2061 South Park Avenue in Buffalo, New York, as the "James T. Molloy Post Office Building". (Nov. 22, 2005; 119 Stat. 2350)

S. 161/P.L. 109–110

Northern Arizona Land Exchange and Verde River Basin Partnership Act of 2005 (Nov. 22, 2005; 119 Stat. 2351)

S. 1234/P.L. 109–111
Veterans' Compensation Cost-of-Living Adjustment Act of 2005 (Nov. 22, 2005; 119 Stat. 2362)

S. 1713/P.L. 109–112
Iran Nonproliferation Amendments Act of 2005 (Nov. 22, 2005; 119 Stat. 2366)

S. 1894/P.L. 109–113

To amend part E of title IV of the Social Security Act to provide for the making of foster care maintenance payments to private for-profit agencies. (Nov. 22, 2005; 119 Stat. 2371)

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