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# Rules and Regulations

Federal Register
Vol. 70, No. 242
Monday, December 19, 2005

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

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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Parts 451, 531, and 575

**RIN 3206–AK88 and 3206–AK81**

### Changes in Pay Administration Rules for General Schedule Employees; Recruitment, Relocation, and Retention Incentives; Corrections

**AGENCY:** Office of Personnel Management.

**ACTION:** Correcting amendments.

**SUMMARY:** The Office of Personnel Management issued interim regulations on May 13, 2005 (70 FR 25732), to implement section 101 of the Federal Workforce Flexibility Act of 2004, which amends the rules governing recruitment, relocation, and retention incentives, and on May 31, 2005 (70 FR 31278), to implement section 301 of the Federal Workforce Flexibility Act of 2004, which amends the rules governing pay setting for General Schedule employees. This notice corrects minor errors in the interim regulations.

**DATES:** *Effective Dates:* The corrections to 5 CFR part 575 are effective on May 13, 2005. The corrections to 5 CFR part 531 are effective on May 1, 2005.

**FOR FURTHER INFORMATION CONTACT:** David Barash by telephone at (202) 606–2858; by fax at (202) 606–0824; or by e-mail at *pay-performance-policy@opm.gov*.

**SUPPLEMENTARY INFORMATION:** The Office of Personnel Management is making the following corrections in Title 5, Code of Federal Regulations:

- In § 451.104(g), we are correcting a citation to 5 U.S.C. 4505a(a)(2).
- In § 531.214(d)(2)(iii)(A), we are replacing the term ''alternate'' with ''standard''.
- In § 531.214(d)(4)(iii), Step D, we are replacing the term ''GS–11'' with ''GS–9''.
- In § 531.222(a)(2), we are moving the phrase ''on a regular tour of duty'' from paragraph (2)(i) to the introductory text of paragraph (2).
- In § 531.407(b)(2), we are inserting the phrase ''(or would have resulted in)''.
- In § 531.602, we are replacing the word ''rates'' with the word ''rate'' in the second sentence of the definition of GS rate.
- In § 531.610(k), we are replacing the phrase ''Lump-sum payments for accumulated and annual leave under 5 CFR part 550, subpart L'' with ''Lump-sum payments under 5 CFR part 550, subpart L, for accumulated and accrued annual leave''.
- In § 572.206(a)(4), we are replacing the word ''recruitment'' with ''relocation.''
- In § 575.310(a), we are replacing the reference to paragraph ''g'' with ''(f).''

**List of Subjects in 5 CFR Parts 451, 531, and 575**

Decorations, medals, awards; Government employees; Law enforcement officers; Wages.

■ Accordingly, 5 CFR parts 451, 531, and 575 are corrected by making the following correcting amendments:

## PART 451—AWARDS

■ 1. The authority citation for part 451 continues to read as follows:

**Authority:** 5 U.S.C. 4302, 4501–4509; E.O. 11438, 33 FR 18085, 3 CFR, 1966–1970 Comp., p. 755; E.O. 12828, 58 FR 2965, 3 CFR, 1993 Comp., p. 569.

### Subpart A—Agency Awards

**§ 451.104 [Amended]**

■ 2. In § 451.104, amend paragraph (g) by removing ''4505a(a)(2)(A)'' and adding in its place ''4505a(a)(2)''.

## PART 531—PAY UNDER THE GENERAL SCHEDULE

■ 3. The authority citation for part 531 continues to read as follows:

**Authority:** 5 U.S.C. 5115, 5307, and 5338; sec. 4 of Pub. L. 103–89, 107 Stat. 981; and E.O. 12748, 56 FR 4521, 3 CFR, 1991 Comp., p. 316; Subpart B also issued under 5 U.S.C. 5303(g), 5305, 5333, 5334(a) and (b), and 7701(b)(2); Subpart D also issued under 5 U.S.C. 5335(g) and 7701(b)(2); Subpart E also issued under 5 U.S.C. 5336; Subpart F also issued under 5 U.S.C. 5304, 5305, and 5338; and E.O. 12883, 58 FR 63281, 3 CFR, 1993 Comp., p. 682 and E.O. 13106, 63 FR 68151, 3 CFR, 1998 Comp., p. 224.

### Subpart B—Determining Rate of Basic Pay

**§ 531.214 [Amended]**

■ 4. In § 531.214(d)(2)(iii)(A), remove ''alternate'' and add in its place ''standard'' and in § 531.214(d)(4)(iii), Step D, remove ''GS–11'' and add in its place ''GS–9''.

■ 5. In § 531.222, revise paragraphs (a)(2), introductory text, and (a)(2)(i) to read as follows:

**§ 531.222 Rates of basic pay that may be used as the highest previous rate.**

(a) * * *

(2) The highest previous rate must be a rate of basic pay received by an employee while serving on a regular tour of duty—

(i) Under an appointment not limited to 90 days or less; or

* * * * *

### Subpart D—Within-Grade Increases

■ 6. In § 531.407, revise paragraph (b)(2), introductory text, to read as follows:

**§ 531.407 Equivalent increase determinations.**

* * * * *

(b) * * *

(2) An opportunity to receive a within-level or within-range increase that results in (or would have resulted in) forward movement in the applicable range of rates of basic pay, where ''forward movement in the applicable range'' means any kind of increase in the employee's rate of basic pay other than an increase that is directly and exclusively linked to—

* * * * *

### Subpart F—Locality-Based Comparability Payments

■ 7. In § 531.602, revise the definition of *GS rate* to read as follows:

**§ 531.602 Definitions.**

* * * * *

*GS rate* means a rate of basic pay within the General Schedule, excluding any LEO special base rate and additional pay of any kind such as locality payments or special rate

supplements. A rate payable to a GM employee is considered a GS rate.

* * * * *

■ 8. In § 531.610, revise paragraph (k) to read as follows:

**§ 531.610 Treatment of locality rate as basic pay.**

* * * * *

(k) Lump-sum payments under 5 CFR part 550, subpart L, for accumulated and accrued annual leave;

* * * * *

## PART 575—RECRUITMENT, RELOCATION, AND RETENTION INCENTIVES; SUPERVISORY DIFFERENTIALS; AND EXTENDED ASSIGNMENT INCENTIVES

■ 9. The authority citation for part 575 continues to read as follows:

**Authority:** 5 U.S.C. 1104(a)(2) and 5307; subparts A, B, and C also issued under sec. 101, Pub. L. 108–411, 118 Stat. 2305 (5 U.S.C. 5753 and 5754); subpart D also issued under 5 U.S.C. 5755; subpart E also issued under sec. 207, Pub. L. 107–273, 116 Stat. 1779 (5 U.S.C. 5757).

### Subpart B—Relocation Incentives

**§ 575.206 [Amended]**

■ 10. In § 575.206(a)(4), remove the word ''recruitment'' and add in its place the word ''relocation.''

### Subpart C—Retention Incentives

**§ 575.310 [Amended]**

■ 11. In § 575.310(a), remove ''(g)'' and add in its place ''(f).''

Office of Personnel Management.

**Linda M. Springer,**

*Director.*

[FR Doc. 05–24214 Filed 12–16–05; 8:45 am]

**BILLING CODE 6325–39–M**

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## OFFICE OF PERSONNEL MANAGEMENT

## 5 CFR Part 531

**RIN 3206–AK78**

## General Schedule Locality Pay Areas

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** On behalf of the President's Pay Agent, the Office of Personnel Management is issuing final regulations on locality pay areas for General Schedule employees. The final regulations merge the Kansas City, St. Louis, and Orlando locality pay areas with the Rest of U.S. locality pay area; create new locality pay areas for Buffalo, NY; Phoenix, AZ; and Raleigh, NC; add the Federal Correctional Complex Butner, NC, to the Raleigh locality pay area under revised criteria for evaluating Federal facilities that cross locality pay area boundaries; add Fannin County, TX, to the Dallas-Fort Worth locality pay area; and make minor changes in the official description of the Los Angeles-Long Beach-Riverside and Washington-Baltimore-Northern Virginia locality pay areas. The new locality pay area definitions will become effective in January 2006.

**DATES:** The regulations are effective January 1, 2006. The regulations are applicable on the first day of the first pay period beginning on or after January 1, 2006.

**FOR FURTHER INFORMATION CONTACT:** Allan Hearne, (202) 606–2838; FAX: (202) 606–4264; e-mail: *pay-performance-policy@opm.gov.*

**SUPPLEMENTARY INFORMATION:** Section 5304 of title 5, United States Code, authorizes locality pay for General Schedule (GS) employees with duty stations in the contiguous United States and the District of Columbia. By law, locality pay is set by comparing GS pay rates with non-Federal pay rates for the same levels of work in each locality pay area. Non-Federal pay levels are estimated by means of salary surveys conducted by the Bureau of Labor Statistics (BLS). In 2005, there are 32 locality pay areas: 31 separate metropolitan locality pay areas and a Rest of U.S. (RUS) locality pay area that consists of all locations in the contiguous United States that are not part of one of the 31 separate metropolitan locality pay areas.

Section 5304(f) of title 5, United States Code, authorizes the President's Pay Agent (the Secretary of Labor, the Director of the Office of Management and Budget (OMB), and the Director of the Office of Personnel Management (OPM)) to determine locality pay areas. The boundaries of locality pay areas must be based on appropriate factors, which may include local labor market patterns, commuting patterns, and the practices of other employers. The Pay Agent must give thorough consideration to the views and recommendations of the Federal Salary Council, a body composed of experts in the fields of labor relations and pay policy and representatives of Federal employee organizations. The President appoints the members of the Federal Salary Council, which submits annual recommendations to the President's Pay Agent about the locality pay program. Based on recommendations of the Federal Salary Council, we use Metropolitan Statistical Area (MSA) and Combined Statistical Area (CSA) definitions established by OMB as the basis for locality pay area definitions.

On June 20, 2005, OPM issued a proposed rule on behalf of the Pay Agent to—

- Create new locality pay areas for Buffalo, Phoenix, and Raleigh;
- Merge the Kansas City, St. Louis, and Orlando locality pay areas with the Rest of U.S. locality pay area;
- Include several new areas of application in the new Raleigh locality pay area; and
- Add Fannin County, TX, to the Dallas locality pay area, Culpepper County, VA, to the Washington, DC, locality pay area, and change the name of the Santa Barbara-Santa Maria-Goleta, CA, Metropolitan Statistical Area within the Los Angeles locality pay area.

### Comments Received

We received 31 comments on the proposed regulations. Several of the commenters requested that separate locality pay areas be established in additional locations due to high living costs. The suggested areas included Eureka, CA; Fresno, CA; Las Vegas, NV; Norfolk, VA; Preston County, WV; Salt Lake City, UT; Tampa, FL; and Toledo, OH. Norfolk, Salt Lake City, and Tampa have been surveyed for the locality pay program in the past, but the surveys indicated that pay levels in each location were below pay levels in the RUS locality pay area.

Living costs are not directly considered in setting locality pay or defining locality pay areas. Locality pay is set by comparing GS and non-Federal pay for the same levels of work to allow the Government to recruit and retain an adequate workforce. Locality pay is not designed to equalize living standards for GS employees across the country. Since living costs are just one of many factors that affect the supply and demand for labor, they are not considered separately.

Several commenters were opposed to merging the Kansas City, St. Louis, and Orlando locality pay areas with the RUS area and expressed concerns about the impact on pay for employees in those areas. Salary survey results consistently show that the pay disparity in these three areas is below that in the RUS locality pay area. Since the purpose of locality pay is to enable the Government to offer higher pay in high-pay areas, there is no policy-based justification for continuing these three cities as separate locality pay areas.

Commenters expressed several other concerns about Kansas City, St. Louis,

and Orlando. These included that pay levels are higher in the core city than the broader locality pay area, that including outlying areas reduces pay levels, that living costs are higher in the suburbs than in the inner cities, that reductions in locality rates will cause staffing problems, and that recent increases in oil prices have affected employees in these three areas. Some or all of these same factors may also apply in any of the other locality pay areas, but they do not justify treating Kansas City, St. Louis, and Orlando differently than the other areas. The Pay Agent does not anticipate any significant staffing difficulties in Kansas City, St. Louis, or Orlando due to this action because the differences between the RUS rate and the current locality rates in these areas are small and the regulations are expected to become effective at the same time as an across-the-board GS pay increase.

A number of commenters focused on the geographic coverage of existing locality pay areas. Some commenters recommended adding Colorado Springs to the Denver locality pay area, adding Toledo to the Detroit locality pay area, adding Fort Dix to the New York locality pay area, including San Diego in the Los Angeles locality pay area, including more locations in Pennsylvania near York County in the Washington-Baltimore locality pay area, extending locality pay to employees in foreign areas or in Alaska and Hawaii, and including nurses and other medical personnel in Fannin County, TX, who are paid under title 38, United States Code, in the Dallas locality pay area.

Colorado Springs, Toledo, Fort Dix, and the additional areas in Pennsylvania do not pass the criteria recommended by the Federal Salary Council for including a location in an existing locality pay area. San Diego is already surveyed separately, and recent survey results indicate that pay levels in San Diego are similar to those in the Los Angeles locality pay area. While the Federal Salary Council considered combining several existing locality pay areas in 2003 in order to free up survey resources (including merging the Los Angeles and San Diego locality pay areas), they took no action on the proposal because BLS indicated there would not be any significant reduction in survey work. Because the areas under consideration were all large areas, they would still have to be surveyed separately for BLS' nationwide products, including the Employment Cost Index.

Section 5304 of title 5, United States Code, does not provide for locality payments in foreign areas or in Alaska or Hawaii, so the Pay Agent cannot extend locality payments to employees in those areas.

The Department of Veterans Affairs is responsible for setting pay for employees covered by title 38, United States Code, and is not required to use the locality pay area boundaries established by the President's Pay Agent under the GS locality pay program for those employees.

Finally, both the American Federation of Government Employees and the prison wardens at the Federal Correctional Facility, Butner, NC, expressed support for adding the entire facility to the new Raleigh locality pay area.

**The Federal Correctional Complex, Butner, NC**

The final regulations include the Federal Correctional Complex, Butner, NC, in the new Raleigh locality pay area. Based on information provided by the wardens of the prison complex, about 1,050 General Schedule employees are stationed at the prison, with an additional 375 to be added in the spring of 2006. The Durham/Granville County line runs through the prison complex. In fact, the county line runs through several of the buildings at the facility, and many employees work in more than one building on a daily basis. Most of the prison land area and buildings are located in Durham County, inside the Raleigh CSA, but the Low Security Institute, with approximately 124 permanently assigned GS employees, is in Granville County, outside the Raleigh CSA but less than a mile from the county line. Granville County, with a total of about 134 GS employees, does not pass the GS employment criterion previously recommended by the Federal Salary Council for including an adjacent county in a higher-paying locality pay area. Likewise, the portion of the prison in Granville County, with 124 GS employees, does not pass the 750 GS employment criterion for including all of a Federal facility in a locality pay area. However, the Pay Agent concluded that it would not be administratively feasible or desirable to include only part of the prison facility in the new Raleigh locality pay area and proposed to include the entire correctional facility in that area.

The Pay Agent requested that the Federal Salary Council consider this matter when it met in 2005. At its meeting on October 3, 2005, the Council voted to amend its recommended criteria for evaluating Federal facilities that cross locality pay area boundaries. The Pay Agent concurs with the Council's recommended revision, as set forth here:

*For Federal facilities that cross locality pay area boundaries:* To be included in an adjacent locality pay area, the whole facility must have at least 500 GS employees, with the majority of those employees in the higher-paying locality pay area, or that portion of a Federal facility outside of a higher-paying locality pay area must have at least 750 GS employees, the duty stations of the majority of those employees must be within 10 miles of the separate locality pay area, and a significant number of those employees must commute to work from the higher-paying locality pay area.

**Impact of Changes**

The changes in locality pay area boundaries move about 34,000 GS employees to the RUS locality pay area and move about 25,000 GS employees from the RUS locality pay area to a separate metropolitan locality pay area.

**Waiver of Delay in Effective Date**

In order to give practical effect to these regulations at the earliest possible moment, I find that good cause exists for making this rule effective in less than 30 days. The delay in effective date is waived so that affected agencies and employees may benefit from the new locality pay area definitions on the effective date of the January 2006 GS pay adjustment.

**E.O. 12866, Regulatory Review**

The Office of Management and Budget has reviewed this rule in accordance with E.O. 12866.

**Regulatory Flexibility Act**

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will apply only to Federal agencies and employees.

**List of Subjects in 5 CFR Part 531**

Government employees, Law enforcement officers, Wages.

Office of Personnel Management.

**Linda M. Springer,**

*Director.*

■ Accordingly, OPM is amending 5 CFR part 531 as follows:

## PART 531—PAY UNDER THE GENERAL SCHEDULE

■ 1. The authority citation for part 531 continues to read as follows:

**Authority:** 5 U.S.C. 5115, 5307, and 5338; sec. 4 of Pub. L. 103–89, 107 Stat. 981; and E.O. 12748, 56 FR 4521, 3 CFR, 1991 Comp., p. 316; Subpart B also issued under 5 U.S.C.

5303(g), 5333, 5334(a), and 7701(b)(2); Subpart C also issued under 5 U.S.C. 5304, 5305, and 5553; sections 302 and 404 of Federal Employees Pay Comparability Act of 1990 (FEPCA), Pub. L. 101–509, 104 Stat. 1462 and 1466; and section 3(7) of Pub. L. 102–378, 106 Stat. 1356; Subpart D also issued under 5 U.S.C. 5335(g) and 7701(b)(2); Subpart E also issued under 5 U.S.C. 5336; Subpart F also issued under 5 U.S.C. 5304, 5305(g)(1), and 5553; and E.O. 12883, 58 FR 63281, 3 CFR, 1993 Comp., p. 682 and E.O. 13106, 63 FR 68151, 3 CFR, 1998 Comp., p. 224; Subpart G also issued under 5 U.S.C. 5304, 5305, and 5553; section 302 of the FEPCA, Pub. L. 101–509, 104 Stat. 1462; and E.O. 12786, 56 FR 67453, 3 CFR, 1991 Comp., p. 376.

## Subpart F—Locality-Based Comparability Payments

■ 2. In § 531.603, paragraph (b) is revised to read as follows:

### § 531.603 Locality pay areas.

* * * * *

(b) The following are locality pay areas for purposes of this subpart:

(1) Atlanta-Sandy Springs-Gainesville, GA-AL—consisting of the Atlanta-Sandy Springs-Gainesville, GA-AL CSA;

(2) Boston-Worcester-Manchester, MA-NH-ME-RI—consisting of the Boston-Worcester-Manchester, MA–NH CSA, plus the Providence-New Bedford-Fall River, RI-MA MSA, Barnstable County, MA, and Berwick, Eliot, Kittery, South Berwick, and York towns in York County, ME;

(3) Buffalo-Niagara-Cattaraugus, NY—consisting of the Buffalo-Niagara-Cattaraugus, NY CSA;

(4) Chicago-Naperville-Michigan City, IL-IN-WI—consisting of the Chicago-Naperville-Michigan City, IL-IN-WI CSA;

(5) Cincinnati-Middletown-Wilmington, OH-KY-IN—consisting of the Cincinnati-Middletown-Wilmington, OH-KY-IN CSA;

(6) Cleveland-Akron-Elyria, OH—consisting of the Cleveland-Akron-Elyria, OH CSA;

(7) Columbus-Marion-Chillicothe, OH—consisting of the Columbus-Marion-Chillicothe, OH CSA;

(8) Dallas-Fort Worth, TX—consisting of the Dallas-Fort Worth, TX CSA;

(9) Dayton-Springfield-Greenville, OH—consisting of the Dayton-Springfield-Greenville, OH CSA;

(10) Denver-Aurora-Boulder, CO—consisting of the Denver-Aurora-Boulder, CO CSA, plus the Ft. Collins-Loveland, CO MSA and Weld County, CO;

(11) Detroit-Warren-Flint, MI—consisting of the Detroit-Warren-Flint, MI CSA, plus Lenawee County, MI;

(12) Hartford-West Hartford-Willimantic, CT-MA—consisting of the Hartford-West Hartford-Willimantic, CT CSA, plus the Springfield, MA MSA and New London County, CT;

(13) Houston-Baytown-Huntsville, TX—consisting of the Houston-Baytown-Huntsville, TX CSA;

(14) Huntsville-Decatur, AL—consisting of the Huntsville-Decatur, AL CSA;

(15) Indianapolis-Anderson-Columbus, IN—consisting of the Indianapolis-Anderson-Columbus, IN CSA, plus Grant County, IN;

(16) Los Angeles-Long Beach-Riverside, CA—consisting of the Los Angeles-Long Beach-Riverside, CA CSA, plus the Santa Barbara-Santa Maria, CA MSA and Edwards Air Force Base, CA;

(17) Miami-Fort Lauderdale-Miami Beach, FL—consisting of the Miami-Fort Lauderdale-Miami Beach, FL MSA, plus Monroe County, FL;

(18) Milwaukee-Racine-Waukesha, WI—consisting of the Milwaukee-Racine-Waukesha, WI CSA;

(19) Minneapolis-St. Paul-St. Cloud, MN-WI—consisting of the Minneapolis-St. Paul-St. Cloud, MN-WI CSA;

(20) New York-Newark-Bridgeport, NY-NJ-CT-PA—consisting of the New York-Newark-Bridgeport, NY-NJ-CT-PA CSA, plus Monroe County, PA, and Warren County, NJ;

(21) Philadelphia-Camden-Vineland, PA-NJ-DE-MD—consisting of the Philadelphia-Camden-Vineland, PA-NJ-DE-MD CSA, plus Kent County, DE, Atlantic County, NJ, and Cape May County, NJ;

(22) Phoenix-Mesa-Scottsdale, AZ—consisting of the Phoenix-Mesa-Scottsdale, AZ MSA;

(23) Pittsburgh-New Castle, PA—consisting of the Pittsburgh-New Castle, PA CSA;

(24) Portland-Vancouver-Beaverton, OR-WA—consisting of the Portland-Vancouver-Beaverton, OR-WA MSA, plus Marion County, OR, and Polk County, OR;

(25) Raleigh-Durham-Cary, NC—consisting of the Raleigh-Durham-Cary, NC CSA, plus the Fayetteville, NC MSA, the Goldsboro, NC MSA, and the Federal Correctional Complex Butner, NC;

(26) Richmond, VA—consisting of the Richmond, VA MSA;

(27) Sacramento—Arden-Arcade—Truckee, CA-NV—consisting of the Sacramento—Arden-Arcade—Truckee, CA-NV CSA, plus Carson City, NV;

(28) San Diego-Carlsbad-San Marcos, CA—consisting of the San Diego-Carlsbad-San Marcos, CA MSA;

(29) San Jose-San Francisco-Oakland, CA—consisting of the San Jose-San Francisco-Oakland, CA CSA, plus the Salinas, CA MSA and San Joaquin County, CA;

(30) Seattle-Tacoma-Olympia, WA—consisting of the Seattle-Tacoma-Olympia, WA CSA;

(31) Washington-Baltimore-Northern Virginia, DC-MD-PA-VA-WV—consisting of the Washington-Baltimore-Northern Virginia, DC-MD-VA-WV CSA, plus the Hagerstown-Martinsburg, MD-WV MSA, the York-Hanover-Gettysburg, PA CSA, and King George County, VA; and

(32) Rest of U.S.—consisting of those portions of the continental United States not located within another locality pay area.

* * * * *

[FR Doc. 05–24212 Filed 12–16–05; 8:45 am]

BILLING CODE 6325–39–P

## FEDERAL RESERVE SYSTEM

## 12 CFR Part 229

**[Regulation CC; Docket No. R–1244]**

## Availability of Funds and Collection of Checks

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Final rule; technical amendment.

**SUMMARY:** The Board of Governors is amending appendix A of Regulation CC to delete the reference to the New Orleans branch office of the Federal Reserve Bank of Atlanta and reassign the Federal Reserve routing symbols currently listed under that office to the head office of the Federal Reserve Bank of Atlanta, and to correct typographical errors in the routing symbols listed under the Helena branch office of the Federal Reserve Bank of Minneapolis. The Board also is providing notice that the previously announced transfer of the Nashville branch office's check-processing operations to the Atlanta head office will be delayed until 2007. Finally, the Board is providing advance notice concerning future appendix A changes affecting the Federal Reserve Bank of New York and the Federal Reserve Bank of Philadelphia.

**DATES:** The amendment to appendix A under the Ninth Federal Reserve District (Federal Reserve Bank of Minneapolis) is effective December 19, 2005. The amendment to appendix A under the Sixth Federal Reserve District (Federal Reserve Bank of Atlanta) is effective on March 31, 2006.

**FOR FURTHER INFORMATION CONTACT:** Jack K. Walton II, Associate Director (202/452–2660), or Joseph P. Baressi, Senior Financial Services Analyst (202/452–3959), Division of Reserve Bank

Operations and Payment Systems; or Adrianne G. Threatt, Counsel (202/452–3554), Legal Division. For users of Telecommunications Devices for the Deaf (TDD) only, contact 202/263–4869.

**SUPPLEMENTARY INFORMATION:**

## Background

Regulation CC establishes the maximum period a depositary bank may wait between receiving a deposit and making the deposited funds available for withdrawal.[1] A depositary bank generally must provide faster availability for funds deposited by a ''local check'' than by a ''nonlocal check.'' A check drawn on a bank is considered local if it is payable by or at a bank located in the same Federal Reserve check processing region as the depositary bank. A check drawn on a nonbank is considered local if it is payable through a bank located in the same Federal Reserve check processing region as the depositary bank. Checks that do not meet the requirements for ''local'' checks are considered ''nonlocal.''

Appendix A to Regulation CC contains a routing number guide that assists banks in identifying local and nonlocal banks and thereby determining the maximum permissible hold periods for most deposited checks. The appendix includes a list of each Federal Reserve check processing office and the first four digits of the routing number, known as the Federal Reserve routing symbol, of each bank that is served by that office for check processing purposes. Banks whose Federal Reserve routing symbols are grouped under the same office are in the same check processing region and thus are local to one another.

## Final Amendments to Appendix A

In the aftermath of Hurricane Katrina, the Federal Reserve Bank of Atlanta implemented its contingency operations plan, which included sending checks that normally would be processed by the New Orleans branch office instead to the Atlanta head office on a temporary basis. On December 5, 2005, the Federal Reserve Banks announced that banks with routing symbols currently assigned to the New Orleans branch office for check processing purposes would be reassigned to the Atlanta head office and that the New Orleans branch permanently would cease its check processing operations, effective March 31, 2006.[2] As a result, some checks that are drawn on and deposited at banks located in the affected check processing regions and that currently are nonlocal checks will become local checks subject to faster availability schedules. To assist banks in identifying local and nonlocal checks and making funds availability decisions, the Board is amending the lists of routing symbols associated with the Federal Reserve Bank of Atlanta to reflect the transfer of check-processing operations from the Reserve Bank's New Orleans branch office to its head office in Atlanta. To coincide with the effective date of the underlying check processing changes, these amendments are effective March 31, 2006. The Board is providing advance notice of these amendments to give affected banks ample time to make any needed processing changes. The advance notice also will enable affected banks to amend their availability schedules and related disclosures if necessary and provide their customers with notice of these changes.[3]

The Reserve Banks had previously announced on August 2, 2004, that the check-processing operations of the Atlanta Reserve Bank's Nashville branch office would be transferred to the Atlanta Reserve Bank's head office by early 2006.[4] However, because of the permanent transfer of the New Orleans branch office's check-processing operations to the Atlanta head office, the transfer of the Nashville branch office's check-processing operations to the Atlanta head office will be delayed until 2007.

The Board also is making technical amendments to the list of routing symbols associated with the Helena branch office of the Federal Reserve Bank of Minnesota to correct typographical errors in the list. The lists of Federal Reserve routing symbols assigned to all other Federal Reserve branches and offices will remain the same at this time.

## Information About Future Changes to Appendix A

As the Federal Reserve Banks announced on May 25, 2005,[5] in response to the continued nationwide decline in check usage and to position themselves more effectively to meet the cost recovery requirements of the Monetary Control Act of 1980, the Reserve Banks have decided to stop processing checks at the East Rutherford office of the Federal Reserve Bank of New York. Checks currently processed by that office instead will be processed at the head office of the Federal Reserve Bank of Philadelphia. Although an exact date for this restructuring has not been determined, it is expected to take place in the latter half of 2006.

The Board intends to publish amendments to appendix A in connection with this restructuring to delete the reference to the East Rutherford office of the Federal Reserve Bank of New York and transfer the affected Federal Reserve routing symbols to the head office of the Federal Reserve Bank of Philadelphia at least 60 days prior to the effective date of the restructuring. This should give affected banks ample time to make appropriate programming changes and, if necessary, to amend their availability schedules and related disclosures and provide their customers with notice of any changes to their availability schedules. However, some affected banks might prefer to make or to plan for their necessary programming and availability changes prior to the effective dates of the relevant amendments. For the information and planning needs of affected banks, the Board today is providing advance notice that, as of the effective date of this restructuring, banks with the following Federal Reserve routing symbols will be local to the Philadelphia head office:

| | |
|---|---|
| 0210 | 2210 |
| 0212 | 2212 |
| 0214 | 2214 |
| 0215 | 2215 |
| 0216 | 2216 |
| 0219 | 2219 |
| 0260 | 2260 |
| 0280 | 2280 |
| 0310 | 2310 |
| 0311 | 2311 |
| 0312 | 2312 |
| 0313 | 2313 |
| 0319 | 2319 |
| 0360 | 2360 |

The Federal Reserve routing symbols assigned to all other Federal Reserve branches and offices will be unaffected by this restructuring.

## Administrative Procedure Act

The Board has not followed the provisions of 5 U.S.C. 553(b) relating to notice and public participation in connection with the adoption of the final rule. All the revisions to the appendix are technical in nature, and the routing symbol revisions for the

[1] For purposes of Regulation CC, the term ''bank'' refers to any depository institution, including commercial banks, savings institutions, and credit unions.

[2] The Reserve Banks' press release is available at *http://www.frbservices.org/Retail/pdf/PRNewOrleansPressRelease120505.pdf.*

[3] Section 229.18(e) of Regulation CC requires that banks notify account holders who are consumers within 30 days after implementing a change that improves the availability of funds.

[4] *See* 69 FR 57837, September 28, 2004.

[5] The Reserve Banks' press release is available at *http://www.frbservices.org/Retail/pdf/May2005FRBanksAnnounceChangesIncreaseEfficiency.pdf.*

Sixth District are required by the statutory and regulatory definitions of ''check-processing region.'' Because there is no substantive change on which to seek public input and because delaying the amendments may impede affected banks' ability to comply with Regulation CC, the Board has determined that the § 553(b) notice and comment procedures are unnecessary.

**Regulatory Flexibility Act Certification**

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Board certifies that the final rule will not have a significantly adverse economic impact on a substantial number of small entities. These amendments are technical, and the routing number changes are required by law. Moreover, these amendments apply to all banks regardless of their size. Many small banks generally provide next-day availability for all checks and will not be affected by this amendment. For the subset of small banks that does distinguish between checks subject to next-day availability and those subject to longer holds, the final rule should necessitate only minimal programming changes. Some of these affected banks might also have to modify their funds availability disclosures and notify both new and existing customers of the modified funds availability schedules.

**Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR part 1320 Appendix A.1), the Board has reviewed the final rule under authority delegated to the Board by the Office of Management and Budget. This technical amendment to appendix A of Regulation CC will delete the reference to the New Orleans branch office of the Federal Reserve Bank of Atlanta and reassign the routing symbols listed under that office to the head office of the Federal Reserve Bank of Atlanta. The depository institutions that are located in the affected check processing regions and that include the routing numbers in their disclosure statements would be required to notify customers of the resulting change in availability under § 229.18(e). However, all paperwork collection procedures associated with Regulation CC already are in place, and the Board accordingly anticipates that no additional burden will be imposed as a result of this rulemaking. The Board is also correcting typographical errors in the routing symbol list under the Helena branch office of the Federal Reserve Bank of Minnesota. The Board anticipates that these corrections will not impose any burden.

**List of Subjects in 12 CFR Part 229**

Banks, Banking, Reporting and recordkeeping requirements.

**Authority and Issuance**

■ For the reasons set forth in the preamble, the Board is amending 12 CFR part 229 to read as follows:

## PART 229—AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS (REGULATION CC)

■ 1. The authority citation for part 229 continues to read as follows:

**Authority:** 12 U.S.C. 4001–4010, 12 U.S.C. 5001–5018.

■ 2. The Sixth and Ninth Federal Reserve District routing symbol lists in appendix A are revised to read as follows:

**Appendix A to Part 229—Routing Number Guide to Next-Day Availability Checks and Local Checks**

* * * * *

**Sixth Federal Reserve District**

[Federal Reserve Bank of Atlanta]

*Head Office*

| | |
|---|---|
| 0610 | 2610 |
| 0611 | 2611 |
| 0612 | 2612 |
| 0613 | 2613 |
| 0620 | 2620 |
| 0621 | 2621 |
| 0622 | 2622 |
| 0650 | 2650 |
| 0651 | 2651 |
| 0652 | 2652 |
| 0653 | 2653 |
| 0654 | 2654 |
| 0655 | 2655 |

*Jacksonville Branch*

| | |
|---|---|
| 0630 | 2630 |
| 0631 | 2631 |
| 0632 | 2632 |
| 0660 | 2660 |
| 0670 | 2670 |

*Nashville Branch*

| | |
|---|---|
| 0640 | 2640 |
| 0641 | 2641 |
| 0642 | 2642 |

* * * * *

**Ninth Federal Reserve District**

[Federal Reserve Bank of Minneapolis]

*Head Office*

| | |
|---|---|
| 0910 | 2910 |
| 0911 | 2911 |
| 0912 | 2912 |
| 0913 | 2913 |
| 0914 | 2914 |
| 0915 | 2915 |
| 0918 | 2918 |
| 0919 | 2919 |
| 0960 | 2960 |

*Helena Branch*

| | |
|---|---|
| 0920 | 2920 |
| 0921 | 2921 |
| 0929 | 2929 |

* * * * *

By order of the Board of Governors of the Federal Reserve System, acting through the Secretary of the Board under delegated authority, December 13, 2005.

**Jennifer J. Johnson,**

*Secretary of the Board.*

[FR Doc. E5–7462 Filed 12–16–05; 8:45 am]

**BILLING CODE 6210–01–P**

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 23

**[Docket No. CE236, Special Condition 23–176–SC]**

## Special Conditions; Envoy Aerospace; EFIS on the Raytheon Model B200, B200C, 300, B300, and B300C; Protection of Systems for High Intensity Radiated Fields (HIRF)

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

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

**SUMMARY:** These special conditions are issued to Envoy Aerospace, 5027 Switch Grass Lane, Naperville, Illinois 60564–5368, for a Supplemental Type Certificate for the Raytheon B200, B200C, 300, B300, and B300C models. These models will have novel and unusual design features when compared to the state of technology envisaged in the applicable airworthiness standards. These novel and unusual design features include the installation of an electronic flight instrument system (EFIS) and a navigation display. The EFIS consists of the Universal Avionics, Inc. EFI–890R system for which the applicable regulations do not contain adequate or appropriate airworthiness standards for the protection of these systems from the effects of high intensity radiated fields (HIRF). The installation includes three EFI–890R Flat Panel Displays (two Primary Flight Displays Pilot/Copilot and one Navigational Display), and supporting equipment. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to the airworthiness standards applicable to these airplanes.

**DATES:** The effective date of these special conditions is December 5, 2005. Comments must be received on or before January 18, 2006.

**ADDRESSES:** Comments may be mailed in duplicate to: Federal Aviation Administration, Regional Counsel, ACE–7, Attention: Rules Docket Clerk, Docket No. CE236, Room 506, 901 Locust, Kansas City, Missouri 64106. All comments must be marked: Docket No. CE236. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

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

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

## Comments Invited

Interested persons are invited to submit such written data, views, or arguments, as they may desire. Communications should identify the regulatory docket or notice number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the Administrator. The special conditions may be changed in light of the comments received. All comments received will be available in the Rules Docket for examination by interested persons, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket. Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must include a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. CE236.'' The postcard will be date stamped and returned to the commenter.

## Background

Envoy Aerospace made application to the FAA for a new Supplemental Type Certificate for several Raytheon King Air Models. The Raytheon Model B200, B200C, 300, B300, and B300C are currently approved under TC No. A24CE. The proposed modification incorporates a novel or unusual design features, such as a digital Primary Flight Display, that may be vulnerable to HIRF external to the airplane.

## Type Certification Basis

Under the provisions of 14 CFR part 21, § 21.101, Envoy Aerospace must show that the modified aircraft meet the original certification basis for the airplane, as listed on Type Data Sheet A24CE, additional certification requirements added for the Universal Avionics EFI–890R system, exemptions, if any; and the special conditions adopted by this rulemaking action. The rules that were applied at Part 23 Amendment 54 for the EFI–890R installation include §§ 23.1301, 23.1311, 23.1309, 23.1321, 23.1322, 23.1325, and 23.1543.

## Discussion

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

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

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

## Novel or Unusual Design Features

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

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

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

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

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

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

(1) The applicant may demonstrate that the operation and operational capability of the installed electrical and electronic systems that perform critical

functions are not adversely affected when the aircraft is exposed to the HIRF environment defined below:

| Frequency | Field strength (volts per meter) | |
|---|---|---|
| | Peak | Average |
| 10 kHz–100 kHz | 50 | 50 |
| 100 kHz–500 kHz | 50 | 50 |
| 500 kHz–2 MHz | 50 | 50 |
| 2 MHz–30 MHz | 100 | 100 |
| 30 MHz–70 MHz | 50 | 50 |
| 70 MHz–100 MHz | 50 | 50 |
| 100 MHz–200 MHz | 100 | 100 |
| 200 MHz–400 MHz | 100 | 100 |
| 400 MHz–700 MHz | 700 | 50 |
| 700 MHz–1 GHz | 700 | 100 |
| 1 GHz–2 GHz | 2000 | 200 |
| 2 GHz–4 GHz | 3000 | 200 |
| 4 GHz–6 GHz | 3000 | 200 |
| 6 GHz–8 GHz | 1000 | 200 |
| 8 GHz–12 GHz | 3000 | 300 |
| 12 GHz–18 GHz | 2000 | 200 |
| 18 GHz–40 GHz | 600 | 200 |

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

or,

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

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

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

## Applicability

As discussed above, these special conditions are applicable to the Raytheon Model B200, B200C, 300, B300, and B300C. Should Envoy Aerospace apply at a later date for a supplemental type certificate to modify any other model on the same type certificate to incorporate the same novel or unusual design feature, the special conditions would apply to that model as well under the provisions of § 21.101.

## Conclusion

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

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

## List of Subjects in 14 CFR Part 23

Aircraft, Aviation safety, Signs and symbols.

## Citation

The authority citation for these special conditions is as follows:

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

## The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the Raytheon Model B200, B200C, 300, B300, and B300C airplanes modified by Envoy Aerospace to add the Universal Avionics EFI–890R system.

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

2. For the purpose of these special conditions, the following definition applies: *Critical Functions:* Functions whose failure would contribute to, or cause, a failure condition that would prevent the continued safe flight and landing of the airplane.

Issued in Kansas City, Missouri on December 5, 2005.

**James E. Jackson,**

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

[FR Doc. 05–24159 Filed 12–16–05; 8:45 am]

BILLING CODE 4910–13–P

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 25

**[Docket No. NM337; Special Conditions No. 25–310–SC]**

## Special Conditions: Raytheon Aircraft Company Model HS.125 Airplanes; High-Intensity Radiated Fields (HIRF)

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

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

**SUMMARY:** These special conditions are issued for a Raytheon Aircraft Company Model HS.125 airplane modified by AeroMech Incorporated. This modified airplane will have a novel or unusual design feature when compared to the state of technology envisioned in the airworthiness standards for transport category airplanes. The modification incorporates the installation of Innovative Solutions and Support air data display units (ADDU). These systems perform critical functions. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for the protection of these systems from the effects of high-intensity radiated fields (HIRF). These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to

that established by the existing airworthiness standards.

**DATES:** The effective date of these special conditions is December 9, 2005. Comments must be received on or before January 18, 2006.

**ADDRESSES:** You must mail two copies of your comments to: Federal Aviation Administration, Transport Airplane Directorate, Attention: Rules Docket (ANM–113), Docket No. NM337, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. You may deliver two copies to the Transport Airplane Directorate at the above address. You must mark your comments: Docket No. NM337. You can inspect comments in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

**FOR FURTHER INFORMATION CONTACT:** Greg Dunn, FAA, Airplane and Flight Crew Interface Branch, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2799; facsimile (425) 227–1320.

**SUPPLEMENTARY INFORMATION:**

## Comments Invited

The FAA has determined that notice and opportunity for prior public comment is impracticable because these procedures would significantly delay certification of the airplane and thus delivery of the affected aircraft. In addition, the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA therefore finds that good cause exists for making these special conditions effective upon issuance; however, we invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning these special conditions. You may inspect the docket before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

We will consider all comments we receive on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these special conditions based on the comments we receive.

If you want the FAA to acknowledge receipt of your comments on these special conditions, include with your comments a pre-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it back to you.

## Background

On June 6, 2005, AeroMech Incorporated, 1616 Hewitt Avenue, Suite 312, Everett, Washington 98201, applied for a supplemental type certificate (STC) to modify a Raytheon Aircraft Company Model HS.125 Series 400A airplane. This model is currently approved under Type Certificate No. A3EU. The Raytheon Model HS.125 airplane is a small transport category airplane powered by two turbine engines. It operates with a 2-pilot crew and can seat up to 15 passengers. The modification incorporates the installation of Innovative Solutions and Support air data display units. The avionics/electronics and electrical systems installed in this airplane have the potential to be vulnerable to high-intensity radiated fields (HIRF) external to the airplane.

## Type Certification Basis

Under the provisions of 14 CFR 21.101, AeroMech Incorporated must show that Raytheon Aircraft Company Model HS.125 Series 400A airplane, as changed, continues to meet the applicable provisions of the regulations incorporated by reference in Type Certificate No. A3EU, or the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the ''original type certification basis.'' The certification basis for the Raytheon Aircraft Company Model HS.125 Series 400A airplane includes Civil Air Regulations (CAR) 10, British Civil Airworthiness Requirements, and Special Conditions. This certification is equivalent to CAR 4b dated December 1953, Amendment 4b–1 through Amendment 4b–11, exclusive of CAR 4b.350(e), and includes Special Regulations SR.422B. Type Certificate No. A3EU was amended to include HS.125 Series 400A on November 15, 1968. Compliance over and above certification basis requirements has been met with CAR Amendment 4B–12 and Amendment 4B–14. Compliance has been established with the special retroactive requirements of 14 CFR 25.2 as amended by Amendment 25–1 through Amendment 25–20, 14 CFR 21 at Amendment 21–27, and 14 CFR 36(1)(c)(2).

If the Administrator finds that the applicable airworthiness regulations (i.e., part 25, as amended) do not contain adequate or appropriate safety standards for the Raytheon Model HS.125 Series 400A airplane because of a novel or unusual design feature, special conditions are prescribed under § 21.16.

In addition to the applicable airworthiness regulations and special conditions, Raytheon Aircraft Company Model HS.125 Series 400A airplane must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

Special conditions, as defined in 14 CFR 11.19, are issued under § 11.38 and become part of the type certification basis under § 21.101.

Special conditions are initially applicable to the model for which they are issued. Should AeroMech Incorporated apply at a later date for a supplemental type certificate to modify any other model included on Type Certificate No. A3EU to incorporate the same or similar novel or unusual design feature, these special conditions would also apply to the other model under § 21.101.

## Novel or Unusual Design Features

As noted earlier, Raytheon Model HS.125 airplane modified by AeroMech Incorporated will incorporate Innovative Solutions and Support air data display units that will perform critical functions. These systems may be vulnerable to high-intensity radiated fields external to the airplane. The current airworthiness standards of part 25 do not contain adequate or appropriate safety standards for the protection of this equipment from the adverse effects of HIRF. Accordingly, this system is considered to be a novel or unusual design feature.

## Discussion

There is no specific regulation that addresses protection requirements for electrical and electronic systems from HIRF. Increased power levels from ground-based radio transmitters and the growing use of sensitive avionics/electronics and electrical systems to command and control airplanes have made it necessary to provide adequate protection.

To ensure that a level of safety is achieved equivalent to that intended by the regulations incorporated by

reference, special conditions are needed for Raytheon Aircraft Company Model HS.125 Series 400A airplane modified by AeroMech Incorporated. These special conditions require that new avionics/electronics and electrical systems that perform critical functions be designed and installed to preclude component damage and interruption of function due to both the direct and indirect effects of HIRF.

**High-Intensity Radiated Fields (HIRF)**

With the trend toward increased power levels from ground-based transmitters, and the advent of space and satellite communications coupled with electronic command and control of the airplane, the immunity of critical avionics/electronics and electrical systems to HIRF must be established.

It is not possible to precisely define the HIRF to which the airplane will be exposed in service. There is also uncertainty concerning the effectiveness of airframe shielding for HIRF. Furthermore, coupling of electromagnetic energy to cockpit-installed equipment through the cockpit window apertures is undefined. Based on surveys and analysis of existing HIRF emitters, an adequate level of protection exists when compliance with the HIRF protection special condition is shown with either paragraph 1 OR 2 below:

1. A minimum threat of 100 volts rms (root-mean-square) per meter electric field strength from 10 KHz to 18 GHz.

a. The threat must be applied to the system elements and their associated wiring harnesses without the benefit of airframe shielding.

b. Demonstration of this level of protection is established through system tests and analysis.

2. A threat external to the airframe of the field strengths identified in the table below for the frequency ranges indicated. Both peak and average field strength components from the table are to be demonstrated.

| Frequency | Field strength (volts per meter) | |
|---|---|---|
| | Peak | Average |
| 10 kHz–100 kHz | 50 | 50 |
| 100 kHz–500 kHz | 50 | 50 |
| 500 kHz–2 MHz | 50 | 50 |
| 2 MHz–30 MHz | 100 | 100 |
| 30 MHz–70 MHz | 50 | 50 |
| 70 MHz–100 MHz | 50 | 50 |
| 100 MHz–200 MHz | 100 | 100 |
| 200 MHz–400 MHz | 100 | 100 |
| 400 MHz–700 MHz | 700 | 50 |
| 700 MHz–1 GHz | 700 | 100 |
| 1 GHz–2 GHz | 2000 | 200 |
| 2 GHz–4 GHz | 3000 | 200 |
| 4 GHz–6 GHz | 3000 | 200 |
| 6 GHz–8 GHz | 1000 | 200 |
| 8 GHz–12 GHz | 3000 | 300 |
| 12 GHz–18 GHz | 2000 | 200 |
| 18 GHz–40 GHz | 600 | 200 |

The field strengths are expressed in terms of peak root-mean-square (rms) over the complete modulation period.

The threat levels identified above are the result of an FAA review of existing studies on the subject of HIRF, in light of the ongoing work of the Electromagnetic Effects Harmonization Working Group of the Aviation Rulemaking Advisory Committee.

**Applicability**

As discussed above, these special conditions are applicable to a Raytheon Aircraft Company Model HS.125 Series 400A airplane modified by AeroMech Incorporated. Should AeroMech Incorporated apply at a later date for a supplemental type certificate to modify any other model included on Type Certificate No. A3EU to incorporate the same or similar novel or unusual design feature, these special conditions would apply to that model as well under § 21.101.

**Conclusion**

This action affects only certain novel or unusual design features on a Raytheon Aircraft Company Model HS.125 Series 400A airplane modified by AeroMech Incorporated. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the airplane.

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

**List of Subjects in 14 CFR Part 25**

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

**The Special Conditions**

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the supplemental type certification basis for the Raytheon Aircraft Company Model HS.125 Series 400A airplane modified by AeroMech Incorporated.

1. *Protection from Unwanted Effects of HIRF.* Each electrical and electronic system that performs critical functions must be designed and installed to ensure that the operation and operational capability of these systems to perform critical functions are not adversely affected when the airplane is exposed to high-intensity radiated fields.

2. For the purpose of these special conditions, the following definition applies: *Critical Functions:* Functions whose failure would contribute to or cause a failure condition that would prevent the continued safe flight and landing of the airplane.

Issued in Renton, Washington, on December 9, 2005.

**Ali Bahrami,**

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

[FR Doc. 05–24158 Filed 12–16–05; 8:45 am]

BILLING CODE 4910–13–P

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2005–20848; Directorate Identifier 2005–NE–02–AD; Amendment 39–14323; AD 2005–20–26]**

**RIN 2120–AA64**

## Airworthiness Directives; Aviointeriors S.p.A. (formerly ALVEN), Series 312 Box Mounted Seats; Correction

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule; correction.

**SUMMARY:** This document makes a correction to Airworthiness Directive (AD) 2005–20–26. That AD applies to Aviointeriors S.p.A. (formerly ALVEN), series 312 box mounted seats. That AD published in the **Federal Register** on October 12, 2005 (70 FR 59243). This document corrects the AD number in the Amendatory section. In all other respects, the original document remains the same.

**EFFECTIVE DATE:** Effective December 19, 2005.

**FOR FURTHER INFORMATION CONTACT:** Jeffrey Lee, Aerospace Engineer, Boston Aircraft Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone: 781–238–7161; fax: 781–238–7170.

**SUPPLEMENTARY INFORMATION:** A final rule AD, FR Doc. 05–19941, that applies to Aviointeriors S.p.A. (formerly ALVEN), series 312 box mounted seats, was published in the **Federal Register** on October 12, 2005 (70 FR 59243). The following correction is needed:

**§ 39.13 [Corrected]**

■ On page 59243, in the third column, under § 39.13 [Amended], paragraph 2., fourth line, ''2005–20–06'' is corrected to read ''2005–20–26''.

Issued in Burlington, MA, on December 13, 2005.

**Peter A. White,**

*Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.*

[FR Doc. 05–24194 Filed 12–16–05; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

## 18 CFR Part 35

**[Docket No. RM05–4–001; Order No. 661–A]**

## Interconnection for Wind Energy

Issued December 12, 2005.

**AGENCY:** Federal Energy Regulatory Commission, DOE.

**ACTION:** Order on rehearing and clarification.

**SUMMARY:** The Federal Energy Regulatory Commission is granting in part and denying in part the requests for rehearing and clarification of its Final Rule on Interconnection for Wind Energy, Order No. 661. Order No. 661 requires public utilities that own, control, or operate facilities for transmitting electric energy in interstate commerce to append to their standard large generator interconnection procedures and large generator interconnection agreements in their open access transmission tariffs standard procedures and technical requirements for the interconnection of large wind generation.

**DATES:** *Effective Date:* Changes made to Order No. 661 in this order on rehearing and clarification will become effective on January 18, 2006.

**FOR FURTHER INFORMATION CONTACT:**

Bruce A. Poole (Technical Information), Office of Markets, Tariffs and Rates, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. (202) 502–8468.

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

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

LaChelle Brooks (Technical Information), Office of Markets, Tariffs and Rates, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. (202) 502–6522.

Jeffery S. Dennis (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. (202) 502–6027.

**SUPPLEMENTARY INFORMATION:**

### Order No. 661–A; Order on Rehearing and Clarification

1. On June 2, 2005, the Commission issued Order No. 661, the Final Rule on Interconnection for Wind Energy (Final Rule).[1] Several entities have filed timely requests for rehearing and clarification of the Final Rule.[2] In this order, the Commission grants in part and denies in part the requests for rehearing and clarification.

### I. Background

2. In Order No. 2003,[3] the Commission adopted standard procedures and a standard agreement for the interconnection of large generation facilities. The Commission required public utilities that own, control, or operate facilities for transmitting electric energy in interstate commerce to file revised Open Access Transmission Tariffs (OATTs) containing these standard provisions, and use them to provide interconnection service to generating facilities having a capacity of more than 20 megawatts.

3. In Order No. 2003–A, on rehearing, the Commission noted that the standard interconnection procedures and agreement were based on the needs of traditional generation facilities and that a different approach might be more appropriate for generators relying on other technologies, such as wind plants.[4] Accordingly, the Commission granted certain clarifications, and also added a blank Appendix G to the standard Large Generation Interconnection Agreement (LGIA) for future adoption of requirements specific to other technologies.[5]

4. The Commission issued a Notice of Proposed Rulemaking (NOPR) that proposed technical standards applicable to the interconnection of large wind generating plants[6] to be included in Appendix G of the LGIA.[7] We proposed the standards in light of our findings in Order No. 2003–A noted above and in response to a petition submitted by the American Wind Energy Association (AWEA).[8] Specifically, the Commission proposed to establish uniform standards in Appendix G that would require large wind plants seeking to interconnect to the grid to: (1) Demonstrate low voltage ride-through capability; in other words, show that the plant can remain on line during voltage disturbances up to specified time periods and associated voltage levels; (2) have supervisory control and data acquisition (SCADA) capability to transmit data and receive instructions from the Transmission Provider; and (3) maintain a power factor within the range of 0.95 leading

[1] *Interconnection for Wind Energy,* Order No. 661, 70 FR 34993 (June 16, 2005), FERC Stats. & Regs. ¶ 31,186 (2005) (Final Rule); *see also* Order Granting Extension of Effective Date and Extending Compliance Date, 70 FR 47093 (Aug. 12, 2005), 112 FERC ¶ 61,173 (2005).

[2] Those entities requesting rehearing and/or clarification, and the acronyms used to refer to them in this order, are listed in Appendix A to this order.

[3] *Standardization of Generator Interconnection Agreements and Procedures,* Order No. 2003, 68 FR 49845 (Aug. 19, 2003), FERC Stats. & Regs., Regulations Preambles ¶ 31,146 (2003) (Order No. 2003), *order on reh'g,* 69 FR 15,932 (Mar. 24, 2004), FERC Stats & Regs., Regulations Preambles ¶ 31,160 (2004) (Order No. 2003–A), *order on reh'g,* 70 FR. 265 (January 4, 2005), FERC Stats & Regs., Regulations Preambles ¶ 31,171 (2004) (Order No. 2003–B), *order on reh'g,* 70 FR 37661 (June 30, 2005), FERC Stats. & Regs. ¶ 31,190 (2005) (Order No. 2003–C); *see also* Notice Clarifying Compliance Procedures, 106 FERC ¶ 61,009 (2004).

[4] Order No. 2003–A at P 407, n.85.

[5] *Id.*

[6] Large wind generating plants are those with an output rated at more than 20 MW at the point of interconnection. The interconnection requirements for small generators rated at 20 MW or less are set forth in *Standardization of Small Generator Interconnection Agreements and Procedures,* Order No. 2006, 70 FR 34190 (June 13, 2005), FERC Stats. & Regs. ¶ 31,180 (2005), reh'g pending.

[7] *See Interconnection for Wind Energy and Other Alternative Technologies,* Notice of Proposed Rulemaking, 70 FR 4791 (Jan. 31, 2005), 110 FERC ¶ 61,036 (2005) (NOPR).

[8] *See* Petition for Rulemaking or, in the Alternative, Request for Clarification of Order No. 2003–A, and Request for Technical Conference of the American Wind Energy Association (May 20, 2004), filed in Docket Nos. RM02–1–005 and PL04–15–000 (AWEA Petition).

to 0.95 lagging, measured at the high voltage side of the substation transformers. The Commission proposed to permit the Transmission Provider to waive the low voltage ride-through requirement on a comparable and not unduly discriminatory basis. We proposed to permit the Transmission Provider to waive or defer compliance with the power factor requirement where it is not necessary. The Commission did not propose to adopt a proposal by AWEA to allow a wind generator to ''enter the interconnection queue and conduct its own Feasibility Study, having obtained the information necessary to do so upon paying the initial deposit and submitting its interconnection application'' (referred to as ''self-study'' provisions).[9] The Commission did, however, ask for comments on how to balance the need of wind generators to obtain certain data from the Transmission Provider before completing their Interconnection Requests with the need to protect critical energy infrastructure information and commercially sensitive data against unwarranted disclosure.

5. In the Final Rule, the Commission adopted final standard procedures and technical requirements for the interconnection of large wind plants in Appendix G, and required all public utilities that own, control, or operate facilities for transmitting electric energy in interstate commerce to append Appendix G to the Large Generator Interconnection Procedures (LGIPs) and LGIAs in their OATTs. As described in more detail below, the Commission adopted provisions establishing standards for low voltage ride-through and power factor design criteria, and requiring that wind plants meet those standards if the Transmission Provider shows, in the System Impact Study, that they are needed to ensure the safety or reliability of the transmission system. Additionally, the Appendix G adopted by the Commission included a SCADA requirement applicable to all wind plants. Finally, as described in more detail below, the Commission adopted in Appendix G to the LGIP limited special interconnection procedures applicable to wind plants.

## II. Requests for Rehearing and Clarification and Commission Conclusions

### *A. Low Voltage Ride-Through Provisions*

6. In the Final Rule, the Commission adopted a low voltage ride-through standard, but provided that a wind plant is required to meet the standard only if the Transmission Provider shows, in the System Impact Study, that low voltage ride-through capability is needed to ensure safety or reliability. The standard (adopted in Figure 1 of Appendix G to the LGIA), if applicable, requires the wind plant to stay online for specified time periods and at associated voltage levels where there is a disturbance on the transmission system. The Final Rule requires that the required voltage levels be measured at the Point of Interconnection.

7. Several entities requested rehearing of various aspects of the low voltage ride-through requirement and standard included in the Final Rule, including: (1) Provisions that require low voltage ride-though only when the System Impact Study shows that such capability is necessary for safety or reliability; (2) the specific low voltage ride-through standard adopted in the Final Rule; (3) the point of measurement for the standard; and (4) arguments that Transmission Providers should be permitted to adopt other provisions of the German low voltage ride-through standard (which the Commission referenced in the Final Rule).

8. However, as described in more detail below, NERC and AWEA jointly requested that the Commission delay the effective date of the Final Rule to give them time to resolve concerns expressed by NERC regarding the low voltage ride-through provisions. The Commission granted this extension, and on September 19, 2005, NERC and AWEA submitted a joint report with recommended revisions.

#### 1. Case-by-Case Application/Burden of Proof for Applying the Low Voltage Ride-Through Standard

9. Prior to the NERC/AWEA joint report, several entities objected on rehearing to the Final Rule's adoption of a low voltage ride-through requirement on a case-by-case basis, placing the burden of proof on the Transmission Provider to show that low voltage ride-through capability is needed. ATC, EEI, NERC, NRECA/APPA, and SCE, among others, urged the Commission to return to the approach in the NOPR, which would have required low voltage ride-through for all wind plants unless waived by the Transmission Provider on a not unduly discriminatory basis. ATC noted that interconnection studies only consider a snapshot of the transmission system, and do not take into account changes in the future that may cause a need for low voltage ride-through capability to ensure reliability. ATC, as well as EEI and SCE, argued that under the case-by-case approach adopted in the Final Rule, Transmission Providers will need to perform additional analyses to determine if a reliability need will exist over the life of the wind plant. SCE, for example, noted that while a particular System Impact Study may not conclusively demonstrate that low voltage ride-through is needed at that time, if other generation projects are built, the first wind plant may come to need low voltage ride-through. According to various entities, the additional analyses needed to take these scenarios into account will increase the time, cost and complexity of wind plant interconnections and could be a barrier to their development.[10]

10. Furthermore, ATC asserted that the case-by-case approach imposes the responsibility for resolving reliability concerns that arise in the future on the Transmission Provider because wind generating plants cannot be retrofitted with low voltage ride-through capability. Similarly, NRECA/APPA argued that this approach unduly discriminates in favor of wind plants in that low voltage ride-through capability may not be ''necessary'' (and therefore required) for a specific plant because other generators or Transmission Providers can ''make up the difference.'' [11] ATC also contended that the case-by-case approach may require the Transmission Provider to incur capital costs that should have been incurred by the wind plant.

11. EEI and NU argued that the case-by-case approach adopted by the Commission in the Final Rule ''lowers the bar for reliability.'' [12] NERC similarly asserted that requiring Transmission Providers to justify common elements of good utility practice on a case-by-case basis is unwise and may deter Transmission Providers from implementing and following good utility practice.[13] Southern Company states that the Transmission Provider, as the entity responsible for maintaining reliability, should not bear the burden of proof to establish what is required to maintain system reliability. Southern Company states that it supports the Commission's statement that Transmission Providers should not be permitted to require wind plants to install costly equipment that is not needed for reliability, but argues

[9] *See* AWEA Petition at 13.

[10] New York ISO asserts that the case-by-case approach could lead to acute problems in New York, where it has received interconnection applications from wind plants totaling over 5000 MW of generation. According to New York ISO, conducting case-by-case reviews for each of these projects could greatly complicate the study process and result in substantial delays.

[11] Request for Rehearing of NRECA/APPA at 6.

[12] Request for Rehearing of EEI at 8.

[13] New York ISO states that it adopts NERC's position on this issue.

that the burden of proof should be shifted, and the System Impact Study should establish that such equipment is not required. Also, NRECA/APPA argued that the case-by-case approach imposes unreasonable reliability risks, and effectively voids the requirement that wind plants have low voltage ride-through capability ''in a broad range of circumstances.'' [14]

12. Those requesting rehearing raised several other arguments regarding the case-by-case approach and burden of proof for applying the low voltage ride-through standard. NERC believed that the case-by-case approach could unintentionally create a ''patchwork'' of varying requirements. EEI and NU also suggested that requiring a showing of need may introduce prolonged uncertainties into the interconnection process if parties disagree as to the study assumptions. SCE asserted that rather than limiting opportunities for undue discrimination, the requirement of a showing of need could result in discriminatory treatment in areas with large amounts of wind generation because projects lower in the queue may be responsible for additional costs since the need for low voltage ride-through could not be demonstrated for earlier projects. EEI contended that Order No. 2003 already contains provisions allowing the parties to an interconnection to exercise their discretion in complying with system reliability obligations, and that there is no evidence of problems with these procedures that justifies such a significant departure from them in the Final Rule. Further, EEI argued that the Final Rule was a significant departure from the NOPR and that the Commission should not adopt it without providing an opportunity for comments on it. Finally, NRECA/APPA argued that the Commission has not explained how this approach is consistent with NERC and WECC standards.

2. Specific Low Voltage Ride-Through Standard

13. Certain requests for rehearing and clarification also addressed the specific low voltage ride-through standard adopted by the Commission in the Final Rule. In its request for rehearing, NERC asserted that the standard in Figure 1 of the Final Rule is not appropriate. More specifically, NERC contended that Figure 1, by allowing a wind plant to disconnect from the transmission system when the voltage drops below 15 percent of the nominal voltage, could result in violation of NERC Reliability Standard TPL–002–0. This standard requires transmission planners to ensure that the system will remain stable and within applicable thermal and voltage ratings, with no loss of demand or curtailment of firm transfers, where there is a normally cleared fault on a single element, which is typically four to eight cycles or 0.067 to 0.133 seconds (67 to 133 milliseconds). According to NERC, a fault occurring on a transmission line near a wind plant could cause the voltage at that point to drop to zero for this clearing time. NERC stated that because Figure 1 would allow the wind plant to disconnect when the voltage drops below 15 percent of the nominal voltage, the loss of the single grid element (the transmission line) would be compounded by the loss of the real power (and any reactive power) produced by the wind plant. This ''double contingency event'' (loss of both the transmission line and wind plant) violates Reliability Standard TPL–002–0, NERC asserted.

14. To remedy this problem, NERC requested that the Commission simply require wind plants to meet NERC and regional reliability council requirements.[15] Alternatively, NERC argued that the rule should be modified to require wind plants to remain connected through a normally cleared single line to ground or three phase fault. Specifically, NERC asserted that Figure 1 should be altered to require a wind plant to remain online for 0.167 seconds (167 milliseconds), or ten cycles, if voltage at the high side of the wind plant step-up transformer is reduced to zero. After 0.167 seconds (167 milliseconds), but before 0.625 seconds (625 milliseconds), NERC argued that Figure 1 should require the wind plant to stay connected as long at the voltage is at or above 15 percent of the nominal voltage. NERC contended that these modifications would reduce the risk to the reliability of the electric system to an acceptable level.[16]

15. Similarly, NU asserted that wind plants should be required to ''remain on-line for all faults cleared by normal operation of all protective equipment unless clearing the fault * * * isolates the plant from the rest of the grid.'' [17] According to NU, this change would require generators to have low voltage ride-through capability down to zero percent of the nominal voltage at the Point of Interconnection. CenterPoint also contend that wind plants should be required to maintain low voltage ride-through capability down to zero percent of the rated line voltage 150 milliseconds (.150 seconds) (the time generally needed for the transmission system protective equipment to clear the fault). NU and CenterPoint argued that this change would reduce the likelihood that a low voltage event would escalate to a cascading outage or voltage collapse. NU also asserted that this requirement is similar to those applicable to other generators, and could be achieved by wind turbines that are currently available. NU stated that the standard adopted in the Final Rule would threaten reliability by allowing a wind plant to reduce output, or trip offline, simply due to a typical system fault.

16. NRECA/APPA also objected to the low voltage ride-through standard adopted in the Final Rule. Specifically, they contended that the Final Rule should not have established the low voltage ride-through curve as an absolute standard, and instead should have permitted Transmission Providers to adopt an alternative curve (subject to review by the Commission if there is a dispute) when the System Impact Study shows that it is necessary. ISO–NE, going further, requested that if the Commission adopted a low voltage ride-through standard, it should be only a guideline for wind turbine manufacturers. NRECA/APPA asserted that the Final Rule did not conclude that the low voltage ride-through standard will protect reliability or address the technical concerns raised by comments, and, by stating that the Commission might consider an alternative low voltage ride-through standard, recognizes that it may not be adequate to preserve reliability in all circumstances. Alternatively, NRECA/APPA asked that the Commission clarify that Transmission Providers may support variations from the low voltage ride-through curve in the Final Rule, based on local and subregional reliability conditions, under the three variation standards adopted in the Final Rule.

17. EEI asserted that the technical challenges presented by wind generation are being considered by the industry worldwide, and that many international standards differ from the Commission's Final Rule. Both EEI and SCE objected to the specific low voltage ride-through standard through comparison to the German

[14] Request for Rehearing of NRECA/APPA at 6.

[15] ISO–NE argued that the Commission should have required wind plants to be subject to the same system performance standards that are applied to other generating technologies.

[16] ISO–NE also suggested that, if the Commission adopted a low voltage ride-through standard, it be modified to require the wind plant to be connected at zero voltage for ''a time period associated with the typical clearing time of a normal design contingency fault.'' Request for Rehearing of ISO–NE at 4.

[17] Request for Rehearing of NU at 5.

interconnection guidelines. Particularly, EEI noted that the German grid code requires wind plants to remain connected to the grid following a fault that results in the voltage at the Point of Interconnection dropping to 15 percent of the nominal voltage for as long as 0.15 seconds. According to EEI, revisions to the German grid code are nearing completion that will require wind plants to remain connected to the transmission system following a fault that drops the voltage at the Point of Interconnection to zero percent of the nominal voltage for as long at 0.15 seconds. Further, EEI reported that the Hydro-Québec requirements for wind farm interconnection are stricter than the Commission's Final Rule; they require wind plants to ride through a fault resulting in a voltage drop to zero percent of nominal voltage for as long as 0.15 seconds. Finally, EEI noted that Ireland requires wind plants to stay online after a fault that drops the voltage to 15 percent of nominal voltage for as long as 0.15 seconds. SCE additionally asserted that the requirement that low voltage ride-through be shown to be necessary in the System Impact Study conflicts with the German wind interconnection guidelines because those guidelines assume that all generation will meet the low voltage ride-through standard. SCE stated that the Final Rule should adopt low voltage ride-through capability as a governing standard, with exceptions approved by the governing technical body (NERC or the Western Electricity Coordinating Council (WECC), a regional reliability council), as in the German standard.

18. In the Final Rule, the Commission stated that ''the low voltage ride-through requirement, and the time periods and associated voltage levels set forth in Appendix G, Figure 1, apply to three-phase faults.'' ATC sought clarification as to whether the low voltage ride-through requirement applied *only* to three-phase faults. Assuming that is the case, ATC asked whether there was a requirement for single-phase and double-phase faults.

3. Point of Measurement for the Low Voltage Ride-Through Standard

19. NERC argued on rehearing that because the Point of Interconnection may be some distance from a wind plant, the plant might actually disconnect at voltages higher than 15 percent of the nominal voltage at the high side of the wind plant step-up transformer. According to NERC, this could create a further risk of a double contingency event.[18] To avoid this risk, NERC contended that low voltage ride-through capability should be measured at the high voltage terminal of the wind plant step-up transformer. Southern Company stated that a revision to section A.i.2 of the LGIA Appendix G was necessary to reflect the Commission's decision in the Final Rule to adopt the Point of Interconnection as the measurement point.

4. Adoption of Other Provisions From the German Standards

20. SCE noted that while the Final Rule adopted a low voltage ride-through standard based on the German wind interconnection guidelines, the Commission did not adopt the related requirements in the German guidelines. It noted several provisions of the German guidelines that it stated go hand-in-hand with the low voltage ride-through standard.[19] SCE asked the Commission to clarify that Transmission Providers may implement these other guidelines in the German standard.

5. NERC/AWEA Recommended Revisions to Low Voltage Ride-Through Provisions

21. As noted above, NERC filed a request for rehearing of the Final Rule contending, in part, that the specific low voltage ride-through standard adopted by the Commission would permit violations of a NERC system performance standard.[20] On August 4, 2005, NERC and AWEA filed a request to extend the effective date of the Final Rule to allow for discussions to resolve the reliability concerns expressed by NERC. They committed to submitting to the Commission a joint final report on their discussions. On August 5, 2005, the Commission issued an order granting this request.[21]

22. On September 19, 2005, NERC and AWEA submitted their joint final report, which recommended revisions to the low voltage ride-through provisions of the Final Rule. They state that the recommended revisions are supported by the NERC Planning Committee and AWEA members. NERC states that the concerns expressed in its request for rehearing will be resolved if the Commission adopts the recommended revisions.

23. Specifically, NERC and AWEA recommend a different low voltage ride-through section to be inserted in Appendix G. The recommended provisions include a transition period standard, which would apply to wind plants that either: (a) Have interconnection agreements signed and filed with the Commission, filed with the Commission in unexecuted form, or filed with the Commission as non-conforming agreements between January 1, 2006 and December 31, 2006, with a scheduled in-service date no later than December 31, 2007; or (b) involve wind turbines subject to a procurement contract executed before December 31, 2005 for delivery through 2007. During this transition period, wind plants would be required to ride through low voltage events down to 0.15 per unit for normal clearing times up to a maximum of nine cycles.

24. Following this transition period, the NERC/AWEA proposal would require wind plants to ride through low voltage events down to a zero voltage level for ''location-specific'' clearing times up to a maximum of nine cycles. If the fault on the transmission system remained after this clearing time, the joint recommendation would permit the wind plant to disconnect from the system.

25. Under the joint recommendation of NERC and AWEA, during both the transition period and after, low voltage ride-through capability would be required for all new wind plant interconnections, instead of only when the System Impact Study shows that such capability is needed for safety or reliability, as in the Final Rule. Additionally, in both cases the point of measurement for the requirement would be at the high side of the wind plant step-up transformer, instead of at the Point of Interconnection, as in the Final Rule. NERC and AWEA also recommend eliminating Figure 1 during both the transition period and after the transition period because the low voltage ride-through standard described in their Joint Report replaces the voltage trace represented by Figure 1.

26. Finally, NERC and AWEA recommend limiting the variations to the low voltage ride-through provisions that were permitted by the Final Rule. The Final Rule permits Transmission Providers to justify variations between their *pro forma* tariff and the Final Rule Appendix G based on the regional reliability, the ''consistent with or superior to,'' or the independent entity variation standards in Order No. 2003.[22] NERC and AWEA recommend that variations to their proposed low voltage ride-through provisions be permitted on an interconnection-wide basis only, reasoning that such a limitation is appropriate because the provisions are intended to satisfy a NERC reliability

[18] *See supra,* P 13.

[19] *See* Request for Rehearing and Clarification of SCE at 9–10.

[20] *See supra,* P 13.

[21] *Interconnection for Wind Energy,* 70 FR 47093 (Aug. 12, 2005), 112 FERC ¶ 61,173 (2005).

[22] Final Rule at P 107, 109.

standard, and because wind generators could incur significant additional costs if they had to meet many different standards. NERC and AWEA note that limiting variations would not restrict the ability to request a deviation in a specific non-conforming agreement filed with the Commission (as opposed to a variation built into a *pro forma* tariff).

27. The Commission issued notice of the NERC/AWEA joint report on September 21, 2005, and provided interested parties with the opportunity to submit comments on or before October 3, 2005. FPL Energy, National Grid, New York ISO and PJM all filed comments supporting the technical recommendations in the joint report.

28. National Grid also asks that the Commission make two clarifications. First, it asks the Commission to clarify that while the point of measurement for compliance with the low voltage ride-through standard would be at the high side of the step-up transformer, the point of measurement for reactive power would remain at the Point of Interconnection. Second, National Grid requests that the nine cycle maximum clearing time in the low voltage ride-through provision applies only to three-phase faults. It says that single line-to-ground faults are typically much longer than nine cycles, so a general, non-specified standard is more appropriate for such faults.

29. New York ISO, while strongly supporting the technical aspects of the NERC/AWEA joint recommendations, urges the Commission to reject the proposal that variations to the low voltage ride-through provision be permitted only on an interconnection-wide basis or through individually-filed interconnection agreements. It argues that this could hamper efforts to preserve reliability in individual regions, and asserts that satisfying NERC planning standards is not sufficient to preserve reliability because New York State, as well as other regions, sometimes need more stringent reliability requirements than those of NERC. New York ISO says that the Commission has viewed NERC's criteria as being minimum reliability requirements, which individual regions may exceed if necessary. Therefore, New York ISO argues that at a minimum, the Commission should permit independent entities to seek variations from the low voltage ride-through standards recommended by NERC and AWEA.

30. Finally, New York ISO asks the Commission to clarify that, assuming the NERC/AWEA recommendations are adopted, the ''filing date'' for purposes of the proposed transition period includes the date that conforming interconnection agreements are fully and finally executed. New York ISO notes that executed conforming agreements need not be filed with the Commission. Therefore, it contends that the transition period should apply to agreements executed within its timeframe but not filed with the Commission.

Commission Conclusion on Low Voltage Ride-Through Provisions

31. The Commission grants rehearing with regard to the low voltage ride-through provisions, and adopts the joint recommendation of NERC and AWEA without modification. This provides a standard that will ensure that wind plants are interconnected to the grid in a manner that will not degrade system reliability. Furthermore, this standard satisfies the reliability concerns expressed by NERC, and either satisfies or renders moot many of the rehearing requests described above, including those related to the case-by-case application of the low voltage ride-through standard and point of measurement for the low voltage ride-through standard. Additionally, the joint recommendation also responds to the arguments on rehearing of EEI and SCE regarding comparison to the German interconnection guidelines.

32. We are eliminating Figure 1 from Appendix G because the standard we are adopting in Appendix G replaces that figure. Accordingly, all references to Figure 1 in the preamble to the Final Rule should be read to apply to the standard now described in Appendix G.

33. We also adopt the NERC/AWEA proposal to permit variations to the low voltage ride-through provisions of Appendix G only on an interconnection-wide basis. The low voltage ride-through provisions we adopt in this order on rehearing were crafted specifically, after negotiation among the wind industry and NERC, to ensure that NERC Reliability Standard TPL–002–0 is met in all regions. While other interconnection standards may be more susceptible to variation among Transmission Providers or independent entities, the close connection of this standard to an industry-wide reliability standard persuades us that limiting variations to those made on an interconnection-wide basis will best ensure that reliability is protected. Accordingly, we reject SCE's request that we clarify that Transmission Providers may implement other guidelines from the German interconnection standard. Adoption of other guidelines from the German standard on a Transmission Provider-specific basis could result in varying requirements that may not meet established reliability standards. For the same reasons, we also reject New York ISO's assertion that the Commission should continue to permit variations to the low voltage ride-through provisions under the three variation standards in the Final Rule, and particularly the independent entity variation. We note, however, that under section 1211 of the Energy Policy Act of 2005, the State of New York ''may establish rules that result in greater reliability within that State, as long as such action does not result in lesser reliability outside the State than that provided by the reliability standards.'' [23] Therefore, the Commission will consider proposed variations from the State of New York under this statutory provision.

34. In response to the arguments of NRECA/APPA that the Final Rule should have permitted Transmission Providers to adopt alternative low voltage ride-through standards, and ISO-NE's contention that the standard in the Final Rule should be only a guideline, we find that the definitive standard we adopt here will provide certainty to wind developers and manufacturers and ensure that reliability is maintained and NERC planning standards are met. If another standard is necessary for a specific wind plant interconnection to maintain reliability, a non-conforming agreement may be filed with the Commission.

35. In response to ATC and National Grid, we clarify that the low voltage ride-through provisions we are adopting apply to all types of faults, not just to three-phase faults. The standard refers to three-phase faults with normal clearing as well as single line to ground faults with delayed clearing. In response to National Grid's specific concern, we clarify that the nine cycle maximum clearing time expressed in the low voltage ride-through provisions applies only to three-phase faults. Single line to ground faults have typically much longer clearing times, as National Grid notes, and the low voltage ride-through provisions adopted here recognize this difference by specifically referring to ''single line to ground faults with delayed clearing.'' This non-specified standard is appropriate for those types of faults.

*B. Power Factor (Reactive Power) Provisions*

36. In the Final Rule, the Commission adopted in Appendix G to the LGIA a power factor standard applicable to

[23] Energy Policy Act of 2005, Pub. L. 109–58, § 1211, 119 Stat. 594, 945 (2005).

wind plants. The Final Rule provides that wind plants are required to meet this standard only if the Transmission Provider shows, in the System Impact Study, that reactive power capability is necessary to ensure the safety or reliability of the transmission system. The specific power factor standard in Appendix G to the LGIA, if applicable, requires a wind plant to maintain a power factor within the range of 0.95 leading to 0.95 lagging (hereinafter +/−0.95), to be measured at the Point of Interconnection.

37. Requests for rehearing and/or clarification of these provisions concern whether wind plants should have to maintain a required power factor only where the System Impact Study shows that it is required for reliability or safety, and whether the power factor standard and point of measurement adopted by the Commission in the Final Rule are appropriate.

1. Case-by-Case Application/Burden of Proof for Applying the Power Factor Standard

38. Several entities object to the provisions in the Final Rule that require wind plants to maintain the required power factor only when the Transmission Provider, in the System Impact Study, shows that it is necessary to ensure safety or reliability. NERC objects to this approach because it may deter Transmission Providers from implementing and following good utility practice and could create a ''patchwork'' of varying requirements. NU argues that this approach ''lowers the bar for reliability,'' and will add complexity, cost and delay to the generator interconnection process because Transmission Providers will be required to perform more studies to determine whether reactive power capability is necessary for reliability or safety. Southern Company states that the Transmission Provider, as the entity responsible for maintaining reliability, should not bear the burden of proof to establish what is required to maintain system reliability. It supports the Commission's statement that Transmission Providers should not be permitted to require wind plants to install costly equipment that is not needed for reliability, but argues that the burden of proof should be shifted to the generator.

39. NRECA/APPA notes that traditional generators are required to meet the power factor standard not because reactive power is needed in every case to preserve reliability, but instead because the transmission system is dynamic and requires flexibility over time to maintain reliability. They state that the need for reactive power in the future under a variety of operating conditions cannot be determined with perfect certainty in the System Impact Study. The case-by-case approach, they contend, grants an undue preference to wind plants, imposes risks to system reliability, and shifts costs to consumers and other generating plants. The risk to system reliability is that the Final Rule may only require a wind plant to provide reactive power after other wind plants have been installed without such capability, and that at that point the resources from that single plant may not be enough to protect the transmission system. NRECA/APPA also asserts that the case-by-case approach increases uncertainty, contrary to the Commission's conclusion in the Final Rule, because each wind plant will face different requirements based on the outcome of the System Impact Study. Additionally, it contends that this approach creates more opportunities for discrimination because it would permit wind plants to be treated differently.

40. ATC contends that the Commission has offered no guidance as to what power factor range would be acceptable if a reliability need is not identified (and thus reactive power is not required), and whether wind plants in this instance must operate within any particular reactive power operating band. Similarly, NU expresses concern that wind plants could operate at any power factor in the absence of a showing of need in the System Impact Study, and thus avoid a physical requirement for delivering power onto the transmission system. According to ATC, the rule could be interpreted to permit wind plants to operate at any power factor they choose. It claims that reactive power is needed for each generator, and that each generator should be obligated to operate within a range of power factors, regardless of whether the transmission system as a whole needs additional reactive power capability. ATC recommends that at a minimum, the Commission require all wind plants to meet a power factor range of 0.95 leading to 1.0 (unity), and allow the Transmission Provider to require a range of 1.0 (unity) to 0.95 lagging if the System Impact Study shows that there is a reliability need.

Commission Conclusion

41. The Commission will not modify the Final Rule to require wind plants to meet the power factor standard without a showing by the Transmission Provider, through the System Impact Study, that it is needed for safety or reliability. The case-by-case approach to a reliability needs assessment adopted in the Final Rule will not threaten reliability, as several of those seeking rehearing argue. As we noted in the Final Rule, if reactive power is necessary to maintain the safety or reliability of the transmission system, the System Impact Study performed by the Transmission Provider will establish that need.[24] We stated in the Final Rule, and reiterate here, that the System Impact Study is the appropriate study for determining whether reactive power capability is needed.[25] Furthermore, we reasoned in the Final Rule that requiring wind plants to maintain the power factor standard only if the System Impact Study shows it to be necessary will not only ensure that increased reliance on wind power will not degrade system safety or reliability, but also will limit opportunities for undue discrimination by ensuring that Transmission Providers do not require costly equipment that is not necessary for reliability.[26]

42. NERC states that the decision in Order No. 661 to use a case-by-case approach may deter Transmission Providers from following Good Utility Practice, and may have the unintended consequence of spawning a patchwork of varying requirements. We agree with NERC that Transmission Providers must follow Good Utility Practice when interconnecting all generating plants, including wind plants, and that not following Good Utility Practice when performing System Impact Studies could lead to problems. However, the Commission points out that every Transmission Provider is required under Order No. 2003 to follow Good Utility Practice. Transmission Providers are required to complete a detailed System Impact Study, and are required to ensure that NERC reliability standards are met in all instances. This includes performing studies to determine what is necessary to ensure that the interconnection of a wind generating facility does not degrade grid reliability. The Commission recognizes that the industry (and particularly NERC) is continuing to address technical issues involved in the interconnection of wind plants. If NERC through its stakeholders and Board approval process develops a new standard, the Commission will entertain such a standard. Finally, we disagree with NRECA/APPA's suggestion that the Final Rule threatens the reliability of the transmission system because it may require only wind plants later in the queue to provide reactive power, which may not

[24] Final Rule at P 51.

[25] *Id.*

[26] *Id.*

be sufficient to protect the grid. The System Impact Study will take into account the system's need for reactive power, both as it exists today and under reasonable anticipated assumptions. NRECA/APPA has not explained how assessing the need for reactive power through the System Impact Study process will result in too little reactive power being available in the future. Whenever a new generator is added to its system, the Transmission Provider must complete a new System Impact Study to ensure that reliability requirements are met; this may require a new wind generator later in the queue to meet the reactive power requirement.

43. We also reject arguments that the case-by-case approach is inappropriate because of the dynamic nature of the transmission system. The fact that the transmission system is constantly changing is not new or unique to the study of wind plant interconnections. The studies that are part of the interconnection process should take into account likely circumstances that could occur on the Transmission Provider's system, whether the studies are conducted in connection with a proposed wind plant or another type of generating facility.

44. Furthermore, we are not persuaded that the approach adopted in the Final Rule will result in additional studies, increased costs and delays, and cost shifts. First, as noted previously, the System Impact Study, as well as the other interconnection studies, should take into account a variety of assumptions concerning anticipated transmission system conditions. If additional or expanded studies are needed to determine whether the power factor standard is necessary, the Commission does not believe that the additional burden will outweigh the cost considerations underlying the case-by-case approach. Finally, although the case-by-case approach may result in some delay, we remind the parties to a wind plant interconnection, like other interconnections, that they are still required to meet the milestones set forth in the LGIP. Any increased costs from completing expanded or additional studies within the timeframe required by this rule will be borne by the wind plant Interconnection Customer, as provided in Order No. 2003, which will leave other generators and the Transmission Provider unharmed.

45. The Commission also rejects arguments that the case-by-case approach provides more opportunities for discrimination. As we noted in the Final Rule Appendix G was adopted to take into account the technical differences between wind plants and traditional generating plants. One of these differences is that for wind plants, reactive power capability is a significant added cost, while it is not a significant additional cost for traditional generators. Given these technical differences, treating wind plants differently with regard to reactive power requirements is not unduly discriminatory or preferential. Additionally, we note that the outcome of the System Impact Study, which determines whether reactive power will be required, can be challenged, which will serve to minimize the opportunities for discrimination by the Transmission Provider. Also, the wind plant Interconnection Customer will have recourse to the Commission if it believes the Transmission Provider has acted in a discriminatory manner.

46. The Commission declines to adopt ATC's request that all wind plants, at a minimum, operate within a power factor range of 0.95 leading to 1.0 (unity). This requirement would essentially require reactive power in every case, which we have already rejected. If reactive power capability is needed, including a power factor range of 0.95 leading to 1.0 (unity), the System Impact Study will demonstrate this need.

2. Specific Power Factor Standard

47. NRECA/APPA argues that the Commission should clarify that wind generators must meet the same reactive power requirements as other generators, provided the requirements are imposed in a nondiscriminatory manner. It notes that some Transmission Providers impose a power factor range wider that +/−0.95 on all new generation, and argues that in such cases, the same range should be applied to wind plants. It argues that not imposing the same range threatens reliability and shifts the costs of preserving reliability to customers or competing generators.

48. EEI and NU assert that wind plants should regulate voltage to a set point established by the Transmission Provider, as do synchronous generators. EEI contends that the language it offered in its initial comments would provide this necessary clarity, while also maintaining the flexibility provided in Order No. 2003 so that individual, site-specific conditions may be addressed.[27] NU states that wind turbines have this capability, either inherently (doubly fed induction generators) or through external equipment.

49. NRECA/APPA also expresses concern that the phrase ''taking into account any limitations due to voltage level, real power output, etc.'' in the power factor requirements section of Appendix G could create operational problems for Transmission Providers with wind plants on their systems. Specifically, it is concerned that this language could exempt wind plants from their reactive power requirements during startup and low output periods, which could degrade reliability during a system contingency.

Commission Conclusion

50. With regard to NRECA/APPA's request for clarification that wind generators must meet a wider power factor range because some Transmission Providers impose a power factor range wider that +/−0.95 on all new generation, we note that if we were to allow the Transmission Provider to impose a wider power factor range as a matter of routine, that would defeat the purpose of adopting a reactive power standard for wind generators. However, we note that if the System Impact Study shows the need for a power factor range wider than +/−0.95 for safety or reliability, the Transmission Provider must file a non-conforming agreement, as Order No. 2003 permits. The Commission will consider these non-conforming agreements on a case by case basis. If a Transmission Provider has a different power factor range in its LGIA and wishes to apply that same range in Appendix G, it may seek a variation from the Commission under the variation standards approved in the Final Rule.[28] We remind Transmission Providers, however, that the Commission has adopted a specific power factor standard for wind plants because of their technical differences. Any proposed variations will be viewed in light of these technical differences.

51. In response to the assertion of EEI and NU that wind plants should regulate voltage to a set point established by the Transmission Provider, we note that in the Final Rule we concluded that article 9.6.2 of the LGIA (which applies to all plants, including wind plants) already requires that the ''Interconnection Customer * * * operate the Large Generating Facility to maintain the specified output voltage or power factor at the Point of Interconnection.''[29]

52. Finally, the Commission addressed in the Final Rule the

[27] EEI's March 2, 2005 comments in this proceeding suggest that we require the wind plant to maintain a power factor within the range specified by the Transmission Provider ''from time to time,'' but would not require that it operate outside of the 0.95 leading to 0.95 lagging range. *See* Comments of EEI (March 2, 2005) at 5–6.

[28] Final Rule at P 109.

[29] *Id.* at P 55.

concerns raised by NRECA/APPA regarding the phrase ''taking into account any limitations due to voltage level, real power output, etc.'' We stated that this language was necessary due to the technical limitations of wind generating technology.[30] We noted that all wind generating equipment vendors cannot meet the required power factor range at all levels of output. We reiterate that these technical differences make the disputed language necessary. Furthermore, without this language, a Transmission Provider could discriminate against a wind plant by requiring that it operate at the stated power factor at voltages where it is technically infeasible to do so.

3. Point of Measurement of Power Factor

53. National Grid asks that if the Commission adopts the recommended revisions to the low voltage ride-through provisions filed jointly by AWEA and NERC, it clarify that while the point of measurement for compliance with the low voltage ride-through standard would be at the high-side of the step-up transformer, the point of measurement for reactive power is at the Point of Interconnection.

Commission Conclusion

54. We clarify that the point of measurement for the reactive power standard is at the Point of Interconnection.

*C. Self-Study of Interconnection Feasibility*

55. In the Final Rule, the Commission adopted special interconnection procedures that allow the wind plant Interconnection Customer, when completing the Interconnection Request form required by section 3.3 of the LGIP, to provide the Transmission Provider with a simplified set of preliminary data depicting the wind plant as a single equivalent generator.[31] Once the wind generator has provided this data and satisfied all other applicable Interconnection Request conditions, the special procedures permit the wind plant to enter the queue and receive the base case data as provided for in the LGIP. Finally, the special procedures adopted in the Final Rule require the wind plant Interconnection Customer to submit, within six months of submitting the Interconnection Request, completed detailed electrical design specifications and other data (including collector system layout data) needed by the Transmission Provider to complete the System Impact Study.

56. Southern Company argues on rehearing that these provisions give wind developers a special preference that unfairly disfavors other generating technologies.

57. EEI, NU and Southern Company contend that the ''self-study'' provisions of the Final Rule will add further complexity and uncertainty to the queue process and make queue management and assignment of cost responsibilities more difficult for Transmission Providers with large wind-powered generation projects in their queue. Southern Company adds that the self-study provisions could increase costs to market participants because the Transmission Provider will have to run multiple studies. EEI argues that until the industry can fully address the issues raised by these provisions in a technical forum, the Commission should remove the provisions from Appendix G. EEI and NU assert that the provisions do not protect against a wind plant Interconnection Customer making significant revisions to its project proposal. If the Commission does not remove the provisions entirely, EEI and NU suggest that the Commission allow the Transmission Provider to determine whether the detailed electrical design specifications later submitted by the wind plant Interconnection Customer are a material modification to the initial proposal, which would result in the initial Interconnection Application being withdrawn.

58. Midwest ISO agrees with the Commission that a wind plant should be able to enter the queue and receive base case data based on preliminary design specifications. However, it seeks rehearing of the provision that permits a wind plant to wait up to six months before submitting final design specifications. It argues that this procedure promotes inefficiency because the Transmission Provider may be able to evaluate the proposed interconnection, but cannot do so because it lacks necessary data. Midwest ISO requests that the Commission revise the Appendix G self-study provisions to permit the Transmission Provider to notify the wind plant Interconnection Customer of its intent to start the System Impact Study. Once this notice is given, the wind plant developer would have five business days to ''submit either actual design specifications or generic specifications based on typical equipment used in the industry.''[32] Further, Midwest ISO proposes that if the wind plant Interconnection Customer submits generic specifications, it should have to accept cost uncertainty, because additional facilities may be required when the actual design specifications are taken into account. Midwest ISO asserts that this would limit delays in the study process and would allow the Transmission Provider to identify potential problems or eliminate tenuous or technically deficient projects earlier and to better use its resources to study proposed interconnections.

Commission Conclusion

59. The Commission will deny these requests for rehearing. We will make one minor revision to label these special interconnection procedures for wind plants as ''Appendix 7'' to the LGIP, as discussed in more detail below.

60. In response to arguments that the self-study procedures for wind plants give these plants a preference, we reiterate that these procedures were developed to recognize the technical differences of wind plants. Unlike conventional generators, wind plant design specifications and configurations can change significantly based on their placement on the transmission system.[33] For example, the placement of wind turbines, voltage support devices, transformers, and other equipment (including the layout of the medium voltage collector system) depend on the location of the wind plant, the location of other generators on the transmission system, and other information included in the base case data.[34] To accommodate these differences, the Final Rule permits wind plants to enter the interconnection queue with a set of preliminary electrical design specifications depicting the wind plant as a single generator, instead of providing detailed design specifications as required by Order No. 2003. Treating wind plants differently in this regard is not unduly discriminatory or preferential, but as noted elsewhere, simply recognizes that wind plants have different technical characteristics than the more traditional forms of generation that the LGIP and LGIA were designed to accommodate. We continue to believe that without this reasonable accommodation, Transmission Providers could frustrate the interconnection of wind plants by requiring them to submit detailed design data, which they cannot do until later in the interconnection process.

61. We are not persuaded that the reasonable self-study provision we adopted will make the interconnection

[30] *Id.* at P 56.

[31] ''Single equivalent generator'' information is design data that represents the aggregate electrical characteristics of the individual wind generators as a single generator.

[32] Request for Rehearing of Midwest ISO at 4.

[33] Final Rule at P 97.

[34] *Id.*

queue process significantly more difficult or complex. Wind plant Interconnection Customers who provide the preliminary single generator equivalent data are required to provide final detailed electrical design specifications no later than six months after submitting the initial Interconnection Request. This six-month time period takes into account the procedures needed before the start of the System Impact Study, including the Feasibility Study and negotiation of study agreements. Therefore, the Transmission Provider will receive from the wind plant the detailed design information needed to conduct the System Impact Study. For this reason, we also deny Midwest ISO's request to modify the six-month deadline. If we adopted Midwest ISO's proposed modifications, the Transmission Provider could request that the wind plant provide detailed design specifications at any time it believes it is ready to begin the System Impact Study, even a day after the initial Interconnection Request is submitted. As a result, this modification would defeat the purpose of permitting wind plants to submit preliminary design specifications, and could allow Transmission Providers to frustrate the interconnection of wind plants.

62. With respect to the alternative suggestion by EEI and NU that the Transmission Provider be permitted to determine that a detailed design specification later submitted by the wind plant Interconnection Customer is a material modification of the Interconnection Request, we note that section 4.4 of the LGIP already addresses modifications and will apply to wind plants as well as other generating technologies. When applying this section to wind plant Interconnection Requests that first submit preliminary design specifications, Transmission Providers are not to consider the detailed design data provided later by the wind plant Interconnection Customer to be a material modification unless it significantly departs from the preliminary specifications provided. In other words, the detailed design provided later should be substantially the same as the initial single-generator equivalent design in terms of its costs and effect on the transmission system.

63. Finally, to avoid confusion, the Commission will rename the Appendix G to the LGIP it adopted in the Final Rule as ''Appendix 7, Interconnection Procedures for a Wind Generating Plant.'' Accordingly, when complying with the Final Rule and this order on rehearing, public utilities must adopt the special interconnection procedures applicable to wind plants as Appendix 7 to their LGIPs. The low voltage ride-through, power factor design criteria and SCADA provisions should continue to be labeled ''Appendix G'' to the LGIA.

*D. Adoption of Appendix G on an Interim Basis Only*

64. EEI and NU each generally argue that the Commission should apply Appendix G only on an interim basis, and should defer to NERC and Institute of Electrical and Electronics Engineers (IEEE) processes to develop formal technical standards. Southern Company argues that the Commission should defer to NERC, regional reliability councils, and other technical organizations to develop technical requirements for wind plants, and should suspend application of the Final Rule and formally request that these entities develop technical standards. Southern Company argues that this would avoid the problems that result from having the Commission review each variation to Appendix G as the technical standards are developed and revised. It also asserts that the Commission should not be the arbiter of technical disputes, such as the outcome of the System Impact Study or specific SCADA requirements, as the Final Rule provides.

65. As noted above, NERC similarly argues that the Commission should only require wind plants to meet NERC and regional reliability council requirements, noting that Figure 1 is likely to remain static over time, which could hamper the development of wind generator technology. EEI notes that NERC has established a Wind Generator Task Force that is examining existing standards and will make proposals later this year. It states that the industry worldwide is addressing technical challenges presented by wind generation. Significant modifications are being developed for the German grid code, and Hydro-Québec is considering several reliability issues regarding wind generator interconnection. NERC further notes that Hydro-Québec requires the same dynamic performance of wind plants that it requires of other generating facilities, and that major wind turbine manufacturers have shown that they can meet this requirement. EEI proposes that the industry conduct a technical forum to resolve issues related to wind plant interconnection, concluding with formal recommendations to the Commission that could be used in a new NOPR, or to develop formal proposals for NERC or IEEE standards.

Commission Conclusion

66. The Commission denies these requests for rehearing, and others noted earlier, that ask us to adopt Appendix G only on an interim basis. Standards are needed today because no nationwide standard is currently in place and it is uncertain when such a standard will be finalized. Without a firm standard in place, the current ad hoc practices for wind interconnection requirements may frustrate the interconnection of wind plants. As we noted in the Final Rule, Appendix G is necessary to recognize the technical differences between wind plants and traditional plants to ensure that the entry of wind generation into markets is not unnecessarily inhibited.

67. We recognize, however, that the industry continues to study and address issues raised by the interconnection and operation of wind plants. For that reason, the Commission stated in the Final Rule that if another entity develops an alternate standard, a Transmission Provider may seek to justify adopting it as a variation from Appendix G.[35] We also stated that we would consider a future industry petition to revise Appendix G to conform to a NERC-developed standard.[36] We reiterate both of those statements here, and also note that under the Energy Policy Act of 2005, the Commission will be addressing mandatory reliability standards.[37]

*E. Transition Period*

68. In the Final Rule, the Commission adopted a transition period that applies to the low voltage ride-through, power factor design criteria and SCADA requirements. These technical requirements in the Final Rule Appendix G, if applicable, apply only to LGIAs signed, filed with the Commission in unexecuted form, or filed as non-conforming agreements, on or after January 1, 2006, or the date six months after publication of the Final Rule in the **Federal Register**, whichever is later.[38] The Commission adopted this transition period to allow wind

[35] *Id.* at P 34. We note that in this order on rehearing, variations to the low voltage ride-through standard will only be permitted on an interconnection-wide basis. As we note above, however, non-conforming agreements may be submitted to the Commission. *See* P 33–34, *supra*.

[36] *Id.*

[37] *See* Energy Policy Act of 2005, Pub. L. 109–58, § 1211, 119 Stat. 594, 941 (2005).

[38] The Final Rule was published in the **Federal Register** on June 16, 2005. Thus, the low voltage ride-through, power factor design criteria and reactive power provisions in the Final Rule, as revised herein, will apply to LGIAs signed, filed with the Commission in unexecuted form, or filed as non-conforming agreements, on or after January 1, 2006.

equipment currently in the process of being manufactured to be completed without delay or added expense, and to ensure that the Final Rule did not interrupt the supply of wind turbines.

69. NRECA/APPA argues that the transition period is arbitrary, capricious, and unduly discriminatory. NRECA/APPA asserts that the Commission adopted the transition period with no technical justification and no explanation of how the transition period will maintain the reliability of the transmission system. They contend that the transition period requires transmission customers and competing generators to bear the reliability effects of wind plants interconnected during the transition period. While NRECA/APPA state that there are ''valid commercial considerations'' that should be taken into account for the existing inventory of wind equipment, they contend that such determinations should be made on a case-by-case basis.

Commission Conclusion

70. The Commission declines to remove the transition period as NRECA/APPA request. We adopted this reasonable transition mechanism to allow wind turbines in the process of being manufactured to be completed without delay or additional expense.[39] The transition period ensures that the supply of wind turbines is not unfairly or unreasonably interrupted.[40] Furthermore, contrary to NRECA/APPA's contention, the Commission considered the possible reliability effects of the transition period, and concluded that the remaining provisions of Order No. 2003 will adequately protect reliability.[41] The remaining provisions of Order No. 2003 will also ensure that other generators or the Transmission Provider will not bear the reliability effects of a wind plant because that rule, and the LGIA and LGIP contained in it, ensure that generating facilities are not interconnected in a manner that degrades reliability.

## III. Document Availability

71. 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.

72. From the Commission'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.

73. User assistance is available for eLibrary and the Commission's Web site during normal business hours. For assistance, please contact FERC Online Support at 1–866–208–3676 (toll free) or 202–502–6652 (e-mail at *FERCOnlineSupport@FERC.gov*), or the Public Reference Room at 202–502–8371, TTY 202–502–8659 (e-mail at *public.referenceroom@ferc.gov*).

## IV. Effective Date

74. As noted above, on August 5, 2005, the Commission issued an order extending the effective date of the Final Rule to October 14, 2005.[42] Those provisions of the Final Rule not revised in this order on rehearing and clarification are effective as of that date. Changes made to the Final Rule in this order on rehearing and compliance will become effective on January 18, 2006.

## V. Compliance With the Final Rule and Order on Rehearing and Clarification

75. In the Commission's August 5, 2005 order extending the effective date of the Final Rule, the Commission also extended to November 14, 2005, the date by which all public utilities that own, control, or operate transmission facilities in interstate commerce are to adopt, in their OATTS, the Final Rule Appendix 7 (as described above)[43] as an amendment to the LGIP, and Final Rule Appendix G as an amendment to the LGIA. By further notice issued October 28, 2005, the Commission extended this date further, to December 30, 2005. Public utilities who have already filed a Final Rule Appendix G as amendments to the LGIPs and LGIAs in their OATTs must file, by December 30, 2005, the revisions to the Final Rule Appendix G to the LGIA made in this order on rehearing.

## List of Subjects in 18 CFR Part 35

Electric power rates; Electric utilities.

By the Commission. Chairman Kelliher dissenting in part with a separate statement attached.

**Magalie R. Salas,**

*Secretary.*

■ In consideration of the foregoing, the Commission revises part 35, Chapter I, Title 18 of the Code of Federal Regulations as follows.

## PART 35—FILING OF RATE SCHEDULES

■ 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.

■ 2. In § 35.28, revise paragraph (f)(1) to read as follows:

### § 35.28 Non-discriminatory open access transmission tariff.

* * * * *

(f) *Standard generator interconnection procedures and agreements.* (1) Every public utility that is required to have on file a non-discriminatory open access transmission tariff under this section must amend such tariff by adding the standard interconnection procedures and agreement contained in Order No. 2003, FERC Stats. & Regs. & 31,146 (Final Rule on Generator Interconnection), as amended by the Commission in Order No. 661, FERC Stats. & Regs. ¶ 31,186 (Final Rule on Interconnection for Wind Energy), and the standard small generator interconnection procedures and agreement contained in Order No. 2006, FERC Stats. & Regs. ¶ 31,180 (Final Rule on Small Generator Interconnection), or such other interconnection procedures and agreements as may be approved by the Commission consistent with Order No. 2003, FERC Stats. & Regs. & 31,146 (Final Rule on Generator Interconnection) and Order No. 2006, FERC Stats. & Regs. ¶ 31,180 (Final Rule on Small Generator Interconnection).

(i) The amendment to implement the Final Rule on Generator Interconnection required by the preceding subsection must be filed no later than January 20, 2004.

(ii) The amendment to implement the Final Rule on Small Generator Interconnection required by the preceding subsection must be filed no later than August 12, 2005.

(iii) The amendment to implement the Final Rule on Interconnection for Wind Energy required by the preceding subsection must be filed no later than December 30, 2005.

(iv) Any public utility that seeks a deviation from the standard interconnection procedures and

[39] Final Rule at P 115.

[40] *Id.*

[41] *Id.*

[42] Order Granting Extension of Effective Date and Extending Compliance Date, 70 FR 47093 (Aug. 12, 2005), 112 FERC ¶ 61,173 (2005).

[43] *See supra*, P 60.

agreement contained in Order No. 2003, FERC Stats. & Regs. & 31,146 (Final Rule on Generator Interconnection), as amended by the Commission in Order No. 661, FERC Stats. & Regs. ¶ 31,186 (Final Rule on Interconnection for Wind Energy), or the standard small generator interconnection procedures and agreement contained in Order No. 2006, FERC Stats. & Regs. ¶ 31,180 (Final Rule on Small Generator Interconnection), must demonstrate that the deviation is consistent with the principles of either Order No. 2003, FERC Stats. & Regs. & 31,146 (Final Rule on Generator Interconnection) or Order No. 2006, FERC Stats. & Regs. ¶ 31,180 (Final Rule on Small Generator Interconnection).

[**Note:** The Appendices will not be published in the Code of Federal Regulations]

## Appendix A—List of Entities Requesting Rehearing and/or Clarification or Submitting Comments and Acronyms

ATC—American Transmission Company LLC.
CenterPoint—CenterPoint Energy Houston Electric, LLC.
EEI—Edison Electric Institute.
FPL Energy—FPL Energy, LLC.
ISO–NE—ISO New England, Inc.
Midwest ISO—Midwest Independent Transmission System Operator, Inc.
National Grid—National Grid USA.
NERC—North American Electric Reliability Council.
New York ISO—New York Independent System Operator, Inc.
NRECA/APPA—National Rural Electric Cooperative Association and American Public Power Association.
NU—Northeast Utilities.
PJM—PJM Interconnection, L.L.C.
SCE—Southern California Edison Company.
Southern Company—Southern Company Services, Inc.

## Appendix B

[**Note:** These Provisions to be Adopted as Appendix G to the LGIA.]

## Appendix G—Interconnection Requirements for a Wind Generating Plant

Appendix G sets forth requirements and provisions specific to a wind generating plant. All other requirements of this LGIA continue to apply to wind generating plant interconnections.

*A. Technical Standards Applicable to a Wind Generating Plant*

i. Low Voltage Ride-Through (LVRT) Capability

A wind generating plant shall be able to remain online during voltage disturbances up to the time periods and associated voltage levels set forth in the standard below. The LVRT standard provides for a transition period standard and a post-transition period standard.

*Transition Period LVRT Standard*

The transition period standard applies to wind generating plants subject to FERC Order 661 that have either: (i) Interconnection agreements signed and filed with the Commission, filed with the Commission in unexecuted form, or filed with the Commission as non-conforming agreements between January 1, 2006 and December 31, 2006, with a scheduled in-service date no later than December 31, 2007, or (ii) wind generating turbines subject to a wind turbine procurement contract executed prior to December 31, 2005, for delivery through 2007.

1. Wind generating plants are required to remain in-service during three-phase faults with normal clearing (which is a time period of approximately 4–9 cycles) and single line to ground faults with delayed clearing, and subsequent post-fault voltage recovery to prefault voltage unless clearing the fault effectively disconnects the generator from the system. The clearing time requirement for a three-phase fault will be specific to the wind generating plant substation location, as determined by and documented by the transmission provider. The maximum clearing time the wind generating plant shall be required to withstand for a three-phase fault shall be 9 cycles at a voltage as low as 0.15 p.u., as measured at the high side of the wind generating plant step-up transformer (*i.e.* the transformer that steps the voltage up to the transmission interconnection voltage or ''GSU''), after which, if the fault remains following the location-specific normal clearing time for three-phase faults, the wind generating plant may disconnect from the transmission system.

2. This requirement does not apply to faults that would occur between the wind generator terminals and the high side of the GSU or to faults that would result in a voltage lower than 0.15 per unit on the high side of the GSU serving the facility.

3. Wind generating plants may be tripped after the fault period if this action is intended as part of a special protection system.

4. Wind generating plants may meet the LVRT requirements of this standard by the performance of the generators or by installing additional equipment (*e.g.*, Static VAr Compensator, etc.) within the wind generating plant or by a combination of generator performance and additional equipment.

5. Existing individual generator units that are, or have been, interconnected to the network at the same location at the effective date of the Appendix G LVRT Standard are exempt from meeting the Appendix G LVRT Standard for the remaining life of the existing generation equipment. Existing individual generator units that are replaced are required to meet the Appendix G LVRT Standard.

*Post-Transition Period LVRT Standard*

All wind generating plants subject to FERC Order No. 661 and not covered by the transition period described above must meet the following requirements:

1. Wind generating plants are required to remain in-service during three-phase faults with normal clearing (which is a time period of approximately 4–9 cycles) and single line to ground faults with delayed clearing, and subsequent post-fault voltage recovery to prefault voltage unless clearing the fault effectively disconnects the generator from the system. The clearing time requirement for a three-phase fault will be specific to the wind generating plant substation location, as determined by and documented by the transmission provider. The maximum clearing time the wind generating plant shall be required to withstand for a three-phase fault shall be 9 cycles after which, if the fault remains following the location-specific normal clearing time for three-phase faults, the wind generating plant may disconnect from the transmission system. A wind generating plant shall remain interconnected during such a fault on the transmission system for a voltage level as low as zero volts, as measured at the high voltage side of the wind GSU.

2. This requirement does not apply to faults that would occur between the wind generator terminals and the high side of the GSU.

3. Wind generating plants may be tripped after the fault period if this action is intended as part of a special protection system.

4. Wind generating plants may meet the LVRT requirements of this standard by the performance of the generators or by installing additional equipment (*e.g.*, Static VAr Compensator) within the wind generating plant or by a combination of generator performance and additional equipment.

5. Existing individual generator units that are, or have been, interconnected to the network at the same location at the effective date of the Appendix G LVRT Standard are exempt from meeting the Appendix G LVRT Standard for the remaining life of the existing generation equipment. Existing individual generator units that are replaced are required to meet the Appendix G LVRT Standard.

ii. Power Factor Design Criteria (Reactive Power)

A wind generating plant shall maintain a power factor within the range of 0.95 leading to 0.95 lagging, measured at the Point of Interconnection as defined in this LGIA, if the Transmission Provider's System Impact Study shows that such a requirement is necessary to ensure safety or reliability. The power factor range standard can be met by using, for example, power electronics designed to supply this level of reactive capability 606 (taking into account any limitations due to voltage level, real power output, etc.) or fixed and switched capacitors if agreed to by the Transmission Provider, or a combination of the two. The Interconnection Customer shall not disable power factor equipment while the wind plant is in operation. Wind plants shall also be able to provide sufficient dynamic voltage support in lieu of the power system stabilizer and automatic voltage regulation at the generator excitation system if the System Impact Study shows this to be required for system safety or reliability.

iii. Supervisory Control and Data Acquisition (SCADA) Capability

The wind plant shall provide SCADA capability to transmit data and receive instructions from the Transmission Provider

to protect system reliability. The Transmission Provider and the wind plant Interconnection Customer shall determine what SCADA information is essential for the proposed wind plant, taking into account the size of the plant and its characteristics, location, and importance in maintaining generation resource adequacy and transmission system reliability in its area.

## Appendix C

[**Note:** These provisions to be adopted as APPENDIX 7 to the LGIP]

## Appendix 7 —Interconnection Procedures for a Wind Generating Plant

Appendix 7 sets forth procedures specific to a wind generating plant. All other requirements of this LGIP continue to apply to wind generating plant interconnections.

### A. Special Procedures Applicable to Wind Generators

The wind plant Interconnection Customer, in completing the Interconnection Request required by section 3.3 of this LGIP, may provide to the Transmission Provider a set of preliminary electrical design specifications depicting the wind plant as a single equivalent generator. Upon satisfying these and other applicable Interconnection Request conditions, the wind plant may enter the queue and receive the base case data as provided for in this LGIP.

No later than six months after submitting an Interconnection Request completed in this manner, the wind plant Interconnection Customer must submit completed detailed electrical design specifications and other data (including collector system layout data) needed to allow the Transmission Provider to complete the System Impact Study.

Joseph T. Kelliher, Chairman, *dissenting in part:*

I vote for this order because it constitutes an improvement over the final rule. I agree with the Commission's decision to grant rehearing with respect to the low voltage ride-through (LVRT) provisions and to adopt the joint recommendation of NERC and AWEA. As the order points out, by adopting a definitive, uniform, LVRT standard, the Commission ''provide[s] certainty'' to the industry and ''ensure[s] that reliability is maintained and NERC planning standards are met.'' [1]

Unfortunately, the Commission's decision on LVRT contrasts with its decision to exempt wind generators from compliance with the same power factor standard as all other generators. The Commission requires all non-wind generators to maintain a power factor within the range of 0.95 leading to 0.95 lagging, which NERC has determined to be ''within a range required by Good Utility Practice.'' [2] Order No. 661, however, singles out wind generators for special treatment by exempting them from meeting the standard power factor requirement unless the Transmission Provider demonstrates in the System Impact Study that reactive power capability is necessary to ensure the safety or reliability of the transmission system. In my view, exempting only wind generators from the power factor standard does not provide certainty to the industry, results in an undue preference for wind generators and does not adequately ensure that reliability of the transmission system is maintained.

Section 205 of the Federal Power Act broadly precludes public utilities, in any transmission or sale subject to the Commission's jurisdiction, from ''mak[ing] or grant[ing] any undue preference or advantage to any person or subject[ing] any person to any undue prejudice or disadvantage. * * *'' [3] In my view, Order No. 661 gives preferential treatment to wind generators, since it exempts wind generators from meeting the same power factor requirement as all other non-wind generators. The issue is whether the preferential treatment afforded to wind generators is undue.

I do not believe that either the record or the explanation offered in this order provides a basis for giving preferential treatment to wind generators when it comes to meeting the power factor requirement. The order's attempt to justify discriminating in favor of wind generators as an accommodation for ''technical differences'' [4] is not convincing. The only ''technical'' difference identified is the assertion that compliance with reactive power capability is more expensive for wind generators than for other generator resources.[5] While one can understand why wind generators would like to be relieved of the added cost of complying with the same power factor standard as all other non-wind generators, I fail to see how the desire to avoid incurring the costs of complying with the Commission's standardized power factor requirement constitutes a technological difference warranting discriminatory treatment.

Equally troubling, I disagree with the Commission's decision to brush aside the concerns raised by NERC and other protesters that the Commission has ''lowered the bar'' for reliability by shifting the burden to the Transmission Provider to justify the need for wind generators to comply with the same power factor requirement as non-wind generators. I find little comfort in the Commission's view that any reliability concerns can be addressed in the System Impact Study if the Transmission Provider proves that a wind generator's compliance with the reactive power factor standard is necessary. In my view, shifting the burden to Transmission Providers to make such a showing simply cannot be reconciled with the approach taken by the Commission in Order No. 2003 which presumes the need for all generators to comply with power factor requirement under ''Good Utility Practice.'' [6]

As a result, I would have granted rehearing and returned to the approach proposed by the Commission in the NOPR of requiring all generators to meet the same power factor standard absent a waiver by the Transmission Provider. Accordingly, I dissent in part from the order.

Joseph T. Kelliher.

[FR Doc. 05–24173 Filed 12–16–05; 8:45 am]

BILLING CODE 6717–01–P

[1] Order at P34.

[2] Order No. 2003 at P541.

[3] 16 U.S.C. 824d(b).

[4] Order at P45.

[5] *Id.* (''One of these [technical] differences is that for wind plants, reactive power capability is a significant added cost, while it is not a significant additional cost for traditional generators.'').

[6] Order No. 2003 at PP541–42.

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Food and Drug Administration

## 21 CFR Part 520

## Oral Dosage Form New Animal Drugs; Moxidectin Gel; Moxidectin and Praziquantel Gel

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of two supplemental new animal drug applications (NADAs) filed by Fort Dodge Animal Health, Division of Wyeth. The supplemental NADAs provide for oral use of moxidectin gel or moxidectin and praziquantel gel in horses and ponies for the treatment and control of two additional species of small strongyles.

**DATES:** This rule is effective December 19, 2005.

**FOR FURTHER INFORMATION CONTACT:** Melanie R. Berson, Center for Veterinary Medicine (HFV–110), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–7543, e-mail: *mberson@cvm.fda.gov.*

**SUPPLEMENTARY INFORMATION:** Fort Dodge Animal Health, Division of Wyeth, 800 Fifth St. NW., Fort Dodge, IA 50501, filed a supplement to NADA 141–087 for QUEST (moxidectin 2.0%) Gel and to NADA 141–216 for QUEST Plus (moxidectin 2.0%/praziquantel 12.5%) Gel. Both products are used for the treatment and control of various species of internal parasites in horses and ponies. The supplements provide for the addition of two new species of adult small strongyles to product labeling. The supplemental NADAs are approved as of November 23, 2005, and 21 CFR 520.1452 and 520.1453 are amended to reflect the approval. The basis of approval is discussed in the freedom of information summaries.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), summaries of safety and effectiveness data and information submitted to support approval of these applications

may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

Under section 512(c)(2)(F)(iii) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(c)(2)(F)(iii)), these approvals qualify for 3 years of marketing exclusivity beginning November 23, 2005. Exclusivity applies only to the effectiveness claim for adult Cylicocyclus radiatus and Petrovinema poculatus for which new data were required.

The agency has determined under 21 CFR 25.33(d)(1) that these actions are of a type that do not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

**List of Subjects in 21 CFR Part 520**

Animal drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 520 is amended as follows:

## PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 520 continues to read as follows:

**Authority:** 21 U.S.C. 360b.

### § 520.1452 [Amended]

■ 2. Section 520.1452 is amended in paragraph (d)(2) as follows:

a. By removing ''and *C. nassatus*;'' and adding in its place ''*C. nassatus*, and *C. radiatus*;'' and

b. By removing ''and *Gyalocephalus capitatus*;'' and adding in its place ''*Gyalocephalus capitatus*; and *Petrovinema poculatus*;''.

### § 520.1453 [Amended]

■ 3. Section 520.1453 is amended in paragraph (d)(2) as follows:

a. By removing ''and *C. nassatus*;'' and adding in its place ''*C. nassatus*, and *C. radiatus*;'' and

b. By removing ''and *Gyalocephalus capitatus*;'' and adding in its place ''*Gyalocephalus capitatus*; and *Petrovinema poculatus*;''.

Dated: December 8, 2005.

**Bernadette A. Dunham,**

*Deputy Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.*

[FR Doc. 05–24166 Filed 12–16–05; 8:45 am]

BILLING CODE 4160–01–S

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Food and Drug Administration

## 21 CFR Parts 520 and 558

## New Animal Drugs; Change of Sponsor; Tiamulin

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of sponsor for four approved new animal drug applications (NADAs) for oral dosage forms and feed uses of tiamulin from Boehringer Ingelheim Vetmedica, Inc., to Novartis Animal Health US, Inc.

**DATES:** This rule is effective December 19, 2005.

**FOR FURTHER INFORMATION CONTACT:** David R. Newkirk, Center for Veterinary Medicine (HFV–100), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–6967, e-mail: *david.newkirk@fda.gov*.

**SUPPLEMENTARY INFORMATION:** Boehringer Ingelheim Vetmedica, Inc., 2621 North Belt Highway, St. Joseph, MO 64506–2002, has informed FDA that it has transferred ownership of, and all rights and interest in, the following four approved NADAs, to Novartis Animal Health US, Inc., 3200 Northline Ave., suite 300, Greensboro, NC 27408:

| NADA Number | Trade Name |
|---|---|
| 134–644 | DENAGARD (tiamulin) Soluble Antibiotic |
| 139–472 | DENAGARD (tiamulin) 25% Premixes |
| 140–916 | DENAGARD (tiamulin) Liquid Concentrate |
| 141–011 | DENAGARD (tiamulin)/ chlortetracycline |

Accordingly, the agency is amending the regulations in 21 CFR 520.2455, 520.2456, and 558.600 to reflect the transfer of ownership and a current format.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

**List of Subjects**

*21 CFR Part 520*

Animal drugs.

*21 CFR Part 558*

Animal drugs, Animal feeds.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 520 and 558 are amended as follows:

## PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 520 continues to read as follows:

**Authority:** 21 U.S.C. 360b.

■ 2. Revise § 520.2455 to read as follows:

### § 520.2455 Tiamulin.

(a) *Specifications*. (1) Each ounce of concentrate solution contains 3.64 grams (12.3 percent) tiamulin hydrogen fumarate.

(2) Each gram of soluble powder contains 450 milligrams (mg) tiamulin hydrogen fumarate.

(b) *Sponsors*. See Nos. 058198 and 059130 in § 510.600(c) of this chapter.

(c) *Related tolerances*. See § 556.738 of this chapter.

(d) *Special considerations*. (1) Swine being treated with tiamulin should not have access to feeds containing polyether ionophores (e.g., lasalocid, monensin, narasin, salinomycin, or semduramycin) as adverse reactions may occur.

(2) Do not use in swine weighing over 250 pounds (lb).

(e) *Conditions of use in swine*—(1) *Amounts and indications for use.* Administer in drinking water for 5 consecutive days:

(i) 3.5 mg per (/) lb of body weight daily for treatment of swine dysentery associated with *Brachyspira hyodysenteriae* susceptible to tiamulin.

(ii) 10.5 mg/lb of body weight daily for treatment of swine pneumonia due to *Actinobacillus pleuropneumoniae* susceptible to tiamulin.

(2) *Limitations*. Withdraw medication 3 days before slaughter following treatment at 3.5 mg/lb and 7 days before slaughter following treatment at 10.5 mg/lb of body weight. Prepare fresh medicated water daily. Use as only source of drinking water.

**§ 520.2456 [Removed]**

■ 3. Remove § 520.2456.

## PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

■ 4. The authority citation for 21 CFR part 558 continues to read as follows:

**Authority:** 21 U.S.C. 360b, 371.

**§ 558.600 [Amended]**

■ 5. Amend § 558.600 in paragraph (b) and in the table in paragraphs (e)(1)(i) through (e)(1)(iv) in the ''Sponsor'' column by removing ''000010'' and by adding in its place ''058198''.

Dated: December 6, 2005.

**Bernadette A. Dunham,**

*Deputy Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.*

[FR Doc. 05–24165 Filed 12–16–05; 8:45 am]

BILLING CODE 4160–01–S

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Part 610

**[Docket No. 1980N–0208]**

## Biological Products; Bacterial Vaccines and Toxoids; Implementation of Efficacy Review

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule and final order.

**SUMMARY:** The Food and Drug Administration (FDA) proposed to amend the biologics regulations and proposed to classify the bacterial vaccines and toxoids on the basis of findings and recommendations of the Panel on Review of Bacterial Vaccines and Toxoids (the Panel) on December 13, 1985. The Panel reviewed the safety, efficacy, and labeling of bacterial vaccines and toxoids with standards of potency, bacterial antitoxins, and immune globulins. After the initial final rule and final order was vacated by the U.S. District Court for the District of Columbia on October 27, 2004, FDA published a new proposed rule and proposed order on December 29, 2004 (69 FR 78281). The purpose of this final rule and final order is to amend the biologics regulations, issue a final order in response to the report and recommendations of the Panel; and, respond to comments on the previously published proposed rule and proposed order submitted to the Division of Dockets Management. This final rule and final order does not address Anthrax Vaccine Adsorbed (AVA). The final order concerning AVA is published elsewhere in this issue of the **Federal Register**. FDA is classifying these products as Category I (safe, effective, and not misbranded), Category II (unsafe, ineffective, or misbranded), or Category IIIB (off the market pending completion of studies permitting a determination of effectiveness).

**DATES:** This rule is effective December 19, 2006. The final order on categorization of products is effective immediately.

**FOR FURTHER INFORMATION CONTACT:** Astrid Szeto, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, Suite 200N, Rockville, MD 20852–1448, 301–827–6210.

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### I. Introduction

On December 13, 1985, FDA proposed to amend the biologics regulations and proposed to classify the bacterial vaccines and toxoids on the bases of findings and recommendations of the Panel. The Panel reviewed the safety, efficacy, and labeling of bacterial vaccines and toxoids with standards of potency, bacterial antitoxins, and immune globulins. After reviewing the Panel's report and comments on the proposal, FDA published a final rule and final order on January 5, 2004 (69 FR 255). On October 27, 2004, the U.S. District Court for the District of Columbia vacated the January 5, 2004, final rule and final order. On December 29, 2004, FDA published a withdrawal of the January 5, 2004, final rule and final order. Concurrently with the withdrawal of the final rule and final order, FDA published again a proposed rule and proposed order (69 FR 78281) to provide notice and to give interested persons an opportunity to comment.

The purpose of this document is to: (1) Categorize those bacterial vaccines

and toxoids licensed before July 1972 according to the evidence of their safety and effectiveness, thereby determining whether they may remain licensed and on the market;[1] (2) issue a final response to recommendations made in the Panel's report.[2] These recommendations concern conditions relating to active components, labeling, tests required before release of product lots, product standards, or other conditions considered by the Panel to be necessary or appropriate for assuring the safety and effectiveness of the reviewed products; and (3) revise the standard for potency of Tetanus Immune Globulin in § 610.21 (21 CFR 610.21).

## II. Background

### *A. History of the Review*

In the **Federal Register** of February 13, 1973 (38 FR 4319), FDA issued procedures for the review by independent advisory review panels of the safety, effectiveness, and labeling of biological products licensed before July 1, 1972. This process was eventually codified in § 601.25 (21 CFR 601.25) (38 FR 32048 at 32052, November 20, 1973). Under the panel assignments published in the **Federal Register** of June 19, 1974 (39 FR 21176), FDA assigned the biological product review to one of the following groups: (1) Bacterial vaccines and bacterial antigens with ''no U.S. standard of potency,'' (2) bacterial vaccines and toxoids with standards of potency, (3) viral vaccines and rickettsial vaccines, (4) allergenic extracts, (5) skin test antigens, and (6) blood and blood derivatives.

Under § 601.25, FDA assigned responsibility for the initial review of each of the biological product categories to a separate independent advisory panel consisting of qualified experts to ensure objectivity of the review and public confidence in the use of these products. Each panel was charged with preparing an advisory report to the Commissioner of Food and Drugs which was to: (1) Evaluate the safety and effectiveness of the biological products for which a license had been issued, (2) review their labeling, and (3) identify the biological products that are safe, effective, and not misbranded. Each advisory panel report was also to include recommendations classifying the products reviewed into one of three categories.

- Category I, designating those biological products determined by the panel to be safe, effective, and not misbranded.
- Category II, designating those biological products determined by the panel to be unsafe, ineffective, or misbranded.
- Category III, designating those biological products determined by the panel not to fall within either Category I or Category II on the basis of the panel's conclusion that the available data were insufficient to classify such biological products, and for which further testing was therefore required. Category III products were assigned to one of two subcategories. Category IIIA products were those that would be permitted to remain on the market pending the completion of further studies. Category IIIB products were those for which the panel recommended license revocation on the basis of the panel's assessment of potential risks and benefits.

In its report, the panel could also include recommendations concerning any condition relating to active components, labeling, tests appropriate before release of products, product standards, or other conditions necessary or appropriate for a biological product's safety and effectiveness.

In accordance with § 601.25, after reviewing the conclusions and recommendations of the review panels, FDA would publish in the **Federal Register** a proposed order containing: (1) A statement designating the biological products reviewed into Categories I, II, IIIA, or IIIB, (2) a description of the testing necessary for Category IIIA biological products, and (3) the complete panel report. Under the proposed order, FDA would propose to revoke the licenses of those products designated into Category II and Category IIIB. After reviewing public comments, FDA would publish a final order on the matters covered in the proposed order.

In the **Federal Register** of November 21, 1980 (45 FR 77134), FDA issued a notice of availability of the Panel's final report. In the **Federal Register** of December 13, 1985 (50 FR 51002), FDA issued a proposed rule that contained the full Panel report[3] and FDA's response to the recommendations of the Panel (the December 1985 proposal). In the December 1985 proposal, FDA proposed regulatory categories (Category I, Category II, or Category IIIB as defined previously in this document) for each bacterial vaccine and toxoid reviewed by the Panel, and responded to other recommendations made by the Panel. The public was offered 90 days to submit comments in response to the December 1985 proposal.

The definition of Category IIIA as described previously in this document was applied at the time of the Panel's review and served as the basis for the Panel's recommendations. In the **Federal Register** of October 5, 1982 (47 FR 44062), FDA revised § 601.25, and codified 21 CFR 601.26 which, established procedures to reclassify those products in Category IIIA into either Category I or Category II based on available evidence of effectiveness. The Panel recommended that a number of biological products be placed into Category IIIA. FDA assigned the review of those products previously classified into Category IIIA to the Vaccines and Related Biological Products Advisory Committee. FDA has addressed the review and reclassification of bacterial vaccines and toxoids classified into Category IIIA through a separate administrative procedure (see the **Federal Register** of May 15, 2000 (65 FR 31003), and May 29, 2001 (66 FR 29148)). Therefore, FDA does not further identify or discuss in this document any bacterial vaccines and toxoids classified into Category IIIA.

### *B. Comments on the December 1985 Proposal*

FDA received four letters of comments in response to the December 1985 proposal. One letter from a licensed manufacturer of bacterial vaccine and toxoid products concerned the confidentiality of information it had submitted for the Panel's review. As provided in § 601.25(b)(2), FDA considered the extent to which the information fell within the confidentiality provisions of 18 U.S.C. 1905, 5 U.S.C. 552(b), or 21 U.S.C. 331(j), before placing the information in the public docket for the December 1985 proposal. Another comment from a member of the Panel provided an update of important scientific information related to bacterial vaccines and toxoids that had accrued since the time of the Panel's review. The letter did not comment on the December 1985 proposal nor did it contend that the newly available information should result in modification of the Panel's recommendations or FDA's proposed actions. FDA's responses to the comments contained in the remaining two letters follow.

[1] The final order concerning AVA is published elsewhere in this issue of the **Federal Register**.

[2] The Panel was convened on July 12, 1973, in an organizational meeting, followed by multiple working meetings until February 2, 1979. The Final Report of the Panel was completed in August 1979.

[3] In addition to publication in the **Federal Register** of December 13, 1985 (50 FR 51002), the full Panel report is available on FDA's Website at *http://www.fda.gov/ohrms/dockets/default.htm* (Docket No. 1980N–0208). A copy of the Panel report is also available at the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

(Comment 1) One comment from a licensed manufacturer of bacterial vaccines and toxoids objected to the proposed classification into Category IIIA of several of its products for use in primary immunization.

As described previously in this document, FDA has addressed those products proposed for Category IIIA in a separate rulemaking process.[4] This final rule and final order does not take any action regarding the further classification of those products proposed for Category IIIA, including those proposed for Category IIIA for primary immunization. All manufacturers and others in the general public have been offered additional opportunity to comment on the final categorization of specific Category IIIA products in the above-noted process.

(Comment 2) In response to FDA's proposal that Pertussis Immune Globulin (Human) be placed into Category IIIA because of insufficient evidence of efficacy, one comment stated that FDA should permit manufacture of Pertussis Immune Globulin (Human) for export only. The comment noted that medical practices in other countries may differ from those in the United States and that in some countries Pertussis Immune Globulin (Human) plays an important role in the augmentation of therapy with antibiotics in young, very ill infants with pertussis.

Since that time, FDA has revoked all licenses for Pertussis Immune Globulin (Human) at the requests of the individual manufacturers. The FDA Export Reform and Enhancement Act of 1996 (Public Law 104–134, as amended by Public Law 104–180) amended provisions of the Federal Food, Drug, and Cosmetic Act (the act) pertaining to the export of certain unapproved products. Section 802 of the act contains requirements for the export of products not approved in the United States. Under these provisions, products such as Pertussis Immune Globulin (Human) can be exported to other countries, if the requirements of section 802 of the act are met.

(Comment 3) One comment concerned the generic order and wording for product labeling recommended by the Panel and which FDA proposed to adopt in its response to the Panel recommendation. The comment recommended that a labeling section concerning ''Overdose'' be included only when circumstances dictate. The comment stated that because the biological products that would be subject to this labeling are prescription products administered by health care providers, the risk of overdose should be greatly reduced.

We agree that, in many cases, a labeling section in part 201 (21 CFR part 201) entitled ''Overdosage'' is not necessary. Section 201.56(d)(3) of the labeling regulations provides that the labeling may omit any section or subsection of the labeling format if clearly inapplicable. The ''Overdosage'' section, provided for in § 201.57(i) of the regulations, is omitted for many bacterial vaccine and toxoid products.

(Comment 4) One comment objected to several statements made by the Panel and provided in the Panel's written report, but did not object to or comment on FDA's proposed responses to the Panel's recommendations.

The Panel's recommendations represent the scientific opinions of a panel of experts and are not binding. We believe that the agency should not modify the statements and recommendations of the Panel as provided in its report, including through public comment. The purpose of the opportunity for comment is to allow comment on FDA's responses to the Panel report and not on the Panel report directly. In reaching our conclusion, we took into account the Panel report and comments on the Panel report.

In the December 1985 proposal, FDA provided the opportunity for comment on FDA's proposals in response to the Panel report. In the December 29, 2004 (69 FR 78281), proposed rule and proposed order (the December 2004 proposal), FDA again provided the opportunity for comment on FDA's proposals. The public was offered 90 days to submit comments in response to the December 2004 proposal.

In response to the December 2004 proposal, most of the comments received pertained to AVA. A response to comments about AVA is provided in a document published elsewhere in this issue of the **Federal Register**. A discussion of comments to the December 2004 proposal other than those pertaining to AVA is provided under section VI of this document.

## III. Categorization of Products—Final Order

*Category I. Licensed biological products determined to be safe and effective and not misbranded.* Table 1 of this document is a list of those products proposed in December 2004 by FDA for Category I. Under the ''Comments'' column, FDA notes those products for which FDA's proposed category differs from that recommended by the Panel. Products for which the licenses were revoked before the December 1985 proposal and that were identified as such in the December 1985 proposal are not listed in the tables below. Products for which the licenses were revoked after the December 1985 proposal are identified in the ''Comments'' column. After review of the comments on the December 1985 and December 2004 proposals, and finding no additional scientific evidence to alter the proposed categorization, FDA adopts Category I as the final category for the listed products.

TABLE 1.—CATEGORY I

| Manufacturer/License No. | Products* | Comments |
|---|---|---|
| Alpha Therapeutic Corp., License No. 744 | Tetanus Immune Globulin (Human) | Although the Panel recommended that Tetanus Immune Globulin (Human), manufactured by Alpha Therapeutic Corp., be placed in Category IIIB, FDA proposed that it be placed in Category I. Alpha Therapeutic Corp. no longer exists. The new owner is Grifols Biologicals, Inc. On August 15, 2003, FDA revoked the license for Tetanus Immune Globulin (Human) |
| Advance Biofactures Corp., License No. 383 | Collagenase | |

[4] See the **Federal Register** of May 15, 2000 (65 FR 31003) and May 29, 2001 (66 FR 29148), containing the proposed order to reclassify Category IIIA products into Category I and Category II based on the review and recommendation of the Vaccines and Related Biological Products Advisory Committee.

TABLE 1.—CATEGORY I—Continued

| Manufacturer/License No. | Products* | Comments |
|---|---|---|
| Armour Pharmaceutical Co., License No. 149 | Tetanus Immune Globulin (Human) | The manufacturer's licensed name is now ZLB Behring AG. On July 26, 1999, FDA revoked the license for Tetanus Immune Globulin (Human) at the request of the manufacturer |
| Aventis Pasteur, Ltd., License No. 1280 | BCG Vaccine, Botulism Antitoxin (Types A, B, and E), Botulism Antitoxin (Type E), Tetanus Toxoid | On February 24, 2000, a name change to Aventis Pasteur, Ltd. with an accompanying license number change to 1280 was granted. On December 21, 2000, FDA revoked the license for Tetanus Toxoid at the request of the manufacturer |
| Connaught Laboratories, Inc., License No. 711 | Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed, and Diphtheria Antitoxin | On December 9, 1999, a name change to Aventis Pasteur, Inc. with an accompanying license number change to 1277 was granted to Connaught Laboratories, Inc. FDA revoked the licenses for these products at the request of the manufacturer on July 6, 2001, and August 2, 2001, respectively |
| Cutter Laboratories, Inc., License No. 8 | Plague Vaccine, Tetanus Immune Globulin (Human) | On October 5, 1994, the manufacturing facilities and process for Plague Vaccine were transferred to Greer Laboratories, Inc., License No. 308. On May 24, 1995, FDA revoked Cutter's license for Plague Vaccine at the request of Cutter, the previous manufacturer; the license for Greer Laboratories, Inc. remains in effect. Bayer Corp. now holds the license for Tetanus Immune Globulin (Human) under License No. 8. The Bayer Corp. subsidiary that holds the license for Tetanus Immune Globulin (Human) is Talecris Biopharmaceutics, Inc. under License No. 1716 |
| Eli Lilly & Co., License No. 56 | Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed | On December 2, 1985, FDA revoked the license for Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed at the request of the manufacturer |
| Glaxo Laboratories, Ltd., License No. 337 | BCG Vaccine | On July 17, 1990, FDA revoked the license for BCG Vaccine at the request of the manufacturer |
| Istituto Sieroterapico Vaccinogeno Toscano Sclavo, License No. 238 | Diphtheria Antitoxin, Diphtheria Toxoid Adsorbed, Tetanus Toxoid Adsorbed | On July 17, 1990, FDA revoked the license for Diphtheria Antitoxin at the request of the manufacturer. On July 27, 1993, FDA revoked the licenses for Diphtheria Toxoid Adsorbed and Tetanus Toxoid Adsorbed at the request of the manufacturer |
| Lederle Laboratories, Division American Cyanamid Co., License No. 17 | Cholera Vaccine, Tetanus Immune Globulin (Human) | On December 23, 1992, FDA revoked the license for Tetanus Immune Globulin (Human) at the request of the manufacturer. On October 23, 1996, FDA revoked the license for Cholera Vaccine at the request of the manufacturer |
| Massachusetts Public Health Biologic Laboratories, License No. 64 | Diphtheria and Tetanus Toxoids Adsorbed, Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed, Tetanus and Diphtheria Toxoids Adsorbed (For Adult Use), Tetanus Antitoxin, Tetanus Immune Globulin (Human), Tetanus Toxoid Adsorbed, Typhoid Vaccine | Although the Panel recommended that Tetanus Antitoxin be placed in Category IIIB, FDA proposed in the December 1985 proposal that it be placed in Category I. On October 26, 1988, FDA revoked the license for Typhoid Vaccine at the request of the manufacturer. On January 10, 1994, FDA revoked the license for Tetanus Antitoxin at the request of the manufacturer. On December 22, 1998, FDA revoked the license for Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed at the request of the manufacturer. On August 3, 2000, FDA revoked the license for Diphtheria and Tetanus Toxoids Adsorbed at the request of the manufacturer. On July 1, 2004, FDA revoked the license for Tetanus Immune Globulin (Human) at the request of the manufacturer. On August 23, 2004, FDA revoked the license for Tetanus Toxoid Adsorbed at the request of the manufacturer |
| Merck Sharp & Dohme, Division of Merck & Co., Inc., License No. 2 | Tetanus Immune Globulin (Human) | The manufacturer is now known as Merck & Co., Inc. On January 31, 1986, FDA revoked the license for Tetanus Immune Globulin (Human) at the request of the manufacturer |
| Michigan Department of Public Health, License No. 99 | Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed, Pertussis Vaccine Adsorbed, Typhoid Vaccine* | On November 11, 1998, a name change to BioPort Corp. (BioPort) with an accompanying license number change to 1260 was granted. The license for Typhoid Vaccine was revoked on June 25, 1985, at the request of the manufacturer. The license for Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed was revoked at the request of the manufacturer (BioPort) on November 20, 2000. The license for Pertussis Vaccine Adsorbed was revoked at the request of the manufacturer (BioPort) on April 22, 2003 |

TABLE 1.—CATEGORY I—Continued

| Manufacturer/License No. | Products* | Comments |
|---|---|---|
| Parke-Davis, Division of Warner-Lambert Co., License No. 1 | Tetanus Immune Globulin (Human) | On November 19, 1983, FDA revoked the license for Tetanus Immune Globulin (Human) at the request of the manufacturer |
| Swiss Serum and Vaccine Institute Berne, License No. 21 | Tetanus Antitoxin | Although the Panel recommended that Tetanus Antitoxin be placed in Category IIIB, FDA proposed that it be placed in Category I. On March 13, 1980, FDA revoked the license for Tetanus Antitoxin at the request of the manufacturer |
| Travenol Laboratories, Inc., Hyland Therapeutics Division, License No. 140 | Tetanus Immune Globulin (Human) | The manufacturer is now known as Baxter Healthcare Corp. On July 27, 1995, FDA revoked the license for Tetanus Immune Globulin (Human) at the request of the manufacturer |
| University of Illinois, License No. 188 | BCG Vaccine | On May 29, 1987, FDA revoked the license for BCG Vaccine at the request of the manufacturer |
| Wyeth Laboratories, Inc., License No. 3 | Cholera Vaccine, Tetanus Immune Globulin (Human), Typhoid Vaccine (acetone inactivated), Typhoid Vaccine (heat-phenol inactivated) | On December 23, 1992, FDA revoked the license for Tetanus Immune Globulin (Human) at the request of the manufacturer. On September 11, 2001, FDA revoked the licenses for Cholera Vaccine and Typhoid Vaccine (both forms) at the request of the manufacturer |

* The final order for Anthrax Vaccine Adsorbed is published elsewhere in this issue of the **Federal Register**.

*Category II. Licensed biological products determined to be unsafe or ineffective or to be misbranded and which should not continue in interstate commerce.* FDA did not propose that any products be placed in Category II and in this final rule and final order does not categorize any products in Category II.

*Category IIIB. Biological products for which available data are insufficient to classify their safety and effectiveness and should not continue in interstate commerce.* Table 2 of this document is a list of those products proposed by FDA for Category IIIB. We have not listed in this document products for which FDA revoked the licenses before the December 1985 proposal but we identified them in the December 1985 proposal. Products for which FDA revoked the licenses after the December 1985 proposal are identified in the ''Comments'' column.

FDA has revoked the licenses of all products proposed by FDA for Category IIIB. After review of the comments on the December 1985 and December 2004 proposals, and finding no additional scientific evidence to alter the proposed categorization, FDA adopts Category IIIB as the final category for the listed products.

TABLE 2.—CATEGORY IIIB

| Manufacturer/License No. | Products | Comments |
|---|---|---|
| Connaught Laboratories, Inc., License No. 711 | Diphtheria Toxoid, Pertussis Vaccine | On June 21, 1994, FDA revoked the license for Diphtheria Toxoid and on December 19, 1997, FDA revoked the license for Pertussis Vaccine, in both cases at the request of the manufacturer |
| Istituto Sieroterapico Vaccinogeno Toscano Sclavo, License No. 238 | Diphtheria Toxoid | On July 27, 1993, FDA revoked the license for Diphtheria Toxoid at the request of the manufacturer |
| Massachusetts Public Health Biologic Laboratories, License No. 64 | Tetanus Toxoid | On October 11, 1989, FDA revoked the license for Tetanus Toxoid at the request of the manufacturer |
| Merck Sharp & Dohme, Division of Merck & Co., Inc., License No. 2 | Cholera Vaccine, Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed, Tetanus and Diphtheria Toxoids Adsorbed (For Adult Use), Tetanus Toxoid, Typhoid Vaccine | The manufacturer is now known as Merck & Co., Inc. On January 31, 1986, FDA revoked the licenses for all the listed products at the request of the manufacturer |
| Michigan Department of Public Health, License No. 99 | Diphtheria Toxoid Adsorbed | On November 11, 1998, the name of the manufacturer was changed to BioPort, and the license number was changed to 1260. On November 20, 2000, FDA revoked the license for Diphtheria Toxoid Adsorbed at the request of the manufacturer |
| Wyeth Laboratories, Inc., License No. 3 | Diphtheria Toxoid, Diphtheria Toxoid Adsorbed, Pertussis Vaccine | On May 19, 1987, FDA revoked the licenses for all listed products at the request of the manufacturer |

## IV. FDA's Responses to Additional Panel Recommendations

In the December 1985 proposal, FDA responded to the Panel's general recommendations regarding the products under review and to the procedures involved in their manufacture and regulation. In this section of the document, FDA responds in final to the general recommendations.

### *A. Generic Order and Wording of Labeling*

The Panel recommended changes to the labeling of the biological products under review. The Panel also recommended a generic order and wording for information in the labeling of bacterial vaccines. In the December 1985 proposal, FDA agreed with the labeling changes recommended by the Panel.

In the December 1985 proposal, FDA proposed that 6 months after publication of a final rule, manufacturers of products subject to this Panel review submit, for FDA's review and approval, draft labeling revised in conformance with the Panel's report and with the regulations. FDA proposed to require that the revised labeling accompany all products initially introduced or initially delivered for introduction into interstate commerce 30 months after the date of publication of the final rule. The proposed labeling review schedule was consistent with the scheduling provided in § 201.59 of the regulations. Although proposed, we are not making this change because it does not appear to be necessary at this time.

Since the time of the Panel's recommendation, FDA has made a number of changes to the labeling regulations and related regulatory policies. FDA has added or revised the requirements in § 201.57 for including in the labeling, in standardized language, the information concerning use during pregnancy, pediatric use, and geriatric use. Section 201.57 requires a specific order and content for drug product labeling. A number of labeling sections included in § 201.57 were not included in the Panel's recommended ordering and wording of the labeling but are now required to help ensure clarity in the labeling. FDA has also provided guidance regarding the wording of sections in which the agency believes complete and consistent language is important. Because FDA regularly monitors labeling for the products subject to this Panel review to determine if the labeling is consistent with applicable labeling requirements, we do not believe that a labeling review is necessary at this time.

Section 314 of the National Childhood Vaccine Injury Act (NCVIA) of 1986 required FDA to review the warnings, use instructions, and precautionary information that are distributed with each vaccine listed in section 2114 of the Public Health Service Act and to determine whether this information was adequate to warn health care providers of the nature and extent of the dangers posed by such vaccine. Since the December 1985 proposal, FDA has completed this review and labeling has been revised accordingly.

### *B. Periodic Review of Product Labeling*

In its report, the Panel noted a number of labeling deficiencies. To improve the labeling, the Panel recommended that labeling be reviewed and revised as necessary at intervals of no more than every 2 years.

As discussed in the December 1985 proposal and December 2004 proposal, we believe the current system of labeling review will adequately assure accurate labeling. Periodic review of labeling on a set schedule is unnecessary. Section 601.12(f) (21 CFR 601.12(f)) prescribes when revised labeling must be submitted, either as a supplement or, if changes are minor, in an annual report. In addition, FDA may request revision of labeling when indicated by current scientific knowledge. We believe that, by these mechanisms, product labeling is kept up to date, and a scheduled, routine review of labeling is unnecessary and burdensome for both the agency and manufacturers.

### *C. Improvement in the Reporting of Adverse Reactions*

The Panel recommended that actions be taken to improve the reporting and documentation of adverse reactions to biological products. The Panel particularly noted the need to improve the surveillance systems to identify adverse reactions to pertussis vaccine.

Since publication of the Panel's report, the Vaccine Adverse Event Reporting System (VAERS) was created as an outgrowth of NCVIA and is administered by FDA and the Centers for Disease Control and Prevention (CDC). VAERS accepts from health care providers, manufacturers, and the public, reports of adverse events that may be associated with U.S.-licensed vaccines. Health care providers must report certain adverse events included in a Reportable Events Table (Ref. 1) and any event listed in the vaccine's package insert as a contraindication to subsequent doses of the vaccine. Health care providers also may report other clinically significant adverse events. FDA and CDC receive about 1,000 reports each month under the VAERS program. A guidance document is available which explains how to complete the VAERS form (Ref. 2).

### *D. Periodic Review of Product Licenses*

The Panel recommended that all licensed vaccines be periodically reviewed to assure that data concerning the safety and effectiveness of these products are kept current and that licenses be revoked for products which have not been marketed for years or which have never been marketed in the licensed form. The Panel noted that, by limiting the period for which specific vaccines may be licensed, older products would be assured periodic review, and new products for which additional efficacy data are required could be provisionally licensed for a limited time period during which additional data can be generated.

In the December 1985 proposal (50 FR 51002 at 51109), FDA noted that licensing policies in effect at the time of the review resulted in licenses being held for some products which were never intended to be marketed as individual products or which were no longer being marketed as individual products. FDA had required that manufacturers licensed for a combination vaccine also hold a license for each individual vaccine contained in the combination. For example, a manufacturer of diphtheria and tetanus toxoids and pertussis (DTP) vaccine would also be required to have separate licenses for Diphtheria Toxoid, Tetanus Toxoid, and Pertussis Vaccines. Because this policy is no longer in effect, most licenses are for currently marketed products. In a few cases, there may be no current demand for a product but, for public health reasons, a license continues to be held for the product. There are some vaccines for which there is little current demand but continued licensure could expedite the manufacture and availability of the product in the event an outbreak of the targeted disease should occur. We believe that the routine inspection of licensed facilities adequately assures that the information held in product licenses is current and that a routine review of safety and efficacy data is unnecessary and burdensome. The Panel's recommendation that some new vaccines be provisionally licensed for only limited periods of time while additional data are generated is inconsistent with the law that requires a determination that a biologic product

is safe, pure, and potent before it is licensed.

*E. Compensation for Individuals Suffering Injury From Vaccination*

The Panel recommended that compensation from public funds be provided to individuals suffering injury from vaccinations that were recommended by competent authorities, carried out with approved vaccines, and where the injury was not a consequence of defective or inappropriate manufacture or administration of the vaccines.

A compensation program has been implemented consistent with the Panel's recommendation. The NCVIA established the National Vaccine Injury Compensation Program (NVICP) designed to compensate individuals, or families of individuals, who have been injured by childhood vaccines, whether administered in the private or public sector. The NVICP, administered by the Health Resources and Services Administration, Department of Health and Human Services (HHS), is a no-fault alternative to the tort system for resolving claims resulting from adverse reactions to routinely recommended childhood vaccines. The specific vaccines and injuries covered by NVICP are identified in a Vaccine Injury Table that may periodically be revised as new vaccines come into use or new types of potential injuries are identified. The NVICP has resulted in a reduction in the amount of litigation related to injury from childhood vaccines while assuring adequate liability coverage and protection. The NVICP applies only to vaccines routinely recommended for infants and children. Vaccines recommended for adults are not covered unless they are routinely recommended for children as well, e.g., Hepatitis B Vaccine.

*F. Public Support for Immunization Programs*

The Panel recommended that both FDA and the public support widespread immunization programs for tetanus, diphtheria, and pertussis.

The National Immunization Program is part of CDC and was established to provide leadership to health agencies in planning and implementing immunization programs, to identify unvaccinated populations in the United States, to assess vaccination levels in State and local areas, and to generally promote immunization programs for children, including vaccination against diphtheria, tetanus, and pertussis. A recent survey shows that nearly 95 percent of children 19 to 35 months of age have received three or more doses of any vaccine that contained diphtheria and tetanus toxoids (i.e., diphtheria and tetanus toxoids and pertussis (DTP), diphtheria and tetanus toxoids and acellular pertussis (DTaP) or diphtheria and tetanus toxoids vaccines (DT)) (Ref. 3).

*G. Assuring Adequate Supplies of Bacterial Vaccines and Toxoids; Establishment of a National Vaccine Commission*

The Panel recommended that FDA work closely with CDC and other groups to assure that adequate supplies of vaccines and passive immunization products continue to be available. The Panel recommended establishment of a national vaccine commission to address such issues.

Since the publication of the December 1985 proposal, the National Vaccine Program was created by Congress (Public Law 99–660) with the National Vaccine Program Office (NVPO) within HHS designated to provide leadership and coordination among Federal agencies as they work together to carry out the goals of the National Vaccine Plan. The National Vaccine Plan provides a framework, including goals, objectives, and strategies, for pursuing the prevention of infectious diseases through immunizations. The National Vaccine Program brings together all of the groups that have key roles in immunizations, and coordinates the vaccine-related activities, including addressing adequate production and supply issues. Despite efforts to assure vaccine availability, shortages may occur (Ref. 4) for a variety of reasons. FDA will continue to work with the NVPO, the National Institutes of Health, CDC, and vaccine manufacturers to help facilitate continued vaccine availability making the establishment of a national vaccine commission unnecessary.

*H. Consistency of Efficacy Protocols*

The Panel recommended that the protocols for efficacy studies be reasonably consistent throughout the industry for any generic product. To achieve this goal, the Panel recommended the development of industry guidelines that provide standardized methodology for adducing required information.

We believe that the standardization of clinical testing methodology for a group of vaccines is often not practical or useful. Because of the variety of possible vaccine types, e.g., live vaccines, killed vaccines, toxoids, bioengineered vaccines, acellular vaccines, and the diversity of populations in which the vaccine may be studied, it is difficult to develop guidance that would apply to more than one or two studies. We routinely meet with manufacturers before the initiation of clinical studies to discuss the study and will comment on proposed protocols for efficacy studies. We intend to continue to allow flexibility in selecting appropriate tests, procedures, and study populations for a clinical study while assuring that the necessary data are generated to fulfill the intended objectives of the study.

*I. The Effect of Regulations Protecting and Informing Human Study Subjects on the Ability to Conduct Clinical Trials*

The Panel expressed concern that the regulations governing informed consent and the protection of human subjects involved in clinical investigations should not establish unnecessary impediments to the goal of obtaining adequate evidence for the safety and effectiveness of a product.

We believe that the regulations and policies applying to informed consent and the protection of human subjects do not inhibit the adequate clinical study of a product. We note that whenever the regulations or guidance documents related to these subjects are modified or amended, FDA offers an opportunity for public comment on the revisions. We particularly welcome comments on how appropriate informed consent and protection of human subjects can be maintained while assuring that the development and study of useful products are not inhibited.

*J. Standards for Determining the Purity of Diphtheria and Tetanus Toxoids*

The Panel recommended that standards should be established for purity of both diphtheria and tetanus toxoids in terms of limits of flocculation (Lf) content per milligram (mg) of nitrogen.

In the December 1985 proposal, we agreed that standards should be set. We have since determined that this approach is overly restrictive and does not allow FDA to keep pace with advances in manufacturing and technology. The Center for Biologics Evaluation and Research (CBER) approves the release specifications for the purity of diphtheria and tetanus toxoids during the review of a Biologics License Application (BLA). The purity of diphtheria toxoids in vaccines currently licensed in the United States is usually at least 1,500 Lf/mg nondialyzable nitrogen and the purity of tetanus toxoids in vaccines currently licensed in the United States is usually at least 1,000 Lf/mg of nondialyzable nitrogen. However, because the purity of tetanus and diphtheria toxoids in different vaccines is established during

the BLA review, the purity may vary between products.

*K. Immunogenic Superiority of Adsorbed Toxoids Over Fluid Toxoids*

The Panel recommended that the immunogenic superiority of the adsorbed diphtheria and tetanus toxoids over the fluid (plain) preparations be strongly emphasized in product labeling, especially with regard to the duration of protection.

Tetanus Toxoid fluid, manufactured by Aventis Pasteur, Inc., is the only fluid toxoid product that remains licensed in the United States in 2005. This product is licensed for booster use only in persons over 7 years of age. The current package insert for this product states that, although the rates of seroconversion are essentially equivalent with either type of tetanus toxoid, the adsorbed toxoids induce more persistent antitoxin titers than fluid products.

*L. Laboratory Testing Systems for Determining Potency of Tetanus and Diphtheria Toxoids*

The Panel noted a need for further studies with tetanus toxoids in a World Health Organization (WHO) sponsored quantitative potency test in animals to establish the conditions under which the test results are reproducible, and to relate these results more closely to those obtained in the immunization of humans. The Panel also recommended the development of an animal or laboratory testing system for diphtheria toxoid that correlates consistently, and with acceptable precision, with primary immunogenicity in humans.

Diphtheria and tetanus toxoids containing vaccines are tested during the licensing process for their ability to induce acceptable levels of protective antibodies in clinical trials in the target populations. Properties of vaccines used in these clinical trials, including potency, also are determined during licensing. The acceptance criteria for commercial lots of these vaccines are set at licensing on the basis of the properties of the vaccines that induced acceptable quantitative/qualitative levels of antibodies.

The animal potency tests currently required by WHO, the European Pharmacopoeia (EP), and FDA differ. Despite these differences, the potency tests have been adequate to ensure sufficient immunogenic activity of the vaccines to induce protective immunity in target populations. However, international efforts to harmonize the diphtheria and tetanus potency tests under development are based on immunogenicity in animals. CBER is currently participating in these international harmonization efforts.

*M. Potency Testing of Diphtheria and Tetanus Toxoids for Pediatric Use*

The Panel recommended FDA require potency testing after combination of the individual diphtheria and tetanus toxoid components in Diphtheria and Tetanus Toxoid vaccines for pediatric use.

We agree with the recommendation. All manufacturers and the FDA testing laboratory follow this procedure on products submitted to the agency for release.

*N. Potency Requirements for Pertussis Vaccine*

The Panel recommended that the regulations concerning the maximum pertussis vaccine dose should be updated to reflect current recommendations and practices. At the time of the Panel review, whole cell pertussis vaccines were in use. Specifically, the Panel recommended that pertussis vaccine have a potency of four protective units per single human dose with the upper estimate of a single human dose not to exceed eight protective units. The Panel also recommended that the total immunizing dose be defined as four doses of four units each, compared to the three doses of four units each defined at the time of the recommendation in the regulations.

We have removed the additional standard regulations applicable to pertussis vaccine (Ref. 5). As whole cell pertussis vaccines are no longer licensed for human use in the United States, this recommendation no longer applies to products available in the United States.

*O. Weight-Gain Test in Mice for Pertussis Vaccine*

The Panel recommended that the weight-gain test in mice used to determine toxicity of pertussis vaccines be revised to include a reference standard and specifications regarding mouse strains to be used.

At the time of the Panel's deliberations, only DTP vaccines containing a whole-cell pertussis component were licensed in the United States. The mouse weight-gain test was a toxicity test used for whole-cell pertussis vaccines. Whole-cell pertussis vaccines are no longer licensed in the United States for human use, thus the mouse weight-gain test is no longer in use. Currently, only DTP vaccines containing an acellular pertussis component (DTaP) vaccines are licensed in the United States.

Although not currently licensed in the United States, vaccines containing a whole-cell pertussis component are still in use in other countries. CBER continues to participate in international efforts to improve the tests used to assess toxicity of whole-cell pertussis vaccines, including the mouse weight-gain test. CBER is represented on WHO committees and working groups with the goal of improving regulation and testing of whole-cell pertussis vaccines.

*P. Agglutination Test to Determine Pertussis Vaccine Response in Humans*

The Panel recommended that the agglutination test used to determine pertussis vaccine response in humans be standardized and that a reference serum be used for comparison. It also recommended that a reference laboratory be available at FDA.

As stated previously in this document, at the time of the Panel's deliberations, only whole-cell pertussis vaccines were licensed in the United States. The agglutination test was used for the clinical evaluation of DTP vaccines. Under the Panel's recommendations, FDA (CBER) developed and distributed reference materials for the agglutination assay and served as a reference laboratory. Currently, only DTaP or DTaP combination vaccines are licensed in the United States. For the clinical evaluation of DTaP vaccines, the agglutination test was replaced by antigen-specific immunoassays, specifically enzyme-linked immunosorbent assays (ELISAs). As had been done with the agglutination assay, CBER took an active role in standardization of the ELISAs used to measure the specific antibody to the pertussis components of DTaP vaccines. Specifically, CBER distributes reference and control materials for the antigen-specific pertussis ELISA and has served as a reference laboratory.

*Q. Warnings in Labeling for Pertussis Vaccine*

The Panel recommended that the pertussis vaccine label warn that if shock, encephalopathic symptoms, convulsions, or thrombocytopenia follow a vaccine injection, no additional injections with pertussis vaccine should be given. The Panel also recommended that the label include a cautionary statement about fever, excessive screaming, and somnolence.

We agree with the recommendation except that such information should be included in product labeling as described in § 201.100(d), i.e., the package insert, rather than the product label. Labeling applicable to whole-cell

pertussis vaccines was revised to include much of the information recommended by the Panel; whole-cell pertussis vaccines are no longer licensed in the United States. Because the acellular forms of pertussis vaccine have a different profile of potential adverse events and contraindications, the product labeling for these products is worded consistent with available data.

*R. Field Testing of Fractionated Pertussis Vaccines*

The Panel recommended that any fractionated pertussis vaccine that differs from the original whole cell vaccine be field tested until better laboratory methods for evaluating immunogenicity are developed. The Panel recommended that the field-testing include agglutination testing and, if possible, evaluation of clinical effectiveness.

The currently approved vaccines containing an acellular pertussis component were studied in the United States and abroad in human populations with the antibody response being measured and clinical effectiveness evaluated.

*S. Use of Same Seed Lot Strain in Manufacturing Bacillus Calmette-Guerin (BCG) Vaccine*

The Panel recommended that all BCG vaccines be prepared from the same seed lot strain with demonstrated efficacy, if available data justify such action.

BCG vaccines are not recommended for routine immunization in the United States. The two currently U.S.-licensed BCG vaccines are produced using different seed strains. Most BCG vaccines produced globally are manufactured using seed strains with a unique history. Recent evidence suggests that these different BCG strains do differ genetically and have slightly varying phenotypes. However, a meta analysis of the current human BCG vaccination data performed in 1994 by Harvard University concluded that no strain-to-strain differences in protection could be detected. Although there have been differences in immunogencity among strains demonstrated in animal models, no significant differences have been seen in human clinical trials (Ref. 6). Thus, FDA does not find that available human data justify requirement of a single BCG vaccine strain.

*T. Development of an Improved Cholera Vaccine*

The Panel recommended public support for development of an improved cholera vaccine because unsatisfactory sanitary conditions in many countries make it clear that control of the disease by sanitation alone cannot be realized in the foreseeable future.

Cholera is not an endemic disease in the United States. However, there is risk to U.S. travelers to certain countries where the disease is endemic. We continue to cooperate with international health agencies in efforts to evaluate new types of vaccines and to study the pathogenesis of the disease. CBER personnel have chaired and participated in the WHO Cholera Vaccine Standardization Committee and have participated in drafting new WHO guidelines for immune measurement of protection from cholera.

*U. Plague Vaccine Immunization Schedule*

The Panel recommended that the following plague vaccine immunization schedule be considered:

1. A primary series of three intramuscular (IM) injections (1 milliliter (mL), 0.2 mL, and 0.2 mL), 1 and 6 months apart, respectively;
2. Booster IM injections of 0.2 mL at 12, 18, and 24 months; and
3. For persons achieving a titer of 1:128 after the third and fifth inoculations, booster doses when the passive agglutination titer falls below 1:32 and empirically every 2 years when the patient cannot be tested serologically.

We agree with the recommendation, and the currently licensed vaccine is labeled consistent with the recommendation. However, this vaccine is not currently in production or distribution.

## V. FDA's Response to General Research Recommendations

In its report, the Panel identified many areas in which there should be further investigation to improve existing products, develop new products, develop new testing methodologies, and monitor the population for its immune status against bacterial disease. In the December 1985 proposal, we responded to these recommendations in the responses identified as items 11, 17 (in part), 21, 25, and 27. As discussed in the December 1985 proposal, we considered the Panel's recommendations in defining its research priorities at the time the recommendations were made. Because a considerable amount of time has elapsed since these recommendations were made and FDA initially responded to the recommendations, we are not providing specific responses to each recommendation. As in any area of scientific research, new discoveries and new concerns require a continual reevaluation of research priorities and objectives to assure their relevance to current concerns.

We recognize the Panel's desire to have FDA's research program evolve with the significant issues and findings of medical science. In order to assure the continued relevance of its research program, CBER's research program for vaccines, including bacterial vaccines and related biological products, is subject to peer review by the Panel's successor, the Vaccines and Related Biological Products Advisory Committee (see, for example, the transcripts from the meetings of February 17, 2005 (Ref. 7), May 6, 2004 (Ref. 8), and May 8, 2003 (Ref. 9). In addition, CBER has defined as part of its strategic plan its goal of a high quality research program that contributes directly to its regulatory mission. This goal includes a plan to assure that CBER's research program continues to support the regulatory review of products and timely development of regulatory policy, and to have a significant impact on the evaluation of biological products for safety and efficacy.

Because of limited resources, we also support the leveraging of resources to create effective collaborations in the advancement of science. We have issued a *Guidance for FDA Staff: The Leveraging Handbook, an Agency Resource for Effective Collaborations* (Ref. 10). Through cooperation with international, other Federal, and State health care agencies and the industry and academia, the agency intends that its research resources will reap the benefits of a wide range of experience, expertise, and energy from the greater scientific community while the agency maintains its legal and regulatory obligations. We invite comment at any time on ways we may improve our research program and set our objectives.

## VI. What Comments Did We Receive?

We received about 350 comments on the December 2004 proposal. Most of the comments related to AVA. A response to comments about AVA is provided in a document published elsewhere in this issue of the **Federal Register**. Comments on the December 2004 proposal not relating to AVA are discussed in this section of this document.

*A. FDA's Consideration of Comments on the Panel's Report*

(Comment 1) Some comments criticized FDA for stating in the December 2004 proposal that we were

not considering comments on the Panel report.

(Response) We wish to clarify our review of comments. We are not considering comments on the Panel report because the Panel's recommendations are not binding on the public or FDA. The Panel is comprised of experts offering scientific opinions for our consideration. We should not modify the statements and recommendations of the Panel as provided in their report, including through public comment. The purpose of the opportunity for public comment allows comment on FDA's responses to the Panel report and not on the Panel report directly. We can take action with regard to public comments on FDA's responses to the Panel report and therefore, we directed comments to our responses rather than to the report itself.

*B. Biological Products Review Process*

(Comment 2) One comment submitted by the former Chief Counsel for FDA during the time that the proposed and final regulations on the Biological Products Review were issued discussed the historical development of the Biological Products Review. The commenter did not comment on the December 2004 proposal nor did he request modification of FDA's proposed actions.

(Response) We offer no response to this informative general comment.

*C. Plague Vaccine*

(Comment 3) One comment noted that the plague vaccine was licensed and once recommended by the CDC's Advisory Committee on Immunization Practices, but is no longer produced.

(Response) As mentioned earlier in this document and consistent with the comment, the plague vaccine remains licensed but is not currently in production or distribution.

*D. Miscellaneous Comments*

(Comment 4) Numerous miscellaneous comments on the December 2004 proposal were received. Many of the comments expressed an opinion about the conduct of vaccination administration programs or activities associated with the Department of Defense. Other miscellaneous comments provided links to Internet sites, but did not provide a comment on the December 2004 proposal. Other submissions to the Docket were electronic mailings to other parties that copied the Docket.

(Response) These miscellaneous comments noted above are not relevant or responsive to the December 2004 proposed order and accordingly, we are not providing any response to them.

## VII. Amendment to the Regulations

In the December 1985 proposal and December 2004 proposal, we proposed to amend § 610.21, limits of potency, by revising the potency requirements for Tetanus Immune Globulin (Human) (TIG). We proposed to amend the regulations to require a minimum potency of 250 units of tetanus antitoxin per container for TIG.

The current regulation requires that the minimum potency of TIG must not be less than 50 units of tetanus antitoxin per mL of fluid. All currently licensed TIG meets this minimum potency standard, and is marketed with a labeled potency of 250 units per container. However the number of units per mL has varied (the current standard provides only a minimum potency per mL of fluid) and thus, the volume per 250 unit container has varied. Because the volume of the final products has varied without any apparent effect on performance of the product, FDA has determined that it is not appropriate to regulate the potency of TIG on a per mL basis. We advise that in this discussion and in the regulation, ''per container'' means that amount of the contents of the container (vial or syringe) deliverable to the patient in normal use. FDA believes that TIG should continue to be marketed at a potency of no less than 250 units per container, which is the dose routinely recommended for prophylaxis against tetanus. All current manufacturers of TIG are already conforming to the proposed requirement by labeling their products with a potency of 250 units per container, while also complying with the existing regulation. Thus, the FDA believes this change will better reflect modern labeling practices.

We received no comments opposing the proposed revision to § 610.21 and therefore, we are amending the regulations to require a minimum potency of 250 units of tetanus antitoxin per container for TIG.

## VIII. Analysis of Impacts

*A. Review Under Executive Order 12866, the Regulatory Flexibility Act, and the Unfunded Mandates Reform Act of 1995*

FDA has examined the impacts of this final rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The agency believes that this final rule is not a significant regulatory action under the Executive order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. The agency believes that this final rule is consistent with the regulatory philosophy and principles identified in the Executive order. In addition, this final rule is not a significant regulatory action as defined by the Executive order and so is not subject to review under the Executive order. Because this final rule does not impose new requirements on any entity and has no associated compliance costs, the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $115 million, using the most current (2003) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

*B. Environmental Impact*

The agency has determined under 21 CFR 25.31(h) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

*C. Paperwork Reduction Act of 1995*

This final rule contains no collections of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

*D. Federalism*

FDA has analyzed this final rule in accordance with the principles set forth

in Executive Order 13132. FDA has determined that the final rule does not contain policies 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. Accordingly, the agency has concluded that the final rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

## IX. References

The following references have been placed on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday. (FDA has verified the Web site addresses, but we are not responsible for subsequent changes to the Web sites after this document publishes in the **Federal Register**).

1. ''Table of Reportable Events Following Vaccination,'' *http://www.vaers.hhs.gov/reportable.htm*.

2. ''Guidance for Industry: How to Complete the Vaccine Adverse Event Reporting System Form (VAERS–1)'', September 1998, *http://www.fda.gov/cber/gdlns/vaers-1.pdf*.

3. ''Estimated Vaccination Coverage With 3+DTP Among Children 19–35 Months of Age by Race/Ethnicity, and by State and Immunization Action Plan Area—U.S., National Immunization Survey, Q3/2000–Q2/2001'', *http://www.cdc.gov/nip/coverage/NIS/00-01/tab19-3dpt_race_iap.htm*.

4. Protecting Our Kids: What Is Causing the Current Shortage in Childhood Vaccines?—Testimony Before the Committee on Governmental Affairs, United States Senate, June 12, 2002, *http://www.cdc.gov/nip/news/testimonies/vac-shortages-walt-6-12-2002.htm*.

5. 61 FR 40153, August 1, 1996.

6. Colditz, et al., ''Efficacy of BCG Vaccine in the Prevention of Tuberculosis: Meta Analysis of the Published Literature,'' *Journal of the American Medical Association*, 271:698–702, 1994.

7. *http://www.fda.gov/ohrms/dockets/ac/05/transcripts/2005-4087T2.htm*

8. *http://www.fda.gov/ohrms/dockets/ac/04/transcripts/4038t1.htm*

9. *http://www.fda.gov/ohrms/dockets/ac/03/transcripts/3948t1.txt*

10. *http://www.fda.gov/cber/gdlns/leverhnbk.pdf*

## List of Subjects

*21 CFR Part 610*

Biologics, Labeling, Reporting and recordkeeping requirements.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act, the Public Health Service Act, and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 610 is amended as follows:

## PART 610—GENERAL BIOLOGICAL PRODUCTS STANDARDS

■ 1. The authority citation for 21 CFR part 610 continues to read as follows:

**Authority:** 21 U.S.C. 321, 331, 351, 352, 353, 355, 360, 360c, 360d, 360h, 360i, 371, 372, 374, 381; 42 U.S.C. 216, 262, 263, 263a, 264.

■ 2. Section 610.21 is amended by revising the entry ''Tetanus Immune Globulin (Human), 50 units of tetanus antitoxin per milliliter'' under the heading ''ANTIBODIES'' to read as follows:

**§ 610.21 Limits of potency.**

* * * * *

ANTIBODIES

* * * * *

Tetanus Immune Globulin (Human), 250 units of tetanus antitoxin per container.

* * * * *

Dated: December 12, 2005.

**Jeffrey Shuren,**

*Assistant Commissioner for Policy.*

[FR Doc. 05–24224 Filed 12–15–05; 8:45 am]

BILLING CODE 4160–01–S

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## DEPARTMENT OF THE TREASURY

## Internal Revenue Service

## 26 CFR Part 1

**[TD 9234]**

**RIN 1545–AU98**

## Obligations of States and Political Subdivisions

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulations.

**SUMMARY:** This document contains final regulations on the definition of private activity bond applicable to tax-exempt bonds issued by State and local governments. These regulations affect issuers of tax-exempt bonds and provide needed guidance for applying the private activity bond restrictions to refunding issues.

**DATES:** Effective Date: These regulations are effective February 17, 2006.

*Applicability Date:* For dates of applicability, see § 1.141–15(j) of these regulations.

**FOR FURTHER INFORMATION CONTACT:** Johanna Som de Cerff, (202) 622–3980 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

## Background

This document amends the Income Tax Regulations (26 CFR part 1) under section 141 of the Internal Revenue Code (Code) by providing rules on the application of the private activity bond tests to refunding issues. This document also amends the Income Tax Regulations under sections 145, 149 and 150 by providing rules on certain related matters.

On May 14, 2003, the IRS published in the **Federal Register** a notice of proposed rulemaking (REG–113007–99) (68 FR 25845) (the proposed regulations) relating to the matters addressed in this Treasury decision. A public hearing on the proposed regulations was scheduled for September 9, 2003. However, the public hearing was cancelled because no requests to speak were received. Written comments on the proposed regulations were received. After consideration of all the written comments, the proposed regulations are adopted as revised by this Treasury decision (the final regulations). The revisions are discussed below.

## Explanation of Provisions

*A. Introduction*

In general, under section 103, gross income does not include the interest on any State or local bond. However, this exclusion does not apply to private activity bonds (other than certain qualified bonds). Section 141(a) defines a private activity bond as any bond issued as part of an issue that meets either (1) the private business use test in section 141(b)(1) and the private security or payment test in section 141(b)(2) (the private business tests) or (2) the private loan financing test in section 141(c) (the private business tests and the private loan financing test are referred to collectively as the ''private activity bond tests'').

The private business use test is met if more than 10 percent of the proceeds of an issue are to be used for any private business use. Section 141(b)(6) defines private business use as use directly or indirectly in a trade or business that is carried on by any person other than a governmental unit.

The private security or payment test is met if the payment of the principal of, or the interest on, more than 10 percent of the proceeds of an issue is directly or indirectly (1) secured by an interest in property used or to be used for a private business use, (2) secured by an interest in payments in respect of such property, or (3) to be derived from payments,

whether or not to the issuer, in respect of property, or borrowed money, used or to be used for a private business use.

The private loan financing test is satisfied if more than the lesser of $5 million or 5 percent of the proceeds of an issue are to be used to make or finance loans to persons other than governmental units.

On January 16, 1997, final regulations (TD 8712) relating to the definition of private activity bonds and related rules under sections 103, 141, 142, 144, 145, 147, 148, and 150 were published in the **Federal Register** (62 FR 2275) (the 1997 regulations). Under the 1997 regulations, the amount of private business use of property financed by an issue is equal to the average percentage of private business use of that property during a defined measurement period. The measurement period begins on the later of the issue date of the issue or the date that the property is placed in service and ends on the earlier of the last date of the reasonably expected economic life of the property or the latest maturity date of any bond of the issue financing the property (determined without regard to any optional redemption dates). In general, under the 1997 regulations, the amount of private security or private payments is determined by comparing the present value of the private security or private payments to the present value of the debt service to be paid over the term of the issue, using the bond yield as the discount rate. The 1997 regulations reserve § 1.141–13 for rules regarding the application of the private business tests and the private loan financing test to refunding issues.

*B. Application of Private Activity Bond Tests to Refunding Issues*

1. *In general.* The proposed regulations provide that, in general, a refunding issue and a prior issue are tested separately under section 141. Thus, the determination of whether a refunding issue consists of private activity bonds generally does not depend on whether the prior issue consists of private activity bonds.

Commentators supported this separate testing principle. The final regulations retain this approach.

2. *Allocation of proceeds.* The proposed regulations provide that, in applying the private business tests and the private loan financing test to a refunding issue, the proceeds of the refunding issue are allocated to the same purpose investments (including any private loan under section 141(c)) and expenditures as the proceeds of the prior issue.

Comments were not received on this allocation provision. The final regulations retain this rule.

3. *Measurement of private business use.* The proposed regulations generally provide that the amount of private business use of a refunding issue is determined based on the separate measurement period for the refunding issue under § 1.141–3(g) (for example, without regard to any private business use that occurred before the issue date of the refunding issue). Thus, for instance, if an issuer refunds a taxable bond or an exempt facility bond, any private business use of the refinanced facilities before the issue date of the refunding issue is disregarded in applying the private business use test to the refunding issue.

In the case of a refunding issue that refunds a prior issue of governmental bonds, however, the amount of private business use is generally determined based on a combined measurement period. For purposes of the proposed regulations, a governmental bond is any bond that, when issued, purported to be either a governmental bond, as defined in § 1.150–1(b), or a qualified 501(c)(3) bond, as defined in section 145(a). The combined measurement period is the period that begins on the first day of the measurement period (as defined in § 1.141–3(g)) for the prior issue (or the first issue of governmental bonds in the case of a series of refundings of governmental bonds) and ends on the last day of the measurement period for the refunding issue.

As an alternative to the combined measurement period approach, the proposed regulations permit issuers to measure private business use based on the separate measurement period of the refunding issue, but only if the prior issue of governmental bonds does not meet the private business use test during a shortened measurement period. The shortened measurement period begins on the first day of the measurement period of the prior issue (or the first issue of governmental bonds in the case of a series of refundings of governmental bonds) and ends on the issue date of the refunding issue. Whether a prior issue meets the private business use test during the shortened measurement period is determined based on the actual use of proceeds, without regard to the reasonable expectations test of § 1.141–2(d).

Commentators suggested that the proposed regulations be modified with respect to governmental bonds: (1) To delete the shortened measurement period concept; (2) to provide, absent any evidence to the contrary, and subject to general anti-abuse rules, a presumption that an issuer did not exceed the ten percent private business use limit; and (3) to specify that the amount of private business use of the refunding issue is the amount of private business use during either the separate measurement period for the refunding issue or the combined measurement period.

These commentators suggested that a separate measurement period approach would not allow an issuer to increase the amount of private business use without jeopardizing the tax exemption of the prior issue, and thus an issuer generally should be permitted to measure private business use of a refunding issue using a separate measurement period. Nevertheless, these commentators suggested that the regulations include a general anti-abuse rule. They noted, for example, that a separate measurement period approach could permit an issuer to have an additional ten percent of private business use in connection with a refunding issue after the period of limitations for the prior bonds has run. These commentators suggested that, in such a situation, it would be fair to consider the refunding issue to be an abuse if the issuer is deliberately trying to exploit the private business use limit.

The final regulations retain the basic approach of the proposed regulations to measuring private business use. The final regulations do not adopt the suggestions to delete the shortened measurement period concept and to provide that private business use may be measured during either a separate or combined measurement period. These suggestions are not adopted because they could result in more private business use than otherwise would be permitted after the expiration of the period of limitations for the prior issue.

The final regulations do not adopt the suggestion to create a presumption that the private business use limit was not exceeded with respect to prior bonds. It is not clear such a presumption is warranted in all cases.

The final regulations also do not adopt the suggestion to add an anti-abuse rule. The IRS and Treasury Department have concluded that the bright-line rule in the proposed regulations for determining when issuers must apply a combined measurement period and when issuers may apply either a combined measurement period or a separate measurement period is an appropriate methodology for measuring the private business use of a refunding issue and provides more administrative certainty than would be provided by an anti-abuse rule.

Commentators expressed concern regarding an issuer's ability to establish the amount of private business use during a combined measurement period if the period begins a significant amount of time before the refunding bonds are issued. They noted that, in some cases, the refunded bonds may have been issued as many as twenty years or more before the refunding bonds are issued. These commentators stated that document retention policies vary by issuer and retaining or locating the necessary information over such long periods of time may be difficult.

The final regulations apply prospectively and only to refunding bonds that are subject to the 1997 regulations. In general, under § 1.141–15, the 1997 regulations apply to refunding bonds only if, among other requirements, (1) the refunded bonds were originally issued on or after May 16, 1997, (2) the weighted average maturity of the refunding bonds is longer than the weighted average maturity of the refunded bonds, or (3) the issuer chooses to apply the 1997 regulations to the refunding bonds. Thus, the final regulations will not apply to any refunding of bonds originally issued before May 16, 1997, unless the issuer extends the weighted average maturity of the prior bonds or otherwise chooses to have the 1997 regulations apply to the refunding bonds (or an earlier issue of bonds).

In addition, to address commentators' concerns, the final regulations provide transitional relief for refundings of bonds originally issued before May 16, 1997 (the effective date of the 1997 regulations). Specifically, the final regulations provide that, if the prior issue (or, in the case of a series of refundings of governmental bonds, the first issue of governmental bonds in the series) was issued before May 16, 1997, then the issuer, at its option, may treat the combined measurement period as beginning on the date (the transition date) that is the earlier of (1) December 19, 2005 or (2) the first date on which the prior issue (or an earlier issue in the case of a series of refundings of governmental bonds) became subject to the 1997 regulations. This transitional relief, which was not contained in the proposed regulations, has been added to the final regulations in response to concerns expressed by commentators regarding an issuer's ability to establish the amount of private business use during a combined measurement period if the period begins a significant amount of time before the refunding bonds are issued.

Some commentators requested guidance on how the private business tests apply to the shortened and combined measurement periods for refundings of bonds originally issued before the effective date of the Tax Reform Act of 1986, 100 Stat. 2085 (the 1986 Act), if the refunding does not qualify for transitional relief under the 1986 Act or prior law. Specifically, commentators requested guidance on whether (1) the ten-percent private business use limitation under the 1986 Act or (2) the applicable private business use limitation under prior law (for example, the 25-percent limitation under the Internal Revenue Code of 1954) applies in the case of a non-transitioned refunding of a bond issued under law in effect prior to the 1986 Act. The final regulations clarify in an example that the 1986 Act limitations apply to the shortened and combined measurement periods. The issuer, however, may treat these periods as beginning on the transition date described above.

4. *Measurement of private security and private payments.* Under the proposed regulations, if the amount of private business use is determined based on the separate measurement period for the refunding issue, then the amount of private security and private payments allocable to the refunding issue is determined under § 1.141–4 by treating the refunding issue as a separate issue. On the other hand, if the amount of private business use is determined based on a combined measurement period, then the amount of private security and private payments allocable to the refunding issue is determined under § 1.141–4 by treating the refunding issue and all earlier issues taken into account in determining the combined measurement period as a combined issue. The proposed regulations contain specific rules for determining the present value of the debt service on, and the private security and private payments allocable to, a combined issue.

Commentators requested clarification regarding how the private security or payment test applies under the combined issue methodology in the case of a refunding of only a portion of the original principal amount of a prior issue. The final regulations clarify that, in these circumstances, (1) the refunded portion of the prior issue is treated as a separate issue and (2) any private security or private payments with respect to the prior issue are allocated ratably between the combined issue and the unrefunded portion of the prior issue in a consistent manner based on relative debt service.

The proposed regulations also permit an issuer to use the yield on a prior issue of governmental bonds to determine the present value of private security or private payments under arrangements that were not entered into in contemplation of the refunding issue. For this purpose, any arrangement that was entered into more than one year before the issue date of the refunding issue will be treated as not entered into in contemplation of the refunding issue.

Comments were not received on this special rule for arrangements not entered into in contemplation of the refunding issue. The final regulations retain this provision.

5. *Multipurpose issue allocations.* Section 1.148–9(h) permits an issuer to use a reasonable, consistently applied allocation method to treat the portion of a multipurpose issue allocable to a separate purpose as a separate issue for certain of the arbitrage provisions of section 148. Section 1.141–13(d) of the proposed regulations allows an issuer to apply § 1.148–9(h) to a multipurpose issue for certain purposes under section 141. An allocation will not be reasonable for this purpose if it achieves more favorable results under section 141 than could be achieved with actual separate issues. In addition, allocations under the proposed regulations and § 1.148–9(h) must be consistent for purposes of sections 141 and 148. The proposed regulations do not permit allocations for purposes of section 141(c)(1) (relating to the private loan financing test) or section 141(d)(1) (relating to certain restrictions on acquiring nongovernmental output property).

Commentators supported the multipurpose allocation provisions in the proposed regulations. The final regulations retain those provisions. Commentators also requested clarification that an allocation under § 1.141–13(d) may be made at any time. The final regulations provide that an allocation under § 1.141–13(d) may be made at any time, but once made may not be changed. The final regulations also provide that the issue to be allocated and each of the separate issues under the allocation must consist of one or more tax-exempt bonds. Thus, an allocation of a multipurpose issue into two or more separate issues is not permitted under § 1.141–13(d) if, at the time of the allocation, the issue to be allocated or any of the separate issues under the allocation consists of taxable private activity bonds.

6. *Application of reasonable expectations test to certain refunding bonds.* Section 1.141–2(d) provides that an issue consists of private activity bonds if the issuer (1) reasonably expects, as of the issue date, that the

issue will meet either the private business tests or the private loan financing test, or (2) takes a deliberate action, subsequent to the issue date, that causes the conditions of either the private business tests or the private loan financing test to be satisfied. Section 1.141–2(d)(3) provides, in general, that a deliberate action is any action taken by the issuer that is within its control.

The proposed regulations provide that an action that would otherwise cause a refunding issue to satisfy the private business tests or the private loan financing test is not taken into account under the reasonable expectations test of § 1.141–2(d) if (1) the action is not a deliberate action within the meaning of § 1.141–2(d)(3), and (2) the weighted average maturity of the refunding bonds is not greater than the remaining weighted average maturity of the prior bonds.

Commentators suggested that the limitation on the weighted average maturity of the refunding bonds to the remaining weighted average maturity of the prior bonds could penalize issuers for issuing shorter-term obligations initially, or provide an incentive to issue longer-term obligations initially. These commentators requested that the weighted average maturity of the refunding bonds be limited only to 120 percent of the weighted average reasonably expected economic life of the property financed by the prior bonds. The final regulations amend this provision to provide that the weighted average maturity of the refunding bonds may not exceed the weighted average reasonably expected economic life of the property financed by the prior bonds.

Commentators also requested that an example illustrating this provision be added to the regulations. The final regulations add such an example.

7. *Refundings of certain general obligation bonds.* Section 1.141–2(d)(5) provides that the determination of whether bonds of an issue are private activity bonds may be based solely on the issuer's reasonable expectations as of the issue date (and not on whether there are any subsequent deliberate actions) if, among other requirements, the issue is an issue of general obligation bonds of a general purpose governmental unit that finances at least 25 separate purposes.

Commentators suggested that a refunding issue should not consist of private activity bonds if the prior issue meets the requirements of § 1.141–2(d)(5). The final regulations adopt this comment.

*C. Treatment of Issuance Costs Financed by Prior Issue of Qualified 501(c)(3) Bonds*

Under the 1997 regulations, the use of proceeds of an issue of qualified 501(c)(3) bonds to pay issuance costs of the issue is treated as a private business use. The proposed regulations provide that, solely for purposes of applying the private business use test to a refunding issue, the use of proceeds of the prior issue (or any earlier issue in a series of refundings) to pay issuance costs of the prior issue (or the earlier issue) is treated as a government use.

Comments were not received on this provision. The final regulations retain this rule.

*D. Limitation on Advance Refundings of Private Activity Bonds*

Under section 149(d)(2), interest on a bond is not excluded from gross income if any portion of the issue of which the bond is a part is issued to advance refund a private activity bond (other than a qualified 501(c)(3) bond). The proposed regulations provide that, for purposes of section 149(d)(2), the term private activity bond includes a qualified bond described in section 141(e) (other than a qualified 501(c)(3) bond), regardless of whether the refunding issue consists of private activity bonds under the proposed regulations. The proposed regulations also provide that, for purposes of section 149(d)(2), the term private activity bond does not include a taxable bond. Section 1.150–1(b) defines *taxable bond* as any obligation the interest on which is not excludable from gross income under section 103.

Commentators recommended that the regulations be modified to permit a tax-exempt private activity bond to be advance refunded by a governmental bond if the nongovernmental entity's participation in the financing has been terminated and the only beneficiary of the financing is the governmental unit. Based on the plain language of section 149(d)(2) and the policies underlying that Code provision, the final regulations do not adopt this comment.

## Effective Date

The final regulations apply to bonds that are (1) sold on or after February 17, 2006 and (2) subject to the 1997 regulations.

## Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply.

## Drafting Information

The principal authors of these regulations are Johanna Som de Cerff and Laura W. Lederman, Office of Chief Counsel (Tax-exempt and Government Entities), Internal Revenue Service and Stephen J. Watson, Office of Tax Legislative Counsel, Department of the Treasury. However, other personnel from the IRS and Treasury Department participated in their development.

## List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

## Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

## PART 1—INCOME TAXES

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

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

■ **Par. 2.** Section 1.141–0 is amended by adding entries to the table in numerical order for §§ 1.141–13 and 1.141–15(j) to read as follows:

**§ 1.141–0 Table of contents.**

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**§ 1.141–13 Refunding issues.**

(a) In general.
(b) Application of private business use test and private loan financing test.
(1) Allocation of proceeds.
(2) Determination of amount of private business use.
(c) Application of private security or payment test.
(1) Separate issue treatment.
(2) Combined issue treatment.
(3) Special rule for arrangements not entered into in contemplation of the refunding issue.
(d) Multipurpose issue allocations.
(1) In general.
(2) Exceptions.
(e) Application of reasonable expectations test to certain refunding bonds.
(f) Special rule for refundings of certain general obligation bonds.
(g) Examples.

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**§ 1.141–15 Effective dates.**

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(j) Effective dates for certain regulations relating to refundings.

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■ **Par. 3.** In § 1.141–1, paragraph (b) is amended by revising the definition of governmental bond to read as follows:

**§ 1.141–1 Definitions and rules of general application.**

* * * * *

(b) * * *

*Governmental bond* has the same meaning as in § 1.150–1(b), except that, for purposes of § 1.141–13, governmental bond is defined in § 1.141–13(b)(2)(iv).

* * * * *

■ **Par. 4.** Section 1.141–13 is added to read as follows:

**§ 1.141–13 Refunding issues.**

(a) *In general.* Except as provided in this section, a refunding issue and a prior issue are tested separately under section 141. Thus, the determination of whether a refunding issue consists of private activity bonds generally does not depend on whether the prior issue consists of private activity bonds.

(b) *Application of private business use test and private loan financing test*—(1) *Allocation of proceeds.* In applying the private business use test and the private loan financing test to a refunding issue, the proceeds of the refunding issue are allocated to the same expenditures and purpose investments as the proceeds of the prior issue.

(2) *Determination of amount of private business use*—(i) *In general.* Except as provided in paragraph (b)(2)(ii) of this section, the amount of private business use of a refunding issue is determined under § 1.141–3(g), based on the measurement period for that issue (for example, without regard to any private business use that occurred prior to the issue date of the refunding issue).

(ii) *Refundings of governmental bonds.* In applying the private business use test to a refunding issue that refunds a prior issue of governmental bonds, the amount of private business use of the refunding issue is the amount of private business use—

(A) During the combined measurement period; or

(B) At the option of the issuer, during the period described in paragraph (b)(2)(i) of this section, but only if, without regard to the reasonable expectations test of § 1.141–2(d), the prior issue does not satisfy the private business use test, based on a measurement period that begins on the first day of the combined measurement period and ends on the issue date of the refunding issue.

(iii) *Combined measurement period*—(A) *In general.* Except as provided in paragraph (b)(2)(iii)(B) of this section, the *combined measurement period* is the period that begins on the first day of the measurement period (as defined in § 1.141–3(g)) for the prior issue (or, in the case of a series of refundings of governmental bonds, the first issue of governmental bonds in the series) and ends on the last day of the measurement period for the refunding issue.

(B) *Transition rule for refundings of bonds originally issued before May 16, 1997.* If the prior issue (or, in the case of a series of refundings of governmental bonds, the first issue of governmental bonds in the series) was issued before May 16, 1997, then the issuer, at its option, may treat the combined measurement period as beginning on the date (the transition date) that is the earlier of December 19, 2005 or the first date on which the prior issue (or an earlier issue in the case of a series of refundings of governmental bonds) became subject to the 1997 regulations (as defined in § 1.141–15(b)). If the issuer treats the combined measurement period as beginning on the transition date in accordance with this paragraph (b)(2)(iii)(B), then paragraph (c)(2) of this section shall be applied by treating the transition date as the issue date of the earliest issue, by treating the bonds as reissued on the transition date at an issue price equal to the value of the bonds (as determined under § 1.148–4(e)) on that date, and by disregarding any private security or private payments before the transition date.

(iv) *Governmental bond.* For purposes of this section, the term *governmental bond* means any bond that, when issued, purported to be a governmental bond, as defined in § 1.150–1(b), or a qualified 501(c)(3) bond, as defined in section 145(a).

(v) *Special rule for refundings of qualified 501(c)(3) bonds with governmental bonds.* For purposes of applying this paragraph (b)(2) to a refunding issue that refunds a qualified 501(c)(3) bond, any use of the property refinanced by the refunding issue before the issue date of the refunding issue by a 501(c)(3) organization with respect to its activities that do not constitute an unrelated trade or business under section 513(a) is treated as government use.

(c) *Application of private security or payment test—(1) Separate issue treatment.* If the amount of private business use of a refunding issue is determined based on the measurement period for that issue in accordance with paragraph (b)(2)(i) or (b)(2)(ii)(B) of this section, then the amount of private security and private payments allocable to the refunding issue is determined under § 1.141–4 by treating the refunding issue as a separate issue.

(2) *Combined issue treatment.* If the amount of private business use of a refunding issue is determined based on the combined measurement period for that issue in accordance with paragraph (b)(2)(ii)(A) of this section, then the amount of private security and private payments allocable to the refunding issue is determined under § 1.141–4 by treating the refunding issue and all earlier issues taken into account in determining the combined measurement period as a combined issue. For this purpose, the present value of the private security and private payments is compared to the present value of the debt service on the combined issue (other than debt service paid with proceeds of any refunding bond). Present values are computed as of the issue date of the earliest issue taken into account in determining the combined measurement period (the earliest issue). Except as provided in paragraph (c)(3) of this section, present values are determined by using the yield on the combined issue as the discount rate. The yield on the combined issue is determined by taking into account payments on the refunding issue and all earlier issues taken into account in determining the combined measurement period (other than payments made with proceeds of any refunding bond), and based on the issue price of the earliest issue. In the case of a refunding of only a portion of the original principal amount of a prior issue, the refunded portion of the prior issue is treated as a separate issue and any private security or private payments with respect to the prior issue are allocated ratably between the combined issue and the unrefunded portion of the prior issue in a consistent manner based on relative debt service. See paragraph (b)(2)(iii)(B) of this section for special rules relating to certain refundings of governmental bonds originally issued before May 16, 1997.

(3) *Special rule for arrangements not entered into in contemplation of the refunding issue.* In applying the private security or payment test to a refunding issue that refunds a prior issue of governmental bonds, the issuer may use the yield on the prior issue to determine the present value of private security and private payments under arrangements that were not entered into in contemplation of the refunding issue. For this purpose, any arrangement that was entered into more than 1 year before the issue date of the refunding issue is treated as not entered into in contemplation of the refunding issue.

(d) *Multipurpose issue allocations*—(1) *In general.* For purposes of section 141, unless the context clearly requires otherwise, § 1.148–9(h) applies to allocations of multipurpose issues (as defined in § 1.148–1(b)), including allocations involving the refunding purposes of the issue. An allocation under this paragraph (d) may be made at any time, but once made may not be changed. An allocation is not reasonable under this paragraph (d) if it achieves more favorable results under section 141 than could be achieved with actual separate issues. The issue to be allocated and each of the separate issues under the allocation must consist of one or more tax-exempt bonds. Allocations made under this paragraph (d) and § 1.148–9(h) must be consistent for purposes of section 141 and section 148.

(2) *Exceptions.* This paragraph (d) does not apply for purposes of sections 141(c)(1) and 141(d)(1).

(e) *Application of reasonable expectations test to certain refunding bonds.* An action that would otherwise cause a refunding issue to satisfy the private business tests or the private loan financing test is not taken into account under the reasonable expectations test of § 1.141–2(d) if—

(1) The action is not a deliberate action within the meaning of § 1.141–2(d)(3); and

(2) The weighted average maturity of the refunding bonds is not greater than the weighted average reasonably expected economic life of the property financed by the prior bonds.

(f) *Special rule for refundings of certain general obligation bonds.* Notwithstanding any other provision of this section, a refunding issue does not consist of private activity bonds if—

(1) The prior issue meets the requirements of § 1.141–2(d)(5) (relating to certain general obligation bond programs that finance a large number of separate purposes); or

(2) The refunded portion of the prior issue is part of a series of refundings of all or a portion of an issue that meets the requirements of § 1.141–2(d)(5).

(g) *Examples.* The following examples illustrate the application of this section:

*Example 1. Measuring private business use.* In 2002, Authority A issues tax-exempt bonds that mature in 2032 to acquire an office building. The measurement period for the 2002 bonds under § 1.141–3(g) is 30 years. At the time A acquires the building, it enters into a 10-year lease with a nongovernmental person under which the nongovernmental person will use 5 percent of the building in its trade or business during each year of the lease term. In 2007, A issues bonds to refund the 2002 bonds. The 2007 bonds mature on the same date as the 2002 bonds and have a measurement period of 25 years under § 1.141–3(g). Under paragraph (b)(2)(ii)(A) of this section, the amount of private business use of the proceeds of the 2007 bonds is 1.67 percent, which equals the amount of private business use during the combined measurement period (5 percent of ⅓ of the 30-year combined measurement period). In addition, the 2002 bonds do not satisfy the private business use test, based on a measurement period beginning on the first day of the measurement period for the 2002 bonds and ending on the issue date of the 2007 bonds, because only 5 percent of the proceeds of the 2002 bonds are used for a private business use during that period. Thus, under paragraph (b)(2)(ii)(B) of this section, A may treat the amount of private business use of the 2007 bonds as 1 percent (5 percent of ⅕ of the 25-year measurement period for the 2007 bonds). The 2007 bonds do not satisfy the private business use test.

*Example 2. Combined issue yield computation.* (i) On January 1, 2000, County B issues 20-year bonds to finance the acquisition of a municipal auditorium. The 2000 bonds have a yield of 7.7500 percent, compounded annually, and an issue price and par amount of $100 million. The debt service payments on the 2000 bonds are as follows:

| Date | Debt service |
|---|---|
| 1/1/01 | $9,996,470 |
| 1/1/02 | 9,996,470 |
| 1/1/03 | 9,996,470 |
| 1/1/04 | 9,996,470 |
| 1/1/05 | 9,996,470 |
| 1/1/06 | 9,996,470 |
| 1/1/07 | 9,996,470 |
| 1/1/08 | 9,996,470 |
| 1/1/09 | 9,996,470 |
| 1/1/10 | 9,996,470 |
| 1/1/11 | 9,996,470 |
| 1/1/12 | 9,996,470 |
| 1/1/13 | 9,996,470 |
| 1/1/14 | 9,996,470 |
| 1/1/15 | 9,996,470 |
| 1/1/16 | 9,996,470 |
| 1/1/17 | 9,996,470 |
| 1/1/18 | 9,996,470 |
| 1/1/19 | 9,996,470 |
| 1/1/20 | 9,996,470 |
| | 199,929,400 |

(ii) On January 1, 2005, B issues 15-year bonds to refund all of the outstanding 2000 bonds maturing after January 1, 2005 (in the aggregate principal amount of $86,500,000). The 2005 bonds have a yield of 6.0000 percent, compounded annually, and an issue price and par amount of $89,500,000. The debt service payments on the 2005 bonds are as follows:

| Date | Debt service |
|---|---|
| 1/1/06 | $9,215,167 |
| 1/1/07 | 9,215,167 |
| 1/1/08 | 9,215,167 |
| 1/1/09 | 9,215,167 |
| 1/1/10 | 9,215,167 |
| 1/1/11 | 9,215,167 |
| 1/1/12 | 9,215,167 |
| 1/1/13 | 9,215,167 |
| 1/1/14 | 9,215,167 |
| 1/1/15 | 9,215,167 |
| 1/1/16 | 9,215,167 |
| 1/1/17 | 9,215,167 |
| 1/1/18 | 9,215,167 |
| 1/1/19 | 9,215,167 |
| 1/1/20 | 9,215,167 |
| | 138,227,511 |

(iii) In accordance with § 1.141–15(h), B chooses to apply § 1.141–13 (together with the other provisions set forth in § 1.141–15(h)), to the 2005 bonds. For purposes of determining the amount of private security and private payments with respect to the 2005 bonds, the 2005 bonds and the refunded portion of the 2000 bonds are treated as a combined issue under paragraph (c)(2) of this section. The yield on the combined issue is determined in accordance with §§ 1.148–4, 1.141–4(b)(2)(iii) and 1.141–13(c)(2). Under this methodology, the yield on the combined issue is 7.1062 percent per year compounded annually, illustrated as follows:

| Date | Previous debt service on refunded portion of prior issue | Refunding debt service | Total debt service | Present value on 1/1/00 |
|---|---|---|---|---|
| 1/1/00 | | | | ($86,500,000.00) |
| 1/1/01 | 6,689,793 | | 6,689,793 | 6,245,945.33 |
| 1/1/02 | 6,689,793 | | 6,689,793 | 5,831,545.62 |
| 1/1/03 | 6,689,793 | | 6,689,793 | 5,444,640.09 |
| 1/1/04 | 6,689,793 | | 6,689,793 | 5,083,404.58 |
| 1/1/05 | 6,689,793 | | 6,689,793 | 4,746,135.95 |
| 1/1/06 | | 9,215,167 | 9,215,167 | 6,104,023.84 |
| 1/1/07 | | 9,215,167 | 9,215,167 | 5,699,040.20 |
| 1/1/08 | | 9,215,167 | 9,215,167 | 5,320,926.00 |
| 1/1/09 | | 9,215,167 | 9,215,167 | 4,967,898.55 |

| Date | Previous debt service on refunded portion of prior issue | Refunding debt service | Total debt service | Present value on 1/1/00 |
|---|---|---|---|---|
| 1/1/10 | ..... | 9,215,167 | 9,215,167 | 4,638,293.40 |
| 1/1/11 | ..... | 9,215,167 | 9,215,167 | 4,330,556.57 |
| 1/1/12 | ..... | 9,215,167 | 9,215,167 | 4,043,237.15 |
| 1/1/13 | ..... | 9,215,167 | 9,215,167 | 3,774,980.51 |
| 1/1/14 | ..... | 9,215,167 | 9,215,167 | 3,524,521.90 |
| 1/1/15 | ..... | 9,215,167 | 9,215,167 | 3,290,680.46 |
| 1/1/16 | ..... | 9,215,167 | 9,215,167 | 3,072,353.70 |
| 1/1/17 | ..... | 9,215,167 | 9,215,167 | 2,868,512.26 |
| 1/1/18 | ..... | 9,215,167 | 9,215,167 | 2,678,195.09 |
| 1/1/19 | ..... | 9,215,167 | 9,215,167 | 2,500,504.89 |
| 1/1/20 | ..... | 9,215,167 | 9,215,167 | 2,334,603.90 |
| | 33,448,965 | 138,227,511 | 171,676,4760.00 | 0.00 |

*Example 3. Determination of private payments allocable to combined issue.* The facts are the same as in *Example 2.* In addition, on January 1, 2001, B enters into a contract with a nongovernmental person for the use of the auditorium. The contract results in a private payment in the amount of $500,000 on each January 1 beginning on January 1, 2001, and ending on January 1, 2020. Under paragraph (c)(2) of this section, the amount of the private payments allocable to the combined issue is determined by treating the refunded portion of the 2000 bonds ($86,500,000 principal amount) as a separate issue, and by allocating the total private payments ratably between the combined issue and the unrefunded portion of the 2000 bonds ($13,500,000 principal amount) based on relative debt service, as follows:

| Date | Private payments | Debt service on unrefunded portion of prior issue | Debt service on combined issue | Percentage of private payments allocable to combined issue | Amount of private payments allocable to combined issue |
|---|---|---|---|---|---|
| 1/1/01 | $500,000 | $3,306,677 | $6,689,793 | 66.92 | $334,608 |
| 1/1/02 | 500,000 | 3,306,677 | 6,689,793 | 66.92 | 334,608 |
| 1/1/03 | 500,000 | 3,306,677 | 6,689,793 | 66.92 | 334,608 |
| 1/1/04 | 500,000 | 3,306,677 | 6,689,793 | 66.92 | 334,608 |
| 1/1/05 | 500,000 | 3,306,677 | 6,689,793 | 66.92 | 334,608 |
| 1/1/06 | 500,000 | ..... | 9,215,167 | 100.00 | 500,000 |
| 1/1/07 | 500,000 | ..... | 9,215,167 | 100.00 | 500,000 |
| 1/1/08 | 500,000 | ..... | 9,215,167 | 100.00 | 500,000 |
| 1/1/09 | 500,000 | ..... | 9,215,167 | 100.00 | 500,000 |
| 1/1/10 | 500,000 | ..... | 9,215,167 | 100.00 | 500,000 |
| 1/1/11 | 500,000 | ..... | 9,215,167 | 100.00 | 500,000 |
| 1/1/12 | 500,000 | ..... | 9,215,167 | 100.00 | 500,000 |
| 1/1/13 | 500,000 | ..... | 9,215,167 | 100.00 | 500,000 |
| 1/1/14 | 500,000 | ..... | 9,215,167 | 100.00 | 500,000 |
| 1/1/15 | 500,000 | ..... | 9,215,167 | 100.00 | 500,000 |
| 1/1/16 | 500,000 | ..... | 9,215,167 | 100.00 | 500,000 |
| 1/1/17 | 500,000 | ..... | 9,215,167 | 100.00 | 500,000 |
| 1/1/18 | 500,000 | ..... | 9,215,167 | 100.00 | 500,000 |
| 1/1/19 | 500,000 | ..... | 9,215,167 | 100.00 | 500,000 |
| 1/1/20 | 500,000 | ..... | 9,215,167 | 100.00 | 500,000 |
| | $10,000,000 | $16,533,385 | $171,676,476 | ..... | $9,173,039 |

*Example 4. Refunding taxable bonds and qualified bonds.* (i) In 1999, City C issues taxable bonds to finance the construction of a facility for the furnishing of water. The bonds are secured by revenues from the facility. The facility is managed pursuant to a management contract with a nongovernmental person that gives rise to private business use. In 2007, C terminates the management contract and takes over the operation of the facility. In 2009, C issues bonds to refund the 1999 bonds. On the issue date of the 2009 bonds, C reasonably expects that the facility will not be used for a private business use during the term of the 2009 bonds. In addition, during the term of the 2009 bonds, the facility is not used for a private business use. Under paragraph (b)(2)(i) of this section, the 2009 bonds do not satisfy the private business use test because the amount of private business use is based on the measurement period for those bonds and therefore does not take into account any private business use that occurred pursuant to the management contract.

(ii) The facts are the same as in paragraph (i) of this *Example 4,* except that the 1999 bonds are issued as exempt facility bonds under section 142(a)(4). The 2009 bonds do not satisfy the private business use test.

*Example 5. Multipurpose issue.* In 2001, State D issues bonds to finance the construction of two office buildings, Building 1 and Building 2. D expends an equal amount of the proceeds on each building. D enters into arrangements that result in 8 percent of Building 1 and 12 percent of Building 2 being used for a private business use during the measurement period under § 1.141–3(g). These arrangements result in a total of 10 percent of the proceeds of the 2001 bonds being used for a private business use. In 2006, D purports to allocate, under paragraph (d) of this section, an equal amount of the outstanding 2001 bonds to Building 1 and Building 2. D also enters into another private business use arrangement with respect to Building 1 that results in an additional 2

percent (and a total of 10 percent) of Building 1 being used for a private business use during the measurement period. An allocation is not reasonable under paragraph (d) of this section if it achieves more favorable results under section 141 than could be achieved with actual separate issues. D's allocation is unreasonable because, if permitted, it would result in more than 10 percent of the proceeds of the 2001 bonds being used for a private business use.

*Example 6. Non-deliberate action.* In 1998, City E issues bonds to finance the purchase of land and construction of a building (the prior bonds). On the issue date of the prior bonds, E reasonably expects that it will be the sole user of the financed property for the entire term of the bonds. In 2003, the federal government acquires the financed property in a condemnation action. In 2006, E issues bonds to refund the prior bonds (the refunding bonds). The weighted average maturity of the refunding bonds is not greater than the reasonably expected economic life of the financed property. In general, under § 1.141–2(d) and this section, reasonable expectations must be separately tested on the issue date of a refunding issue. Under paragraph (e) of this section, however, the condemnation action is not taken into account in applying the reasonable expectations test to the refunding bonds because the condemnation action is not a deliberate action within the meaning of § 1.141–2(d)(3) and the weighted average maturity of the refunding bonds is not greater than the weighted average reasonably expected economic life of the property financed by the prior bonds. Thus, the condemnation action does not cause the refunding bonds to be private activity bonds.

*Example 7. Non-transitioned refunding of bonds subject to 1954 Code.*

In 1985, County F issues bonds to finance a court house. The 1985 bonds are subject to the provisions of the Internal Revenue Code of 1954. In 2006, F issues bonds to refund all of the outstanding 1985 bonds. The weighted average maturity of the 2006 bonds is longer than the remaining weighted average maturity of the 1985 bonds. In addition, the 2006 bonds do not satisfy any transitional rule for refundings in the Tax Reform Act of 1986, 100 Stat. 2085 (1986). Section 141 and this section apply to determine whether the 2006 bonds are private activity bonds including whether, for purposes of § 1.141–13(b)(2)(ii)(B), the 1985 bonds satisfy the private business use test based on a measurement period that begins on the first day of the combined measurement period for the 2006 bonds and ends on the issue date of the 2006 bonds.

■ **Par. 5.** Section 1.141–15 is amended by revising paragraphs (b)(1), (c), (d) and (h) and adding paragraph (j) to read as follows:

**§ 1.141–15 Effective dates.**

* * * * *

(b) *Effective dates*—(1) *In general.* Except as otherwise provided in this section, §§ 1.141–0 through 1.141–6(a), 1.141–9 through 1.141–12, 1.141–14, 1.145–1 through 1.145–2(c), and the definition of bond documents contained in § 1.150–1(b) (the 1997 regulations) apply to bonds issued on or after May 16, 1997, that are subject to section 1301 of the Tax Reform Act of 1986 (100 Stat. 2602).

* * * * *

(c) *Refunding bonds.* Except as otherwise provided in this section, the 1997 regulations (defined in paragraph (b)(1) of this section) do not apply to any bonds issued on or after May 16, 1997, to refund a bond to which those regulations do not apply unless—

(1) The refunding bonds are subject to section 1301 of the Tax Reform Act of 1986 (100 Stat. 2602); and

(2)(i) The weighted average maturity of the refunding bonds is longer than—

(A) The weighted average maturity of the refunded bonds; or

(B) In the case of a short-term obligation that the issuer reasonably expects to refund with a long-term financing (such as a bond anticipation note), 120 percent of the weighted average reasonably expected economic life of the facilities financed; or

(ii) A principal purpose for the issuance of the refunding bonds is to make one or more new conduit loans.

(d) *Permissive application of regulations.* Except as provided in paragraph (e) of this section, the 1997 regulations (defined in paragraph (b)(1) of this section) may be applied in whole, but not in part, to actions taken before February 23, 1998, with respect to—

(1) Bonds that are outstanding on May 16, 1997, and subject to section 141; or

(2) Refunding bonds issued on or after May 16, 1997, that are subject to 141.

* * * * *

(h) *Permissive retroactive application.* Except as provided in paragraphs (d), (e) or (i) of this section, §§ 1.141–1 through 1.141–6(a), 1.141–7 through 1.141–14, 1.145–1 through 1.145–2, 1.149(d)–1(g), 1.150–1(a)(3), the definition of bond documents contained in § 1.150–1(b) and § 1.150–1(c)(3)(ii) may be applied by issuers in whole, but not in part, to—

(1) Outstanding bonds that are sold before February 17, 2006, and subject to section 141; or

(2) Refunding bonds that are sold on or after February 17, 2006, and subject to section 141.

* * * * *

(j) *Effective dates for certain regulations relating to refundings.* Except as otherwise provided in this section, §§ 1.141–13, 1.145–2(d), 1.149(d)–1(g), 1.150–1(a)(3) and 1.150–1(c)(3)(ii) apply to bonds that are sold on or after February 17, 2006 and that are subject to the 1997 regulations.

■ **Par. 6.** Section 1.145–0 is amended by adding an entry to the table in numerical order for § 1.145–2(d) to read as follows:

**§ 1.145–0 Table of contents.**

* * * * *

**§ 1.145–2 Application of private activity bond regulations.**

* * * * *

(d) Issuance costs financed by prior issue.

■ **Par. 7.** In § 1.145–2, paragraph (d) is added to read as follows:

**§ 1.145–2 Application of private activity bond regulations.**

* * * * *

(d) *Issuance costs financed by prior issue.* Solely for purposes of applying the private business use test to a refunding issue under § 1.141–13, the use of proceeds of the prior issue (or any earlier issue in a series of refundings) to pay issuance costs of the prior issue (or the earlier issue) is treated as a government use.

■ **Par. 8.** Section 1.149(d)–1 is amended by revising paragraph (g) and adding paragraph (h) to read as follows:

**§ 1.149(d)–1 Limitations on advance refundings.**

* * * * *

(g) *Limitation on advance refundings of private activity bonds.* Under section 149(d)(2) and this section, interest on a bond is not excluded from gross income if any portion of the issue of which the bond is a part is issued to advance refund a private activity bond (other than a qualified 501(c)(3) bond). For this purpose, the term private activity bond—

(1) Includes a qualified bond described in section 141(e) (other than a qualified 501(c)(3) bond), regardless of whether the refunding issue consists of private activity bonds under § 1.141–13; and

(2) Does not include a taxable bond.

(h) *Effective dates*—(1) *In general.* Except as provided in this paragraph (h), this section applies to bonds issued after June 30, 1993, to which §§ 1.148–1 through 1.148–11 apply, including conduit loans that are treated as issued after June 30, 1993, under paragraph (b)(4) of this section. In addition, this section applies to any issue to which the election described in § 1.148–11(b)(1) is made.

(2) *Special effective date for paragraph (b)(3).* Paragraph (b)(3) of this

section applies to any advance refunding issue issued after May 28, 1991.

(3) *Special effective date for paragraph (f)(3).* Paragraph (f)(3) of this section applies to bonds sold on or after July 8, 1997 and to any issue to which the election described in § 1.148–11(b)(1) is made. See § 1.148–11A(i) for rules relating to certain bonds sold before July 8, 1997.

(4) *Special effective date for paragraph (g).* See § 1.141–15 for the applicability date of paragraph (g) of this section.

■ **Par 9.** Section 1.150–1 is amended by revising paragraphs (a)(3) and (c)(3)(ii) to read as follows:

**§ 1.150–1 Definitions.**

(a) * * *

(3) *Exceptions to general effective date.* See § 1.141–15 for the applicability date of the definition of bond documents contained in paragraph (b) of this section and the effective date of paragraph (c)(3)(ii) of this section.

* * * * *

(c) * * *

(3) * * *

(ii) *Exceptions.* This paragraph (c)(3) does not apply for purposes of sections 141, 144(a), 148, 149(d) and 149(g).

* * * * *

**Mark E. Matthews,**

*Deputy Commissioner for Services and Enforcement.*

Approved: November 23, 2005.

**Eric Solomon,**

*Acting Deputy Assistant Secretary of the Treasury.*

[FR Doc. 05–23944 Filed 12–16–05; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 165

**[CGD14–04–116]**

**RIN 1625–AA87**

## Security Zones; Oahu, Maui, Hawaii, and Kauai, HI

**AGENCY:** Coast Guard, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Coast Guard is changing existing permanent security zones in designated waters adjacent to the islands of Oahu, Maui, Hawaii, and Kauai, Hawaii. These revised security zones are necessary to protect personnel, vessels, and facilities from acts of sabotage or other subversive acts, accidents, or other causes of a similar nature and will extend from the surface of the water to the ocean floor. Some of the revised security zones are continuously activated and enforced at all times, while others are activated and enforced only during heightened threat conditions. Entry into these Coast Guard security zones while they are activated and enforced is prohibited unless authorized by the Captain of the Port.

**DATES:** This rule is effective January 18, 2006.

**ADDRESSES:** Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket CGD14–04–116 and are available for inspection or copying at Coast Guard Sector Honolulu, between 7 a.m. and 3:30 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Junior Grade Quincey Adams, U. S. Coast Guard Sector Honolulu at (808) 842–2600.

**SUPPLEMENTARY INFORMATION:**

### Regulatory Information

On May 20, 2004, we published a notice of proposed rulemaking (NPRM) entitled ''Security Zones; Oahu, Maui, Hawaii, and Kauai, Hawaii,'' in the **Federal Register** (69 FR 29114). We received five letters commenting on the proposed rule. No public meeting was requested, and none was held. On June 7, 2005, we published a supplemental NPRM (SNPRM) entitled ''Security Zones; Oahu, Maui, HI, and Kauai, HI,'' in the **Federal Register** (70 FR 33047). We received one letter and one phone call commenting on the SNPRM. No public meeting was requested, and none was held.

### Background and Purpose

The terrorist attacks against the United States that occurred on September 11, 2001, have emphasized the need for the United States to establish heightened security measures in order to protect the public, ports and waterways, and the maritime transportation system from future acts of terrorism or other subversive acts. The terrorist organization Al Qaeda and other similar groups remain committed to conducting armed attacks against U.S. interests, including civilian targets within the United States. Accordingly, the President has continued the national emergencies he declared following the attacks: national emergency with respect to terrorist attacks, 70 FR 54229, September 13, 2005; and national emergency with respect to persons who commit, threaten to commit, or support acts of terrorism, 70 FR 55703, September 22, 2005. Pursuant to the Magnuson Act, 50 U.S.C. 191, *et seq.*, the President also has found that the security of the United States is and continues to be endangered by the September 11, 2001 attacks (E.O. 13273, 67 FR 56215, September 3, 2002). National security and intelligence officials warn that future terrorist attacks are likely.

In response to this threat, on April 25, 2003, the Coast Guard established permanent security zones in designated waters surrounding the Hawaiian Islands (68 FR 20344). These security zones have been in operation for more than 2 years. We have conducted periodic review of port and harbor security procedures and considered the oral feedback that local vessel operators gave to Coast Guard units enforcing the zones. In response, the Coast Guard is continuing most of the current security zones but is reducing the size and scope of some to afford acceptable protection to critical assets and maritime infrastructure and minimize the disruption to maritime commerce and inconvenience to small entities.

This rule establishes permanently-existing security zones in the waters surrounding the islands of Oahu, Maui, Kauai, and Hawaii. Specifically, 13 permanent security zones affect the following locations and facilities: (1) Honolulu Harbor, Oahu; (2) Honolulu Harbor General Anchorages B, C, and D, Oahu; (3) Kalihi Channel and Keehi Lagoon, Oahu; (4) Honolulu International Airport, North Section, Oahu; (5) Honolulu International Airport, South Section, Oahu; (6) Barbers Point Offshore Moorings, Oahu; (7) Barbers Point Harbor, Oahu; (8) Kahului Harbor, Maui; (9) Lahaina, Maui; (10) Hilo Harbor, Hawaii; (11) Kailua-Kona Harbor, Hawaii; (12) Nawiliwili Harbor, Lihue, Kauai; and (13) Port Allen, Kauai. When activated and enforced by the Captain of the Port or his or her representative, persons and vessels must not enter these security zones without the express permission of the Captain of the Port.

### Discussion of Comments and Changes

In response to our initial proposed rule published on May 20, 2004, the Coast Guard received five letters. Two letters from the State of Hawaii are in favor of the rulemaking and contained no objections. One letter from a maritime association is also in favor with no objections. These three letters recognize the need for the security zones and reiterate the Coast Guard's reasons for proposing them, raising no

additional issues. The remaining two letters raised issues that are discussed below.

A letter from a Hawaii-based oil company is in favor of the changes to the security zones, but suggests that the Coast Guard include a provision allowing such companies to submit an advance transportation schedule to the Captain of the Port that would permit fuel barges to conduct transit and fuel-transfer operations in port within a large cruise ship (LCS) security zone under normal circumstances. The letter also states that there should be more explicit language assuring minimal interruption of businesses that conduct routine operations in the commercial harbors when the Maritime Security (MARSEC) Level is not elevated.

*Coast Guard Response:* For these security zones to be effective in safeguarding ports, facilities, and vessels from acts of terrorism and sabotage, the Captain of the Port must have access to accurate and timely information regarding current vessel traffic in any designated security zone. Paragraph 165.1407(c)(2) in the rule below specifically authorizes the public to employ either oral or written means to request permission to enter and operate within a designated security zone. This rule does not preclude the submission of an accurate operating schedule as a means of obtaining permission to enter the security zones established by this rule. Any party desiring to submit a schedule in writing to the Captain of the Port for approval may call the Sector Honolulu Command Center at (808) 842–2600. Approval of such requests is at the discretion of the Captain of the Port.

The final letter commenting on the security-zone changes is from a maritime association and raises three separate issues:

*Issue 1:* The letter comments that, because Maui, Hawaii, and Kauai, each contain port facilities within 100 yards of each other, the security zone around a large cruise ship moored at one of those facilities would preclude the simultaneous use of that harbor by any other vessel, especially the tugs and barges that frequently transit the area. The comment emphasizes that tug and barge operations are the main ''life line'' of the outlying islands, and that large crew ship (LCS) traffic is expected to increase, with no increase in facilities, so the security zones around these ships will soon have an even greater negative impact on such operations.

*Coast Guard Response:* These security zones do not preclude simultaneous use of a harbor when an LCS is moored at one of the facilities. We acknowledge that the security zones around large cruise ships occasionally may cause inconvenience to other vessels and operators within the immediate area because they will have to get permission before entering those zones. We do not agree, however, that this inconvenience is unreasonable considering the benefits provided by the security zones.

With their high profile and passenger-carrying capacity, large cruise ships are attractive targets for acts of sabotage and terrorism, particularly when they are stationary at a pier or mooring. Nevertheless, in response to this comment, we have considered reducing the size of the zones around stationary LCSs, but we determined that an effective security zone must be large enough to allow security personnel to identify and respond to potential threats. Moreover, any person affected by the security zone around a large cruise ship may request permission to enter and transit the zone by contacting the Sector Honolulu Command Center via VHF channel 16 (156.8 Mhz) or phone: (808) 842–2600. Operators who frequently operate in the vicinity of a security zone have the option of submitting a written schedule for advance approval to minimize any potential disruption.

*Issue 2:* The letter comments that the language in the NPRM about security zones around large cruise ships and designated enforcement zones is confusing, as is much of the other terminology, and certain paragraphs of the proposed rule should be reworded.

*Coast Guard Response:* We agree and have extensively revised both the wording and organization of our rule. We separated the zones by island and gave each of the four islands a separate section in the CFR. This change allows us to focus the regulation paragraphs on LCS zones for the islands of Maui, Kauai, and Hawaii, because the LCS zones are for those islands only; none are for Oahu. This change also allows us to focus the regulation and notice paragraphs in the Oahu CFR section on the three Oahu zones (Kalihi Channel and Keehi Lagoon; Honolulu International Airport, South Section; and Barbers Point Harbor) that are enforced only upon a rise in the MARSEC level or when the Captain of the Port has determined there is a heightened risk of a transportation security incident.

As for wording changes, we inserted the word ''activated'' several times to help discern when certain security zones are enforced. It is important to note, however, that these security zones are permanently established, and that the word ''activated'' is only meant to distinguish whether the permanently-established zone is subject to enforcement. We made numerous similarly non-substantive wording changes for the SNPRM that did not change the meaning or intent of our initial proposed rule but were intended to improved the clarity of the rule in response to this letter.

*Issue 3:* The letter suggests removing the Honolulu International Airport Security Zone from Category 1 (zones subject to enforcement at all times) and placing it in Category 2 (zones subject to enforcement only during heightened threat conditions, as provided in the rule). The commenter noted that this area is planned for future ocean recreation expansion and it should not be continuously and permanently removed from public use, and the alignment with the adjacent Keehi Lagoon Security Zone (Category 2) would preserve public use of the entire Keehi Lagoon area for future recreational and commercial improvements.

*Coast Guard Response:* The security zone nearest Honolulu International Airport in particular must remain a Category 1 zone because all major airports are possible terrorist targets. The Category 1 designation of this area is specifically meant to protect the Honolulu International Airport, as well as all the aircraft and people working or transiting that facility. Designating this area a Category 2 zone would compromise security by removing the continuous waterside buffer around the airport afforded by the Category 1 designation. Those wishing to enter the zone, however, need only to seek and obtain prior approval. The Captain of the Port will not manage security zones solely based on possible future scenarios but rather adjust as appropriate to the current threat situation so security can be maintained while minimizing disruption to commercial and recreational traffic.

The comments received affected this rule to the extent described above, but we also made additional substantive changes from the proposed rule published on May 20, 2004 (69 FR 29114) that necessitated the SNPRM. We proposed an additional security zone, described in this rule, § 165.1407(a)(4)(ii), as *Honolulu International Airport, South Section.* This zone, encompassing Honolulu Harbor anchorages B, C, and D, is a Category 2 zone, subject to enforcement only in times of raised MARSEC levels or other threats. We determined there is a need to add this zone to establish an extra protective buffer around the airport when necessary.

The separately-designated *Honolulu Harbor Anchorages B, C, and D* security zone remains the same as in our initial proposed rule: limited to the waters extending 100 yards in all directions from vessels over 300 gross tons anchored there. The 100-yard security zone around those vessels is still activated and enforced at all times regardless of whether an emerging threat has necessitated the additional activation and enforcement of the encompassing *Honolulu International Airport, South Section* security zone for increased airport protection.

The name of the *Honolulu International Airport* security zone in our initial proposed rule is changed to *Honolulu International Airport, North Section*, § 165.1407(a)(4)(i), to distinguish it from the *Honolulu International Airport, South Section* security zone. The *Honolulu International Airport, North Section* security zone remains a Category 1 zone, enforced and activated at all times, extending only about 800 yards offshore from the airport, the minimal distance required for low-level security conditions.

We also eliminated an unnecessary notification requirement that was in our initial proposed rule. We have determined that the best public notification of the presence of an LCS security zone is the presence of the LCS itself, which is obvious to operators well before they reach the 100-yard zone. Therefore, while we may use other notification methods, like a broadcast notice to mariners, the requirement to make such other notification is not in this rule.

Additionally, in the paragraphs of our rule that address permission to transit a security zone, we have included language that eliminates the need for seaplane operators to get Coast Guard permission while they are in compliance with established Federal Aviation Administration regulations regarding flight-plan approval. We have determined that this change is necessary to limit the communications that pilots would otherwise have to make when transiting the zones. For the convenience of the reader, we included a cross reference to the relevant FAA regulations in the regulation text.

We have also revised our penalty paragraphs so that they are limited to referencing the statutes (33 U.S.C. 1232 and 50 U.S.C. 192) that provide violation penalties. This change eliminates the need to amend those paragraphs every time the penalty statutes are amended.

Other corrections of our initial proposed rule include the addition of the words ''or hundredths''in § 165.1407(a) to more accurately describe how security-zone coordinates are expressed, and an update of Sector Honolulu's contact information to reflect recent changes.

In response to our SNPRM published on June 7, 2005, the Coast Guard received one phone call and one letter. The phone call from the National Oceanic and Atmospheric Administration highlighted an inconsistency within our description of the *Honolulu International Airport, South Section* security zone, § 165.1407(a)(4)(ii). The description erroneously suggested that Kalihi Channel buoy ''5'' is located at 21°18.0′ N/157°53.92′ W. To avoid any potential misunderstanding, we deleted those coordinates from the description in the final rule, leaving the buoy itself as the pertinent reference point.

The letter commenting on our SNPRM is from a maritime association and raises several issues, including calls for more specific language in various parts of our *Discussion of Proposed Rule* section. We drafted that section, however, solely for our SNPRM to help the public understand the proposal and formulate comments. As the regulatory text makes clear, all LCS security zones are activated at least 3 nautical miles seaward of the six harbors that have LCS security zones: Kahului Harbor, Maui; Lahaina, Maui; Hilo Harbor, Hawaii; Kailua-Kona, Hawaii; Nawiliwili Harbor, Lihue, Kauai; and Port Allen, Kauai The letter raised four other issues, addressed as follows:

*Issue 1:* The letter comments that the SNPRM did not include Sector Honolulu's toll-free telephone number for requesting permission to enter a zone. It recommends that we include the number in our final rule for the use of mariners transiting the other Hawaiian islands' zones.

*Coast Guard Response:* We understand that a toll-free line for requesting permission to enter a zone would ease the burden on mariners calling from the affected islands. The Sector's toll-free number, however, is a direct line to the Search and Rescue Controller, who must not be distracted by routine transit requests. We have determined that the use of the contact information provided in the SNPRM is not excessively burdensome, especially considering the abundance of options, including phone, fax, radio, and mail.

*Issue 2:* The ports at Hilo, Kahului, and Nawiliwili are large enough to completely accommodate LCSs, so there is no need for the LCSs to anchor seaward of those harbors. Therefore, the enforcement areas 3 nautical miles seaward of those harbors should be deleted.

*Coast Guard Response:* We have considered deleting the seaward enforcement areas for those harbors, but we determined that they must remain because they enable the Coast Guard to bolster an LCS's security before it reaches the harbor. This provision allows security personnel to identify and respond to potential threats before the harbor itself is threatened by the arrival of an unsecured LCS. Additionally, depending on the status of harbor traffic at the time or the intentions of LCS masters, it is conceivable that vulnerable LCSs will anchor within the enforcement areas seaward of those harbors.

*Issue 3:* In paragraph (c)(1) of §§ 165.1408, 165.1409, and 165.1410 of this rule, the last sentence (''No person is allowed within 100 yards * * *'') should specify that that restriction applies to LCSs within designated geographic locations.

*Coast Guard Response:* We agree and have inserted the phrase ''in any of the areas described by paragraph (a) of this section'' into that last sentence of paragraph (c)(1) in each of those three sections to clarify the restriction.

*Issue 4:* The SNPRM's proposed § 165.1407(a) fails to specify paragraph (d) as a provision affecting enforcement of the zones.

*Coast Guard Response:* We agree and have revised paragraph (a) of that section to include a reference to paragraph (d).

We changed from our proposed regulatory text to the extent described above. Our final rule otherwise remains the same as that published in our SNPRM.

**Regulatory Evaluation**

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

The Coast Guard expects the economic impact of this rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. This expectation is based on the short activation duration of most of the zones and the limited geographic area affected by them. We considered our changes to the regulatory text resulting from our

NPRM and SNPRM and determined that they do not alter our expectation.

**Small Entities**

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. While we are aware that many affected areas have small commercial entities, including canoe and boating clubs and small commercial businesses that provide recreational services, we expect that there will be little or no impact to these small entities due to the narrowly tailored scope of these security zones. We considered our changes to the regulatory text resulting from our NPRM and SNPRM and determined that they do not change the information upon which we based our original assessment of impact on small entities.

**Assistance for Small Entities**

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offered to assist small entities in understanding this rule so that they could better evaluate its effects on them and participate in the rulemaking process.

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

**Collection of Information**

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

**Federalism**

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and either preempts State law or imposes a substantial direct cost of compliance on them. We have analyzed this rule under that Order, including our changes to the regulatory text resulting from our NPRM and SNPRM, and have determined that it does not have implications for federalism.

**Unfunded Mandates Reform Act**

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

**Taking of Private Property**

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

**Civil Justice Reform**

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

**Protection of Children**

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

**Indian Tribal Governments**

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

**Energy Effects**

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

**Technical Standards**

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

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

**Environment**

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

**List of Subjects 33 CFR Part 165**

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

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

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

**Authority:** 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L.

107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Revise § 165.1407 to read as follows:

**§ 165.1407 Security Zones; Oahu, HI.**

(a) *Location.* The following areas, from the surface of the water to the ocean floor, are security zones that are activated and enforced subject to the provisions of paragraphs (c) and (d). All coordinates below are expressed in degrees, minutes, and tenths or hundredths of minutes.

(1) *Honolulu Harbor.* All waters of Honolulu Harbor and Honolulu entrance channel commencing at a line between entrance channel buoys no. 1 and no. 2, to a line between the fixed day beacons no. 14 and no. 15 west of Sand Island Bridge.

(2) *Honolulu Harbor Anchorages B, C, and D.* All waters extending 100 yards in all directions from each vessel in excess of 300 gross tons anchored in Honolulu Harbor Anchorage B, C, or D, as defined in 33 CFR 110.235(a).

(3) *Kalihi Channel and Keehi Lagoon, Oahu.* All waters of Kalihi Channel and Keehi Lagoon beginning at Kalihi Channel entrance buoy no. 1 and continuing along the general trend of Kalihi Channel to day beacon no. 13, thence continuing on a bearing of 332.5°T to shore, thence east and south along the general trend of the shoreline to day beacon no. 15, thence southeast to day beacon no. 14, thence southeast along the general trend of the shoreline of Sand Island, to the southwest tip of Sand Island at 21°18.0′ N/157°53.05′ W, thence southwest on a bearing of 233°T to Kalihi Channel entrance buoy no. 1.

(4) *Honolulu International Airport.* (i) *Honolulu International Airport, North Section.* All waters surrounding Honolulu International Airport from 21°18.25′ N/157° 55.58° W, thence south to 21°18.0′ N/157° 55.58′ W, thence east to the western edge of Kalihi Channel, thence north along the western edge of the channel to day beacon no. 13, thence northwest at a bearing of 332.5°T to shore.

(ii) *Honolulu International Airport, South Section.* All waters near Honolulu International Airport from 21°18.0′ N/157°55.58′ W, thence south to 21°16.5′ N/157°55.58′ W, thence east to 21°16.5′ N/157°54.0′ W (the extension of the western edge of Kalihi Channel), thence north along the western edge of the channel to Kalihi Channel buoy ''5'', thence west to 21°18.0′ N/157°55.58′ W.

(5) *Barbers Point Offshore Moorings.* All waters around the Tesoro Single Point and the Chevron Conventional Buoy Moorings beginning at 21°16.43′ N/158°06.03′ W, thence northeast to 21°17.35′ N/158°3.95′ W, thence southeast to 21°16.47′ N/ 158°03.5′ W, thence southwest to 21°15.53′ N/158°05.56′ W, thence north to the beginning point.

(6) *Barbers Point Harbor, Oahu.* All waters contained within the Barbers Point Harbor, Oahu, enclosed by a line drawn between Harbor Entrance Channel Light 6 and the jetty point day beacon at 21°19.5′ N/158°07.26′ W.

(b) *Definitions.* As used in this section, *MARSEC Level 2 or Maritime Security Level 2* means, as defined in 33 CFR 101.105, the level for which appropriate additional protective security measures shall be maintained for a period of time as a result of heightened risk of a transportation security incident.

(c) *Regulations.* (1) Under 33 CFR 165.33, entry into the security zones described in this section is prohibited unless authorized by the Coast Guard Captain of the Port, Honolulu or his or her designated representatives.

(2) Persons desiring to transit the areas of the security zones may contact the Captain of the Port at Command Center telephone number (808) 842–2600 or on VHF channel 16 (156.8 Mhz) to seek permission to transit the area. Written requests may be submitted to the Captain of Port, U.S. Coast Guard Sector Honolulu, Sand Island Access Road, Honolulu, Hawaii 96819, or faxed to (808) 842–2622. If permission is granted, all persons and vessels must comply with the instructions of the Captain of the Port or his or her designated representatives. For all seaplane traffic entering or transiting the security zones, a seaplane's compliance with all Federal Aviation Administration regulations (14 CFR parts 91 and 99) regarding flight-plan approval is deemed adequate permission to transit the waterway security zones described in this section.

(d) *Enforcement and suspension of enforcement of certain security zones.*

(1) The security zones in paragraphs (a)(3) (Kalihi Channel and Keehi Lagoon, Oahu), (a)(4)(ii) (Honolulu International Airport, South Section), and (a)(6) (Barbers Point Harbor, Oahu) of this section will be enforced only upon the occurrence of one of the following events—

(i) Whenever the Maritime Security (MARSEC) level, as defined in 33 CFR part 101, is raised to 2 or higher; or

(ii) Whenever the Captain of the Port, after considering all available facts, determines that there is a heightened risk of a transportation security incident or other serious maritime incident, including but not limited to any incident that may cause a significant loss of life, environmental damage, transportation system disruption, or economic disruption in a particular area.

(2) A notice will be published in the **Federal Register** reporting when events in paragraph (d)(1)(i) or (d)(1)(ii) have occurred.

(3) The Captain of the Port of Honolulu will cause notice of the enforcement of the security zones listed in paragraph (d)(1) of this section and notice of suspension of enforcement to be made by appropriate means to affect the widest publicity, including the use of broadcast notice to mariners and publication in the local notice to mariners.

(e) *Informational notices.* The Captain of the Port will cause notice of the presence of the security zones established in paragraph (a)(2) of this section, Honolulu Harbor Anchorages B, C, and D, to be made by appropriate means to affect the widest publicity, including the use of broadcast notice to mariners and publication in the local notice to mariners.

(f) *Enforcement.* Any Coast Guard commissioned, warrant, or petty officer, and any other Captain of the Port representative permitted by law, may enforce the rules in this section.

(g) *Waiver.* The Captain of the Port, Honolulu may waive any of the requirements of this section for any vessel or class of vessels upon his or her determination that application of this section is unnecessary or impractical for the purpose of port and maritime security.

(h) *Penalties.* Vessels or persons violating this section are subject to the penalties set forth in 33 U.S.C. 1232 and 50 U.S.C. 192.

■ 3. Add § 165.1408 to read as follows:

**§ 165.1408 Security Zones; Maui, HI.**

(a) *Location.* The following areas, from the surface of the water to the ocean floor, are security zones that are activated and enforced subject to the provisions in paragraph (c):

(1) *Kahului Harbor, Maui.* All waters extending 100 yards in all directions from each large cruise ship in Kahului Harbor, Maui, HI or within 3 nautical miles seaward of the Kahului Harbor COLREGS DEMARCATION (See 33 CFR 80.1460). This is a moving security zone when the LCS is in transit and becomes a fixed zone when the LCS is anchored, position-keeping, or moored.

(2) *Lahaina, Maui.* All waters extending 100 yards in all directions from each large cruise ship in Lahaina, Maui, whenever the LCS is within 3 nautical miles of Lahaina Light (LLNR

28460). The security zone around each LCS is activated and enforced whether the cruise ship is underway, moored, position-keeping, or anchored, and will continue in effect until such time as the LCS departs Lahaina and the 3-mile enforcement area.

(b) *Definitions.* As used in this section, *Large cruise ship* or *LCS* means a passenger vessel over 300 feet in length that carries passengers for hire.

(c) *Regulations.* (1) Under 33 CFR 165.33, entry into the security zones established by this section is prohibited unless authorized by the Coast Guard Captain of the Port, Honolulu or his or her designated representatives. When authorized passage through an LCS security zone, all vessels must operate at the minimum speed necessary to maintain a safe course and must proceed as directed by the Captain of the Port or his or her designated representatives. No person is allowed within 100 yards of a large cruise ship that is underway, moored, position-keeping, or at anchor in any of the areas described by paragraph (a) of this section unless authorized by the Captain of the Port or his or her designated representatives.

(2) When conditions permit, the Captain of the Port, or his or her designated representatives, may permit vessels that are at anchor, restricted in their ability to maneuver, or constrained by draft to remain within an LCS security zone in order to ensure navigational safety.

(3) Persons desiring to transit the areas of the security zones in this section may contact the Captain of the Port at Command Center telephone number (808) 842–2600 or on VHF channel 16 (156.8 Mhz) to seek permission to transit the area. Written requests may be submitted to the Captain of Port, U.S. Coast Guard Sector Honolulu, Sand Island Access Road, Honolulu, Hawaii 96819, or faxed to (808) 842–2622. If permission is granted, all persons and vessels must comply with the instructions of the Captain of the Port or his or her designated representatives. For all seaplane traffic entering or transiting the security zones, compliance with all Federal Aviation Administration regulations (14 CFR parts 91 and 99) regarding flight-plan approval is deemed adequate permission to transit the waterway security zones described in this section.

(d) *Enforcement.* Any Coast Guard commissioned, warrant, or petty officer, and any other Captain of the Port representative permitted by law, may enforce the rules in this section.

(e) *Waiver.* The Captain of the Port, Honolulu may waive any of the requirements of this section for any vessel or class of vessels upon his or her determination that application of this section is unnecessary or impractical for the purpose of port and maritime security.

(f) *Penalties.* Vessels or persons violating this section are subject to the penalties set forth in 33 U.S.C. 1232 and 50 U.S.C. 192.

■ 4. Add § 165.1409 to read as follows:

**§ 165.1409 Security Zones; Hawaii, HI.**

(a) *Location.* The following areas, from the surface of the water to the ocean floor, are security zones that are activated and enforced subject to the provisions in paragraph (c):

(1) *Hilo Harbor, Hawaii.* All waters extending 100 yards in all directions from each large cruise ship in Hilo Harbor, Hawaii, HI or within 3 nautical miles seaward of the Hilo Harbor COLREGS DEMARCATION (See 33 CFR 80.1480). This is a moving security zone when the LCS is in transit and becomes a fixed zone when the LCS is anchored, position-keeping, or moored.

(2) *Kailua-Kona, Hawaii.* All waters extending 100 yards in all directions from each large cruise ship in Kailua-Kona, Hawaii, whenever the LCS is within 3 nautical miles of Kukailimoku Point. The 100-yard security zone around each LCS is activated and enforced whether the LCS is underway, moored, position-keeping, or anchored and will continue in effect until such time as the LCS departs Kailua-Kona and the 3-mile enforcement area.

(b) *Definitions.* As used in this section, *Large cruise ship* or *LCS* means a passenger vessel over 300 feet in length that carries passengers for hire.

(c) *Regulations.* (1) Under 33 CFR 165.33, entry into the security zones established by this section is prohibited unless authorized by the Coast Guard Captain of the Port, Honolulu or his or her designated representatives. When authorized passage through an LCS security zone, all vessels must operate at the minimum speed necessary to maintain a safe course and must proceed as directed by the Captain of the Port or his or her designated representatives. No person is allowed within 100 yards of a large cruise ship that is underway, moored, position-keeping, or at anchor in any of the areas described by paragraph (a) of this section unless authorized by the Captain of the Port or his or her designated representatives.

(2) When conditions permit, the Captain of the Port, or his or her designated representatives, may permit vessels that are at anchor, restricted in their ability to maneuver, or constrained by draft to remain within an LCS security zone in order to ensure navigational safety.

(3) Persons desiring to transit the areas of the security zones in this section may contact the Captain of the Port at Command Center telephone number (808) 842–2600 or on VHF channel 16 (156.8 Mhz) to seek permission to transit the area. Written requests may be submitted to the Captain of Port, U.S. Coast Guard Sector Honolulu, Sand Island Access Road, Honolulu, Hawaii 96819, or faxed to (808) 842–2622. If permission is granted, all persons and vessels must comply with the instructions of the Captain of the Port or his or her designated representatives. For all seaplane traffic entering or transiting the security zones, compliance with all Federal Aviation Administration regulations (14 CFR parts 91 and 99) regarding flight-plan approval is deemed adequate permission to transit the waterway security zones described in this section.

(d) *Enforcement.* Any Coast Guard commissioned, warrant, or petty officer, and any other Captain of the Port representative permitted by law, may enforce the rules in this section.

(e) *Waiver.* The Captain of the Port, Honolulu may waive any of the requirements of this section for any vessel or class of vessels upon his or her determination that application of this section is unnecessary or impractical for the purpose of port and maritime security.

(f) *Penalties.* Vessels or persons violating this section are subject to the penalties set forth in 33 U.S.C. 1232 and 50 U.S.C. 192.

■ 5. Add § 165.1410 to read as follows:

**§ 165.1410 Security Zones; Kauai, HI.**

(a) *Location.* The following areas, from the surface of the water to the ocean floor, are security zones that are activated and enforced subject to the provisions in paragraph (c):

(1) *Nawiliwili Harbor, Lihue, Kauai.* All waters extending 100 yards in all directions from each large cruise ship in Nawiliwili Harbor, Kauai, HI or within 3 nautical miles seaward of the Nawiliwili Harbor COLREGS DEMARCATION (See 33 CFR 80.1450). This is a moving security zone when the LCS is in transit and becomes a fixed zone when the LCS is anchored, position-keeping, or moored.

(2) *Port Allen, Kauai.* All waters extending 100 yards in all directions from each large cruise ship in Port Allen, Kauai, HI or within 3 nautical

miles seaward of the Port Allen COLREGS DEMARCATION (See 33 CFR 80.1440). This is a moving security zone when the LCS is in transit and becomes a fixed zone when the LCS is anchored, position-keeping, or moored.

(b) *Definitions.* As used in this section, *Large cruise ship* or *LCS* means a passenger vessel over 300 feet in length that carries passengers for hire.

(c) *Regulations.* (1) Under 33 CFR 165.33, entry into the security zones established by this section is prohibited unless authorized by the Coast Guard Captain of the Port, Honolulu or his or her designated representatives. When authorized passage through an LCS security zone, all vessels must operate at the minimum speed necessary to maintain a safe course and must proceed as directed by the Captain of the Port or his or her designated representatives. No person is allowed within 100 yards of a large cruise ship that is underway, moored, position-keeping, or at anchor in any of the areas described by paragraph (a) of this section unless authorized by the Captain of the Port or his or her designated representatives.

(2) When conditions permit, the Captain of the Port, or his or her designated representatives, may permit vessels that are at anchor, restricted in their ability to maneuver, or constrained by draft to remain within an LCS security zone in order to ensure navigational safety.

(3) Persons desiring to transit the areas of the security zones may contact the Captain of the Port at Command Center telephone number (808) 842–2600 or on VHF channel 16 (156.8 Mhz) to seek permission to transit the area. Written requests may be submitted to the Captain of Port, U.S. Coast Guard Sector Honolulu, Sand Island Access Road, Honolulu, Hawaii 96819, or faxed to (808) 842–2622. If permission is granted, all persons and vessels must comply with the instructions of the Captain of the Port or his or her designated representatives. For all seaplane traffic entering or transiting the security zones, compliance with all Federal Aviation Administration regulations (14 CFR parts 91 and 99) regarding flight-plan approval is deemed adequate permission to transit the waterway security zones described in this section.

(d) *Enforcement.* Any Coast Guard commissioned, warrant, or petty officer, and any other Captain of the Port representative permitted by law, may enforce the rules in this section.

(e) *Waiver.* The Captain of the Port, Honolulu may waive any of the requirements of this section for any vessel or class of vessels upon his or her determination that application of this section is unnecessary or impractical for the purpose of port and maritime security.

(f) *Penalties.* Vessels or persons violating this section are subject to the penalties set forth in 33 U.S.C. 1232 and 50 U.S.C. 192.

Dated: December 8, 2005.

**C.D. Wurster,**

*Rear Admiral, U.S. Coast Guard, Commander, Fourteenth Coast Guard District.*

[FR Doc. 05–24195 Filed 12–16–05; 8:45 am]

**BILLING CODE 4910–15–P**

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## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 63

**[FRL–8009–3]**

## NESHAP: National Emission Standards for Hazardous Air Pollutants: Standards for Hazardous Air Pollutants for Hazardous Waste Combustors

**AGENCY:** Environmental Protection Agency.

**ACTION:** Direct final rule.

**SUMMARY:** EPA is taking direct final action on amendments to the national emissions standards for hazardous air pollutants (NESHAP) for hazardous waste combustors which were issued October 12, 2005, under section 112 of the Clean Air Act. In that rule, we inadvertently included three new or revised bag leak detection system requirements for Phase I sources—incinerators, cement kilns, and lightweight aggregate kilns—among implementation requirements taking effect on December 12, 2005, rather than, as intended, after three years when the sources begin complying with the revised emission standards under the NESHAP for hazardous waste combustors. We intended to establish the compliance date for these provisions three years after promulgation—October 14, 2008—because the provisions establish more stringent requirements for Phase I sources, which cannot readily be complied with on short notice, and because these provisions are inextricably tied to the revised emissions standards. We are issuing the amendments as a direct final rule, without prior proposal, because we view the revisions as noncontroversial and anticipate no adverse comments.

**DATES:** This direct final rule will be effective on February 17, 2006 without further notice, unless EPA receives adverse written comment by January 18, 2006, or by February 2, 2006 if a public hearing is requested. If adverse comments are received, EPA will publish a timely withdrawal notice in the **Federal Register** indicating which provisions are being withdrawn due to adverse comment.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2004–0022, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- Email: *a-and-r-docket@epa.gov* and *behan.frank@epa.gov.*
- Fax: 202–566–1741.
- Mail: U.S. Postal Service, send comments to: HQ EPA Docket Center (6102T), Attention Docket ID No. EPA–HQ–OAR–2004–0022, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Please include a total of two copies. We request that you also send a separate copy of each comment to the contact person listed below (see **FOR FURTHER INFORMATION CONTACT**).
- Hand Delivery: In person or by courier, deliver comments to: HQ EPA Docket Center (6102T), Attention Docket ID No. EPA–HQ–OAR–2004–0022, 1301 Constitution Avenue, NW., Room B–108, Washington, DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. Please include a total of two copies. We request that you also send a separate copy of each comment to the contact person listed below (see **FOR FURTHER INFORMATION CONTACT**).

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–OAR–2004–0022. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* 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 *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov,* your e-mail address will be automatically captured

and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

*Docket:* All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the HQ EPA Docket Center, Docket ID No. EPA–HQ–OAR–2004–0022, EPA West Building, Room B–102, 1301 Constitution Ave., NW., Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The HQ EPA Docket Center telephone number is (202) 566–1742. 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.

**FOR FURTHER INFORMATION CONTACT:** For more information on this rulemaking, contact Frank Behan at (703) 308–8476, or *behan.frank@epa.gov,* Office of Solid Waste (MC: 5302W), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

**SUPPLEMENTARY INFORMATION:**

*Regulated Entities.* Categories and entities potentially regulated by this action include:

| Category | NAICS code | SIC code | Examples of potentially regulated entities |
|---|---|---|---|
| Any industry that combusts hazardous waste as defined in the final rule. | 562211 | 4953 | Incinerator, hazardous waste. |
| | 327310 | 3241 | Cement manufacturing, clinker production. |
| | 327992 | 3295 | Ground or treated mineral and earth manufacturing. |
| | 325 | 28 | Chemical Manufacturers. |
| | 324 | 29 | Petroleum Refiners. |
| | 331 | 33 | Primary Aluminum. |
| | 333 | 38 | Photographic equipment and supplies. |
| | 488, 561, 562 | 49 | Sanitary Services, N.E.C. |
| | 421 | 50 | Scrap and waste materials. |
| | 422 | 51 | Chemical and Allied Products, N.E.C. |
| | 512, 541, 561, | 73 | Business Service, N.E.C. |
| | 812 | 89 | Services, N.E.C. |
| | 512, 514, 541, 711 924 | 95 | Air, Water and Solid Waste Management. |

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists examples of the types of entities EPA is now aware could potentially be regulated by this action. Other types of entities not listed could also be affected. To determine whether your facility, company, business, organization, etc., is regulated by this action, you should examine the applicability criteria in 40 CFR 63.1200. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

*Worldwide Web (WWW).* In addition to being available in the docket, an electronic copy of today's direct final rule will also be available on the WWW at *http://www.epa.gov/hwcmact.*

*Comments.* We are publishing the direct final rule amendments without prior proposal because we view the amendments as noncontroversial and do not anticipate adverse comments. However, in the Proposed Rules section of this issue of the **Federal Register**, we are publishing a separate document that will serve as the proposal to amend the NESHAP for hazardous waste combustors if adverse comments are filed. If we receive any adverse comments on one or more distinct amendments, we will publish a timely withdrawal in the **Federal Register** informing the public which provisions will become effective, and which provisions are being withdrawn due to adverse comment. We will address all public comments in a subsequent final rule, should the Agency determine to issue one. Any of the distinct amendments in today's direct final rule for which we do not receive adverse comment will become effective on the previously mentioned date. We will not institute a second comment period on the direct final rule amendments. Any parties interested in commenting must do so at this time.

*Judicial Review.* Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of a final action is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit. Under section 307(d)(7)(B) of the CAA, only an objection to the direct final rule amendments that was raised with reasonable specificity during the period for public comment can be raised during judicial review. Moreover, under section 307(b)(2) of the CAA, the requirements established by the direct final rule amendments may not be challenged separately in any civil or criminal proceeding brought by EPA to enforce these requirements.

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## Part One: Overview and Background for This Direct Final Rule

### *I. What Is the Purpose of This Direct Final Rule?*

Today's notice makes specific changes to the National Emission Standards for Hazardous Air Pollutants (NESHAP): Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors (Phase I Final Replacement Standards and Phase II), published October 12, 2005 (70 FR 59402). In that rule, we inadvertently included three new or revised bag leak detection system requirements for Phase I sources—incinerators, cement kilns, and lightweight aggregate kilns—among implementation requirements taking effect on December 12, 2005, rather than, as intended, after three years when the sources begin complying with the revised emission standards under §§ 63.1219, 63.1220, and 63.1221. We intended to establish the compliance date for these provisions three years after promulgation—October 14, 2008—because the provisions establish more stringent requirements for Phase I sources and these sources will need three years to comply with these more stringent requirements.

### *II. What Are the Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors (Phase I Final Replacement Standards and Phase II)?*

The final standards for hazardous air pollutants for hazardous waste combustors (HWC) are NESHAP that establish controls on toxic emissions from the burning of hazardous waste in incinerators, cement kilns, lightweight aggregate kilns, liquid fuel boilers, solid fuel boilers, and hydrochloric acid production furnaces. The standards replace existing NESHAP for Phase I sources—incinerators, cement kilns, and lightweight aggregate kilns—and establish new NESHAP for Phase II sources—liquid fuel boilers, solid fuel boilers, and hydrochloric acid production furnaces.

These NESHAP create a technology-based national cap for hazardous air pollutant emissions from the combustion of hazardous waste in these devices. Additional risk-based conditions necessary to protect human health and the environment may be imposed (assuming a proper, site-specific justification) under section 3005(c)(3) of the Resource Conservation and Recovery Act (RCRA).

Section 112(d) of the Clean Air Act (CAA) requires NESHAP to be based on the performance of the Maximum Achievable Control Technology (MACT). These NESHAP are expected to achieve significant reductions in the amount of hazardous air pollutants being emitted each year by these sources.

Additionally, these NESHAP satisfy our obligation under RCRA (the main statute regulating hazardous waste management) to ensure that hazardous waste combustion is conducted in a manner protective of human health and the environment. By using both CAA and RCRA authorities in a harmonized fashion, we consolidate regulatory control of hazardous waste combustion into a single set of regulations, thereby minimizing the potential for conflicting or duplicative federal requirements.

More information on these NESHAP is available electronically from the World Wide Web at *http://www.epa.gov/hwcmact.*

## Part Two: Amendments to the HWC NESHAP

### *I. Compliance Date for Cement Kilns To Use a Bag Leak Detection System*

This amendment establishes an October 14, 2008 compliance date for cement kilns equipped with fabric filters to comply with the bag leak detection system (BLDS) requirements under § 63.1206(c)(8). See amended § 63.1206(a)(1)(i).

The HWC NESHAP revised the bag leak detection system (BLDS) requirements for Phase I sources—incinerators, cement kilns, and lightweight aggregate kilns—to require cement kilns equipped with a fabric filter to use a BLDS to ensure compliance with the particulate matter and nonmercury metal emission standards. Prior to this revision, only incinerators and lightweight aggregate kilns equipped with a fabric filter were required to use a BLDS. 64 FR 52827 (September 30, 1999); 67 FR 6967 (February 14, 2002). Cement kilns were subject to an opacity standard in lieu of the BLDS. In the October 12, 2005 HWC NESHAP, however, we concluded that a BLDS provided better compliance assurance than an opacity standard and required cement kilns to use a BLDS in lieu of compliance with the opacity standard. 69 FR at 21346–47. That rule also subjected Phase II sources—liquid fuel boilers, solid fuel boilers, and hydrochloric acid production furnaces—equipped with a fabric filter to the same BLDS requirements.

We intended for cement kilns to begin complying with this new requirement when they begin complying with the revised emission standards under § 63.1220—not later than October 14, 2008. Cement kilns need time to design, install, and address start-up problems with the BLDS. Although a three-year compliance date is appropriate, we were inadvertently silent on this issue in the October 2005 rule, and failed to specify that these provisions would not be effective until the effective date of the new emission standards. Consequently, absent this amendment, the BLDS requirement for cement kilns would be applicable immediately—on December 12, 2005.

We note that § 63.1209(a)(1)(ii)(A and B) indicate that we had intended for cement kilns to comply with the BLDS requirement when they begin complying with § 63.1220. Paragraph (a)(1)(ii)(A) states that cement kilns subject to the emission standards under § 63.1204 continue to be subject to the opacity standard, while paragraph (a)(1)(ii)(B) states that, when complying with the revised emission standards under § 63.1220, only those cement kilns that are not equipped with a BLDS or particulate matter detection system continue to be subject to the opacity standard. Thus, we had intended to subject cement kilns to the BLDS requirements when they begin complying with the revised standards under § 63.1220. Cement kilns must comply with those revised standards by October 14, 2008 unless a time extension is granted under § 63.6(i) or § 63.1213. See § 63.1206(a)(1)(ii).

### *II. Compliance Date for the Bag Leak Detection System Excessive Exceedances Notification*

This amendment establishes an October 14, 2008 compliance date for the excessive exceedances notification requirement for bag leak detection systems (BLDS) under § 63.1206(c)(8)(iv). See amended § 63.1206(a)(1)(i).

The October 2005 rule establishes an excessive exceedances notification requirement for bag leak detection systems (BLDS). See § 63.1206(c)(8)(iv). If the alarm level is exceeded for more than five percent of the time in a 6-month block, the source must notify the permitting authority.

We intended for Phase I sources to begin complying with this new requirement when they begin complying with the revised emission standards under §§ 63.1219, 63.1220, and 63.1221—not later than October 14, 2008. Phase I sources need time to install the data logging and recording equipment to aggregate the time that the source is operating when the alarm level is exceeded. Although a three-year compliance date is appropriate, we were inadvertently silent on this issue in the October 2005 rule, and failed to specify that these provisions would not be effective until the effective date of the new emission standards. Consequently, absent this amendment, the excessive exceedances notification requirement would be applicable immediately—on December 12, 2005.

*III. Compliance Date for the Revised Detection Limit Requirement for Bag Leak Detection Systems*

This amendment establishes an October 14, 2008 compliance date for the revised detection limit requirement for bag leak detection systems (BLDS) under § 63.1206(c)(8)(ii)(A). See amended § 63.1206(a)(1)(i).

The October 2005 rule revised the detection limit for BLDS for Phase I sources to require a 1.0 mg/acm detection limit for the BLDS unless you demonstrate in an alternative monitoring petition under § 63.1209(g)(1) that a higher detection limit would routinely detect particulate matter loadings during normal operations. See § 63.1206(c)(8)(ii)(A). The previous detection limit requirement applicable to Phase I sources allowed a higher detection limit under § 63.1209(g)(1) if you demonstrate ''that a higher sensitivity would adequately detect bag leaks.'' The revised detection limit requirement is applicable to both Phase I and Phase II sources.

We revised the detection limit requirement as an outgrowth of our reconsideration of the BLDS detection limit for Phase I sources. When investigating whether it was appropriate to continue allowing sources to petition under § 63.1209(g)(1) to use a detector with a detection limit higher than 1.0 mg/acm, we concluded that the basis for approving a higher detection limit should be more prescriptive. 69 FR at 21340. Thus, the October 2005 rule requires the detector to be able to detect increases in normal emissions rather than simply being able to detect bag leaks.

We intended for the revised detection limit requirement to become applicable to Phase I sources when they begin complying with the revised emission standards under §§ 63.1219, 63.1220, and 63.1221—not later than October 14, 2008. Phase I sources that were granted approval under § 63.1209(g)(1) to use a bag leak detector with a detection limit greater than 1.0 mg/acm may be required to resubmit the alternative monitoring petition to document that the detector can detect particulate matter loadings under normal operations. In addition, some sources may be required to upgrade their BLDS to ensure that it can detect particulate matter loadings during normal operations. Although a three-year compliance date is appropriate, we were inadvertently silent on this issue in the October 2005 rule, and failed to specify that these provisions would not be effective until the effective date of the new emission standards. Consequently, absent this amendment, the revised detection limit would be applicable immediately—on December 12, 2005.

**Part Three: Analytical and Regulatory Requirements**

*I. Executive Order 12866: Regulatory Planning and Review*

Under Executive Order 12866 (58 FR 51735 (October 4, 1993)), the Agency must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that the direct final amendments do not constitute a ''significant regulatory action'' because this action creates no new regulatory requirements that meet any of the above criteria. Consequently, this action was not submitted to OMB for review under Executive Order 12866.

*II. Paperwork Reduction Act*

The information collection requirements in the final rule (70 FR 59402, October 12, 2005) were submitted to and approved by OMB under the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*, and assigned OMB control number 2050–0171. An Information Collection Request (ICR) document was prepared by EPA (ICR No. 1773.08) and a copy may be obtained from Susan Auby by mail at Office of Environmental Information Collection Strategies Division (ME–2822T), 1200 Pennsylvania Avenue, NW., Washington DC 20460, by e-mail at *auby.susan@epa.gov*, or by calling (202) 566–1672. A copy may also be downloaded from the internet at *http://www.epa.gov/icr*.

Today's action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Because there is no additional burden on the industry as a result of the direct final rule amendments, the ICR has not been revised.

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.

*III. Regulatory Flexibility Act*

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with today's action.

For purposes of assessing the impacts of today's direct final rule amendments 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 the field.

After considering the economic impacts of today's direct final rule amendments on small entities, EPA has concluded that this action will not have a significant economic impact on a substantial number of small entities. This action does not create any new regulatory requirements. Rather, they continue to apply existing requirements by delaying the compliance date for new or more stringent requirements. After considering the economic impacts of today's direct final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities.

*IV. Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that the direct final rule amendments do not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, or tribal governments, in the aggregate, or to the private sector in any one year. Thus, today's action is not subject to sections 202 and 205 of the UMRA. EPA has also determined that the direct final rule amendments contain no regulatory requirements that might significantly or uniquely affect small governments. Thus, today's direct final rule amendments are not subject to the requirements of section 203 of the UMRA no new enforceable duty on any State, local or tribal governments or the private sector.

*V. Executive Order 13132: Federalism*

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action delays the compliance date of new or more stringent requirements. Thus, Executive Order 13132 does not apply to this rule.

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

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This final rule does not have tribal implications, as specified in Executive Order 13175. This action delays the compliance date of new or more stringent requirements. Thus, Executive Order 13175 does not apply to this rule.

*VII. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks*

''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

Today's final rule is not subject to E.O. 13045 because it does not meet either of these criteria. The rule simply delays the compliance date of new or more stringent requirements.

*VIII. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

*IX. National Technology Transfer and Advancement Act*

As noted in the proposed rule, Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to

provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

*X. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*

EPA is committed to addressing environmental justice concerns and is assuming a leadership role in environmental justice initiatives to enhance environmental quality for all residents of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, or income bears disproportionately high and adverse human health and environmental impacts as a result of EPA's policies, programs, and activities, and that all people live in clean and sustainable communities. In response to Executive Order 12898 and to concerns voiced by many groups outside the Agency, EPA's Office of Solid Waste and Emergency Response formed an Environmental Justice Task Force to analyze the array of environmental justice issues specific to waste programs and to develop an overall strategy to identify and address these issues (OSWER Directive No. 9200.3–17).

Today's rule delays the compliance date of new or more stringent requirements and will not result in any disproportionately negative impacts on minority or low-income communities relative to affluent or non-minority communities.

*XI. Congressional Review*

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. Section 804 exempts from section 801 the following types of rules (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding today's action under section 801 because this is a rule of particular applicability, applying only to a specific waste type at two facilities under particular (and, as noted, exceptional) circumstances.

A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The direct final rule is not a ''major rule'' as defined by 5 U.S.C. 804 (2). This rule is effective on February 17, 2006.

**List of Subjects in 40 CFR Part 63**

Environmental protection, Air pollution control, Hazardous substances, Reporting and recordkeeping requirements.

Dated: December 12, 2005.

**Stephen L. Johnson,**

*Administrator.*

■ For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

## PART 63—NATIONAL EMISSIONS STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

■ 1. The authority citation for part 63 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

■ 2. Section 63.1206 is amended by revising paragraphs (a)(1)(i)(A) and (a)(1)(i)(B)(*1*) to read as follows:

**§ 63.1206 When and how must you comply with the standards and operating requirements?**

(a) * * * (1) * * * (i) * * * (A) *Compliance dates for existing sources.* You must comply with the emission standards under §§ 6312.03, 63.1204, and 63.1205 and the other requirements of this subpart no later than the compliance date, September 30, 2003, unless the Administrator grants you an extension of time under § 63.6(i) or § 63.1213, except:

(*1*) Cement kilns are exempt from the bag leak detection system requirements under paragraph (c)(8) of this section;

(*2*) The bag leak detection system required under § 63.1206(c)(8) must be capable of continuously detecting and recording particulate matter emissions at concentrations of 1.0 milligram per actual cubic meter unless you demonstrate under § 63.1209(g)(1) that a higher detection limit would adequately detect bag leaks, in lieu of the requirement for the higher detection limit under paragraph (c)(8)(ii)(A) of this section; and

(*3*) The excessive exceedances notification requirements for bag leak detection systems under paragraph (c)(8)(iv) of this section are waived.

(B) * * * (*1*) If you commenced construction or reconstruction of your hazardous waste combustor after April 19, 1996, you must comply with the emission standards under §§ 63.1203, 63.1204, and 63.1205 and the other requirements of this subpart by the later of September 30, 1999 or the date the source starts operations, except as provided by paragraphs (a)(1)(i)(A)(*1*) through (*3*) and (a)(1)(i)(B)(*2*) of this section. The costs of retrofitting and replacement of equipment that is installed specifically to comply with this subpart, between April 19, 1996 and a source's compliance date, are not considered to be reconstruction costs.

* * * * *

[FR Doc. 05–24198 Filed 12–16–05; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 63

**[OAR–2003–0028, FRL–8009–5]**

**RIN: 2060–AI72**

## List of Hazardous Air Pollutants, Petition Process, Lesser Quantity Designations, Source Category List

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is amending the list of hazardous air pollutants (HAP) contained in section 112 of the Clean Air Act (CAA) by removing the compound methyl ethyl ketone (MEK) (2-Butanone) (CAS No. 78–93–3). This action is being taken in response to a petition submitted by the Ketones Panel of the American Chemistry Council (formerly the Chemical Manufacturers Association) on behalf of MEK producers and consumers to delete MEK from the HAP list. Petitions to remove a substance from the HAP list are permitted under section 112 of the CAA.

Based on the available information concerning the potential hazards of and projected exposures to MEK, EPA has made a determination pursuant to CAA section 112(b)(3)(C) that there are ''adequate data on the health and environmental effects [of MEK] to determine that emissions, ambient concentrations, bioaccumulation, or deposition of the substance may not reasonably be anticipated to cause adverse effects to human health or adverse environmental effects.''

**EFFECTIVE DATE:** December 19, 2005.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. OAR–2003–0028 and A–99–03. 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 EPA Docket Center (Air Docket), EPA/DC, EPA West, Room B–108, 1301 Constitution Avenue, NW., Washington, DC 20004. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

**FOR FURTHER INFORMATION CONTACT:** Mr. Mark Morris, Office of Air Quality Planning and Standards, Emission Standards Division, C404–01, Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–5416; fax number: 919–541–0840; e-mail address: *morris.mark@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

*Regulated Entities.* Entities potentially affected by this action are those industrial facilities that manufacture or use MEK. This action amends the HAP list contained in section 112(b)(1) of the CAA by removing the compound MEK. The decision to issue a final rule to delist MEK removes MEK from regulatory consideration under section 112(d) of the CAA.

*Judicial Review.* Under section 307(b)(1) of the CAA, judicial review is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by 60 days from publication in the **Federal Register**. Under section 307(d)(7)(B) of the CAA, only an objection to a rule or procedure raised with reasonable specificity during the period for public comment can be raised during judicial review. Moreover, under section 307(b)(2) of the CAA, the requirements established by the final rule may not be challenged separately in any civil or criminal proceeding brought to enforce these requirements.

*Outline.* The information presented in this preamble is organized as follows:

I. Introduction
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B. The Present Petition and Rulemaking
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## I. Introduction

### *A. The Delisting Process*

Section 112 of the CAA contains a mandate for EPA to evaluate and control emissions of HAP. Section 112(b)(1) includes an initial HAP list that is composed of specific chemical compounds and compound classes to be used by EPA to identify source categories for which EPA will subsequently promulgate emissions standards.

CAA section 112(b)(2) requires EPA to make periodic revisions to the initial HAP list set forth in CAA section 112(b)(1) and outlines criteria to be applied in deciding whether to add or delete particular substances. Section 112(b)(2) identifies pollutants that should be listed as:

> * * * pollutants which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise. * * *

To assist EPA in making judgments about whether a pollutant causes an adverse environmental effect, CAA section 112(a)(7) defines an ''adverse environmental effect'' as:

> * * * any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas.

Section 112(b)(3) establishes general requirements for petitioning EPA to modify the HAP list by adding or deleting a substance. Although the Administrator may add or delete a substance on his own initiative, in the case where a party petitions the Agency to add or delete a substance, the burden has historically been on the petitioner to include sufficient information to support the requested addition or deletion under the substantive criteria set forth in CAA section 112(b)(3)(B) and (C). The Administrator must either grant or deny a petition within 18 months of receipt of a complete petition. If the Administrator decides to grant a petition, EPA publishes a written explanation of the Administrator's decision, along with a proposed rule to add or delete the substance. If the Administrator decides to deny the petition, EPA publishes a written explanation of the basis for denial. A decision to deny a petition is final Agency action subject to review in the DC Circuit Court of Appeals under CAA section 307(b).

To promulgate a final rule deleting a substance from the HAP list, CAA section 112(b)(3)(C) provides that the Administrator must determine that:

> * * * there is adequate data on the health and environmental effects of the substance to determine that emissions, ambient concentrations, bioaccumulation or deposition of the substance may not reasonably be anticipated to cause any adverse effects to the human health or adverse environmental effects.

EPA will grant a petition to delete a substance and publish a proposed rule to delete that substance if it makes an initial determination that this criterion has been met. After affording an opportunity for comment and for a hearing, EPA will make a final determination whether the criterion has been met.

EPA does not interpret CAA section 112(b)(3)(C) to require absolute certainty that a pollutant will not cause adverse effects on human health or the environment before it may be deleted from the list. The use of the terms ''adequate'' and ''reasonably'' indicate that EPA must weigh the potential uncertainties and their likely significance. Uncertainties concerning the risk of adverse health or environmental effects may be mitigated if EPA can determine that projected exposures are sufficiently low to provide reasonable assurance that such adverse effects will not occur. Similarly, uncertainties concerning the magnitude

of projected exposure may be mitigated if EPA can determine that the levels that might cause adverse health or environmental effects are sufficiently high to provide reasonable assurance that exposures will not reach harmful levels. However, the burden remains on a petitioner to resolve any critical uncertainties associated with missing information. EPA will not grant a petition to delete a substance if there are major uncertainties that need to be addressed before EPA would have sufficient information to make the requisite determination.

*B. The Petition and Rulemaking*

On November 27, 1996, the American Chemistry Council's Ketones Panel submitted a petition to delete MEK (CAS No. 78–93–3) from the HAP list in CAA section 112(b)(1). Following the receipt of the petition, EPA conducted a preliminary evaluation to determine whether the petition was complete according to EPA criteria (58 FR 45081). To be deemed complete, a petition must consider all available health and environmental effects data. A petition must also provide comprehensive emissions data, including peak and annual average emissions for each source or for a representative selection of sources, and must estimate the resulting exposures of people living in the vicinity of the sources. In addition, a petition must address the environmental impacts associated with emissions to the ambient air and impacts associated with the subsequent cross-media transport of those emissions.

EPA published a notice of receipt of a complete petition to delist MEK in the **Federal Register** on June 23, 1999 (64 FR 33453), and requested information to assist us in technically reviewing the petition in addition to other comments. In response to the request for comment, EPA received ten submissions that included information to aid in the technical review of the petition.

Based on a comprehensive review of the data provided in the petition and from other sources, EPA made an initial determination that the statutory criterion for deletion of MEK from the HAP list had been met. EPA, therefore, granted the petition by the American Chemistry Council's Ketones Panel and issued a proposed rule to delist MEK on May 30, 2003 (68 FR 32608). EPA responded to substantive comments on the notice of receipt of a complete petition in the preamble to the proposed rule. The delay between receiving a complete petition and publishing the proposal to delist was due, in part, to the time it took to reevaluate and update the human health toxicity value for MEK.

EPA received a total of 57 comments on the proposed rule and responds to the substantive comments below. There was no request for a public hearing.

## II. Completion of the 2003 Inhalation Reference Concentration

In the preamble to the proposed rule, EPA stated that it would not make the final decision whether to delist MEK until it considered the inhalation reference concentration (RfC) resulting from an updated Integrated Risk Information System (IRIS) review. This review was completed in 2003. The MEK RfC is a peer-reviewed value defined as an estimate (with uncertainty spanning perhaps an order of magnitude) of a daily inhalation exposure to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime.

The 2003 RfC was not yet finalized when EPA received the petition. However, to support statutory requirements and assist in the determination of the technical merits of the petition to delist MEK, EPA's Office of Research and Development derived an interim health effects threshold for MEK inhalation exposure that considered current data and current EPA science policy. That process resulted in the derivation of a prospective RfC of 9 milligrams per cubic meter (mg/m$^3$). The analysis underlying the development of the prospective RfC can be found in ''A Prospective Reference Concentration for MEK (78–93–3),'' which is in the docket. In the preamble to the proposed rule, EPA stated that while it would base its initial determination to delist MEK on the prospective RfC, it would rely on the RfC and other information resulting from the completed IRIS assessment in making its determination whether to delist MEK.

The 2003 RfC was published in IRIS on September 26, 2003. Where the prospective RfC was 9 mg/m$^3$, the 2003 RfC is slightly lower at 5 mg/m$^3$ because of a difference in dose-response methodology and interpretation of remaining uncertainties. To evaluate the potential impact of the 2003 RfC on the decision to delist, EPA recalculated the inhalation hazard quotient (HQ) using the 2003 RfC and the estimate of maximum exposure cited in the proposed rule. Whereas the HQ calculated in the proposed rule was 0.1, the new HQ is 0.2, or 20 percent of the RfC. EPA still finds the recalculated HQ to be below a level of concern. Thus, the 2003 RfC did not change the scientific basis of EPA's determination that emissions, ambient concentrations, bioaccumulation, or deposition of MEK may not reasonably be anticipated to cause adverse human health or environmental effects.

## III. Acute Effects From Exposure to MEK

In the preamble to the proposed rule, EPA addressed acute exposure from MEK using the Dick *et al.* (1992) study (Dick study), which assessed neurotoxic effects. EPA concluded that the Dick study indicated that exposures to MEK of up to 200 parts per million (ppm) (590 mg/m$^3$) for up to 4 hours would be an appropriate no-adverse-effect concentration for the general population for both subjective effects (such as objectionable odor or irritancy) and for neurobehavioral effects.

EPA used the Dick study to examine the potential effects of short-term exposure to MEK because no short-term human health values have been finalized for MEK. The Dick study is the best study in the MEK database with which to assess short-term effects of MEK exposure.

During public comment, EPA did not receive any negative comment on our interpretation of the Dick study. EPA did, however, receive a request to address the potential for developmental effects as a result of short-term exposure because the RfC that EPA used to assess long-term exposure to MEK was based on a developmental endpoint.

EPA agrees that this is appropriate to do since the Agency, thus far, has not finalized an acute reference exposure methodology. EPA is in the process of developing this methodology and sought the Science Advisory Board's (SAB) review of the draft methodology in 1998 (The SAB report is available at: *http://www.epa.gov/sab/pdf/ehc9905.pdf*). Thus, EPA considered several types of analysis. One type of analysis EPA considered was a general approach consistent with that used for the chronic RfC and based on the developmental study that was the basis for the RfC.

The quantitative aspect of EPA's RfC methodology is a two-step approach that distinguishes analysis of the dose-response data from inferences made about lower doses. The first step is an analysis of dose and response in the range of observation of the experimental and/or epidemiologic studies. The modeling or statistical significance testing yields a point of departure (POD) from the range of observation. The second step is extrapolation to lower doses. Thus, the RfC is derived from the POD (in terms of human equivalent

exposure) for the critical effect by consistent application of uncertainty factors (UFs). The UFs are applied to account for recognized uncertainties in the extrapolations from the experimental data conditions to an estimate appropriate to the assumed human scenario (U.S. EPA, 1994).

The POD from the developmental study is a 24-hour human equivalent exposure concentration of 1,517 mg/m$^3$. In the derivation of the chronic RfC, this POD was divided by a cumulative UF of 300. The cumulative factor comprised three UFs, accounting for uncertainties in interspecies (3) and intraspecies (10) extrapolation, as well as uncertainty in the database with regard to chronic exposures (10). In calculating an acute reference value, the latter would not be relevant, resulting in a cumulative UF of 30. Thus, one analysis of the short-term exposure potential might result in a short-term (24 hour) reference value of 50 mg/m$^3$ by dividing 1,517 mg/m$^3$ by a cumulative UF of 30. The petitioner's maximum modeled 24-hour average MEK concentration in air of 10 mg/m3 is lower than this potential short-term reference value by a factor of 5.

An alternate approach is that routinely employed by EPA's Office of Prevention, Pesticides and Toxic Substances (OPPTS), which involves consideration of the margin of exposure (MOE) between the POD and the estimated exposure concentration of interest (67 FR 60886). For decision-making purposes, the OPPTS MOE level of concern is the value derived from multiplicative factors representing key outstanding areas of uncertainty with regard to the chemical's toxicity. Given the available data for MEK, which includes an animal study on developmental toxicity, the predominant outstanding areas of uncertainty with regard to short-term toxicity are the potential for interspecies and intraspecies differences in susceptibility. Assigning them each the traditional default value of 10 yields a MOE of 100.[1] Therefore, in evaluating the potential for adverse human health effects to occur from acute exposures to MEK from inhalation, EPA considers adverse effects to be unlikely if the MOE is at least 100.

Using the petition's maximum modeled 24-hour average MEK concentration in air of 10 mg/m$^3$, and the 24-hour human equivalent exposure concentration at the POD from the study used to develop the RfC of 1,517 mg/m$^3$, EPA calculates a margin of exposure of 152. Therefore, based on either of the two approaches outlined above, the predicted 24-hour exposures to MEK may not reasonably be anticipated to pose appreciable risk of adverse developmental health effects. This conclusion, when added to the previous conclusions described in the preamble to the proposed rule, further supports our determination that emissions of MEK may not reasonably be anticipated to cause adverse health or environmental effects.

Since proposal, EPA's OPPTS has proposed several Acute Exposure Guideline Levels (AEGLs) for MEK. The AEGLs represent threshold exposure limits for the general public for various degrees of severity of toxic effects, and are applicable to emergency exposure periods ranging from 10 minutes to 8 hours. It is believed that the recommended exposure levels are applicable to the general population including infants and children, and other individuals who may be susceptible.

The AEGL value for the lowest severity level, the AEGL–1, is the airborne concentration of a substance above which it is predicted that the general population, including susceptible individuals, could experience notable discomfort, irritation, or certain asymptomatic nonsensory effects. However, the effects are not disabling and are transient and reversible upon cessation of exposure. With increasing airborne concentrations above each AEGL, there is a progressive increase in the likelihood of occurrence and the severity of effects described for each corresponding AEGL. Although the AEGL values represent threshold levels for the general public, including susceptible subpopulations, such as infants, children, the elderly, persons with asthma, and those with other illnesses, it is recognized that individuals, subject to unique or idiosyncratic responses, could experience the effects described at concentrations below the corresponding AEGL.

The interim AEGL–1 value for MEK is 200 ppm (for all exposure periods up to 8 hours). This is the same concentration as the no-adverse-effect concentration for the general population derived from the Dick Study, which provides further support for the use of the Dick study for assessing short-term exposures.

## IV. Voluntary Children's Chemical Evaluation Program Peer Review

In the preamble to the proposed rule, EPA stated that it would not make the final decision whether to delist MEK until it considered the results of the peer consultation of the industry's tier 1 submission for MEK under the Voluntary Children's Chemical Evaluation Program (VCCEP). The VCCEP is intended to provide information to enable the public to understand the potential health risks to children associated with exposures to certain chemicals. Under the VCCEP, EPA has asked industries that manufacture or import certain chemicals to sponsor these chemicals to develop assessments regarding the potential health effects, exposures, and risks of those chemicals to children (see *http://www.epa.gov/chemrtk/vccep/index.htm*).

EPA received the industry's submission under the VCCEP on December 1, 2003. The peer consultation meeting for MEK was held on February 19, 2004. On April 19, 2004, EPA received the report of the peer consultation. Peer consultation panel members concluded that the MEK database and submission were adequate, and the key areas of hazard, exposure, and risk were sufficient to characterize risks to children for the purposes of the VCCEP. None of the panelists thought that further data or analyses were needed to characterize MEK's risks to children for the purposes of the VCCEP. Subsequent to completion of the final meeting report, EPA requested additional MEK exposure information from the industry sponsors. This information was provided to EPA on January 12, 2005 (see *http://www.tera.org/peer/vccep/MEK/MEKwelcome.html*).

The only substantive issue raised by the peer consultation that is relevant to the final rule pertains to acute exposures to MEK. To characterize potential impacts from short-term exposures to MEK, the VCCEP submission took much the same approach that EPA took in the proposed rule. That is, they estimated maximum short-term exposures and compared them to a short-term health value that was based on irritation. Like the public commenter, the VCCEP peer consultation panel requested that the sponsor compare the short-term exposures to a developmental endpoint because the RfC was based on a developmental endpoint.

The sponsors proposed one of the approaches EPA considered above, the approach based on the RfC. The sponsors proposed to begin with the 2003 RfC of 5 mg/m$^3$, then remove the 10-fold database uncertainty factor. This results in a 24-hour value of 50 mg/m$^3$. The reason given for the removal of the

[1] Note that the value of 10 that EPA assigned here for interspecies variability is greater than the value of 3 that EPA assigned in developing the RfC for MEK. This adds another layer of conservatism to our evaluation of the potential for MEK to cause acute effects.

uncertainty factor is that it was applied to the RfC to account for the lack of chronic studies. Since considering chronic studies is not relevant to the development of a short-term health value, there is no need for the 10-fold database uncertainty factor. EPA agrees with the approach submitted to the VCCEP and, as described above, EPA considered this approach as well as other methods.

## V. Adverse Comments and EPA Responses

Of the 57 written comments EPA received pertaining to the proposed delisting of MEK, 42 supported the proposal to delist, 13 opposed the proposal to delist and 2 comments neither supported nor opposed the proposal. EPA received comments on the development of the RfC used in the decision and on the exposure assessment.

EPA has considered carefully all the comments, focusing in particular on comments which suggested potential deficiencies in the substantive rationale upon which EPA based its initial determination that the criterion in CAA section 112(b)(3)(C) had been met. A summary of the comments and EPA responses has been included in the docket. In this preamble, EPA will discuss adverse comments received and our responses to them.

The proposed rule invited comment from interested parties on the proposal to delist MEK. In addition, EPA specifically requested comments on our prospective RfC for MEK (the interim health value EPA developed for the proposal). EPA also solicited comment on the portion of our human health risk characterization based on this prospective RfC. In addition, EPA requested comment on whether it would be appropriate to delist MEK if the RfC resulting from an updated IRIS review differed from the prospective RfC; for example, EPA requested comment on the appropriateness of delisting if the RfC were 3 mg/m$^3$, the level suggested by industry in its petition, or if it remained unchanged from the 1992 RfC of 1 mg/m$^3$.

*Comment:* One commenter asserted that the 1992 RfC of 1 mg/m$^3$ was set to protect against birth defects and it should not be changed. Another commenter stated that the 2003 RfC (external review draft), which was based on the same study from 1991, does not adequately provide an estimate ''likely to be without an appreciable risk of deleterious effects during a lifetime.''

*Response:* The RfC is designed to consider all adverse noncancer effects associated with lifetime exposure to a chemical. The 2003 RfC is also based on developmental effects, and is based on the methodologies that were in place at the time of derivation, including (1) the methods for the use of inhalation dosimetry to extrapolate from animal to human exposures (U.S. EPA, 1994) and (2) benchmark dose methods (U.S. EPA, 2000, external review draft). Those methods have been subject to peer review.

*Comment:* One commenter asserted that the toxicological database is not complete regarding developmental effects, and stated that there is inadequate evidence to assess the carcinogenic potential of MEK (i.e., there are no 2-year animal cancer bioassays).

*Response:* There are adequate data on developmental effects and on cancer effects to support a decision to delist MEK. The principal study (Schwetz *et al.*, 1991), a developmental toxicity study in the mouse, is well-designed and tests several exposure concentrations over a reasonable range that include maximum tolerated doses for dams and fetuses. Also, animal studies in a second species (rats) corroborate the effect level for developmental toxicity (Deacon *et al.*, 1981; Schwetz *et al.*, 1974).

Regarding carcinogenicity, the current IRIS file (completed in September of 2003) states that the data for MEK are characterized as ''inadequate for an assessment of human carcinogenic potential.'' The ''Toxicological Review of Methyl Ethyl Ketone'' (U.S. EPA, 2003) (Toxicological Review of MEK), upon which the IRIS file is based states, ''Under EPA's draft revised cancer guidelines (U.S. EPA, 1999), data are inadequate for an assessment of human carcinogenic potential for MEK because studies of humans chronically exposed to MEK are inconclusive, and MEK has not been tested for carcinogenicity in animals by the oral or inhalation routes.'' Recent revision of these guidelines does not materially affect this conclusion.

The traditional 2-year animal cancer study has not been conducted for MEK, nor is EPA aware of any organization planning to conduct one. EPA believes one reason no cancer assay has been done is that the results from the majority of the genotoxicity tests (which are often used as an indicator of the need to pursue a 2-year cancer study) are negative, indicating that MEK is a low priority for further study. In 1997, the Organization for Economic Cooperation and Development (OECD) reached this conclusion. OECD's report states that ''MEK is not genotoxic and is not likely to be carcinogenic.'' (OECD, 1997). The report also states that MEK is ''* * * currently of low priority for further work.'' (OECD, 1997).

The general descriptors recommended by EPA's ''Guidelines for Carcinogen Risk Assessment'' (U.S. EPA, 1999) for characterizing the weight of evidence with regard to a chemical's potential for human carcinogenicity did not explicitly recognize this situation. The descriptor applied to MEK in the 2003 IRIS assessment (i.e., ''data are inadequate for an assessment of human carcinogenic potential'') pertains to cases where ''* * * there is a lack of pertinent or useful data.'' (U.S. EPA, 1999). While lacking data or studies that would clearly support their placement in other categories (e.g., the traditional 2-year rodent study), chemicals included within this broad category may, however, have pertinent or useful data which do not indicate any potential for carcinogenicity, consequently providing no support for the performance of the traditional, resource-intensive studies.

Accordingly, EPA's Toxicological Review of MEK also states, ''the majority of short-term genotoxicity testing of MEK has demonstrated no activity, and the Structure Activity Relationship (SAR) analysis suggests that MEK is unlikely to be carcinogenic.'' (U.S. EPA, 2003). One study (Woo *et al.*, 2002) has given MEK and other unsubstituted mono-ketones (a compound class to which MEK belongs) a low concern rating (unlikely to be of cancer concern) because these chemicals lack electrophilic activity (*i.e.,* a structural alert of carcinogenicity) and are generally not associated with carcinogenicity.

There is an absence of positive results in the majority of mutagenicity and genotoxicity tests which are designed to indicate the potential for carcinogenicity. Methyl ethyl ketone has been tested for activity in an extensive spectrum of *in vitro* and *in vivo* genotoxicity assays and has shown no evidence of genotoxicity in most conventional assays (National Toxicology Program, no date; World Health Organization 1992; Zeiger *et al.*, 1992). Methyl ethyl ketone tested negative in bacterial assays (both the *S. typhimurium* (Ames) assay, with and without metabolic activation, and *E. coli*), the unscheduled deoxyribonucleic acid (DNA) synthesis assay, the assay for sister chromatid exchange (SCE) in Chinese hamster ovary (CHO) cells, the mouse lymphoma assay, the assay for chromosome aberrations in CHO cells, and the micronucleus assay in the mouse and hamster. The only evidence of mutagenicity was mitotic

chromosome loss at high concentrations in a study of aneuploidy in yeast *S. cerevisiae* (Zimmerman *et al.*, 1985), but the relevance of this finding to humans is questionable. Overall, studies of MEK yield little or no evidence of genotoxicity.

However, the finding of low potential for genotoxicity alone is not the sole criterion for an assessment of carcinogenic potential, as non-genotoxic mechanisms can also result in carcinogenesis. While developing the final rule, EPA learned that preliminary results of a recent cancer bioassay by the National Toxicology Program suggested that methyl isobutyl ketone (MIBK) appears to be a weak or marginally active carcinogen in rats and mice, possibly by a nongenotoxic mode of action. Both MEK and MIBK are small molecular weight alkyl ketones, and this similarity raised some questions regarding the possible relevance of the preliminary MIBK results to MEK. To investigate this further, EPA undertook SAR analysis of MIBK and MEK. These two ketones have a key difference in their chemical structure: MIBK is branched, while MEK is linear. EPA's SAR analysis indicates that MIBK's toxicity and possible carcinogenicity are likely due to its branched alkyl structure. Methyl ethyl ketone, like acetone, is linear and lacks this structure. Thus, the analysis concluded that in analogy to acetone and its metabolite isopropanol (which has shown no evidence of carcinogenicity), MEK and its metabolite (2-butanol) are linear and, therefore, have low concern for carcinogenicity potential. A short document describing the analysis, ''Acetone, MEK, and MIBK—SAR Analysis on Carcinogenicity/Toxicity,'' is included in the docket. Subsequently, EPA conducted an external peer review of this document. All three reviewers found the reasoning to be sound and supported the conclusions of the analysis. These reviews are also included in the docket. Thus, EPA concludes that the available scientific evidence shows a low potential for carcinogenicity in MEK.

*Comment:* One commenter suggested that the UFs for the prospective RfC were not adequate. The commenter disagreed with the reduction of the interspecies UF and stated that it should have remained at 10 because there are no developmental and reproductive studies available for humans and animals. Another commenter suggested that the human equivalent concentration (HEC) resulted in low confidence because it was based on the same mouse study (1991) as the 1992 RfC, and the prospective RfC was not robust enough to warrant decreasing the interspecies UF from 10 to 3. This commenter also asserted that the chronic and reproductive studies are still missing and, therefore, EPA's proposal of reducing the database UF is not valid. The commenter contended that the lack of current information results in continued low confidence in the database because the data used are from the original studies used to develop the 1992 RfC. The commenter believes that the Dick study did not provide adequate statistical power. Consequently, the commenter believes that the lack of toxicity was not demonstrated, and that the modifying factor should be maintained at 3. The commenter concluded that the ''absence of data should not conclude an absence of toxicity.''

*Response:* An interspecies UF of 3 was applied in deriving both the prospective RfC and the 2003 RfC, consistent with EPA guidance for deriving RfCs in effect at the time (U.S. EPA, 1994). The UF for interspecies extrapolation is not intended to address database deficiencies. A database UF of 10 was used in developing the 2003 RfC to account for the lack of a chronic inhalation toxicity study and multigeneration reproductive toxicity study.

Modifying factors have been used in the past in RfC derivations, where the magnitude of the factor reflected the scientific uncertainties of the study and database that were not explicitly treated with standard uncertainty factors. For the 2003 RfC, the default modifying factor of one was used because EPA concluded that the modifying factor was sufficiently subsumed in the general database UF.

*Comment:* The petitioner stated that EPA did not present adequate scientific justification for applying a duration adjustment to the inhalation developmental toxicity study and, at the very least, the additional conservatism added by the application of this factor should be explicitly recognized. The commenter pointed to the draft Toxicological Review that indicated that MEK was rapidly absorbed, distributed, and metabolized, suggesting that the duration adjustment may be inappropriate.

*Response:* Duration adjustment of the exposure concentrations in the developmental study of MEK (Schwetz *et al.*, 1991) was performed consistent with the EPA Risk Assessment Forum RfD/RfC Technical Panel report, ''A Review of the Reference Dose and Reference Concentration Processes'' (U.S. EPA, 2002). The report recommends that procedures for adjusting to continuous exposure based on the product of concentration and time be used as a default for inhalation developmental toxicity studies as it is for other health effects from inhalation exposure. While the recommendation is based on evidence that shows that some agents cause developmental toxicity more as a function of peak concentration, the effects of other agents are related to area-under-the-curve (AUC). The latter is true even of some developmental toxicants with a short half-life. In the absence of data that support peak concentration or AUC as more closely correlated with developmental toxicity, EPA's 2002 review document recommends duration adjustment as the more health-protective default procedure. As noted in the Toxicological Review of MEK, because the data are insufficient to argue convincingly for either peak exposure level or AUC as the most appropriate metric, the more health-protective procedure (duration adjustment) was applied as a policy matter.

*Comment:* The petitioner commented on our interpretation of the Cavender *et al.* (1983) study. They stated that EPA regarded 5,000 ppm in a 90-day inhalation study as the Lowest Observed Adverse Effect Level (LOAEL) based on reduced weight gain, increased liver weight, and decreased brain weight. The commenter stated that this was inconsistent with the 1992 IRIS database where EPA indicated that a change in liver weight may not be conclusively caused by MEK inhalation. The petitioner recommended that 5,000 ppm be the No Observed Adverse Effect Level (NOAEL).

*Response:* In the 2003 IRIS assessment, EPA gave further consideration to the biological significance of the findings in the 5,000 ppm animals in the Cavender *et al.* (1983) study, specifically the organ weight findings. Although the decrease in brain weight in female high-dose animals is of some concern, EPA agrees that this effect, in the absence of corresponding histopathology and functional abnormalities, cannot be clearly characterized as being of toxicological relevance. In light of these uncertainties, characterization of the effects associated with the 5,000 ppm exposure level as adverse, use of that level as a LOAEL, and the use of mid-dose group (2,518 ppm) as a NOAEL were dropped.

*Comment:* Three commenters suggested that the actual emissions of MEK may result in environmental concentrations below the RfC, but allowable emissions would not. This

means that should the emissions reach allowable limits, then the concentrations of MEK will be above the RfC. One commenter provided an example of a facility that emits 500 tons per year (tpy) of MEK but is permitted to emit up to 2,200 tpy. The commenter states that a simple screening model run (most likely similar to the tier 1 or tier 2 analysis submitted by the petitioner) of this facility at the allowable emission rate predicts 24-hour peak concentrations to be about 75 mg/m$^3$, which is above the maximum predicted 24-hour average concentration of 10 mg/m3 that EPA cited in the preamble.

*Response:* The maximum offsite 24-hr MEK concentration for the worst-case facility in the petition as predicted by the Industrial Source Complex Short Term 3 (ISCST3) model was 10 mg/m$^3$. The maximum annual concentration was 1.2 mg/m$^3$. This facility emits about 500 tpy MEK. The maximum offsite concentration occurs within a few hundred meters of the facility.

The commenters provided limited information on the facility that has the potential to emit 2,200 tpy. EPA contacted the commenter in order to understand how they estimated the value of 75 mg/m$^3$. EPA was told that the SCREEN3 model was used to estimate this concentration. However, EPA was unable to obtain the modeling runs which would contain important model input data (e.g., stack heights and distances from stacks to fence lines). From the comment, EPA does know that the maximum offsite concentration for this facility as predicted by the SCREEN3 model was 75 mg/m$^3$ for a 24-hr average and 1.1 mg/m$^3$ for an annual average. If this facility were modeled with a more refined dispersion model, such as the ISCST3 model, EPA would expect impacts that are considerably lower than those predicted with the more conservative SCREEN3 model. Most likely, the maximum offsite concentration for the facility would be much closer to 10 mg/m$^3$ for a 24-hr average near the facility, and well below 1 mg/m$^3$ for the annual average. EPA would suspect that the facility to which the commenter refers has much better dispersion characteristics than the petitioner's worst-case facility, which had a very low stack and nearby fenceline.

*Comment:* Three commenters stated that EPA failed to meet the CAA deadline (18 months) for adding or deleting a substance from the HAP list, instead taking 78 months total. Therefore, the commenters believed the 1994 Toxic Release Inventory (TRI) data used in the assessment were not appropriate and that current TRI data should have been used. These commenters also contended that the calculations in the petition did not consider potential increases in MEK use once MEK is delisted, and that EPA should base its decision to delist MEK on emission levels and locations expected after delisting.

*Response:* EPA interprets the CAA to require consideration of current emissions. It is not appropriate to make a decision on what can only be speculative emissions. EPA states in the final rule to delist caprolactam (61 FR 30816, June 18, 1996) that ''EPA does not interpret section 112(b)(3)(C) to require consideration of hypothetical emissions from facilities that might be constructed in the future. The logical consequence of such an expansive construction would be that no substance could ever be delisted, due to the hypothetical possibility of some future facility that has uncontrolled emissions large enough to cause adverse effects. In the event some future facility has uncontrolled caprolactam emissions great enough to change the conclusion of the current EPA risk assessment, EPA can revisit its decision to delist caprolactam at that time.'' It is not the case, however, that EPA can never take potential increases in emissions into account. For example, such consideration is appropriate where EPA has information regarding specific facilities, such as the information it considered in denying the methanol delisting petition (66 FR 21929, May 2, 2001).

Using similar logic in this case, EPA does not interpret CAA section 112 (b)(3)(C) to require consideration of hypothetical emissions from facilities that might be constructed in the future, nor projections of increases in emissions from existing facilities.

There are several reasons why EPA does not expect that increases in emissions of MEK will cause health or environmental concerns. With regard to increased emissions themselves, EPA believes that such increases will be limited by good housekeeping practices which are designed to save product. Methyl ethyl ketone is an effective solvent, but one that evaporates readily. Employing techniques to prevent wasting the product also results in decreased emissions.

Due to the health-protective nature of the analysis upon which the decision to delist is based, EPA concludes that the potential risks from outdoor exposures to MEK are overestimated. It is unlikely that future emissions increases will result in unacceptable risk. For example, the petitioner based the risk assessment on 1994 TRI total air emissions of MEK, which were 628 tpy for the worst-case facility. This facility's modeled annual average concentration is only 20 percent of the RfC. This facility could increase emissions significantly before the concentration would be above a level of concern. The highest-emitting facility in the 2003 TRI emits 638 tpy of MEK, only slightly higher than the 1994 TRI emissions for the worst-case facility.

In addition, the national trend in MEK emissions is distinctly downward. Comparing the 1994 and 2003 TRI MEK air emissions data for the 100 highest-emitting facilities indicates that emissions have decreased by approximately 20 percent during that nine year period.

The risk assessment was based on a maximum off-site concentration. The assessment did not consider the amount of time people would be at that location, or other factors that address the amount of exposure faced by actual individuals. Further, this maximum concentration was located at the entrance to a facility in an industrial park. The probability that an individual would live at this location in the future is extremely low.

Given the low hazard presented by the worst-case facility, the health-protective nature of the analysis, and the overall downward trend of MEK emissions over the last several years, EPA believes that emissions of MEK may not reasonably be anticipated to cause adverse human health effects.

The preamble to the proposed rule discussed the March 30, 1998, **Federal Register** notice (63 FR 15195) in which EPA issued a Denial of Petition entitled ''Methyl Ethyl Ketone; Toxic Chemical Release Reporting; Community Right-to-Know.'' The denial was in response to a petition from the Ketones Panel of the Chemical Manufacturers Association (CMA) that requested the deletion of MEK from the list of chemicals reportable under section 313 of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA) and section 6607 of the Pollution Prevention Act.

The American Chemistry Council (formerly the Chemical Manufacturers Association) filed suit challenging EPA's decision in the United States District Court for the District of Columbia. Subsequently, the court granted summary judgment in favor of EPA (*American Chemistry Council* v. *Whitman,* 309 F.Supp. 2d 111 (D.D.C. 2004)). On appeal, the Court of Appeals for the District of Columbia Circuit reversed the lower court's decision, vacating the lower court's decision, and directed the district court to issue an order to ''direct EPA to delete MEK from

the TRI'' (406 F.3d 738, 742 (DC Cir. 2005)). The circuit court issued its mandate on June 13, 2005 and, accordingly, on June 30, 2005, EPA issued a final rule (70 FR 37698) revising the EPCRA section 313 list of reportable chemicals in 40 CFR 372.65 to delete MEK.

The deletion of MEK from the EPCRA section 313 list eliminates the main source of data EPA uses to track MEK emissions. However, there are other data sources available to estimate MEK emissions, including market research data on MEK production, import, export, and consumption. Consumption of MEK should provide an adequate surrogate for emissions to determine whether significant increases in emissions are occurring. If data indicate that MEK emissions are increasing significantly, EPA has the option to add MEK back on the HAP list.

*Comment:* One commenter suggested that the risk was not adequately identified because the industry was not studied comprehensively enough to determine chronic exposure.

*Response:* In order to determine the risks from emissions of MEK, the petitioner used the 1994 TRI as the basis of an emissions inventory intended to quantify annual emissions of MEK, to identify and locate emissions sources, and to acquire some facility-specific emissions information. The 1994 TRI shows that there are over 2,000 sources with reported emissions of MEK. The petition states that over 85 percent of these facilities (approximately 1,700) emit 25 tpy or less. The petition also states that approximately 800 facilities emit between 10 and 200 tpy, and 27 facilities emit 200 tpy or more. In addition to using the 1994 TRI, the petitioner queried a subset of individual sources to obtain site-specific source, release, and facility information for the purpose of conducting more detailed risk assessments. EPA has determined that this approach to establishing reasonable worst-case exposures to MEK emissions is an adequate basis upon which to base a decision to delist MEK. EPA states in the preamble to the proposed rule that it does not interpret CAA section 112(b)(3)(C) to require absolute certainty that a pollutant will not cause adverse effects on human health or the environment before it may be deleted from the list. The use of the terms ''adequate and ''reasonably'' indicate that EPA must weigh the potential uncertainties and likely significance. In this case, the uncertainty in the predicted exposure levels is biased toward protecting public health. Therefore, EPA concludes that delisting MEK is appropriate.

*Comment:* Several commenters contended that chronic effects of MEK had not been adequately studied or evaluated, and that the delisting was not supported by new or compelling scientific evidence. One commenter requested that EPA conduct long-term health effects studies. Additionally, the commenters stated that there were no lifetime-chronic studies included, no studies evaluating developmental effects, nor studies concerning reproductive toxicity. Moreover, these commenters asserted, there were no multigenerational studies included, and the evaluation of the carcinogenic potential was not adequate.

*Response:* EPA's RfC methodology (U.S. EPA, 1994) does not always require a complete database in order to develop an RfC; however, the database must at least meet minimum data requirements. For MEK, ''* * * confidence in the database is medium * * *.'' (U.S. EPA, 2003). ''The subchronic study by Cavender *et al.* (1983) satisfies the minimum inhalation database requirements for derivation of an RfC.'' (U.S. EPA, 2003).

In the case where there are enough quality data with which to set an RfC, but where the database is less than complete, EPA adds a database uncertainty factor to account for the lack of data. For MEK, that factor is 10. EPA acknowledges the lack of a chronic toxicity bioassay and an inhalation multigeneration reproductive toxicity study (an oral multigeneration is available), but notes that contrary to the commenters' statements, the developmental toxicity of MEK has been well studied.

As stated above, the RfC is an estimate (with uncertainty spanning perhaps an order of magnitude) of a daily inhalation exposure to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime. Because maximum expected ambient air concentrations are well below the RfC, EPA does not expect adverse noncancer effects to result.

In addition, the health-protective nature of the assessment described above adds to our confidence that no adverse health effects will occur from ambient exposures to MEK.

*Comment:* One commenter asserted that the appropriate averaging time for assessing the potential for adverse developmental effects to occur is the 24-hour average, not an annual average. The commenter held that evaluating developmental toxicity on a 24-hour basis is supported by EPA guidelines for evaluating developmental risk. This issue was also raised by the VCCEP review panel as they considered the information industry submitted on MEK and children's health.

*Response:* EPA agrees with the commenter that potential concern for developmental effects from short-term exposures should be addressed, and EPA did so elsewhere in this preamble. With regard to the use of endpoint-specific reference values, EPA's review of the RfD/RfC processes recommended against the use of endpoint-specific reference values, and instead recommended that duration-specific reference values be derived in consideration of the full range of adverse effects.

*Comment:* A commenter remarked that EPA did not take into account all routes of exposure to MEK and, therefore, did not adequately identify the risk.

*Response:* MEK is neither bioaccumulative nor persistent. It has a half-life of approximately 9 days. The releases of MEK to air are unlikely to result in elevated concentrations in surface water, ground water, or the food supply. Therefore, the route of exposure EPA is concerned with is direct inhalation of MEK released to the ambient air. For this reason, inhalation was the focus of the analysis. The petitioner also assessed the potential for risks due to ingestion of water contaminated with MEK. In both cases, the risks were below a level of concern.

*Comment:* One commenter asserted that the risk assessment did not fully address: (1) Other solvents released from stationary and area sources of MEK, (2) actual ambient concentrations near stationary and area sources (only modeled concentrations were used), and (3) the human health effects within the facilities as opposed to fenceline ambient concentrations.

*Response:* The maximum annual average air concentration resulting from emissions of MEK is not expected to exceed an HQ of 0.2. This value, which is 20 percent of the RfC, is quite low. EPA believes that there is a large enough margin of exposure to preclude a need to address any other emitted HAP that may affect the same target organ as MEK.

The petitioner did not monitor ambient air around actual MEK-emitting facilities. Such an effort would not add to the analysis, or change EPA's conclusion with regard to delisting. This is because the maximum monitored concentration EPA found in the U.S. was over two orders of magnitude below the maximum modeled concentration, and because the modeling conducted was designed to over-estimate ambient concentrations. For example, the model

assumed that individuals are continuously exposed to the maximum modeled concentrations of MEK in air for 70 years, and EPA used the maximum annual average concentration as a surrogate for long-term exposure. Also, the model used 1994 emission rates which are significantly higher than current emissions for the facility with the highest estimated HQ of 0.2. EPA believes that the health-protective air dispersion modeling performed as part of the petition and described in detail in the proposed rule resulted in higher concentrations than would monitoring around facilities.

EPA cannot consider the health effects of emissions within facility boundaries. That is the purview of the Occupational Safety and Health Administration.

*Comment:* One commenter recommended that a comparative analysis with the 1998 Office of Pollution Prevention and Toxics (OPPT) assessment (located in the docket) be done to fully assess the risks of MEK.

*Response:* EPA agrees with the comment, and EPA conducted a comparison of the 1998 OPPT assessment and the assessment in the proposal to delist MEK.

The assessment presented in the petition to delist MEK estimated a maximum annual average MEK concentration of 1.2 mg/m$^3$. It used the ISCST3 model, which is a refined air dispersion model that predicts an annual average by averaging 8,760 hours of real time meteorological data. The ISCST3 model predicted a maximum 24-hour average MEK concentration of 10 mg/m$^3$.

The 1998 OPPT study estimated maximum 24-hour average concentrations of 100–200 mg/m$^3$. It used a screening model similar to the SCREEN3 model and predicted 1-hour average concentrations under defined meteorological conditions with the assumption that the receptor is always directly downwind from the source. Such screening model runs typically result in high air concentrations as compared to the ISCST3 model. EPA would expect the difference in concentrations to be as high as a factor of 10. In addition, the OPPT study applied a multiplicative factor to predict typical (5), stagnant (10), and maximum (60) acute impacts. Thus, the difference between the two model results can be attributed to the multiplicative factors and differences between a refined and screening model.

*Comment:* One commenter recommended that EPA not wait for the formal IRIS review of MEK or the VCCEP results to make a final decision regarding delisting of MEK, as there was enough evidence to delist MEK without the additional information. Another commenter asserted that if the RfC resulting from the completed IRIS assessment is different from the prospective RfC, then the petition should be reconsidered and an additional public comment period should be allowed giving the public an opportunity to comment on EPA's decision. This commenter also stated that the results of the VCCEP should be concluded before the comments on the delisting are due.

*Response:* Regarding the first comment, EPA waited to make a final decision to delist MEK until the 2003 IRIS RfC was determined and until the information submitted by industry under the VCCEP was reviewed in case the results of each of these processes altered our decision to remove MEK from the HAP list.

Regarding the second comment, EPA considers an additional comment period unnecessary for a number of reasons. First, EPA explicitly solicited comment on the effect of a difference between the prospective RfC and the RfC resulting from the completed IRIS assessment. EPA specifically requested comments on the decision in light of potential values for the RfC of 9 mg/m$^3$, 3 mg/m$^3$ and 1 mg/m$^3$. The 2003 RfC of 5 mg/m$^3$ is in the middle of the range upon which EPA solicited comment. Second, while the 2003 RfC is lower than the prospective RfC, the result of this change was only to increase the HQ for the maximum annual average ambient exposure from 0.1 to 0.2 (20 percent of the RfC). This HQ is well below a level of concern.

In addition, EPA judges that the exposures to MEK of actual persons living in the immediate vicinity of an MEK emission source would more typically be at least a factor of 2 to 10 less than the predicted maximum ambient concentration presented in the petition of 1 mg/m$^3$. This is because the concentration of MEK declines very rapidly as the plume disperses, and the analysis showed that people do not live at the point of maximum concentration. Therefore, actual exposed individuals would be subject to MEK concentrations less than 1 mg/m$^3$. If EPA were to replace the maximum ambient concentration with a more realistic exposure scenario, it would yield an HQ less than 0.2. Based on the current information, and given the conservative nature of the parameters used to estimate the maximum exposure, and because the petition and subsequent analyses characterize the vast majority of MEK exposures from stationary sources, EPA concludes that by applying the RfC of 5 mg/m$^3$, potential ambient exposures to MEK may not reasonably be anticipated to cause adverse human health effects.

With respect to the results of the VCCEP, EPA found it unnecessary to extend the public comment period until after the review of the industry-submitted information was complete. This is because the industry provided no new information to EPA that was not already available. Therefore, there was no new information upon which to solicit comments.

*Comment:* Many commenters noted that the interactions with n-hexane and other ketones have not been sufficiently investigated should the MEK emissions increase. These commenters stated that MEK interactions with n-hexane have been shown to increase neurotoxicity of n-hexane.

*Response:* EPA stated in the preamble to the proposed rule that MEK has been shown to potentiate the neurotoxicity of other solvents in experiments with laboratory animals when both MEK and the other solvent are present in high concentrations. EPA also stated that studies of occupationally-exposed populations (as reviewed by Noraberg and Alien-Soborg, 2000) provide some evidence of possible interactions in humans. EPA reviewed the occupational epidemiology literature in more depth during the development of the 2003 RfC for MEK. These findings are summarized in the Toxicological Review for MEK (*http://www.epa.gov/iris/toxreviews/0071-tr.pdf,* section 4.4.4). Available occupational studies involving multiple chemical exposures do not provide information adequate to clearly establish an interaction between MEK and other neurotoxic solvents in humans. In studies suggesting a potential interaction, neurotoxicity has been observed only in workplace populations exposed to solvent mixtures where reported MEK air concentrations reached levels at or above the Threshold Limit Value (TLV) (200 ppm or 590 mg/m$^3$). EPA concluded that the concerns for chemical interactions are especially diminished at the low levels seen in this assessment: Less than 1 mg/m$^3$ for chronic exposures, 10 mg/m$^3$ for 24-hour exposures and 25 mg/m$^3$ for a 1-hour exposure. These exposures are all well below the reversible effects level of 590 mg/m$^3$. Therefore, EPA does not expect possible potentiation of n-hexane by MEK at the low environmental concentrations that would be associated with industrial releases.

*Comment:* One commenter was concerned that MEK was detected by

the National Health and Nutrition Examination Survey in biomonitoring programs.

*Response:* EPA acknowledged in the preamble to the proposed rule that MEK has been reported to be found in blood. EPA also stated that the data indicated the source of the MEK is likely a by-product of normal human metabolism, and it is reasonable to expect it did not result from an air exposure to MEK at the concentrations seen in the ambient air.

*Comment:* One commenter requested that EPA consider the role of MEK as an ozone precursor in deciding the petition.

*Response:* EPA stated in the preamble to the proposed rule that it was inappropriate to consider the role of MEK as an ozone precursor because the ''dual structure (differentiating between HAP and criteria pollutants/precursors) would lose its significance if EPA were to include substances on the HAP list solely as a result of their contribution to concentrations of criteria air pollutants.'' Specifically, the structure of the CAA is best protected by including compounds on the HAP list only where such inclusion is warranted based upon the HAP noncriteria pollutant related effects. This interpretation is supported by the following prohibition related to listing of new HAP contained in CAA section 112(b)(2): ''No air pollutant which is listed under section 7408(a) of this title [the criteria pollutant list] may be added to the list under this section, except that the prohibition of this sentence shall not apply to any pollutant which independently meets the listing criteria of this paragraph and is a precursor to a pollutant which is listed under section 7408(a) * * *.''

*Comment:* One commenter stated that decisions to list or delist are governed by the precautionary principle. The commenter stated that, ''in considering whether a petitioner has met the heavy burden of demonstrating that a substance should be removed from the hazardous air pollutant list, the precautionary principle requires that EPA resolve uncertainty in favor of more protection, not less. The recognition of uncertainty in the listing and delisting process does not give EPA discretion to delist a chemical based on incomplete and outdated information as it has proposed to do with MEK.''

*Response:* EPA does not believe it is appropriate to require that all uncertainty be resolved in favor of not delisting. Such a requirement of absolute certainty is inconsistent with our interpretation of the requirement that to delist a HAP, EPA must determine that there are ''adequate data on the health and environmental effects of the substance to determine that emissions, ambient concentrations, bioaccumulation or deposition of the substance may not reasonably be anticipated to cause any adverse effect to human health or adverse environmental effects.'' As explained in denying the petition to delist methanol, EPA does ''not interpret CAA section 112(b)(3)(C) to require absolute certainty that the pollutant will not cause adverse effects on human health * * * before it may be deleted from the list. The use of the terms 'adequate' and 'reasonably' indicate that EPA must weigh the potential uncertainties and their likely significance.'' (See 66 FR 21929–21930, May 2, 2001.) For the reasons explained above, EPA determined that this burden has been met here. Responses with respect to the contention that the database was outdated and/or incomplete are also addressed elsewhere is this preamble.

*Comment:* One commenter asserted that EPA has not adequately considered the odor problems associated with MEK. The commenter stated that odors can cause neurological problems such as fatigue, dizziness, headache, and nausea resulting in a diminished quality of life. The commenter also stated that odor thresholds for MEK have been reported in the range of 6–250 mg/m$^3$, and the estimates presented in the proposed rule for a 1-hour maximum concentration near MEK sources is 25 mg/m$^3$, which is within the range of the reported odor thresholds. The commenter also suggested that EPA recognize that the risk to sensitive individuals could increase after delisting.

*Response:* While EPA does not expressly consider odor as a health endpoint, EPA considers the physiological effects of chemical exposures, including the neurological effects that the commenter described. In the proposed rule, EPA stated the following, ''The IRIS assessment of MEK states that at present, there is no convincing experimental evidence that MEK is neurotoxic * * * other than possibly inducing CNS (central nervous system) depression at high exposure levels.'' The IRIS documentation shows that no peripheral neurohistopathological changes were reported in rats exposed continuously to 3,320 mg/m$^3$ of MEK for up to 5 months (Saida *et al.*, 1976). No treatment-related central or peripheral neurohistopathology was observed in rats exposed for 90 days (6 hours/day, 5 days/week) at concentrations of MEK as high as 14,865 mg/m$^3$, even among animals in animal tissues specifically prepared and examined for neurohistopathology (Cavender *et al.*, 1983). Also, ten of ten rats exposed to MEK at 17,700 mg/m$^3$ and higher for 8 hours/day, 7 days/week, died in the seventh week of exposure without neurological symptoms or histopathology (Altenkirch *et al.*, 1978).

Regarding sensitive individuals, EPA could not identify any specific data that address the potential differences in susceptibility to adverse effects from MEK exposure. In the MEK Toxicological Review in support of the IRIS assessment, EPA did note that ''The potential exists for increased susceptibility to neurotoxicity, hepatotoxicity, and renal toxicity following exposure to MEK in combination with certain other solvents * * *.'' The potentiating effects of MEK on the toxicity of other solvents have only been demonstrated at relatively high exposure concentrations (200–1,000 ppm or 590–2950 mg/m$^3$).

*Comment:* One commenter recommended changing the hazardous waste regulations that apply to MEK as follows: Remove MEK as a listed toxicity characteristic in 40 CFR 261.64; remove MEK as a toxic constituent in part 261, appendix VIII; and remove MEK from the F005 listing, but it may be appropriate to add it to F2003 listing.

*Response:* EPA was petitioned under CAA section 112(b)(3) to remove MEK from the CAA section 112 HAP list. This is the only action under consideration as part of the final rule.

## VI. Final Rule

### *A. Rationale for Action*

The detailed factual rationale for supporting EPA's initial determination that the criterion in CAA section 112(b)(3)(C) had been met is set forth in the proposed rule published in the **Federal Register** on May 30, 2003 (68 FR 32606). Although, as described above, EPA has done some additional analysis pursuant to public comments received on the subsequent action, none of those comments nor EPA analyses have caused EPA to revise the scientific basis upon which that initial determination was predicated. Except as modified or clarified above, EPA hereby incorporates into its rationale for the final rule the substantive assessment of potential hazards, projected exposures, human risk, and environmental effects set forth in the proposed rule to delist MEK. Based on that assessment, EPA's evaluation of the comments and additional information submitted during the rulemaking process (as summarized above), and on other materials, EPA has made a determination that there are

adequate data on the health and environmental effects of MEK to determine that emissions, ambient concentrations, bioaccumulation, or deposition of the compound may not reasonably be anticipated to cause adverse human health or environmental effects.

*B. Effective Date*

The final rule will be effective on December 19, 2005. Although section 553(d) of the Administrative Procedure Act, 5 U.S.C. 553(d), provides that substantive rules must be published at least 30 days prior to their effective date, this requirement does not apply to this action. First, the final rule was promulgated pursuant to CAA section 307(d), and that provision expressly states that the provisions of section 553 of the Administrative Procedure Act do not apply to this action. Second, even under section 553, the requirement that a rule be published 30 days prior to its effective date does not apply to a rule, ''which grants or recognizes an exemption or relieves a restriction.''

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## VIII. Statutory and Executive Order Reviews

*A. Executive Order 12866: Regulatory Planning and Review*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA must determine whether the regulatory action is ''significant'' and, therefore, subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Executive Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adverse affect in a material way the economy, a sector to 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 obligation of recipients thereof; or

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

It has been determined that this rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is, therefore, not subject to OMB review.

*B. Paperwork Reduction Act*

Today's final action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The final action will remove MEK from the CAA section 112(b)(1) HAP list and, therefore, eliminate the need for information collection under the CAA. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

*C. Regulatory Flexibility Act (RFA)*

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule. For purposes of assessing the impacts of today's 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 rule on small entities, EPA has concluded that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant *adverse* economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the proposed rule on small entities.'' 5 U.S.C. sections 603 and 604. Thus, an agency may conclude that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

The final rule will eliminate the burden of additional controls necessary to reduce MEK emissions and the associated operating, monitoring and reporting requirements. EPA has, therefore, concluded that today's final rule will relieve regulatory burden for all small entities.

*D. Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 1044, 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 final 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.

Today's final rule contains no Federal mandates for State, local, or tribal governments or the private sector. The final rule imposes no enforceable duty on any State, local or tribal governments or the private sector. In any event, EPA has determined that the final rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any 1 year. Because the final rule removes a compound previously labeled in the CAA as a HAP, it actually reduces the burden established under the CAA. Thus, today's final rule is not subject to the requirements of sections 202 and 205 of the UMRA. Since the final rule contains no Federal mandates and imposes no enforceable duties on any entity, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments.

*E. Executive Order 13132, Federalism*

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

The final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Today's final rule removes the substance MEK from the list of HAP contained under section 112(b)(1) of the CAA. It does not impose any additional requirements on the States and does not affect the balance of power between the States and the Federal government. Thus, Executive Order 13132 does not apply to this rule.

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

Executive Order 13175 (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 final rule does not have tribal implications, as specified in Executive Order 13175.

A review of the available emission inventory does not indicate tribal MEK emissions sources subject to control under the CAA and, therefore, the final rule is not anticipated to have tribal implications. In addition, the final rule will eliminate control requirements for MEK and, therefore, reduce control costs and reporting requirements for any tribal entity operating a MEK source subject to control under the CAA which EPA might have missed. Thus, Executive Order 13175 does not apply to the final rule.

*G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks*

Executive Order 13045 (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, EPA must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. The final rule is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because EPA does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This determination is based on the fact that the RfC is determined to be protective of sensitive sub-populations, including

children. Also, the single study cited during public comment to indicate a potential effect on children has been reviewed during this petition process and found to be limited in design and execution. Consequently, EPA determined that the study was of insufficient quality to provide information regarding health risks (leukemia) of MEK to children. Also, EPA evaluated industry's submission to the first tier of the VCCEP program and has determined that there are no data which specifically indicate that the RfC will not be protective of children.

*H. Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

The final rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act*

Section 112(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) 915 U.S.C. 272 note), directs all Federal agencies to use voluntary consensus standards instead of government-unique standards in their regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., material specifications, test method, sampling and analytical procedures, business practices, etc.) that are developed or adopted by one or more voluntary consensus standards bodies. Examples of organizations generally regarded as voluntary consensus standards bodies include the American society for Testing and Materials (ASTM), the National Fire Protection Association (NFPA), and the Society of Automotive Engineers (SAE). The NTTAA requires Federal agencies like EPA to provide Congress, through OMB, with explanations when an agency decides not to use available and applicable voluntary consensus standards. The final rule does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

*J. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing today's final 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 action is not a ''major rule'' as defined by 5 U.S.C. 804(2). The final rule will be effective on December 19, 2005.

**List of Subjects in 40 CFR Part 63**

Environmental protection, Air pollution control, Hazardous substances, Reporting and recordkeeping requirements.

Dated: December 13, 2005.

**Stephen L. Johnson,**

*Administrator.*

■ For the reasons set out in the preamble, part 63, title 40, chapter I of the Code of Federal Regulations is amended as follows:

## PART 63—[AMENDED]

■ 1. The authority citation for part 63 continues to read as follows:

**Authority:** 42 U.S.C. 7401, *et seq.*

## Subpart C—[Amended]

■ 2. Subpart C is amended by adding § 63.61 to read as follows:

**§ 63.61 Deletion of methyl ethyl ketone from the list of hazardous air pollutants.**

The substance methyl ethyl ketone (MEK, 2-Butanone) (CAS Number 78–93–3) is deleted from the list of hazardous air pollutants established by 42 U.S.C. 7412(b)(1).

[FR Doc. 05–24200 Filed 12–16–05; 8:45 am]

BILLING CODE 6560–50–P

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## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 710

**[EPA–HQ–OPPT–2004–0106; FRL–7743–9]**

**RIN 2070–AC61**

## TSCA Inventory Update Reporting Revisions

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is amending the Toxic Substances Control Act (TSCA) section 8(a) Inventory Update Reporting (IUR) regulations. The IUR currently requires manufacturers (including importers) of certain chemical substances listed on the TSCA Chemical Substances Inventory to report data on chemical manufacturing, processing, and use every 4 years. In this amendment, EPA is extending the reporting cycle, modifying the timing of the submission period, further clarifying the new partial exemption for specific chemicals for which certain IUR data are of low current interest, amending the petroleum refinery process streams partial exemption, amending the list of consumer and commercial product categories, revising the manner in which production volume would be reported, restricting reporting of processing and use information to domestic processing and use activities only, clarifying the polymer exemption definition, and removing a provision regarding the confidentiality of production volume within specified ranges.

**DATES:** This final rule is effective on January 18, 2006.

**ADDRESSES:** EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPPT–2004–0106. All documents in the docket are listed on the www.regulations.gov web site. (EDOCKET, EPA's electronic public docket and comment system was replaced on November 25, 2005, by an enhanced federal-wide electronic docket management and comment system located at *http://www.regulations.gov/*. Follow the on-line instructions.) Although listed in the index, some information is not publicly available, i.e., confidential business information (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:* Susan Sharkey, Project Manager, Economics, Exposure and Technology Division (7406M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–8789; e-mail address: *sharkey.susan@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 (defined by statute at 15 U.S.C. 2602(7) to include import) chemical substances, including inorganic chemical substances, subject to reporting under the TSCA Inventory Update Reporting (IUR) regulations at 40 CFR part 710. Any use of the term ''manufacture'' in this document will encompass ''import,'' unless otherwise stated. Potentially affected entities may include, but are not limited to:

Chemical manufacturers and importers, including chemical manufacturers and importers of inorganic chemical substances (North American Industrial Classification System (NAICS) codes 325, 32411).

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 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 at 40 CFR 710.48. If you have any questions regarding the applicability of this action to a particular entity, consult the technical contact 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 710 is available on E-CFR Beta Site Two at *http://www.gpoaccess.gov/ecfr/*.

## II. Background

### *A. What Action is the Agency Taking?*

Through this action, EPA is promulgating amendments to the IUR regulations that were proposed on January 26, 2005 (70 FR 3658) (FRL–7332–2), taking into consideration comments received on the proposed rule. The amendments to the IUR regulation that are contained in this final rule pertain to 40 CFR Part 710, Subpart C--Inventory Update Reporting for 2006 and Beyond. The following is a brief listing of the changes made to the IUR regulations via this rule. These changes are described in more detail in Unit II.D., along with a summary of the comments received and the Agency's response to those comments.

First, EPA is amending 40 CFR 710.43, 40 CFR 710.46, 40 CFR 710.48, and 40 CFR 710.52 to change the reporting cycle from 4 years to 5 years.

Second, EPA is amending 40 CFR 710.53 to adjust the dates of the submission period within which manufacturers and importers must report IUR data to EPA. For data required to be submitted in 2006, the submission period remains August 25 to December 23, 2006. Beginning in 2010 and for each subsequent submission period, the submission period will begin June 1 and end September 30. EPA is also clarifying the recordkeeping requirements by identifying that the 5–year record retention period begins on the last day of the submission period.

Third, EPA is clarifying the partial exemption for petroleum process streams and amending 40 CFR 710.46(b)(1) to add certain petroleum process streams to the listing.

Fourth, EPA is amending 40 CFR 710.46(b)(2) to add an explanation that, for the partial exemption for chemicals for which the IUR processing and use information is of low current interest, petitions must include a written rationale for suggested additions of a chemical to or deletions of a chemical from the list of partially exempt chemical substances.

Fifth, EPA is further amending 40 CFR 710.46 to remove the references to the 1985 edition of the TSCA Inventory from paragraphs (a)(1)(i) and (ii).

Sixth, EPA is amending 40 CFR 710.52(c)(4)(ii)(A) to change the list of commercial and consumer product use categories by adding a new category.

Seventh, EPA is amending 40 CFR 710.52(c)(3)(iv) to require separate reporting of manufacture and import volumes.

Eighth, EPA is amending 40 CFR 710.52(c)(4) to limit the reporting of processing and use information to domestic processing and use activities only.

Ninth, EPA is removing the provision regarding the confidentiality of production volume information within specified ranges (40 CFR 710.52(c)(3)(v)).

### *B. What is the Agency's Authority for Taking this Action?*

EPA is required under TSCA section 8(b), 15 U.S.C. 2607(b), to compile and keep current an inventory of chemical substances manufactured or processed in the United States. This inventory is known as the TSCA Chemical Substances Inventory (the TSCA Inventory). In 1977, EPA promulgated a rule (42 FR 64572, December 23, 1977) under TSCA section 8(a), 15 U.S.C. 2607(a), to compile an inventory of chemical substances in commerce at that time. In 1986, EPA promulgated the initial IUR regulation under TSCA section 8(a) at 40 CFR part 710 (51 FR 21438, June 12, 1986) to facilitate the periodic updating of the TSCA Inventory and to support activities associated with the implementation of TSCA. In 2003, EPA promulgated extensive amendments to the IUR regulation (68 FR 848, January 7, 2003) (FRL–6767–4) (2003 Amendments) to collect exposure-related information associated with the manufacturing, processing, and use of eligible chemical substances and to make certain other changes (Ref. 1).

TSCA section 8(a)(1) authorizes the EPA Administrator to promulgate rules under which manufacturers and processors of chemical substances and mixtures (referred to hereinafter as chemical substances) must maintain such records and submit such information as the Administrator may reasonably require. TSCA section 8(a) generally excludes small manufacturers and processors of chemical substances from the reporting requirements established in TSCA section 8(a). However, EPA is authorized by TSCA section 8(a)(3) to require TSCA section 8(a) reporting from small manufacturers and processors with respect to any chemical substance that is the subject of a rule proposed or promulgated under TSCA section 4, 5(b)(4), or 6, or that is the subject of an order under TSCA section 5(e), or that is the subject of relief that has been granted pursuant to a civil action under TSCA section 5 or 7. The standard for determining whether an entity qualifies as a small

manufacturer for purposes of 40 CFR part 710 generally is found at 40 CFR 704.3. Processors are not currently subject to the regulations at 40 CFR part 710.

*C. What is the Inventory Update Reporting (IUR) Regulation?*

The data reported pursuant to the IUR regulations are used to update the information maintained on the TSCA Inventory. EPA uses the TSCA Inventory and data reported under the IUR regulation to support many TSCA-related activities and to provide overall support for a number of EPA and other federal health, safety, and environmental protection activities. The IUR regulations, as amended by the 2003 Amendments (Ref. 1), require U.S. manufacturers (including importers) of chemicals listed on the TSCA Inventory to report to EPA every 4 years the identity of chemical substances manufactured (including imported) during the reporting year in quantities of 25,000 pounds or more at any single site they own or control (see 40 CFR part 710, subpart C). The IUR regulation generally excludes several groups of chemical substances from its reporting requirements, i.e., polymers, microorganisms, naturally occurring chemical substances, and certain natural gas substances (40 CFR 710.46). Persons manufacturing or importing chemical substances are required to report information such as company name, site location and other identifying information, production volume of the reportable chemical substance, and exposure-related information associated with the manufacture of each reportable chemical substance, including the physical form and maximum concentration of the chemical substance and the number of potentially exposed workers (40 CFR 710.52).

Manufacturers (including importers) of chemicals in larger volumes (i.e., 300,000 lbs. or more manufactured (including imported) during the reporting year at any single site) are additionally required to report certain processing and use information (40 CFR 710.52(c)(4)). This information includes process or use category, NAICS code, industrial function category, percent production volume associated with each process or use category, number of use sites, number of potentially exposed workers, and consumer/commercial information such as use category, use in or on products intended for use by children, and maximum concentration.

For the 2006 submission period, manufacturers (including importers) of inorganic chemical substances will be required to report for the first time. However, for the 2006 submission period only, manufacturers (including importers) of inorganic chemical substances will be partially exempt from reporting under IUR regulations, regardless of production volume. A partial exemption means that a submitter is exempt from the processing and use reporting requirements described in 40 CFR 710.52(c)(4). After the 2006 submission period, the partial exemption for inorganic chemicals will no longer be applicable and submitters will fully report information on inorganic chemical substances, including information on processing and use (40 CFR 710.46(b)(3)). In addition, specifically listed petroleum process streams and other specifically listed chemical substances are partially exempt, and manufacturers of such substances are not required to report processing and use information during the 2006 or in any subsequent submission periods, for as long as the chemical substances remain on these partial exemption lists (40 CFR 710.46(b)(1) and (b)(2)).

*D. What Changes are Being Made by the Agency to the IUR regulation?*

1. *What changes are being made to the chemical substances covered by the IUR regulations?*--a. *Partially exempt petroleum process streams.* Certain petroleum process streams listed in 40 CFR 710.46(b)(1) are exempted from additional reporting requirements under the IUR regulations for chemical substances manufactured in amounts of 300,000 lbs. or more. EPA is adding chemicals to this list and is clarifying EPA's intention concerning the scope of this partial exemption. Additionally, EPA proposed changing the name of this partial exemption from ''petroleum process streams'' to ''petroleum refinery process streams'' to clarify the types of covered substances. EPA received comments which indicated that the proposed change was misunderstood; EPA, therefore, at this time, is retaining the name ''petroleum process streams.''

EPA is amending the list of partially exempt substances by adding the following 25 petroleum refinery process streams, listed by CAS registry number: 67254–74–4, 67891–81–0, 67891–86–5, 68476–27–7, 68477–98–5, 68477–99–6, 68478–31–9, 68513–03–1, 68514–39–6, 73138–65–5, 92045–43–7, 92045–58–4, 92062–09–4, 98859–55–3, 98859–56–4, 101316–73–8, 164907–78–2, 164907–79–3, 178603–63–9, 178603–64–0, 178603–65–1, 178603–66–2, 212210–93–0, 221120–39–4, and 445411–73–4. EPA also is adding the following two petroleum process streams listed by CAS registry number: 68919–16–4 and 61789–60–4. They were inadvertently left off the initial partial exemption list established by the 2003 Amendments

The petroleum process stream partial exemption was established by the 2003 Amendments (Ref. 1). As described in the preamble to the 2003 Amendments, EPA established the exemption based upon expected exposures and uses of the listed chemical substances. In the 2003 Amendment preamble, EPA explained that these chemicals are frequently processed at the site where they are produced in vessels which are designed to minimize losses and, coincidentally, the potential for releases and exposure. Also, in many cases, the flammable nature of these products requires that they also be transported, processed, and stored in well controlled vessels. For these reasons, EPA believed worker exposure to the chemicals termed ''petroleum process streams'' for purposes of IUR was diminished and thus IUR processing and use reporting was not considered to be warranted at the time the 2003 Amendments were promulgated. The initial listing of chemical substances in 40 CFR 710.46(b)(1), was derived from the 1983 publication of the American Petroleum Institute (API) document entitled *Petroleum Process Stream Terms Included in the Chemical Substances Inventory Under the Toxic Substances Control Act (TSCA)* (API publication) (Ref. 2).

In developing the proposed IUR Revisions rule, EPA considered adding potential petroleum process streams, identified by API as having been added to the TSCA Inventory since the 1983 publication was compiled, to the 40 CFR 710.46(b)(1) listing. As noted in the proposed rule, in order to determine which of these substances qualified as petroleum process streams, EPA applied the criteria embodied in the Agency's petroleum stream descriptions contained in EPA's January 1978 Addendum I to the TSCA Candidate List of Chemical Substances, entitled *Generic Terms Covering Petroleum Refinery Process Streams* (Addendum I) (Ref. 3). Based on Addendum I, EPA described in the proposal the reasons why several of the suggested chemical substances were not considered to be petroleum process streams for IUR reporting purposes: (i) The chemical substance consists of a complex mixture of one class of hydrocarbons, e.g., all alkanes or all alkenes (with defined carbon number ranges) and aromatic hydrocarbons (without defined carbon number range), which do not specify petroleum as a source material in the chemical name; (ii) the chemical substance is a well defined

alkylbenzene, or is an alkylbenzene fractionation product or distillation residues. Alkylbenzenes are typical downstream petrochemical products that are made synthetically from benzene and paraffinic hydrocarbons in a chemical process that does not involve refinery processing; (iii) the chemical substance includes the chemical modification terms sulfated, bisulfited, sulfurized, sulfonated, esters, and reaction products etc., are not substances produced within the scope of petroleum refining operations, but rather they are considered to be products from other chemical manufacturing processes; or (iv) the chemical substance is derived using a chemical process (a Fischer-Tropsch process) from a non-petroleum source (Refs. 1 and 4).

There is one point regarding the petroleum process stream exemption that EPA wishes to clarify. In the proposed rule, EPA stated that the decision criteria used to develop both the initial list in 40 CFR 710.46(b)(1) and the then-proposed additions were applied in a consistent manner. The API document, used to compile the initial list, and EPA's Addendum I, used to compile today's additions, do vary in approach. The API document includes a number of substances that would not be included as petroleum process streams in Addendum I. For instance, the API publication contained individual light hydrocarbons and related gases (Class I substances) which were not identified in Addendum I. EPA intends to revisit the list in 40 CFR 710.46(b)(1) after the 2006 reporting cycle to ensure that all chemicals listed are consistent with Addendum I.

The Agency received many comments on the proposed changes to the petroleum process streams partial exemption. In general, the commenters supported adding chemicals to the partial exemption chemical list. One commenter felt that EPA's proposed change in the name of the partial exemption to ''petroleum refinery process streams'' was constricting. Another commenter stated that the scope of the proposed change excludes a variety of substances that are in fact petroleum process streams produced in a refinery.

EPA is not promulgating the name change and will retain ''petroleum process streams'' to describe the partial exemption. EPA's inclusion of the term ''refinery'' was intended to indicate that the streams were refining streams and to make the title consistent with terms used in EPA's Addendum I document. This name change was not intended to affect the scope of the partial exemption nor was it intended to restrict substances to only those produced at a refinery. Although EPA acknowledges that petroleum process streams can be manufactured outside of a refinery, the Agency also notes that some substances produced in a refinery are petrochemicals and do not qualify as petroleum process streams.

Two commenters highlighted EPA's statement that ''Qualifying petroleum process streams are produced only in a petroleum refinery, are further refined at the same site, and are processed and used in closed equipment, or are used as fuel.'' 70 FR 3662. According to these commenters, limiting the scope of the partial exemption to petroleum refineries was inappropriate because certain chemicals are produced in closed systems at production facilities other than refineries, in a manner similar to their production at refineries. One of the commenters stated that denying the partial exemption to all except petroleum refineries violates the Paperwork Reduction Act (PRA) and offers a competitive advantage to refineries. One commenter requested that, if EPA implements its proposed definition of petroleum process stream as a substance produced only in a petroleum refinery, further refined at the same site, and processed and used in closed equipment or used as fuel, the Agency should acknowledge that the definition is not intended for any purpose other than for identifying partially exempt chemicals for the IUR regulation.

The statement concerning qualifying petroleum process streams was included in the discussion describing the Agency's decision concerning whether or not to list certain substances suggested by the API. EPA did not intend the proposed change to alter the status of chemicals currently on the list nor did EPA intend to change the exemption to be based upon the location at which a substance is manufactured. A chemical substance listed by CAS Registry Number (CASRN) at 40 CFR 710.46(b)(1) is exempt from reporting requirements of 40 CFR 710.52(c)(4), unless the substance is ineligible because of exceptions noted in the introductory text of 40 CFR 710.46. For example, one of the commenters noted that calcined petroleum coke (CASRN 64743–05–1) can be manufactured either in a petroleum refinery or in another type of facility. This substance, since it is listed by CASRN at 40 CFR 710.46(b)(1), is exempted from reporting IUR processing and use information regardless of where it is manufactured. Therefore, refineries are not receiving any competitive advantage over other manufacturers of these chemicals. As recognized by the commenters, EPA stated that qualifying petroleum process streams are produced only in a petroleum refinery. In light of the confusion identified by the comments, and to recognize that qualifying petroleum process streams may occur outside of a petroleum refinery, EPA is now stating that qualifying petroleum process streams to be added in 40 CFR 710.46(b)(1) are produced within the scope of petroleum refining operations. Additionally, while EPA did not define the term ''petroleum process stream'' in its proposal, the Agency agrees that the discussion included in the proposed revisions preamble is intended solely for reporting under the IUR regulations.

b. *''Low current interest'' partial exemption.* 40 CFR 710.46(b)(2) exempts manufacturers (including importers) of certain chemical substances from reporting processing and use information under 40 CFR 710.52(c)(4) if EPA has determined that it has a ''low current interest'' in the IUR processing and use information for that chemical substance. The public may request EPA to add a substance to, or remove a substance from, the list of chemicals partially exempt from reporting by submitting a petition that addresses the considerations set forth in 40 CFR 710.46(b)(2)(ii).

In the proposed rule, the Agency sought to clarify the process for petitioning EPA to add a chemical to, or remove it from, the list at 40 CFR 710.46(b)(2)(iv). The revisions were intended to more clearly state that the burden is on the petitioner to demonstrate that the collection of information on the production and use of the chemical substance is or is not of low current interest. The proposed rule also clarified that it is the petitioner's obligation to address the considerations set forth in § 710.46(b)(2)(ii) by providing sufficient information, including documentation and relevant citations to supporting information. In addition, the proposed rule altered the consideration of whether a chemical substance was adequately managed by broadening it to include entities other than Federal agencies. (See 70 FR 3658).

Many persons commented that the proposed change would clarify the requirements for a petition for partial exemption under the IUR regulations and supported the change. In addition, one person commented that the proposed changes support the continued consideration of the totality of information available on a chemical in deciding to grant or deny a partial exemption. EPA is finalizing the

changes to this partial exemption as proposed.

Several comments addressed issues beyond the Agency's proposed actions, advocating substantive changes to the partial exemption. For example, two persons believed that EPA should provide additional certainty to the exemption process. Another commented that, while a formal risk assessment was not needed, review of requests for partial exemption must be objective. This commenter supported a delisting process that incorporated the criteria used for exempting petroleum streams, described by the commenter as exempting intermediates processed in closed equipment or burned as fuels. Another commenter suggested adding additional criteria which promoted pollution prevention and resource recovery and ongoing programs of other offices within EPA. Finally, one commenter advocated removing the partial exemption process entirely. EPA intends to further consider these suggestions concerning the ''low current interest'' partial exemption. If change is warranted, EPA will initiate a separate rulemaking.

2. *How is this rule changing the data elements reported by all submitters?*--a. *Production volume reporting.* EPA is requiring that domestic production volume data be reported separately from import volume data. Prior to the 2003 Amendments, submitters were required to report the domestically manufactured volume data separate from the imported volume data for each reportable substance. With the 2003 Amendments, persons manufacturing and/or importing a reportable chemical substance were required to aggregate the amounts of a chemical imported and manufactured domestically and to report the total. In the proposed rule, EPA suggested a return to the previous method of reporting data on manufactured volumes separately from imported volumes. EPA explained that it is frequently useful to distinguish between the volume of a chemical manufactured in the United States and imported into this country to understand the nature of chemical production in the United States, characterize the markets for chemicals, and assess potential exposures during importation and domestic manufacture of chemical substances (See 70 FR 3658).

Several persons who commented on the proposed rule agreed with the proposed change. One person noted that separate reporting of the manufactured and imported volumes for chemical substances will allow the Agency to separately evaluate manufacturing and import activities and assist the Agency in characterizing exposures to these chemical substances. EPA concurs with these observations and is promulgating the proposed change.

b. *Production volume range confidentiality claims.* EPA is removing the requirement that submitters who claim production volume as TSCA confidential business information (CBI) must indicate whether they are also claiming a specified range within which the production volume falls as confidential (40 CFR 710.52 (c)(3)(v)).

EPA received 11 comments on the proposed removal of the requirement that submitters indicate whether or not production volumes submitted in ranges should be treated as CBI. While one commenter supported this change, the others opposed it. Commenters that opposed the change expressed concern that such a change would decrease the protection of CBI, and several proposed that EPA simply adjust the ranges that it uses to publicly release aggregated production volume data to match those of the IUR regulation.

EPA believes that many of the objections to this proposed change result from a misunderstanding of EPA's intent in removing this requirement. As a general matter, EPA releases IUR production volume range information for a chemical only after aggregating the data across all reporting sites. In the 2003 Amendments, EPA included a provision requiring each IUR submitter to report whether its production volume, when considered in a range specified in § 710.52(c)(3)(v), should be treated as CBI. This amendment was included in the 2003 final rule as part of an effort to make available to the public site- and chemical-specific production volume range information from the IUR that was not claimed as CBI.

Upon consideration of various public comments and internal discussion, the Agency has decided that a submitter may no longer claim as CBI a specified production volume range that corresponded to the submitter's site-specific production volume data. Submitters will be able to continue to claim their actual production volume as CBI. EPA's decision not to allow confidentiality claims for the standardized production volume ranges in 40 CFR 710.52(c)(3)(v) is based on several concerns, most importantly issues inherent in releasing both aggregated data and site-specific production volume ranges. Because of this difficulty, the Agency has determined that this provision regarding the confidentiality of production volume information within specified ranges is not likely to result in greater availability of production volume information to the public, which was the goal of this data element as expressed in the 2003 Amendments (Ref. 1). Additionally, several commenters suggested that EPA should not release these standardized production volume ranges. It is important to note that, by this change, EPA is not presuming consent to release these production volume ranges for site-specific production volume ranges or otherwise lessening any CBI protections. Any production volume information released to the public will be in the form of production volume data that is aggregated and ranged.

3. *How have the data elements reported only by larger production volume manufacturers changed?*--a. *Reporting processing and use information for domestic activities only.* Persons manufacturing 300,000 lbs. or more of a reportable chemical substance were required to report processing and use information for that chemical substance to the extent that the information is readily obtainable. EPA is restricting the processing and use information reported under 40 CFR 710.52(c)(4) to domestic processing and use activities for two reasons. First, EPA is primarily focused on exposures to chemical substances resulting from domestic processing and use of the chemicals. Second, EPA anticipates that restricting the processing and use information that must be reported by larger production volume manufacturers to that associated with domestic activities will reduce the burden associated with reporting this information. The Agency estimates that the average burden for reporting the IUR processing and use information is reduced by about 15%, resulting in a total savings of approximately $8 million per reporting period (Ref. 5).

Many commenters supported limiting reported processing and use information to that associated with domestic activities. Those commenters supported this proposal as narrowly tailored to satisfy the Agency's data needs while reducing the burden on entities subject to reporting under the IUR regulations. They noted that chemicals sold in international commerce are frequently distributed through brokers and as a consequence the information on processing and use of exported chemicals is, in their view, not readily obtainable. In addition, the commenters stated that information from foreign sources may be less easily verified and therefore could reduce the accuracy of the data collected. One person commented that tracking the processing

and use of domestically manufactured volumes separately from exported volumes would require separate tracking systems and would increase the burden associated with larger production volume manufacturers' reporting under the IUR regulations. EPA anticipates that, for most submitters, limiting the reporting of processing and use information to that associated with domestic activities will decrease the burden associated with reporting under the IUR regulation. For these reasons, EPA is finalizing the proposal to restrict information reported in response to 40 CFR 710.52(c)(4) to domestic processing and use of chemical substances.

b. *Consumer and commercial product categories.* Persons manufacturing 300,000 lbs. or more of a reportable chemical substance must report the commercial and consumer product category or categories that best describe the commercial and consumer products in which each reportable chemical substance is used (see 40 CFR 710.52(c)(4)(ii)(A)). EPA proposed the following changes to the list of categories:

(i) Combine the categories for ''Soaps and Detergents'' and ''Polishes and Sanitation Goods'' to form a new category called ''Cleaning Products (non-pesticidal).''

These two categories are quite similar and this change was intended to assist submitters who might have difficulty differentiating between them. EPA believed that both categories relate, at least to a certain extent, to cleaning goods. EPA is not finalizing this proposed change.

EPA received comments supporting the consolidation of these two categories, however no specific reasons were provided for their support. EPA also received a comment stating that combining these categories will result in a loss of information. The latter commenter, Environmental Defense, et.al., (ED) provided specific information on the ''Soaps and Detergents'' and ''Polishes and Sanitation Goods'' categories, noting that these categories have distinct six-digit North American Industry Classification System (NAICS) codes and showing that these categories are readily distinguishable from each other. EPA found the same information provided by ED at the following U.S. Census Bureau's web site: *http://www.census.gov/epcd/naics02/def/NDEF325.HTM#N3256.* The website defines ''soaps and detergents'' and ''polishes and sanitation goods'' by further breaking those categories into more distinct subcategories, demonstrating that there are real differences between those two categories. For instance, ''Soaps and Detergents'' contains bar soaps manufacturing; dentifrices manufacturing; dishwasher detergents manufacturing; hand soaps (e.g., hard, liquid, soft) manufacturing; toothpastes, gels, and tooth powders manufacturing; and other categories. ''Polishes and Sanitation Goods'' contains air fresheners manufacturing; ammonia, household-type, manufacturing; brass polishes manufacturing; floor polishes and waxes manufacturing; shoe polishes and cleaners manufacturing; wallpaper cleaners manufacturing; and other categories. Please note that, as described in the preamble to the 2003 Amendments, submitters under the IUR will not be required to report on non-TSCA downstream uses of the TSCA chemicals that they manufacture (See 68 FR 871, Unit III.B.3.b.).

Additionally, ED stated that ''the two different types of uses may have significant implications for exposure patterns. For example, the former category primarily includes products that many people would use several times a day, while the latter includes products that most consumers would use considerably less frequently'' (Ref. 6). EPA more carefully considered the way in which it would utilize these categories in a screening-level exposure assessment. While there are products in the ''Polishes and Sanitation Goods'' category that could be used on a daily basis in similar quantities as products in the ''Soaps and Detergents'' category, there are also products with very different use scenarios. For instance, EPA has developed default scenarios in the Agency's screening level Consumer Exposure Module, which is embedded into the Agency's Exposure, Fate Assessment Screening Tool (E-FAST) (see *http://www.epa.gov/opptintr/exposure/docs/efast.htm*), for laundry detergent (in the ''Soap and Detergent'' category) and for solid air fresheners (in the ''Polishes and Sanitation Goods'' category). These use scenarios are different from each other and therefore would generate different potential exposure results. Therefore, based upon a further analysis of the NAICS Index Entries and EPA's screening models, EPA has decided not to combine the two categories and will maintain separate reporting categories for ''Soaps and Detergents'' and ''Polishes and Sanitation Goods.''

(ii) Add a category called ''Agricultural Products (non-pesticidal).'' Comments addressing this addition were all favorable, and EPA is finalizing the addition of this category. Without this category, agricultural uses of chemicals would have been reported under the miscellaneous ''Other'' category.

One commenter requested a definition for ''non-pesticidal,'' which is used in the ''Agricultural Products'' category as well as the existing ''Lawn and Garden Products (non-pesticidal)'' category. For guidance as to what substances are considered to be ''pesticides'' and information as to what uses are considered to be pesticidal uses, refer to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) definition of ''pesticide'' (7 U.S.C. 136(u) or FIFRA section 2(u)), which generally defines the term as ''(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant, and (3) any nitrogen stabilizer. . .'' If the subject persons find that the agricultural or lawn and garden product on which they are reporting does not meet the definition under FIFRA section 2(u), their product will fall into the ''Agricultural Products (non-pesticidal)'' or the ''Lawn and Garden Products (non-pesticidal) category.

(iii) The Agency had also proposed removing the category ''Photographic Chemicals,'' due to the expected decline in the traditional film photofinishing industry, which indicates that consumer/commercial exposure issues associated with photographic chemicals may be of diminished importance. Six commenters stated their general support of changes made to the commercial and consumer product categories, although no commenter specifically mentioned photographic chemicals or provided any specific reason for their support. One comment supported maintaining the ''Photographic Chemicals'' category, stating that any burden associated with the reporting of a category covering uses that are less prevalent over time ought to also decline, and that there are indications of a relatively stable remaining core of film users and therefore the associated chemicals will continue to be used. Upon further investigation, EPA has decided to maintain this category. According to several industry sources, despite the displacement of analog photography by digital imaging, U.S. consumption of film and paper chemicals is projected to remain relatively stable. Included in this category are many substances that have a role in digital as well as analog imaging. Also, toners and resins for copiers included in this category are continuing to increase in volume. Thus, while specific types of photographic

chemicals may decrease in use, it seems unlikely that use of chemical substances in the ''Photographic Chemicals'' category as a whole will drastically decrease, as EPA originally thought (Ref. 7).

4. *What other changes are being made?*--a. *Reporting frequency and recordkeeping.* The IUR regulations require reporting every 4 years. The first submission period to occur after the 2003 Amendments will be in 2006, at which time submitters will report information based on the 2005 reporting year. EPA proposed to change the reporting frequency so that, after the 2006 submission period, the reporting frequency will be every 5 years instead of every 4 years. This means that the second submission period after the 2003 Amendments would be 2011 (i.e., 5 years after 2006) and would then occur every 5 years thereafter. The reporting year would continue to occur in the calendar year immediately preceding the submission period, i.e., 2010, 2015, etc.

EPA received a variety of comments on the proposed change to the IUR reporting cycle from every 4 years to every 5 years. Several companies and trade associations supported this extension to the reporting cycle. Those who supported the change generally recognized that the extended reporting cycle would result in burden reduction, particularly in the wake of the amended reporting requirements promulgated in 2003 (68 FR 848, January 7, 2003), while agreeing that the extended reporting cycle would still meet EPA's data needs. Certain commenters correctly understood that the extended cycle would allow inorganic chemical manufacturers to become familiar with IUR reporting (which will be required for inorganic chemical substances for the first time as of the 2006 submission period) before having to report processing and use information during submission periods after 2006. One company indicated that, although it was supportive of changing from a 4–year to a 5–year reporting cycle, such a change would not result in a reduced (or increased) burden to industry because the 4–year reporting cycle has been in effect for some time, and companies have this frequency integrated into their regulatory compliance calendars.

Other commenters did not support the proposed change in reporting frequency. A group of organizations and individuals indicated that reporting every 5 years will not meet the Agency's and others' critical data needs. They suggested that the large fluctuation in the universe of high production volume chemicals from 1990–2002 indicates a need for more frequent, rather than less frequent, reporting, and they also provided an analysis of publicly available IUR information to bolster the assertion that the chemical industry is dynamic and that production volumes change dramatically over the 4 years between reporting cycles. These commenters suggested that annual reporting of production volume data would be more appropriate, but if EPA chose not to require annual reporting of this data, it should require the reporting of yearly production volume data every 5 years. They also recognized that EPA bases many of its actions on information reported under the IUR regulation, and contended that more accurate reporting will lead to better risk management at a lower cost.

EPA intends to consider further the suggestion to adopt a provision requiring persons to report their annual production volumes for each of the 5 years preceding the submission period. If the reporting of annual volumes appears to be an appropriate change to the IUR regulations, EPA may initiate a separate rulemaking.

EPA recognizes that more frequent reporting could track more closely the actual amounts of IUR reportable chemical substances manufactured (including imported) in the U.S. In this rule, the Agency is incorporating its proposed change to IUR reporting frequency in an effort to reduce burden to industry while still meeting the Agency's basic information needs. The Agency believes that reporting every 5 years will meet EPA's most critical needs, particularly given that the information that will be reported under the newly amended IUR will be significantly more useful for exposure and risk screening purposes than the information that was reported under IUR in the past. EPA also agrees that the extended reporting cycle will allow increased time for industry (particularly inorganic chemical manufacturers) to learn how to comply with the amended IUR, and may result in submissions with fewer errors.

EPA disagrees with the comment that the change from a 4–year reporting cycle to a 5–year reporting cycle does not affect industry burden. Over a 20–year period, a 5–year frequency results in 4 submission periods while a 4–year frequency results in 5 submission periods. As a result of requiring one less submission period over the course of 20 years, EPA estimates that a 5–year frequency will save regulated entities from $59.3 to $75.7 million over 20 years at a 3% discount rate (about a 16% reduction), and from $41.2 to $52.6 million over 20 years at a 7% discount rate (Ref. 5), and would still meet EPA's most critical data needs.

Currently, submitters are required to retain records relevant to reporting during a submission period for a period of 5 years beginning with the effective date of that submission period. EPA is clarifying this requirement by changing ''beginning with the effective date'' to ''beginning on the last day'' of that submission period (i.e., for a submission period ending December 23, 2006, submitters would be required to retain records relevant to that submission until December 23, 2011). EPA is also adding a sentence to the recordkeeping provisions to encourage submitters to retain records longer than 5 years to ensure that past records are available as a reference when submitters are generating subsequent submissions.

One commenter noted that, under the current IUR regulations, persons submitting their information at the beginning of the submission period rather than at the end will have to review their records twice, once in preparation for making the submission and then again for records retention purposes at the end of the submission period. The commenter stated that this could result in submitters who report early in the submission period keeping all IUR records from two submission periods for a period of time, even if the submitter determines the older records are not necessary to help guide subsequent reporting. The commenter suggests that to reduce burden and encourage early reporting, the required period for record retention be changed from 5 years from the last day of the submission period to ''5 years or until the date of their next IUR submission to EPA, whichever is less.'' In addition to the submitter having its past records to refer to, EPA proposed the change from ''beginning with the effective date'' to ''beginning on the last day'' of the submission period to clarify the records retention requirement. EPA is concerned that following the commenter's suggestion would result in a lack of clarity concerning what date is considered the date of submission or when the 5–year period begins. Additionally, EPA suspects that most submitters review past submissions well before submitting their information to EPA. A submitter can identify records it no longer finds useful at the time of review for the current submission and will easily be able to later identify those records. EPA does not require that a submitter destroy records by a certain date, and believes the method and timing of such an action is entirely up to the submitter, as long as the IUR

regulations record retention requirement is met.

b. *Submission period.* Under the current IUR rule, submitters are required to report on a recurring basis every 4 years, and that report is required to be submitted to EPA during the period of August 25 through December 23 in the year immediately following each reporting year. In today's action, for the submission period in 2006, EPA is retaining August 25 through December 23 as the submission period, but for future submission periods beginning in 2011 and thereafter, the submission period will be moved up to June 1 through September 30. This means that in the next submission period in 2011, submitters are required to submit reports between June 1 and September 30, 2011.

In the proposed rule, EPA solicited comment on its proposal to move the submission period to January 1 through April 30 of the year following the reporting year. The 2003 amendment to the IUR regulation also changed the reporting year from the company's fiscal year to the calendar year beginning in 2005. Therefore, all of the information required to be submitted to EPA should be available early in 2006 for all companies. Moving the submission period to earlier in the calendar year would allow the Agency to obtain and process the information in a more timely manner, and therefore make the information available for use closer in time to the period in which it was generated.

The Agency received many comments on its proposal to move the submission period to a point earlier in the year. The majority of commenters opposed the change to the submission period, stating:

(1) The proposed submission period of January 1 to April 30 coincides with the time when many other reports must be filed, and the current period (August 25 through December 23) works well allowing reporting companies time to generate accurate data. A trade group indicated that all of its members surveyed reported to the IUR in December.

(2) It is unreasonable for EPA to shorten the submission period in light of the increased reporting requirements enacted by the 2003 Amendments to the IUR. Inorganic chemical producers, who will be reporting for the first time under the IUR regulation in 2006, felt that adjusting to the reporting requirements would take considerable time. Most suggested that respondents will struggle to collect the required data in time. Firms reporting on a large number of chemicals were of the opinion that the complexity of their reporting would make meeting the April 30 deadline difficult due to obligations of other forms of regulatory compliance occurring early in the calendar year. Importers pointed out the complexity of their situation, especially because they will often have to rely on Customs Entry forms that can be delayed up to 30 days.

(3) Numerous other EPA reporting programs require reporting in the first half of the year, such as the Toxics Release Inventory (TRI), as do other state and federal environmental programs. This would strain staff responsible for reporting, and lead to inaccuracy. Some commenters identified approximately 30 additional federal, state and local reporting programs that require their attention. Other commenters stated that they believe the coordination of these IUR and TRI reporting deadlines may encourage submitters to coordinate their data collection processes.

(4) Several persons commenting on the proposal believed that delaying the reporting until later in calendar year 2006 would improve the accuracy of the information reported. These persons pointed out that import notifications are often delayed by up to 30 days after the chemical is imported thereby reducing the time available to incorporate this information into IUR reporting. In addition, those firms whose byproducts are either beneficially reused or disposed as wastes will need additional time to report because the determination of beneficial use may be made months after the byproducts are manufactured.

(5) Requiring accelerated submissions based on ''timeliness'' of the data is inconsistent with EPA's proposal to extend the reporting cycle from 4 to 5 years because a delay of several additional months is insignificant when compared to the extension of the reporting cycle by an additional year. Some commenters pointed out that by waiting an extra few months, EPA would collect more accurate data. One commenter questioned EPA's rationale for moving up the submission period to better coincide with the change of the reporting year from the fiscal year to the calendar year. This commenter suggested that EPA's reasoning was erroneous because many businesses, in their experience, had fiscal years ending significantly before July and therefore, for those companies, the period to prepare and submit IUR reports has been reduced from approximately 1 year (for companies with a fiscal year coinciding with the calendar year) to only 4 months.

(6) Almost all of the commenters objected to the change in the submission period for the 2006 reporting cycle. Based on the comments, EPA believes these objections are due to the commenter's unfamiliarity with the new requirements imposed by the amended IUR regulations. Many commenters mentioned that EPA guidance for the 2006 reporting period is not yet available (though several mentioned and appreciated that EPA was conducting IUR training), noted that EPA's electronic reporting program for 2002 was flawed, and questioned whether the 2006 materials would be ready in time to be adequately tested before reporting is required. Others stated that they were already planning IUR information-gathering activities around the August-December timeframe.

Most commenters, while preferring that EPA retain the current submission period, suggested alternatives. These included deadlines of October 31, August 31, July 1 (to coincide with TRI reporting), and May 1, and a submission period from July 1 through October 31.

In response to the many objections to the proposed change to the submission period, EPA has reconsidered its proposal to move the submission period to January 1 through April 30. The proposed change was not intended to place additional burdens on industry, but to remove an unnecessary delay in collecting the IUR data. In light of the commenters' concerns about their ability to collect accurate data in a timely fashion and submit them during the proposed submission period, EPA will maintain the current submission period of August 25 through December 23 for the 2006 reporting cycle, and switch to a June 1 through September 30 submission period for all future reporting cycles beginning in 2011. Recognizing that companies may have already begun planning data collection activities around the August to December submission period for the 2006 reporting cycle, and that the data collection will include new requirements resulting from the 2003 Amendments, EPA recognizes that altering the 2006 IUR submission period at this time could be overly burdensome to some reporters. Beginning in 2011, and for all future reporting cycles thereafter, EPA believes that the June 1 through September 30 submission period balances industry's needs in collecting the data with EPA's desire to begin analyzing the data in a timely manner.

c. *Polymer exemption.* Chemical substances meeting the definition for polymers included in 40 CFR 710.46(a)(1) are fully exempt from reporting under the IUR regulations. EPA is changing the references included

in the polymer definition from the ''1985 edition of the Inventory or the Master Inventory File'' to the more general and current ''Master Inventory File'' by removing the reference to the 1985 edition of the Inventory. The Master Inventory File has been regularly updated since the 1985 edition of the Inventory was published, and is the more appropriate reference for use within the IUR polymer exemption. All who commented on this subject agreed with this change, and EPA is finalizing the definition as proposed.

## III. Materials in the Rulemaking Record

An official docket was established under docket ID number EPA–HQ–OPPT–2004–0106. The official public docket includes information considered by EPA in developing this final rule, such as the documents specifically referenced in this action, any public comments received, and other information related to this action. In addition, interested parties should consult documents that are referenced in the documents that EPA has placed in the docket, regardless of whether these referenced documents are physically located in the docket. For assistance in locating documents that are referenced in documents that EPA has placed in the docket, but that are not physically located in the docket, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**. The official public docket is available for review as specified in **ADDRESSES**. The following is a listing of the documents referenced in this preamble that have been placed in the official docket for this final rule:

1. USEPA, ''TSCA Inventory Update Rule Amendments'' (68 FR 848, January 7, 2003) (FRL–6767–4).

2. American Petroleum Institute, ''Petroleum Process Stream Terms Included in the Chemical Substances Inventory Under the Toxic Substances Control Act (TSCA),'' Health and Safety Regulation Committee Task Force on Toxic Substances Control, February 1985.

3. USEPA, ''Toxic Substances Control Act (TSCA) PL 94–469 Candidate List of Chemical Substances Addendum I Generic Terms Covering Petroleum Refinery Process Streams,'' January 1978.

4. USEPA, ''Technical Support Document Inventory Update Reporting Rule Petroleum Process Stream Partial Exemption Added Petroleum Process Chemicals'' OPPT, April 17, 2004. Revised, July 6, 2005.

5. USEPA, ''Economic Analysis of the IUR Revisions Final Rule,'' Office of Pollution Prevention and Toxics, July 2005.

6. Comment from Denison, Richard A., Environmental Defense, on Comments on Proposed Rule, TSCA Inventory Update Reporting Revisions (70 FR 3658, 26 January 2005). Submitted via EDOCKET on 18 February, 2005.

7. USEPA, ''Summary of Information on Photographic Chemicals,'' Office of Pollution Prevention and Toxics, July 2005.

## IV. Statutory and Executive Order Reviews

### *A. Executive Order 12866*

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 this action is not a ''significant regulatory action'' subject to review by OMB because it does not meet the criteria in section 3(f) of the Executive Order.

EPA has prepared an economic analysis of the potential impacts of this action, which is contained in a document entitled *Economic Analysis of the IUR Revisions Final Rule* (Ref. 1). This document is available as a part of the public version of the official record for this action and is briefly summarized here.

These revisions will reduce IUR reporting costs. The quantified portions of the rule are estimated to save $6 million to $7 million per year when annualized over the next 20 years at a 3% or a 7% discount rate. Most of the savings of these revisions will accrue to the chemical industry in the form of decreased costs of complying with the IUR regulations. There will also be some savings to EPA in the form of decreased costs to administer the regulation and maintain the collected data.

### *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, after initial display in the **Federal Register** and in addition to its display on any related collection instrument, are listed in 40 CFR part 9.

The information collection requirements related to the IUR regulations have already been approved by OMB pursuant to the PRA under OMB control number 2070–0162. This action would not impose any burden requiring additional OMB approval. Instead, this action would reduce reporting burden by 113,000 to 123,000 hours in the 2006 reporting cycle and 112,000 to 121,000 hours in subsequent reporting cycles. This reduction is out of a total burden of 1,300,000 to 1,658,000 hours in the 2006 reporting cycle, and 1,189,000 to 1,516,000 in future reporting cycles.

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 (2822), Office of Environmental Information, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. 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 this action will not have a significant adverse economic impact on a substantial number of small entities. The factual basis for the Agency's determination is summarized below.

The term ''small entities'' includes small businesses, small not-for profit organizations, and small governmental jurisdictions, but because not-for-profit organizations and governmental jurisdictions will not be affected by this rule, ''small entity'' in this analysis is synonymous with small business.

Small manufacturers that fully meet the 40 CFR 704.3 definition are generally exempt from reporting under the IUR regulations, and thus are not significantly impacted by IUR reporting. Nevertheless, this rulemaking is expected to reduce IUR reporting costs for businesses of all sizes. Thus, EPA concludes that these revisions will not result in significant adverse effects on a substantial number of small entities.

### *D. Unfunded Mandates Reform Act*

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (Public Law 104–4) (UMRA), EPA has determined that this regulatory action does not contain a Federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or for the private sector in any 1 year. As described in Unit IV.A., the rule is expected to decrease expenditures by $6 million to $7 million per year. EPA has

also determined that the rule would not significantly or uniquely affect small governments and is not subject to the requirements of sections 202, 203, 204, and 205 of UMRA.

*E. Executive Order 13132*

This rule will not have a substantial direct effect on states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999).

*F. Executive Order 13175*

This rule will not have tribal implications because it is not expected to have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000).

*G. Executive Order 13045*

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*

This action 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*

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*

This action does not involve special considerations of environmental justice related issues as required 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*

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).

**V. 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 710**

Environmental protection, Chemicals, Hazardous materials, Inventory Update Reporting, Reporting and recordkeeping requirements, TSCA.

Dated: December 5, 2005.

**Susan B. Hazen,**

*Acting Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances.*

■ Therefore, 40 CFR chapter I is amended as follows:

## PART 710—[AMENDED]

■ 1. The authority citation for part 710 continues to read as follows:

**Authority:** 15 U.S.C. 2607(a).

**§ 710.43 [Amended]**

■ 2. Section 710.43 is amended by revising the phrase ''4–year intervals'' to read ''5–year intervals'' in the definition for ''reporting year.''

■ 3. Section 710.46 is amended as follows:

■ a. By removing the phrase ''the 1985 edition of the Inventory or in'' in paragraph (a)(1)(i).

■ b. By removing the phrase ''the 1985 edition of the Inventory or'' in paragraph (a)(1)(ii).

■ c. By relisting in ascending order the entries for 68514–36–3, 68514–37–4, 68514–38–5, 68814–87–9, and 68921–09–5 and adding entries in ascending order to the table in paragraph (b)(1).

■ d. By revising paragraph (b)(2)(ii)(F).

■ e. By removing the third, fourth, and fifth sentences in paragraph (b)(2)(iii)(A) and adding a new third sentence.

■ f. By revising the phrase ''4–year intervals'' to read ''5–year intervals'' in paragraph (b)(2)(iii)(C).

**§ 710.46 Chemical substances for which information is not required.**

* * * * *

(b) * * *

(1) * * *

CAS NUMBERS OF PARTIALLY EXEMPT SUBSTANCES TERMED ''PETROLEUM PROCESS STREAMS'' FOR PURPOSES OF INVENTORY UPDATE REPORTING

| CAS No. | Product |
|---|---|
| 61789–60–4 | Pitch |
| * * * | * * |
| 67254–74–4 | Naphthenic oils |
| * * * | * * |
| 67891–81–0 | Distillates (petroleum), oxidized light, potassium salts |
| * * * | * * |
| 67891–86–5 | Hydrocarbon waxes (petroleum), oxidized, compds. with diisopropanolamine |
| * * * | * * |
| 68476–27–7 | Fuel gases, amine system residues |
| * * * | * * |
| 68477–98–5 | Gases (petroleum), hydrotreater blend oil recycle, hydrogen-nitrogen rich |
| 68477–99–6 | Gases (petroleum), isomerized naphtha fractionater, C4-rich, hydrogen sulfide- free |
| * * * | * * |
| 68478–31–9 | Tail gas (petroleum), isomerized naphtha fractionates, hydrogen sulfide-free |
| * * * | * * |
| 68513–03–1 | Naphtha (petroleum), light catalytic reformed, arom.-free |
| * * * | * * |
| 68514–39–6 | Naphtha (petroleum), light steam-cracked, isoprene-rich |
| * * * | * * |
| 68919–16–4 | Hydrocarbons, catalytic alkylation, by-products, C3-6 |
| * * * | * * |
| 73138–65–5 | Hydrocarbon waxes (petroleum), oxidized, magnesium salts |

CAS NUMBERS OF PARTIALLY EXEMPT SUBSTANCES TERMED ''PETROLEUM PROCESS STREAMS'' FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CAS No. | Product |
|---|---|
| 92045–43–7 | Lubricating oils (petroleum), hydrocracked nonarom. solvent deparaffined |
| 92045–58–4 | Naphtha (petroleum), isomerization, C6-fraction |
| 92062–09–4 | Slack wax (petroleum), hydrotreated |
| * * * * * | |
| 98859–55–3 | Distillates (petroleum), oxidized heavy, compds. with diethanolamine |
| 98859–56–4 | Distillates (petroleum), oxidized heavy, sodium salts |
| 101316–73–8 | Lubricating oils (petroleum), used, noncatalytically refined |
| 164907–78–2 | Extracts (petroleum), asphaltene-low vacuum residue solvent |
| 164907–79–3 | Residues (petroleum), vacuum, asphaltene-low |
| 178603–63–9 | Gas oils (petroleum), vacuum, hydrocracked, hydroisomerized, hydrogenated, C10-25 |
| 178603–64–0 | Gas oils (petroleum), vacuum, hydrocracked, hydroisomerized, hydrogenated, C15-30, branched and cyclic |
| 178603–65–1 | Gas oils (petroleum), vacuum, hydrocracked, hydroisomerized, hydrogenated, C20-40, branched and cyclic |
| 178603–66–2 | Gas oils (petroleum), vacuum, hydrocracked, hydroisomerized, hydrogenated, C25-55, branched and cyclic |
| 212210–93–0 | Solvent naphtha (petroleum), heavy arom., distn. residues |
| 221120–39–4 | Distillates (petroleum), cracked steam-cracked, C5-12 fraction |

CAS NUMBERS OF PARTIALLY EXEMPT SUBSTANCES TERMED ''PETROLEUM PROCESS STREAMS'' FOR PURPOSES OF INVENTORY UPDATE REPORTING—Continued

| CAS No. | Product |
|---|---|
| 445411–73–4 | Gas oils (petroleum), vacuum, hydrocracked, hydroisomerized, hydrogenated, C10-25, branched and cyclic |

* * * * *

(2) * * *

(ii) * * *

(F) Whether the potential risks of the chemical substance are adequately managed.

(iii) * * *

(A) * * * Requests must identify the chemical in question, as well as its CAS number or other chemical identification number as identified in § 710.52(c)(3)(i), and must contain a written rationale for the request that provides sufficient specific information, addressing the considerations listed in § 710.46(b)(2)(ii), including cites and relevant documents, to demonstrate to EPA that the collection of the information in § 710.52(c)(4) for the chemical in question either is or is not of low current interest. * * *

* * * * *

**§ 710.48 [Amended]**

■ 4. Section 710.48 is amended by revising the phrase ''4–year intervals'' to read ''5–year intervals'' in paragraph (a).

■ 5. Section 710.52 is amended as follows:

■ a. By revising the phrase ''4–year intervals'' to read ''5–year intervals'' in the first and last sentences of the introductory text, and in the introductory text of paragraphs (c)(2), (c)(3), and (c)(4).

■ b. By revising paragraph (c)(3)(iv).

■ c. By removing paragraph (c)(3)(v) and redesignating existing paragraphs (c)(3)(vi), (c)(3)(vii), (c)(3)(viii), and (c)(3)(ix) as paragraphs (c)(3)(v), (c)(3)(vi), (c)(3)(vii), and (c)(3)(viii), respectively.

■ d. By revising the phrase ''paragraph (c)(3)(viii)'' to read ''paragraph (c)(3)(vii)'' in newly designated paragraph (c)(3)(viii).

■ e. By adding a sentence after the third sentence in paragraph (c)(4).

■ f. By revising the table in paragraph (c)(4)(ii)(A).

**§ 710.52 Reporting information to EPA.**

* * * * *

(c) * * *

(3) * * *

(iv) The total volume (in pounds) of each reportable chemical substance manufactured and imported at each site. The total manufactured volume (not including imported volume) and the total imported volume must be separately reported. This amount must be reported to two significant figures of accuracy provided that the reported figures are within ±10% of the actual volume.

* * * * *

(4) * * * Information required to be reported under this paragraph is limited to domestic (i.e., within the custom territory of the United States) processing and use activities. * * *

* * * * *

(ii) * * *

(A) * * *

CODES FOR REPORTING COMMERCIAL AND CONSUMER PRODUCT CATEGORIES

| Codes | Category |
|---|---|
| C01 | Adhesives and sealants |
| C02 | Agricultural products (non-pesticidal) |
| C03 | Artists' supplies |
| C04 | Automotive care products |
| C05 | Electrical and electronic products |
| C06 | Fabrics, textiles and apparel |
| C07 | Glass and ceramic products |
| C08 | Lawn and garden products (non-pesticidal) |
| C09 | Leather products |
| C10 | Lubricants, greases and fuel additives |
| C11 | Metal products |
| C12 | Paints and coatings |
| C13 | Paper products |
| C14 | Photographic supplies |
| C15 | Polishes and sanitation goods |
| C16 | Rubber and plastic products |
| C17 | Soaps and detergents |
| C18 | Transportation products |
| C19 | Wood and wood furniture |
| C20 | Other |

* * * * *

■ 6. By revising § 710.53 to read as follows:

**§ 710.53 When to report.**

All information reported to EPA in response to the requirements of this subpart must be submitted during an applicable submission period. The first submission period is from August 25, 2006, to December 23, 2006. Subsequent recurring submission periods are from June 1 to September 30 at 5–year intervals after the first submission period. Any person described in § 710.48(a) must report during each submission period for each chemical substance described in § 710.45 that the person manufactured (including imported) during the preceding calendar year (i.e., the ''reporting year'').

■ 7. By revising § 710.57 to read as follows:

**§ 710.57 Reporting requirements.**

Each person who is subject to the reporting requirements of this subpart must retain records that document any information reported to EPA. Records relevant to reporting during a submission period must be retained for a period of 5 years beginning on the last day of the submission period. Submitters are encouraged to retain their records longer than 5 years to ensure that past records are available as a reference when new submissions are being generated.

[FR Doc. 05–24196 Filed 12–16–05; 8:45 am]

BILLING CODE 6560–50–S

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 64

**[CG Docket No. 02–278; CG Docket No. 05–338; FCC 05–206]**

### Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission released an *Order* delaying until January 9, 2006, the effective date of the Commission's rule requiring the sender of a facsimile advertisement to obtain the recipient's express permission in writing. The Junk Fax Prevention Act of 2005 was subsequently signed into law amending section 227 of the Communications Act of 1934 relating to unsolicited facsimile advertisements and requiring this Commission to issue regulations to implement the statute. Therefore, this document extends the stay of the Commission's existing facsimile advertising rules, until the conclusion of the Commission's rulemaking.

**DATES:** The effective date of § 64.1200(a)(3)(i), published at 68 FR 44144, July 25, 2003, is delayed until further notice published in the **Federal Register**.

**ADDRESSES:** Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** Erica McMahon or Richard Smith, Consumer & Governmental Affairs Bureau, (202) 418–2512.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Order*, CG Docket Nos. 02–278 and 05–338, FCC–05–206, adopted and released December 9, 2005. The *Order* further delays the effective date of a rule initially adopted in *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, (*2003 TCPA Order*), CG Docket No. 02–278, FCC 03–153, released July 3, 2003; published at 68 FR 44144, July 25, 2003. In association with this *Order*, the Commission released a *NPRM*, FCC 05–206, adopted and released December 9, 2005, that proposes amendments to its unsolicited facsimile advertising rules and seeks comment on related aspects of those rules. The *NPRM* also opens a new docket—CG Docket No. 05–338—for all filings in response to this document and those addressing the facsimile advertising rules generally.

This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, it does not contain new or modified ''information collection burdens for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4). Copies of any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, Room CY–A257, 445 12th Street, SW., Washington, DC 20054. The complete text of this decision may be purchased from the Commission's duplicating contractor at Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact the Commission's contractor at their Web site: *www.bcpiweb.com* or call 1–800–378–3160. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice) or (202) 418–0432 (TTY). The *Order* can also be downloaded in Word and Portable Document Format (PDF) at *http://www.fcc.gov/cgb/policy*.

**Synopsis**

On June 27, 2005, the Commission released an order, CG Docket No. 02–278, published at 70 FR 37705, delaying until January 9, 2006, the effective date of the Commission's determination that an established business relationship (EBR) will no longer be sufficient to show that an individual or business has given its permission to receive unsolicited facsimile advertisements. Consistent with the Junk Fax Prevention Act of 2005, the Commission extends the stay of the Commission's existing facsimile advertising rules until the conclusion of this rulemaking. Specifically, the Commission delays until the conclusion of this rulemaking, the effective date of: (1) The Commission's prior determination that an EBR will no longer be sufficient to show that an individual or business has given prior express permission to receive an unsolicited facsimile advertisement; (2) § 64.1200(a)(3)(i) of the Commission's rules, which requires a person or entity sending a facsimile advertisement to obtain a prior signed, written statement as evidence of a facsimile recipient's permission to receive the advertisement; and (3) the rule establishing the duration of an EBR as applied to the sending of unsolicited facsimile advertisements.

**Regulatory Flexibility Act Analysis**

The Commission notes that no Final Regulatory Flexibility Analysis is necessary for this *Order*. The Commission is not making any changes to the Commission's rules; rather, we are simply delaying the effective date of a rule.

**Congressional Review Act**

The Commission will not send a copy of this *Order* pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A), because the adopted rules are rules of particular applicability.

**Ordering Clauses**

Pursuant to the authority contained in sections 1–4, 227, and 303(r), of the Communications Act of 1934, as amended; 47 U.S.C. 151–154, 227, and 303(r); the Junk Fax Prevention Act of 2005, and § 64.1200 of the Commission's rules, 47 CFR 64.1200 and 64.2401, this *Order* in CG Docket 02–278 and 05–338 *is adopted*.

The Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, *Shall send* a copy of the *Order* to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. 05–24210 Filed 12–16–05; 8:45 am]

**BILLING CODE 6712–01–P**

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 17

## Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to List *Cicurina cueva* (No Common Name) as an Endangered Species

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

**ACTION:** Notice of 12-month petition finding.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce a 12-month finding on a petition to list a karst meshweaver (spider), *Cicurina cueva* (no common name), under the Endangered Species Act of 1973, as amended. Since receiving the petition, both a genetic assessment and a re-assessment of morphological characters have failed to support the distinctness of *C. cueva from two other named* Cicurina, *C. bandida* and *C. reyesi.* After reviewing all available scientific and commercial information, we find that current information available to us does not support the taxonomic standing of *C. cueva* as a species, and therefore it is not a listable entity and listing is therefore not warranted.

**DATES:** The finding announced in this document was made on December 19, 2005.

**ADDRESSES:** The complete file for this finding is available for inspection, by appointment, during normal business hours at the Austin Ecological Services Field Office, 10711 Burnet Rd., Suite 200, Austin, Texas 78758. Please submit any new information, materials, comments, or questions concerning this species or this finding to the above address.

**FOR FURTHER INFORMATION CONTACT:** Robert Pine, Supervisor (see **ADDRESSES** section); 512–490–0057 extension 248.

**SUPPLEMENTARY INFORMATION:**

### Background

Section 4(b)(3)(B) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), requires that, for any petition to revise the List of Threatened and Endangered Species containing substantial scientific and commercial information indicating listing may be warranted, we make a finding within 12 months of the date of receipt of the petition. The finding must be that the petitioned action is one of the following: (a) Not warranted, (b) warranted, or (c) warranted but that the immediate proposal of a regulation implementing the petitioned action is precluded by other pending proposals to determine whether a species is threatened or endangered, and expeditious progress is being made to add or remove qualified species from the List of Endangered and Threatened Species. Section 4(b)(3)(C) of the Act requires that a petition for which the requested action is found to be warranted but precluded be treated as though resubmitted on the date of such finding, that is, requiring a subsequent finding to be made within 12 months. Such 12-month findings must be published in the **Federal Register**.

On July 8, 2003, we received a petition requesting that we list a karst meshweaver, *Cicurina cueva* (no common name), as an endangered species with critical habitat. On May 25, 2004, Save Our Springs Alliance (SOSA) filed a complaint against the Secretary of the Interior and the Service for failure to make a 90-day petition finding under section 4 of the Act for *C. cueva.* In our response to Plaintiff's motion for summary judgment on October 15, 2004, we informed the court that we believed that we could complete a 90-day finding by January 20, 2005, and if we determined that the 90-day finding provided substantial information that listing may be warranted, we could make a 12-month finding by December 8, 2005. On February 1, 2005 (70 FR 5123), we published a 90-day finding and initiation of status review on a petition to list *C. cueva* as an endangered species. On March 18, 2005, the District Court for the Western District of Texas, Austin Division, adopted our schedule and ordered the Service to issue a 12-month finding on or before December 8, 2005.

### Taxonomy

Gertsch (1992) described and named *C. cueva*, *C. bandida*, and *C. reyesi* from adult, female specimens collected from Cave X in 1962 by Bell and Woolsey, Bandit Cave in 1966 by Reddell and Fish, and Airman's Cave in 1989 by Reddell and Reyes, respectively. The three *Cicurina* species are all unpigmented and range in length from 5 millimeters (mm) (0.19 inches (in)) to 5.6 mm (0.2 in). Gertsch (1992) distinguished these three species by differences he perceived in the female reproductive system.

*Cicurina cueva*, *C. bandida* and *C. reyesi* were described by Gertsch (1992) on the basis of female genitalia of a small number of specimens. Because there were some locations that only had records of immature *Cicurina* that could not be identified to the species level, we contracted Drs. Marshal Hedin and Pierre Paquin on September 24, 2004, to determine whether species-level identification of immature specimens of blind *Cicurina* spiders from southern Travis and northern Hays counties could be made using a genetic assessment technique they had previously applied to other species of *Cicurina* (see Paquin and Hedin 2004 for methods). Their report on the contracted study concludes that *C. cueva* and two other formally described species, *C. bandida* and *C. reyesi* (Gertsch 1992), likely represent variants of a single species that shows genetic structuring across its range. They explain that ''This finding makes biological sense, as we would expect geographically-adjacent cave populations to share more genetic similarity than caves that are distant in space. The genetic structuring observed is a natural consequence of the fragmented nature of cave habitats, and the unique habitat limitations of these spiders * * *'' (Paquin and Hedin 2005). The report authors suggest that rather than three different species, the populations collected represent one species, which they informally refer to as the ''C. *cueva* complex.'' They say ''We suggest that conservation activities concerning cave populations in this confined geographic region be based on this single species hypothesis.'' Since a formal revision reflecting this change in taxonomy (the naming and classification of organisms) has not been published in a peer-reviewed scientific journal, the Service requested independent peer review of the report. We believe we should now make this 12-month finding based on the taxonomic treatment recommended in the contracted report (Paquin and Hedin 2005).

Drs. Paquin and Hedin submitted a report in May 2005, titled, ''Genetic and morphological analysis of species limits in *Cicurina* spiders (Araneae, Dictynidae) from southern Travis and northern Hays counties, with emphasis on *Cicurina cueva* Gertsch and relatives.'' When *Cicurina* specimens from Travis, Hays, and Williamson

counties, Texas, were compared to sampled populations of *C. cueva*, Paquin and Hedin (2005) found that the *C. cueva complex (including all three named species)* forms a monophyletic group (defined as a group descended from a single common ancestral form) or clade (a group of organisms that share features derived from a common ancestor) within a mitochondrial phylogeny (the evolutionary development and history of a species or higher taxonomic group based on mitochondrial DNA). Additionally, both *C. bandida* and *C. reyesi* are deeply embedded within the mitochondrial DNA clade corresponding to the *C. cueva* complex, indicating that they are part of the same group. In addition, they examined female genital morphology and found that ''a similar genital morphology, with slight variations, is shared across the entire distribution of this species [the *C. cueva* complex].'' Based on the Paquin and Hedin 2005 genetic and morphological results, they concluded that these three named taxa represent variants of a single species. Ultimately, when *C. cueva*, *C. bandida*, and *C. reyesi* are formally combined as a single species, the authors propose all populations within this expanded species be referred to as *C. bandida*, as this name has page priority in Gertsch (1992). Paquin and Hedin (2005) acknowledge that formal taxonomic decisions must involve publication in a scientific journal; therefore, the authors suggest using ''*C. cueva* complex'' to refer to the morphologically variable and genetically divergent populations within this single species until the formal change is published. In consideration of this information for use in our 12-month finding, we conducted a scientific peer review of Paquin and Hedin's 2005 report to determine if the proposed change in taxonomy was likely to be accepted.

On May 6, 2005, we sent the report to 20 scientists, 19 with Ph.Ds, with expertise in genetics, morphology, and/or conservation biology for peer review. We asked that they particularly review the completeness of the data in the report and identify any pertinent information that may be missing and the soundness of the methodology, data analysis, conclusions, and recommendations in the report. Each invited reviewer was assigned a number, which will be referred to here. We received eight responses (reviewers 2, 4, 5, 7, 8, 10, 13, 14). Dr. Mark Kirkpatrick (co-petitioner) also submitted two letters to the Service and personal email correspondence with Dr. Hedin (regarding the report). Because Dr. Kirkpatrick is a co-petitioner he was not considered a peer reviewer. However, the Service acknowledges his considerable expertise in genetics. To allow peer reviewers the opportunity to comment on the issues presented by Dr. Kirkpatrick, we sent a second request for peer review to the same twenty scientists on June 20, 2005, and received ten peer reviews (from reviewers 5, 7, 8, 9, 10, 12, 13, 14, 19, 20). We asked the peer reviewers for their opinion on what degree of certainty they would assign to each of the following hypotheses/conclusions: (1) *C. cueva*, *C. bandida*, and *C. reyesi* are all one species (Paquin and Hedin conclusion), (2) they are all separate species, or (3) another hypothesis/conclusion is possible. We asked them to explain their views on appropriate criteria for delimiting species using the types of morphological and genetic data available in this case, and how those criteria apply to their review.

Of the 14 peer reviewers that responded to one or more requests for reviews, 10 reviewers (2, 4, 5, 8, 10, 12, 13, 19, 20, and 22) expressed general agreement with Paquin and Hedin's conclusion that *C. cueva*, *C. bandida*, and *C. reyesi* represent a single species, one reviewer (9) expressed support for continuing to recognize them as three separate species, and three reviewers (7, 14, and 21) concluded that more study was needed to distinguish between the one-species and three species alternatives. In addition to these overall conclusions, most reviewers provided additional comments on various aspects of the Paquin and Hedin report, and on pertinent issues related to the taxonomic interpretation of genetic and morphological data. These comments on specific issues are summarized below.

Six of the twelve peer reviewers (2, 4, 5, 9, 10, 19) who responded to at least one of these two requests for review indicated the study overall was well done and the methods used in the genetic aspects of this study were scientifically sound. However, we did receive a variety of comments. Below we discuss the comments from both of these sets of reviews in regard to the methods, analysis, and conclusions in the study.

Concerns were raised by five peer reviewers (4, 5, 7, 9, 14) regarding the authors' use of a single region of the mitochondrial DNA. Some believed the report would be strengthened by a larger sample size from each sampling locality, inclusion of data from other mitochondrial DNA regions, and an analysis of genetic markers from nuclear DNA. Three peer reviewers (4, 5, 14) speculated that the conclusion to group the three taxa into a single species would probably still be the same even with further genetic analysis.

Two reviewers (13, 14) questioned the use of particular phylogenetic methods to analyze the genetic data and construct the tree diagrams of relationships. The authors' present two different trees, or phylogenies, based on a single data set; one generated by neighbor joining (NJ) analyses and the other by Bayesian phylogenetics. These methods differ in that NJ is a distance-based approach based on analysis of a matrix of genetic distances (Hedrick 2000), and Bayesian phylogenetics is a character-based approach (Avise 2004). Although they rely on different assumptions and may give somewhat different results, both are generally accepted methods for analyzing and presenting DNA sequence data (Avise 2004), and Avise (2004, page 142) recommends that studies include both a distance-based approach and a character-based approach for comparison. The authors stated that they also analyzed the data using maximum likelihood analysis, which is another character-based method (Avise 2004). They did not present a phylogenetic tree representing the results of the maximum likelihood analysis but stated that the results were similar to their Bayesian analysis (Dr. Paquin, San Diego State University, pers. comm., 2005; Hedin and Paquin 2005). Although we acknowledge that there are a number of additional methods of phylogenetic analysis (Hedrick 2000, Avise 2004), the authors presented trees representing the two major types of trees, as recommended by Avise (2004).

Three peer reviewers (8, 13, 14) suggested different conclusions could be drawn, even if the phylogenies are accepted. These alternative interpretations reflect differing views on the appropriate amount of genetic difference for delineating species boundaries, which is an active area of debate in taxonomy (Sites and Marshall 2004).

One peer reviewer (14) suggested that the study of additional morphological characters, rather than genitalia, such as somatic (non-sexual) characters, might find diagnosable differences within the ''*C. cueva* complex.'' However this peer reviewer doubted that the outcome of such studies would likely affect the authors' conclusion that *C. cueva* is not a species. Additionally, one reviewer (14) stated the assessment of genitalic variation was subjective and would have been better if the different genitalic parameters could have been quantified somehow with the variation analyzed

statistically. Reviewers 7 and 12 stated that morphology clearly plays a critical role in deciphering the systematics of this group, and reviewer 7 wondered if some statistical quantification of patterns in morphological characters is possible. Gertsch's (1992) original diagnoses for these three species included only collection locality and characters of the female reproductive system; no other characters were identified in the diagnosis. The diagnosis that accompanies the original description of a new species is important because it provides the characters or character states that allow that species to be distinguished from other species. Gertsch (1992) expressed doubts that other characters were useful; for example, ''*Cicurella* [the subgenus to which the species in question belong] * * * offer few coloration or somatic features to allow easy identification.'' Gertsch (1992) was also dismissive of the value of different reproductive features in males and notes that males are much less available for study, as they represent only a fifth the number of mature females.

One reviewer (22) noted variation in female genitalia observed among the specimens presented in the report was considered ''well within'' the range of intraspecific (within-species) variation typically observed in female genitalia of other species and adequately demonstrates that there is no morphological reason to consider *C. cueva, C. bandida*, and *C. reyesi* as three separate species. We recognize that study of additional morphological characters and more quantitative analysis of current characters could increase our understanding of morphological variation within this group of spiders, but we find little support for rejecting the authors' recommended taxonomy, considering their findings and the peer reviewers' comments on the morphological data.

Dr. Kirkpatrick thought the Paquin and Hedin (2005) report did not statistically disprove the ''established taxonomy'' previously described by Gertsch (1992). However, two peer reviewers (8 and 22) expressed concern that Gertsch (1992) did not sufficiently account for the possibility of intraspecific variation in genitalic characters and improperly recognized minor morphological variants as different species and that his species descriptions were based on small sample sizes. While such a lack of statistical analysis is common in the field of systematic biology, we believe that since two experts (19 and 22) in this field have expressed strong doubts about the basis of the species-level taxonomy presented by Gertsch, the alternative taxonomic delineation presented by Paquin and Hedin (2005) deserves serious consideration. We also note that Paquin and Hedin's (2005) morphological studies were based on more than double the number of specimens available to Gertsch (1992) when he originally described the species.

We received a variety of responses to the specific question in the second peer review regarding the degree of certainty that the reviewer would assign to the various hypotheses or possible conclusions about species limits. Two reviewers (8 and 19) clearly supported the Paquin and Hedin conclusion that *C. cueva, C. bandida*, and *C. reyesi* are all one species. However, reviewer 8 did disagree about the assignment of three or four of the populations to this group and did differ with Paquin and Hedin about the level of differences accepted to represent a species. One of the reviewers (13) was ''unconvinced that the report's conclusions are correct'', and suggested an alternate hypothesis and classification. Reviewers 7 and 9 believe the Paquin and Hedin conclusions should be considered preliminary and premature, respectively. Reviewers 5, 10, 12, and 20 tended to accept the Paquin and Hedin hypothesis based on the information presented; however, they each expressed some uncertainty or suggested that additional data collection and analysis would be advisable. Reviewer 14 felt that both Hedin and Kirkpatrick provided ''solid, convincing arguments for their points of view'; this reviewer doubted that further investigation would lead to improved resolution on the question of how many species there are and believes this is ultimately a matter of interpretation.

In response to divergent opinions regarding how to define species limits and how much data are needed to confidently make a species determination, and because some but not all peer reviewers were familiar with spider taxonomy in particular, we conducted a third peer review. We sent four arachnologists the Paquin and Hedin 2004 publication (that described the methods used in this study) and 2005 report, the first peer review request and responses, Dr. Kirkpatrick's letters and emails, and the second peer review request and responses. We received two responses (reviewers 21 and 22). One of these reviewers (22) stated that ''Based on the evidence presented by Hedin & Paquin, the only well supported scientific conclusion at this time, is that only one species is present.'' The other reviewer (21) stated Paquin and Hedin clearly explained their methods and that they are adequate for their questions. The reviewer also stated that ''Paquin and Hedin have given a conservative conclusion based on their data, and have noted alternative explanations and the need for more specimens''.The reviewer stated that ''without more of this work I do not see a way to resolve the concerns about data interpretation raised by Dr. Mark Kirkpatrick.''

There is ongoing debate among many scientists regarding methods for species differentiation (Sites and Marshall 2004). Some believe defining species boundaries requires a ''total evidence'' approach that includes data from multiple genes and morphology, as well as ecology and behavior. Although it is reasonable to believe this debate will continue, the Service's ''Interagency Cooperative Policy on Information Standards under the Endangered Species Act'' (59 FR 34271) requires we use the ''best available comprehensive technical information'' in making Federal listing determinations. The Paquin and Hedin (2005) report provides genetic data for the first time and morphological data based on an increased number of specimens; both approaches fail to distinguish *C. cueva* from *C. bandida* and *C. reyesi.* In addition, the claim by the petitioners that the genetic analysis employed is not informative about taxonomic standing within the *C. cueva* complex is not supported by the clear correspondence between geography and branching patterns of both phylogenetic trees. The correspondence between geography and phylogeny indicates that the phylogenetic patterns have a biological basis and do not simply present ''noise'' that is obscuring biologically important patterns. We believe, based on our review and the results of the peer reviews, the Paquin and Hedin (2005) report provides the best available information on the current taxonomic status of the *Cicurina* complex. Although it is always possible that future analyses on other morphological characters or genetic markers may convince spider taxonomists that another taxonomic interpretation is appropriate, we cannot base our findings on the speculative outcomes of studies not yet performed. We find, however, that the Paquin and Hedin (2005) report is based on procedures and methods of analysis that are generally accepted in the application of molecular methods to taxonomy. Although additional study could affect the taxonomic conclusions of the report, according to the requirements of the Act the best available genetic and

morphological data at this time support the recommendation of Paquin and Hedin (2005) to treat these three species as one species.

**Previous Federal Actions**

Previous Federal actions can be found in our 90-day finding that published on February 1, 2005 (70 FR 5123), and in our notice reopening the comment period on August 16, 2005 (70 FR 48093). That information is incorporated by reference into this 12-month finding.

In addition to information incorporated by reference we note that the first comment period for providing information for our status review closed May 15, 2005. Pursuant to 50 CFR 424.16(c)(2), we may extend or reopen a comment period upon finding that there is good cause to do so. We reopened the comment period from May 23 to June 22, 2005 (70 FR 29471; May 23, 2005), since additional information from the genetic analysis of *Cicurina* species in southern Travis County was completed. Several parties requested another extension of the comment period. We reopened the public comment period from August 16 to 30, 2005 (70 FR 48093; August 16, 2005). During this final comment period, we made available the results of our peer review on the Paquin and Hedin (2005) report.

**Finding**

We have carefully assessed the best scientific and commercial information available regarding the taxonomic status of *Cicurina cueva.* We reviewed the petition, available published and unpublished scientific and commercial information, and information submitted to us during the public comment periods on our status review following our 90-day finding. This finding reflects and incorporates information we received during the public comment periods. We also consulted with recognized spider and karst invertebrate experts. On the basis of this review, we find that listing *C. cueva* is not warranted because *C. cueva* does not meet the definition of a ''species'' under the Act.

**References Cited**

A complete list of all references cited herein is available upon request from the Field Supervisor at the Austin Ecological Services Office (see **ADDRESSES** section).

**Author**

The primary author of this document is the Austin Ecological Services Office (see **ADDRESSES** section).

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

Dated: December 8, 2005.

**Marshall P. Jones Jr.,**

*Acting Director, Fish and Wildlife Service.*

[FR Doc. 05–24119 Filed 12–16–05; 8:45 am]

**BILLING CODE 4310–55–P**

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## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 648

**[Docket No. 041110317–4364–02; I.D. 121205C]**

## Fisheries of the Northeastern United States; Summer Flounder Fishery; Commercial Quota Harvested for New York

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

**ACTION:** Temporary rule; closure.

**SUMMARY:** NMFS announces that the 2005 summer flounder commercial quota available to New York has been harvested and is announcing the closure of summer flounder in Federal waters. Vessels issued a commercial Federal fisheries permit for the summer flounder fishery may not land summer flounder in New York for the remainder of calendar year 2005, unless additional quota becomes available through a transfer. Regulations governing the summer flounder fishery require publication of this notification to advise New York of the closure and to advise vessel permit holders and dealer permit holders that no commercial quota is available for landing summer flounder in New York.

**DATES:** Effective 0001 hours, December 14, 2005, through 2400 hours, December 31, 2005.

**FOR FURTHER INFORMATION CONTACT:** Mike Ruccio, Fishery Management Specialist, (978) 281–9104.

**SUPPLEMENTARY INFORMATION:** Regulations governing the summer flounder fishery are found at 50 CFR part 648. The regulations require annual specification of a commercial quota that is apportioned on a percentage basis among the coastal states from North Carolina through Maine. The process to set the annual commercial quota and the percent allocated to each state is described in § 648.100.

The initial total commercial quota for summer flounder for the 2005 calendar year was set equal to 18,180,002 lb (8,246,395 kg) (70 FR 303, January 4, 2005). The percent allocated to vessels landing summer flounder in New York is 7.64699 percent, resulting in a commercial quota of 1,390,223 lb (630,601 kg). However, the 2005 allocation to New York was reduced to 1,374,164 lb (623,317 kg) due to research set-aside. The states of North Carolina, New Jersey, and Rhode Island and the Commonwealth of Virginia have transferred a total of 50,530 lb (22,920 kg) to New York in accordance with the Atlantic States Marine Fisheries Commission Addendum XV to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan, bringing the total quota to 1,424,694 lb (646,241 kg).

Section 648.101(b) requires the Administrator, Northeast Region, NMFS (Regional Administrator) to monitor state commercial quotas and to determine when a state's commercial quota has been harvested. NMFS then publishes a notification in the **Federal Register** to advise the state and to notify Federal vessel and dealer permit holders that, effective upon a specific date, the state's commercial quota has been harvested and no commercial quota is available for landing summer flounder in that state. The Regional Administrator has determined, based upon dealer reports and other available information, that New York has harvested its quota for 2005.

The regulations at § 648.4(b) provide that Federal permit holders agree, as a condition of the permit, not to land summer flounder in any state that the Regional Administrator has determined no longer has commercial quota available. Therefore, effective 0001 hours, December 14, 2005, further landings of summer flounder in New York by vessels holding summer flounder commercial Federal fisheries permits are prohibited for the remainder of the 2005 calendar year, unless additional quota becomes available through a transfer and is announced in the **Federal Register**. Effective 0001 hours, December 14, 2005, federally permitted dealers may not purchase summer flounder from federally permitted vessels that land in New York for the remainder of the calendar year, or until additional quota becomes available through a transfer.

**Classification**

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

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

Dated: December 14, 2005.

**Alan D. Risenhoover,**

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

[FR Doc. 05–24204 Filed 12–14–05; 1:57 pm]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 660

**[Docket No. 050620162–5326–02; I.D. 061505D]**

**RIN 0648–AS30**

## Fisheries Off West Coast States and in the Western Pacific; Pelagic Fisheries; Additional Measures to Reduce the Incidental Catch of Seabirds in the Hawaii Pelagic Longline Fishery

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

**ACTION:** Final rule; notice of availability of Record of Decision (ROD).

**SUMMARY:** NMFS issues a final rule to implement measures to further reduce the incidental catch of seabirds in the Hawaii-based longline fishery. Depending on the fishing method and area where the vessels operate, owners and operators of longline fishing vessels must either side-set (deploy longline gear from the side of the vessel rather than from the stern) or use a combination of other seabird mitigation measures to prevent seabirds from being accidentally hooked, entangled, and killed during fishing operations.

NMFS also announces the availability of the ROD for the ''Final Environmental Impact Statement, Seabird Interaction Avoidance Methods under the Fishery Management Plan for Pelagic Fisheries of the Western Pacific Region and Pelagic Squid Fishery Management under the Fishery Management Plan for Pelagic Fisheries of the Western Pacific Region and the High Seas Fishing Compliance Act'' (FEIS). The ROD announces that NMFS selects the Preferred Alternative of the FEIS, modified slightly, to cost-effectively further reduce the potentially harmful effects of the Hawaii-based longline fishery on seabirds.

**DATES:** Effective January 18, 2006.

**ADDRESSES:** Copies of the following documents are available from William L. Robinson, Administrator, NMFS, Pacific Islands Region (PIR), 1601 Kapiolani Boulevard, Suite 1110, Honolulu, HI 96814:

- The Regulatory amendment document entitled ''Additional Measures to Reduce the Incidental Catch of Seabirds in the Hawaii-Based Longline Fishery'' (April 6, 2005), which contains a Regulatory Impact Review and a Final Regulatory Flexibility Assessment (FRFA);
- The FEIS; and
- The ROD for the FEIS.

Requests for copies of any of these documents should indicate whether paper copies or electronic copies on CD-ROM are preferred. These documents are also available at the following web site: *http://swr.nmfs.noaa.gov/pir*.

**FOR FURTHER INFORMATION CONTACT:** Robert Harman, NMFS PIR, 808–944–2271.

**SUPPLEMENTARY INFORMATION:**

### Electronic Access

This **Federal Register** document is also accessible via the Internet at: *http://www.archives.gov/federal-register/publications*.

### Background

On July 13, 2005, NMFS published in the **Federal Register** a proposed rule (70 FR 40302) that, depending on the fishing method and area where the vessels operate, would require owners and operators of Hawaii-based longline fishing vessels to either side-set (deploy longline gear from the side of the vessel rather than from the stern) or use a combination of other seabird mitigation measures to prevent seabirds from being accidentally hooked, entangled, and killed during fishing operations.

NMFS, the Western Pacific Fishery Management Council (WPFMC), and the fishing industry have collaborated on research to test side-setting and other measures as additional seabird deterrent methods for Hawaii longline vessels. The research results were analyzed and considered by the WPFMC as potential new seabird mitigation requirements to cost-effectively further reduce the effects of the Hawaii longline fleet on seabirds. In October 2004, the WPFMC recommended that NMFS amend the Fishery Management Plan for Pelagic Fisheries of the Western Pacific Region (Pelagics FMP) regulations to include the following seabird conservation measures: (a) when fishing north of 23° N. lat., all deep-setting Hawaii longline vessels must either side-set, or use a tori line (bird-scaring) system plus the currently-required measures (blue-dyed thawed bait, strategic offal discards, and line shooter with weighted branch lines), with the requirement to use strategic offal discards modified to require that vessel operators use them only when seabirds are present; and (b) all shallow-setting Hawaii longline vessels, wherever they fish, must either side-set, or use a tori line plus the currently required measures (night setting, blue dyed thawed bait, and strategic offal discards), with the requirement to use strategic offal discards modified to require that vessel operators use them only when seabirds are present.

In the ROD for the FEIS, NMFS selects the Preferred Alternative of the FEIS, modified slightly, to cost-effectively further reduce the potentially harmful effects of the Hawaii-based longline fishery on seabirds. The original Preferred Alternative included a requirement to add weights of 60 g (2.1 oz) to each branch line while side-setting. The modified Preferred Alternative reduces the weight requirement used on branch lines while side-setting to 45 g (1.6 oz). Additionally, the modified Preferred Alternative eliminates the requirement to use tori line systems.

Additional background on this final rule may be found in the preamble to the proposed rule (70 FR 40302, July 13, 2005) and is not repeated here.

### Comments and Responses

NMFS received comments on the proposed rule (70 FR 40302, published July 13, 2005) from fishing industry organizations, government agencies, environmental groups, and private citizens. The responses are found later in this section. Based on comments received and on subsequent action by the WPFMC, the final rule contains changes to the proposed rule that change the weight required to sink branch lines and remove the proposed requirement to use tori lines when not side-setting, and clarify technical specifications related to gear deployment.

Prompted by several of the comments, the WPFMC held a meeting by teleconference on November 1, 2005, to address and discuss recent analyses involving two elements of the proposed rule, and to make adjustments to their recommendations in the proposed rule. As a result of the recommendations from that meeting, the final rule contains changes to the proposed rule that modify one technical requirement and remove another requirement.

The first issue addressed by the WPFMC, the requirement to use 60 g (2.1 oz) weights on branch lines used to sink baited hooks on branch lines when side-setting, was revisited on two grounds: safety and relative

effectiveness. The final rule contains changes from the proposed rule that modify the specifications for the weights used on branch lines. These weights, deployed in the form of weighted swivels, are intended to quickly sink the baited hooks so that foraging seabirds are not attracted to the baits and subsequently hooked or entangled.

There is a concern for human safety because when a weighted branch line breaks under strain, it tends to lash backwards toward the crew members who are handling the gear. Fishermen report that heavier weights are more dangerous than lighter ones, and that severe injuries from backlashed weights have occurred in the longline fishery. Thus, from a safety perspective, fishermen prefer to use a lighter-weight swivel.

A recent study compared the effective sinking rates of baited hooks on branch lines weighted with a range of weights. The sink rates were almost identical for baited hooks with 40 g (1.4 oz) and 60 g (2.1 oz) weights. Thus, the advantage in sinking a baited hook out of the foraging range of seabirds using the 60 g (2.1 oz) weight had little advantage over using a 40 g (1.4 oz) weight. Because the industry preference is to use 45 g (1.6 oz) swivels, and because the weight requirement for branch lines when deep-setting from the stern is 45 g (1.6 oz), and because the differences in sink rates between the lighter and heavier weights were negligible, the WPFMC opted to modify its recommendation and require 45 g (1.6 oz) weights on the branch lines, rather than 60 g (2.1 oz) weights in the proposed rule. This final rule reflects that change.

The second issue addressed during the WPFMC meeting was the requirement to use tori line systems. The WPFMC acknowledged that its previous recommendation to use tori lines was an incentive for vessels to convert to side-setting, that other measures have been effective in reducing interactions with seabirds, and that the construction and operating performance standards of these systems had not been fully analyzed in the Hawaii longline fishery. The incentive to side-set has worked unexpectedly well, with more than 40 vessels already converted and more awaiting funding to convert. NMFS has provided financial assistance to help convert the Hawaii longline fleet to side-setting operations.

After the proposed rule was published, NMFS and the WPFMC received information that showed that interactions with seabirds have been reduced markedly from historical levels. When compared with the data from 1995–99, the rates for seabird takes (expressed as birds/1,000 hooks) in the first and second quarters of 2005 decreased on the order of 90–99% from the historical averages. This decrease in seabird takes can be attributed to the requirement to set at night when shallow-setting (starting one hour after local sunset and finishing one hour before local sunrise), combined with the effective use of other measures to reduce seabird interactions. These other measures include the use of thawed blue-dyed bait, strategic offal discards, and line shooters to sink lines quickly. Additionally, under a rule published on November 15, 2005 (70 FR 69282), shallow-set vessels are now required to use large, offset circle hooks, and this may also reduce the mortality of seabirds.

Because the existing seabird measures for this fishery are relatively effective in minimizing the take of seabirds, and because the construction and operating performance standards of using tori line systems in the Hawaii pelagic longline fleet have not been thoroughly studied, the WPFMC removed its previous recommendation to require tori lines in this fishery. This final rule reflects that recommendation.

Even though the WPFMC changed its previous recommendation to implement tori lines in the Hawaii longline fishery, NMFS understands that tori lines have proven to be effective in reducing interactions with seabirds in similar fisheries in other locations. NMFS is concerned that adding the tori line requirement at this time may potentially obscure the factors that have led to recent dramatic decreases in seabird catches. Based on the existing data and analyses, it is not clear whether tori line systems would lead to even further decreases in seabird interactions. Thus, NMFS views side-setting as a valuable addition to the techniques already in place, but will wait before considering other avoidance measures (e.g., tori lines). NMFS aims to collect information and analyze the effectiveness of the new measure before considering additional seabird mitigation measures.

The requirements in 600.35(a)(1)(i) and (iii) were changed to clarify that the mainline must be deployed, and the mainline shooter must be mounted, as far forward on the vessel as practicable, to comply with the terms and conditions of a US Fish and Wildlife Service (USFWS) Biological Opinion, as supplemented, on the effects of the Hawaii longline fleet on the endangered short-tailed albatross.

NMFS, the WPFMC, and fishery participants are continually collecting information about the effectiveness of fishing techniques that reduce the take of non-target species, including seabirds. This information comes from directed research, observer reports and other sources. Whenever new information is available and analyzed, NMFS and the Council can re-evaluate the management regime. In the future, if the information supports such actions, the WPFMC and NMFS may propose measures such as mandatory side-setting or tori lines, or the revision of existing measures such as blue-dyed bait, offal discards, etc.

NMFS responds to the received written comments on the proposed rule, as follows:

*Comment 1:* The take of albatrosses in the Hawaii longline fleet violates the Migratory Bird Treaty Act (MBTA) because there is no take authorization under this act.

*Response:* The MBTA applies only in nearshore waters, i.e., from the shoreline seaward to three nautical miles offshore. The Hawaii pelagic longline fleet does not operate in waters covered by the MBTA, so no take authorization is required.

*Comment 2:* Longline vessels should be required to use tori lines during gear hauling, in addition to during gear setting.

*Response:* For the reasons identified above, the use of tori lines is not required by this rule. As new information on the construction and operating performance standards of tori lines in the pelagic longline fishery becomes available and is analyzed, the WPFMC and NMFS may revisit this issue for future management consideration.

NMFS is taking a step-wise approach to building the suite of measures to reduce interactions between the Hawaii longline fleet and seabirds. Rather than adding two new measures at this time, only side-setting will be added as an optional measure. NMFS and the WPFMC intend to evaluate the effectiveness of side-setting and current suite of optional measures, and consider if future modifications to the regulations need to be made. This final rule allows NMFS and the WPFMC to assess how well side-setting works in a commercial setting.

*Comment 3:* The requirement for strategic offal discards will result in increased, rather than decreased, seabird captures.

*Response:* This measure complies with the non-discretionary terms and conditions of a USFWS Biological Opinion, as supplemented, on the

effects of the Hawaii longline fleet on the endangered short-tailed albatross. The results of research on the effectiveness of strategic offal discards in the Hawaii pelagic longline swordfish fishery have demonstrated that offal, when discarded strategically, does reduce seabird interactions with longline gear.

The requirement for strategic offal discards applies only when birds are present. Although discarding offal during setting is designed to distract birds away from baited hooks and reduce interactions, there is some anecdotal information that indicates a possible unwanted effect of attracting some birds to the vessel, increasing potential captures. NMFS is continuing to assess the impacts and effectiveness of strategic offal discards, and as new information becomes available and is analyzed, the WPFMC and NMFS may revisit this issue.

*Comment 4:* The requirement to use weights on branch lines creates a safety hazard for the crew of Hawaii longline swordfish vessels.

*Response:* The requirement to attach weights to branch lines is necessary for the rapid sinking of branch lines and baited hooks to minimize interactions with seabirds. The use of weighted lines has, however, been identified as a potential safety hazard. NMFS and the WPFMC are continuing to assess the effectiveness of and safety aspects of weighted lines (see discussion above on safety aspects of weighted lines). As new information becomes available and is analyzed, however, the WPFMC and NMFS may adjust the management measures. In the meantime, crew members may minimize the risk of injury by using wire leaders in lieu of monofilament leaders, and may wear safety equipment such as eye protection and hard hats. Also see the response to Comment 5.

*Comment 5:* The use of 45 g (1.6 oz), not 60 g (2.1 oz), weighted swivels should be required to be used with side-setting.

*Response:* NMFS and the WPFMC agree. For the reasons identified above, the requirement for branch line weights is changed to a minimum of 45 g (1.6 oz) in the final rule, from a minimum of 60 g (2.1 oz) in the proposed rule. NMFS and the WPFMC are continuing to assess the effectiveness and safety aspects of weighted lines, and as new information becomes available and is analyzed, the WPFMC and NMFS may adjust the management measures.

*Comment 6:* The side-setting specifications should require deployment so that the baited hooks remain submerged all the time, not just when birds are present, because seabirds can arrive at any time.

*Response:* Based on current research results and understanding of the fishery and its interaction with seabirds, the specification to ensure that baited hooks remain submerged when birds are present is adequate to reduce interactions. NMFS is continuing to assess the effectiveness of this specification, and as new information becomes available and is analyzed, the WPFMC and NMFS may revisit this issue for future management consideration.

*Comment 7:* The term ''submerged portion'' in the definition of a tori line is problematic because the line may be dragging at the sea surface and not underwater.

*Response:* For the reasons identified above, the use of tori lines is not required by this rule.

*Comment 8:* To achieve the required lengths of the aerial portions of the tori line, items such as weighted funnels and buoys will need to be placed at the end of the line.

*Response:* See the response to Comment 7.

*Comment 9:* It is unclear why the regulations specify a minimum length of the portion of the tori line that must be in the water.

*Response:* See the response to Comment 7.

*Comment 10:* The design specified for the tori line for deep-setting longline vessels is unlikely to result in the aerial portion of the line maintaining a minimum length of 40 m (131 ft), as the regulations require.

*Response:* See the response to Comment 7.

*Comment 11:* More than three streamer pairs should be required to be used with each tori line.

*Response:* See the response to Comment 7.

*Comment 12:* The regulations do not specify whether flexible hollow rubber tubing may be used as streamer material.

*Response:* See the response to Comment 7.

*Comment 13:* The requirement to carry a minimum of two cans of blue dye is insufficient, as this amount of dye will not last for an entire trip.

*Response:* Research has indicated that two cans of dye are sufficient to dye the bait used during a normal longline fishing trip. Nothing in the regulations prevents operators from carrying more dye if they think it is necessary to ensure that they comply with the requirement to dye blue all deployed bait to the degree required in the regulations.

*Comment 14:* All vessels should be required to side-set unless they can demonstrate that doing so is impracticable.

*Response:* The purpose of the final rule is to cost-effectively further reduce the potentially harmful effects of the longline fishery on seabirds. Research in the Hawaii longline fishery and elsewhere has identified and demonstrated several cost-effective methods to minimize seabird captures, including the alternatives in the regulations. In addition to the primary goal of reducing seabird captures, the required seabird avoidance measures also consider economic impacts and practicality. Allowing vessels to choose between alternative effective methods ensures that vessels can select the options that are most viable for that vessel and fishing operation. NMFS and the WPFMC are continuing to assess the effectiveness of all measures that potentially reduce seabird captures. As new information becomes available and is analyzed, the WPFMC and NMFS may consider revisions to the measures contained in this final rule.

*Comment 15:* All longliners, not just shallow-set vessels, should be required to set at night when fishing north of 23° N. lat., in addition to the other measures that are currently required.

*Response:* See the response to Comment 14. The 23° N. lat. boundary for the deep-set component of the fishery conforms with a USFWS Biological Opinion, as supplemented, on the effects of the Hawaii longline fleet on the federally listed short-tailed albatross. These birds have not been observed to range south of this latitude.

*Comment 16:* The most effective combination of bird avoidance methods should be required to be used by all longline vessels to minimize bird captures, or the vessels should be required to use all known seabird avoidance methods in combination.

*Response:* See the response to Comment 14.

*Comment 17:* Vessels that choose not to side-set should be required to use paired tori lines, which were found to be effective in reducing bird captures in Alaska demersal longline fisheries.

*Response:* See the response to Comment 7. Also, Hawaii's pelagic longline fishery differs significantly from Alaska's demersal longline fishery in terms of target species, oceanographic and environmental conditions, and fishing operations, and there is currently no information available that assesses the effectiveness, economic viability, or practicality of paired tori lines in the Hawaii pelagic longline fishery. NMFS and the WPFMC are

continuing to assess the effectiveness of tori lines, and as new information becomes available and is analyzed, the WPFMC and NMFS may consider revisions to the measures contained in this final rule.

*Comment 18:* Vessels should be required to use seabird avoidance methods everywhere that they fish. The requirement for the use of bird avoidance methods only when fishing N. of 23° N. lat. is insufficient because vessels catch seabirds south of this latitude.

*Response:* Shallow-set longline fishing operations must use seabird avoidance techniques wherever they fish. The 23° N. lat. boundary for the deep-set component of the fishery conforms with a USFWS Biological Opinion, as supplemented, on the effects of the Hawaii longline fleet on the federally listed short-tailed albatross. These birds have not been observed to range south of this latitude. The current catch levels of other seabirds in the Hawaii longline fishery, and the anticipated lower catch levels under the new regulations, are not anticipated to result in population-level effects on affected seabird populations. As new information on interactions with other seabirds becomes available and is analyzed, the WPFMC and NMFS may revisit this issue.

*Comment 19:* When compared with historical bird capture rates, the current seabird regulations are extremely effective at reducing bird captures and, therefore, the proposal to add a requirement for use of a tori line is not justified.

*Response:* NMFS and the WPFMC agree. For the reasons identified above, the use of tori lines is not required by this rule. As new information on the benefits and costs of tori lines in the pelagic longline fishery becomes available and is analyzed, the WPFMC and NMFS may revisit this issue for future management consideration.

*Comment 20:* NMFS should establish an annual cap on the number of seabirds that may be captured by the Hawaii longline fleet.

*Response:* The measures contained in the final rule comply with the requirements of a USFWS Biological Opinion on the effects of the Hawaii longline fishery on the endangered short-tailed albatross. Although no other seabird species with which the longline fishery interacts is listed as threatened or endangered, the measures are also effective at reducing interactions with other seabird species. The current seabird catch levels in the Hawaii longline fleet, and the anticipated lower levels under this final rule, are not believed to result in population-level effects on seabird populations. Establishing thresholds for the capture of these birds is, therefore, not necessary.

*Comment 21:* Longline fishing should be prohibited because it results in the mortality of endangered species.

*Response:* The western Pacific pelagic longline fishery is governed under the Magnuson-Stevens Act and other applicable laws, including the Endangered Species Act (ESA) which is designed to protect species under threat of extinction. NMFS and the USFWS have determined that the fishery is not likely to jeopardize threatened or endangered species under their purview. Provided that specified terms and conditions of biological opinions are met, the ESA does authorize specific levels of the incidental take of endangered species. NMFS does comply with these biological opinions, so an incidental take is authorized.

Federal and other fishery regulations benefit the Nation by minimizing and mitigating interactions with threatened and endangered species, while maintaining a viable and productive fishery. NMFS and the WPFMC continue to assess the effectiveness of all measures that potentially reduce the interactions between fishing gear and protected resources. As new information becomes available and is analyzed, the Council and NMFS may adjust the management regime, as appropriate.

*Comment 22:* Side-setting vessels should be monitored to measure the continuing effectiveness of this technique in reducing seabird captures. Half of the fleet should be required to side-set, so that observers on these vessels can evaluate the effectiveness of the seabird avoidance method. Observers need to determine if seabirds habituate to these techniques.

*Response:* By allowing vessels to choose between alternative effective mitigation methods, the final rule will allow for the collection of additional data regarding effectiveness of the various measures. More than 40 vessels in the fleet are currently side-setting. A NMFS and industry program is underway to provide technical assistance to vessels to convert to side-setting, so we anticipate a larger number of vessels to soon be converted to side-setting. NMFS is also in the process of conducting a survey of operators that are side-set longlining; the survey will identify strengths, weaknesses and issues related to this technique.

Observer data will enable an assessment of the relative effectiveness of vessels opting to side-set versus the alternative seabird avoidance measures. Analyses of observer data will enable an assessment of the long-term efficacy of side-setting in reducing seabird captures. As new information becomes available and is analyzed, the WPFMC and NMFS may revisit this issue for future management consideration.

*Comment 23:* More specific measures for the implementation of side-setting are needed in the regulations.

*Response:* The final rule specifies required elements of the side-setting technique, including line deployment and line shooter (if used) locations on the vessel, branch line weights, submergence of baited hooks, and bird curtain design. NMFS considers these specifications sufficient guidance for the technique.

**Changes to the Proposed Rule**

In § 660.35, paragraphs (a)(1)(i) and (iii), are changed to clarify that, while side-setting, the mainline must be deployed as far forward on the vessel as practicable, but at least one meter from the stern. The mainline shooter, if used, must be mounted as far forward on the vessel as practicable, but at least one meter from the stern.

In § 660.35, paragraph (a)(1)(iv), the requirement to use branch line weights of at least 60 g (2.1 oz) is changed to require the use of branch line weights of at least 45 g (1.6 oz).

In § 660.35, paragraph (a)(2)(ix), the requirement to use tori lines when not side-setting is removed.

**Classification**

The Regional Administrator, Pacific Islands Region, NMFS, determined that this rule is necessary for the conservation and management of the pelagic fisheries in the western Pacific region, and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

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

The potential economic impacts of this final rule on small entities were identified in an Initial Regulatory Flexibility Analysis (IRFA) and summarized in the **Federal Register** published on July 13, 2005 (70 FR 40302). A FRFA was subsequently prepared. A description of the need for and objectives of the action may be found at the beginning of this section. There are no recordkeeping or reporting requirements in this rule. No public comment was made on the IRFA.

All vessels are considered to be small entities. Therefore, there are no economic impacts resulting from disproportionality between large and

small vessels. A summary of the FRFA analysis follows.

This final rule applies to all holders of Hawaii longline limited access permits. The number of Hawaii longline limited access permits is 164. Not all such permits are renewed each year (approximately 110 were renewed in 2003, 122 in 2004, and 120 in 2005) and, of those renewed, not all are used to participate in the Hawaii-based longline fishery. In a few cases, multiple permits are held by a single business, so the number of businesses to whom the rule would apply is slightly smaller than the number of affected permit holders. All holders of Hawaii longline limited access permits are small entities (i.e., they are businesses that are independently owned and operated, and have no more than $3.5 million in annual receipts). Therefore, the number of entities to which the rule would potentially apply is approximately 164.

NMFS considered a range of 25 alternatives to this final rule. Each alternative would have applied one or more seabird deterrent strategies to the fishery sectors (deep- or shallow-setting) and by area (north of 23° N. lat., south of 23° N. lat., or all areas). Alternatives that would have applied deterrent measures to both fishery sectors in all areas were rejected as not being cost-effective, given that deep-setting vessels south of 23° N. lat. average just over one (1) seabird interaction per year. Alternatives that would have required the use of an underwater setting chute were rejected as untenable based on the fact that the hardware broke when used experimentally, and likely would not withstand the rigors of routine use aboard commercial fishing vessels.

Alternatives that would have required all shallow-setting vessels to side-set in one or more areas were rejected because (1) some smaller vessels may be unable to be reconfigured for side-setting, and (2) side-setting has been subject to limited experimental testing and, although it has been very promising for reducing seabird interactions, there has been limited commercial testing of this seabird deterrent method. NMFS and the WPFMC determined that voluntary implementation of side-setting would allow the collection and analysis of additional scientific information about, and further consideration of, the value of this mitigation measure.

This rule is expected to have mixed impacts on small entities. Current seabird deterrent requirements for all vessels fishing north of 23° N. lat. are modified to require that strategic offal discards be used only when seabirds are present. Vessel operators may opt to side-set with no additional deterrents. Operators of vessels that can be easily reconfigured for side-setting may find that their operations are more efficient because (1) less bait will be taken by seabirds, thus potentially increasing fish catch rates, and (2) side-setting can improve the efficiency of fishing operations because fishing crews do not have to move the fishing gear from one location on the vessel to another between sets. Whether or not these savings will be enough to offset the initial purchase and installation cost (up to approximately $4,000) and ongoing maintenance cost (estimated at $50/year) is unknown. Operators of vessels that cannot be easily reconfigured for side-setting will have to use the currently required measures at no additional cost.

To the extent that these measures increase fish catch rates by reducing bait loss, they will have a positive economic impact, but whether or not these savings will be enough to offset the costs of the measures is unknown. Under the rule, vessels that shallow-set south of 23° N. lat. will also be subject to seabird deterrent measures. Operators of these vessels will have to use the same measures as those required when shallow setting north of 23° N. lat. Impacts on these operations are likely to be similar to those described above, but if side-setting is not feasible, vessel operators will have to invest in blue dye (estimated to cost $1,400/year), and containers for offal discards (initial cost of about $150). Again, it is not known if potential increases in catch rates due to reduced bait loss will be enough to offset the costs of these deterrent measures. However, given the already low number of seabird interactions, this seems unlikely. In addition, estimates of net revenue per vessel from a 2000 survey of the longline fishery indicate that net revenues ranged from a low of $18,208 for the average large tuna longline vessel to $385,776 for the average large swordfish longline vessel, with an average net return of $27,483 and $55,058 for all swordfish and tuna vessels, respectively. This would indicate that relative reductions in profitability from this action based on size and target species may be disproportionately distributed among vessels in the Hawaii-based longline fleet. However, there is no indication that this rule would lead to the cessation of operations of any vessel participating in this fishery.

NMFS considered several alternatives (2A through 7C in the regulatory amendment document) that would have allowed vessel owners to minimize their costs for complying with this action by giving them the opportunity to use the current seabird avoidance methods at no additional cost. In addition, a USFWS Biological Opinion (which concluded that the shallow-set longline fishery was not likely to jeopardize the continued existence of the endangered short-tailed albatross), recommended that NMFS ''implement and monitor side-setting or another appropriate seabird deterrent or combination of deterrents that the USFWS [Service] agrees is at least as effective as side-setting in reducing the risks to the short-tailed albatross in the shallow-set Hawaii-based longline fishery.'' Recent information suggests that the measures currently required in the shallow-set fishery (night-setting and other measures) may be as effective as side-setting, so the WPFMC reversed its initial recommendation to require the use of tori lines. The WPFMC and NMFS will continue to analyze whether the additional use of tori lines would be justified in the future.

Copies of the FRFA are available from William L. Robinson (see **ADDRESSES**).

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides''. The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rule making process, a small entity compliance guide (compliance guide) will be prepared. Copies of this final rule will be sent to all holders of permits issued for the western Pacific pelagic fisheries. Likewise, the compliance guide will be distributed to permit holders and will be available at the following web site *http://swr.nmfs.noaa.gov/pir*. Copies can also be obtained from the PIR (see **ADDRESSES**).

NMFS determined that fishing activities conducted pursuant to this rule will not affect endangered and threatened species or critical habitat in any manner not considered in prior consultations on this fishery. In a February 11, 2005, letter from W. Robinson, NMFS, to G. Shultz, USFWS, NMFS provided a description of the proposed rule and notified the USFWS that reinitiating consultation under section 7 of the ESA was not warranted for the proposed Federal action because the proposed actions are consistent with the November 2002 and October 2004 biological opinions on short-tailed albatross. The USFWS concurred with

this determination in a letter dated October 20, 2005.

NMFS prepared an FEIS for this regulatory amendment. A Notice of Availability of the FEIS was published on May 6, 2005. The Record of Decision is available from William L. Robinson (see **ADDRESSES**).

**List of Subjects in 50 CFR Part 660**

Administrative practice and procedure, American Samoa, Fisheries, Fishing, Guam, Hawaiian natives, Indians, Northern Mariana Islands, and Reporting and recordkeeping requirements.

Dated: December 13, 2005.

**James W. Balsiger,**

*Acting Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

■ For the reasons set out in the preamble, 50 CFR part 660 is amended as follows:

## PART 660—FISHERIES OFF WEST COAST STATES AND IN THE WESTERN PACIFIC

■ 1. The authority citation for part 660 continues to read as follows:

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

■ 2. In § 660.22, paragraphs (aa), (bb), (cc), and (mm) are removed; paragraphs (dd) though (ll) are redesignated as (aa) through (ii); paragraphs (nn) through (vv) are redesignated as paragraphs (jj) through (rr); new paragraphs (ss) through (vv) are added and reserved; and paragraph (z) is revised to read as follows:

### § 660.22 Prohibitions.

* * * * *

(z) Fail to fish in accordance with the seabird take mitigation techniques set forth at § 660.35(a)(1) or § 660.35(a)(2) when operating a vessel registered for use under a Hawaii longline limited access permit in violation of § 660.35(a).

* * * * *

■ 3. In § 660.35, paragraphs (a) and (b)(10) are revised to read as follows:

### § 660.35 Pelagic longline seabird mitigation measures.

(a) *Seabird mitigation techniques.* When deep-setting or shallow-setting north of 23° N. lat. or shallow-setting south of 23 N. lat., owners and operators of vessels registered for use under a Hawaii longline limited access permit, must either side-set according to paragraph (a)(1) of this section, or fish in accordance with paragraph (a)(2) of this section.

(1) *Side-setting.* Owners and operators of vessels opting to side-set under this section must fish according to the following specifications:

(i) The mainline must be deployed as far forward on the vessel as practicable, and at least 1 m (3.3 ft) forward from the stern of the vessel;

(ii) The mainline and branch lines must be set from the port or the starboard side of the vessel;

(iii) If a mainline shooter is used, the mainline shooter must be mounted as far forward on the vessel as practicable, and at least 1 m (3.3 ft) forward from the stern of the vessel;

(iv) Branch lines must have weights with a minimum weight of 45 g (1.6 oz);

(v) One weight must be connected to each branch line within 1 m (3.3 ft) of each hook;

(vi) When seabirds are present, the longline gear must be deployed so that baited hooks remain submerged and do not rise to the sea surface; and

(vii) A bird curtain must be deployed. Each bird curtain must consist of the following three components: a pole that is fixed to the side of the vessel aft of the line shooter and which is at least 3 m (9.8 ft) long; at least three main streamers that are attached at regular intervals to the upper 2 m (6.6 ft) of the pole and each of which has a minimum diameter of 20 mm (0.8 in); and branch streamers attached to each main streamer at the end opposite from the pole, each of which is long enough to drag on the sea surface in the absence of wind, and each of which has a minimum diameter 10 mm (0.4 in).

(2) *Alternative to side-setting.* Owners and operators of vessels that do not side-set must:

(i) Discharge fish, fish parts (offal), or spent bait while setting or hauling longline gear, on the opposite side of the vessel from where the longline gear is being set or hauled, when seabirds are present;

(ii) Retain sufficient quantities of fish, fish parts, or spent bait, between the setting of longline gear for the purpose of strategically discharging it in accordance with paragraph (i) of this section;

(iii) Remove all hooks from fish, fish parts, or spent bait prior to its discharge in accordance with paragraph (i) of this section;

(iv) Remove the bill and liver of any swordfish that is caught, sever its head from the trunk and cut it in half vertically and periodically discharge the butchered heads and livers in accordance with paragraph (i) of this section;

(v) When using basket-style longline gear north of 23° N. lat., ensure that the main longline is deployed slack to maximize its sink rate; and

(vi) Use completely thawed bait that has been dyed blue to an intensity level specified by a color quality control card issued by NMFS; and

(vii) Maintain a minimum of two cans (each sold as 0.45 kg or 1 lb size) containing blue dye on board the vessel; and

(viii) Follow the requirements in paragraphs (a)(3) and (a)(4) of this section, as applicable.

(3) *Deep-setting requirements.* The following additional requirements apply to vessels engaged in deep-setting using a monofilament main longline north of 23° N. lat. that do not side-set. Owners and operators of these vessels must:

(i) Employ a line shooter; and

(ii) Attach a weight of at least 45 g (1.6 oz) to each branch line within 1 m (3.3 ft) of the hook.

(4) *Shallow-setting requirement.* In addition to the requirements set forth in paragraphs (a)(1) and (a)(2) of this section, owners and operators of vessels engaged in shallow-setting that do not side-set must begin the deployment of longline gear at least 1 hour after local sunset and complete the deployment no later than local sunrise, using only the minimum vessel lights to conform with navigation rules and best safety practices.

(b) * * *

(10) Any seabird that is released in accordance with paragraph (b)(9) of this section or under the guidance of a veterinarian must be placed on the sea surface.

* * * * *

[FR Doc. 05–24207 Filed 12–16–05; 8:45 am]

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## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 679

**[Docket No. 050628170–5328–02; I.D. 062105B]**

**RIN 0648—AR67**

## Groundfish Fisheries of the Exclusive Economic Zone Off the Coast of Alaska; Recordkeeping and Reporting

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues this final rule amending Table 2 to 50 CFR part 679. Table 2 is the source for species codes used in data collection, analysis, and

monitoring of the Federal groundfish fisheries. This action is necessary to standardize collection of species information with the State of Alaska Department of Fish and Game (ADF&G), increase effectiveness of rockfish management, reflect current fisheries management interest in skates, and promote better enforcement of rockfish regulations. This final rule is intended to meet the conservation and management requirements of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) with respect to groundfish and to further the goals and objectives of the Alaska groundfish fishery management plans.

**DATES:** Effective January 18, 2006.

**ADDRESSES:** Copies of the Categorical Exclusion and the Regulatory Impact Review (RIR) prepared for this action may be obtained by mail from the Sustainable Fisheries Division, Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802 1668, Attn: Lori Durall, or from the NMFS Alaska Region website at *www.fakr.noaa.gov*. Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to NMFS Alaska Region and by e-mail to *David__Rostker@omb.eop.gov*, or fax to (202) 395–7285.

**FOR FURTHER INFORMATION CONTACT:** Patsy A. Bearden, (907) 586 7008 or *patsy.bearden@noaa.gov*.

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fisheries in the EEZ off the coast of Alaska according to the Fishery Management Plan for Groundfish of the Gulf of Alaska and the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands. These fishery management plans (FMPs) were prepared by the North Pacific Fishery Management Council (Council) and approved by the Secretary of Commerce (Secretary) under authority of the Magnuson-Stevens Act, 16 U.S.C. 1801 *et seq.* The FMPs are implemented by regulations at 50 CFR part 679. General provisions governing fishing by U.S. vessels in accordance with the FMPs appear at subpart H of 50 CFR part 600.

## Background and Need for Action

The management background and explanation of the need for this action were described in the preamble to the proposed rule published in the **Federal Register** on September 1, 2005 (70 FR 52060). Table 2 to Part 679 provides a list of FMP species and non-FMP species on which ADF&G and NMFS Alaska Region have agreed for use on ADF&G fish tickets as well as NMFS logbooks and forms. The FMP species are those which are managed under the FMPs and which must be recorded and reported in logbooks and forms. The non-FMP species are species that are frequently caught in association with FMP species, but that are not actively managed under the FMPs. These non-FMP species may be recorded and reported in logbooks and forms.

This action may require a few participants to learn to identify individual species of rockfish. An identification guide for rockfish of the Northeastern Pacific Ocean is available from NMFS, Alaska Region (see **ADDRESSES**) or at: *http://www.afsc.noaa.gov/race/media/publications/archives/pubs2000/techmemo117.pdf*.

The proposed rule to implement these changes was published in the **Federal Register** on September 1, 2005, for a 30-day comment period that ended October 3, 2005 (70 FR 52060). No written comments were received.

## Elements of the Final Rule

*Table 2 to Part 679*

1. The table is reformatted from one table into four separate tables (Tables 2a, 2b, 2c, and 2d).

2. The following rockfish group codes are removed from Table 2 to part 679: 144, slope rockfish; 168, demersal shelf rockfish; 169, pelagic shelf rockfish; and 171, shortraker/rougheye rockfish. Removal of these group codes does not alter the use of the terms, ''slope rockfish,'' ''demersal shelf rockfish,'' ''pelagic shelf rockfish,'' or ''shortraker/rougheye rockfish'' in Tables 10 and 11 to 50 CFR part 679. These terms are still valid for calculation of maximum retainable percentages for basis species.

3. In § 679.2, the definition for ''Groundfish product or fish product'' is revised by removing ''Tables 1 and 2 to this part, excluding the prohibited species listed in Table 2 to this part'' and adding in its place ''Tables 1, 2a, 2c, and 2d to this part.''

4. In § 679.5, paragraph (m)(3)(v) is revised by removing reference to group codes 144, 168, 169, and 171.

*Table 2a to Part 679*

1. The table is entitled ''Species Codes: FMP Groundfish Species.'' This table contains the names and species codes of groundfish that are managed under the FMPs and that must be recorded and reported in NMFS logbooks and forms.

2. A species code, 702, is added to Table 2a to describe the species ''big skates.'' NMFS has implemented separate management and harvest specifications for the species ''big skates'' that require a new species code (69 FR 26313, May 12, 2004). An identification guide of big skates and longnose skates is available from NMFS, Alaska Region (see **ADDRESSES**) or at *http://www.fakr.noaa.gov/infobulletins/2003/Rajalposter.jpg*.

3. The description ''skates general,'' code 700 in Table 2a, is revised to read ''Other (if longnose or big skates - use specific species code).''

4. The description ''sharks general,'' code 689 in Table 2a, is revised to read ''Other (if salmon, spiny dogfish or Pacific sleeper shark - use specific species code).''

5. The description ''miscellaneous flatfish,'' code 120, is removed from the group codes and added to the FMP species in Table 2a as ''Flatfish, miscellaneous (flatfish species without separate codes).''

6. The Latin name for all individual rockfish species is added to Table 2a.

7. In § 679.2, paragraph (1) of the definition for ''Groundfish'' is revised by removing ''Table 2'' and adding in its place ''Table 2a.''

*Table 2b to Part 679*

1. The table is entitled ''Species Codes: FMP Prohibited Species.'' This table contains the names and species codes of species that are identified as prohibited species in the FMPs and that must be recorded and reported in NMFS logbooks and forms.

2. The species name for prohibited species code 932 in Table 2b, is changed from ''Opilio tanner crab'' to read ''Tanner, snow (*C. opilio*).''

3. The species name for prohibited species code 923 in Table 2b, is changed from ''Gold/brown king crab'' to read ''King, golden (brown).''

4. In § 679.2, the definition for ''Prohibited species'' is revised by adding a reference to ''Table 2b.''

5. In § 679.5, paragraph (n)(2)(iv)(D) is revised by removing ''Table 2'' and adding in its place ''Table 2b.''

6. In § 679.21, paragraph (b)(1) is revised by removing ''see § 679.2'' and adding in its place ''see § 679.2 and Table 2b to this part.''

*Table 2c to Part 679*

1. The table is entitled ''Species Codes: FMP Forage Fish Species.'' This table contains the names and species codes of species that are identified as forage fish in the FMPs and that must be recorded and reported in NMFS logbooks and forms.

2. In § 679.2, the definition for ''Forage fish'' is revised by removing

''see Table 2 to this part'' and adding in its place ''see Table 2c to this part and § 679.20(i).''

3. In § 679.20, paragraph (i)(1) is revised by removing ''see § 679.2'' and adding in its place ''See Table 2c to this part.''

*Table 2d to Part 679*

1. The table is entitled ''Species Codes: Non-FMP Species.'' This table contains the names and species codes of species that may be recorded in NMFS logbooks and forms but which recording is not required by regulations at 50 CFR part 679.

2. A species code, 112, is added to Table 2d for the species, Pacific hake. Fishermen increasingly are reporting catch of Pacific hake in the EEZ off Alaska. This creates the need for a new species code to record the catch.

3. The species name for non-FMP species code 961 in Table 2d, is changed from ''Pink shrimp'' to read ''Northern (pink).''

4. The species name for non-FMP species code 951 in Table 2d, is amended by adding the Latin name ''Paralomis multispina.''

5. The species name for non-FMP species code 953 in Table 2d, is amended by adding the Latin name ''Paralomis verilli.''

*Additional Changes*

In § 679.5, the headings for paragraphs (a)(1)(ii)(A), (B), and (C) are revised by removing ''groundfish and prohibited species'' and by adding in its place ''groundfish, prohibited species, and forage fish.''

In § 679.5, paragraphs (a)(1)(ii)(A), (B), and (C) are revised by removing ''all groundfish and prohibited species'' and adding in its place ''all groundfish (see Table 2a to this part), prohibited species (see Table 2b to this part), and forage fish (see Table 2c to this part).''

**Classification**

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. No comments were received regarding this certification or the economic impacts of the rule. As a result, a regulatory flexibility analysis was not required and none was prepared.

This rule contains collection-of-information requirements that are subject to review and approval by OMB under the Paperwork Reduction Act (PRA) and which have been approved by OMB. The collections are listed below by OMB Control Number.

*OMB Control Number 0648 0213*

Total public reporting burden for this collection is 41,219 hours. Species codes are recorded and reported in this collection.

*OMB Control Number 0648 0401*

Total public reporting burden for this collection is 1,024 hours. Species codes are recorded and reported in this collection.

Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see **ADDRESSEES**) and by e-mail to *David_Rostker@omb.eop.gov*, or fax to (202) 395 7285.

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

This rule does not duplicate, overlap, or conflict with other Federal regulations.

**List of Subjects in 50 CFR Part 679**

Alaska, Fisheries, Recordkeeping and reporting requirements.

Dated: December 13, 2005.

**James W. Balsiger,**

*Acting Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

■ For reasons set out in the preamble, 50 CFR part 679 is 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.*

**§§ 679.2, 679.5, 679.20, and 679.21 [Amended]**

■ 2. In the table below, for each of the paragraphs shown in the ''Location'' column, remove the phrase indicated in the ''Remove'' column and replace it with the phrase indicated in the ''Add'' column for the number of times indicated in the ''Frequency'' column.

| Location | Remove | Add | Frequency |
|---|---|---|---|
| § 679.2 definition for ''Forage fish'' | (see Table 2 to this part) | (see Table 2c to this part and § 679.20(i)) | 1 |
| § 679.2 definition for paragraph (1) ''Groundfish'' | Table 2 | Table 2a | 1 |
| § 679.2 definition for ''Groundfish product or fish product'' | Tables 1 and 2 to this part, excluding the prohibited species listed in Table 2 to this part | Tables 1, 2a, 2c, and 2d to this part | 1 |
| § 679.2 definition for ''Prohibited species'' | Tanner crab | Tanner crab (see Table 2b to this part) | 1 |
| § 679.5(a)(1)(ii)(A), (B), and (C) paragraph heading | Groundfish and prohibited species | Groundfish, prohibited species, and forage fish | 1 |
| § 679.5(a)(1)(ii)(A), (B), and (C) | all groundfish and prohibited species | all groundfish (see Table 2a to this part), prohibited species (see Table 2b to this part), and forage fish (see Table 2c to this part) | 1 |

| Location | Remove | Add | Frequency |
|---|---|---|---|
| § 679.5(m)(3)(v) | code for each species from Table 2 to this part, except species codes 120, 144, 168, 169, or 171; | code for each species from Tables 2a though 2d to this part, except species code 120 | 1 |
| § 679.5(n)(2)(iv)(D) | Table 2 | Table 2b | 1 |
| § 679.20(i)(1) | See § 679.2 | See Table 2c to this part | 1 |
| § 679.21(b)(1) | See § 679.2 | See § 679.2 and Table 2b to this part | 1 |

■ 3. Table 2 to Part 679—Species Codes for FMP Species and non-FMP Species is removed, and Tables 2a, 2b, 2c, and 2d to Part 679 are added to read as follows:

TABLE 2A TO PART 679—SPECIES CODES: FMP GROUNDFISH

| Species Description | Code |
|---|---|
| Atka mackerel (greenling) | 193 |
| Flatfish, miscellaneous (flatfish species without separate codes) | 120 |
| FLOUNDER | |
| Alaska plaice | 133 |
| Arrowtooth and/or Kamchatka | 121 |
| Starry | 129 |
| Octopus | 870 |
| Pacific cod | 110 |
| Pollock | 270 |
| ROCKFISH | |
| Aurora (*S. aurora*) | 185 |
| Black (BSAI) (*S. melanops*) | 142 |
| Blackgill (*S. melanostomus*) | 177 |
| Blue (BSAI) (*S. mystinus*) | 167 |
| Bocaccio (*S. paucispinis*) | 137 |
| Canary (*S. pinniger*) | 146 |
| Chilipepper (*S. goodei*) | 178 |
| China (*S. nebulosus*) | 149 |
| Copper (*S. caurinus*) | 138 |
| Darkblotched (*S. crameri*) | 159 |
| Dusky (*S. ciliatus*) | 154 |
| Greenstriped (*S. elongatus*) | 135 |
| Harlequin (*S. variegatus*) | 176 |
| Northern (*S. polyspinis*) | 136 |

TABLE 2A TO PART 679—SPECIES CODES: FMP GROUNDFISH—Continued

| Species Description | Code |
|---|---|
| Pacific ocean perch (*S. alutus*) | 141 |
| Pygmy (*S. wilsoni*) | 179 |
| Quillback (*S. maliger*) | 147 |
| Redbanded (*S. babcocki*) | 153 |
| Redstripe (*S. proriger*) | 158 |
| Rosethorn (*S. helvomaculatus*) | 150 |
| Rougheye (*S. aleutianus*) | 151 |
| Sharpchin (*S. zacentrus*) | 166 |
| Shortbelly (*S. jordani*) | 181 |
| Shortraker (*S. borealis*) | 152 |
| Silvergray (*S. brevispinis*) | 157 |
| Splitnose (*S. diploproa*) | 182 |
| Stripetail (*S. saxicola*) | 183 |
| Thornyhead (all *Sebastolobus* species) | 143 |
| Tiger (*S. nigrocinctus*) | 148 |
| Vermilion (*S. miniatus*) | 184 |
| Widow (*S. entomelas*) | 156 |
| Yelloweye (*S. ruberrimus*) | 145 |
| Yellowmouth (*S. reedi*) | 175 |
| Yellowtail (*S. flavidus*) | 155 |
| Sablefish (blackcod) | 710 |
| Sculpins | 160 |
| SHARKS | |
| Other (if salmon, spiny dogfish or Pacific sleeper shark - use specific species code) | 689 |
| Pacific sleeper | 692 |

TABLE 2A TO PART 679—SPECIES CODES: FMP GROUNDFISH—Continued

| Species Description | Code |
|---|---|
| Salmon | 690 |
| Spiny dogfish | 691 |
| SKATES | |
| Big | 702 |
| Longnose | 701 |
| Other (if longnose or big skate - use specific species code) | 700 |
| SOLE | |
| Butter | 126 |
| Dover | 124 |
| English | 128 |
| Flathead | 122 |
| Petrale | 131 |
| Rex | 125 |
| Rock | 123 |
| Sand | 132 |
| Yellowfin | 127 |
| Squid | 875 |
| Turbot, Greenland | 134 |

TABLE 2B TO PART 679—SPECIES CODE: FMP PROHIBITED SPECIES

| Species Description | Code |
|---|---|
| CRAB | |
| King, blue | 922 |
| King, golden (brown) | 923 |
| King, red | 921 |
| King, scarlet | 924 |
| Tanner, Bairdi (*C. bairdi*) | 931 |

TABLE 2B TO PART 679—SPECIES CODE: FMP PROHIBITED SPECIES—Continued

| Species Description | Code |
|---|---|
| Tanner, grooved | 933 |
| Tanner, snow (*C. opilio*) | 932 |
| Tanner, triangle | 934 |
| Pacific halibut | 200 |
| Pacific herring (family *Clupeidae*) | 235 |
| SALMON | |
| Chinook | 410 |
| Chum | 450 |
| Coho | 430 |
| Pink | 440 |
| Sockeye | 420 |
| Steelhead trout | 540 |

TABLE 2C TO PART 679—SPECIES CODES: FMP FORAGE FISH SPECIES

(all species of the following families)

| Species Description | Code |
|---|---|
| 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 sandfish (family *Trichodontidae*) | 206 |
| Pacific sand lance (family *Ammodytidae*) | 774 |
| Pricklebacks, war-bonnets, eelblennys, cockscombs and shannys (family *Stichaeidae*) | 208 |

TABLE 2C TO PART 679—SPECIES CODES: FMP FORAGE FISH SPECIES—Continued

(all species of the following families)

| Species Description | Code |
|---|---|
| Surf smelt (family *Osmeridae*) | 515 |

TABLE 2D TO PART 679—SPECIES CODES—NON-FMP SPECIES

| Species Description | Code |
|---|---|
| Abalone | 860 |
| Albacore | 720 |
| Arctic char, anadromous | 521 |
| CLAMS | |
| Butter | 810 |
| Cockle | 820 |
| Eastern softshell | 842 |
| Geoduck | 815 |
| Little-neck | 840 |
| Razor | 830 |
| Surf | 812 |
| Coral | 899 |
| CRAB | |
| Box | 900 |
| Dungeness | 910 |
| Korean horsehair | 940 |
| Multispina (*Paralomis multispina*) | 951 |
| Verrilli (*Paralomis verillii*) | 953 |
| Dolly varden, anadromous | 531 |
| Eels or eel-like fish | 210 |
| Giant grenadier | 214 |
| GREENLING | |
| Kelp | 194 |
| Rock | 191 |
| Whitespot | 192 |
| Grenadier (rattail) | 213 |

TABLE 2D TO PART 679—SPECIES CODES—NON-FMP SPECIES—Continued

| Species Description | Code |
|---|---|
| Jellyfish | 625 |
| Lamprey, Pacific | 600 |
| Lingcod | 130 |
| Lumpsucker | 216 |
| Mussel, blue | 855 |
| Pacific flatnose | 260 |
| Pacific hagfish | 212 |
| Pacific hake | 112 |
| Pacific saury | 220 |
| Pacific tomcod | 250 |
| Prowfish | 215 |
| Rockfish, black (GOA) | 142 |
| Rockfish, blue (GOA) | 167 |
| Sardine, Pacific (pilchard) | 170 |
| Scallop, weathervane | 850 |
| Scallop, pink (or calico) | 851 |
| Sea cucumber | 895 |
| Sea urchin, green | 893 |
| Sea urchin, red | 892 |
| Shad | 180 |
| SHRIMP | |
| Coonstripe | 964 |
| Humpy | 963 |
| Northern (pink) | 961 |
| Sidestripe | 962 |
| Spot | 965 |
| Skilfish | 715 |
| Smelt, surf | 515 |
| Snails | 890 |
| Sturgeon, general | 680 |

[FR Doc. 05–24203 Filed 12–16–05; 8:45 am]

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# Proposed Rules

Federal Register
Vol. 70, No. 242
Monday, December 19, 2005

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 50

**[Docket No. PRM–50–79]**

### Mr. Lawrence T. Christian, et al.; Denial of Petition for Rulemaking

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Denial of petition for rulemaking.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking submitted by Mr. Lawrence T. Christian and 3,000 co-signers on September 4, 2002. The petition was docketed by the NRC on September 23, 2002, and has been assigned Docket No. PRM–50–79. The petition requests that the NRC amend its regulations regarding offsite state and local government emergency plans for nuclear power plants to ensure that all daycare centers and nursery schools in the vicinity of nuclear power facilities are properly protected in the event of a radiological emergency.

**ADDRESSES:** Publicly available documents related to this petition, including the petition for rulemaking, public comments received, and the NRC's letter of denial to the petitioner, may be viewed electronically on public computers in the NRC's Public Document Room (PDR), 01 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. The PDR reproduction contractor will copy documents for a fee. Selected documents, including comments, may be viewed and downloaded electronically via the NRC rulemaking Web site at *http://ruleforum.llnl.gov*.

Publicly available documents created or received at the NRC after November 1, 1999, are also available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html*. From this site, the public can gain entry into the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR reference staff at (800) 387–4209, (301) 415–4737 or by e-mail to *pdr@nrc.gov*.

**FOR FURTHER INFORMATION CONTACT:** Michael T. Jamgochian, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–3224, e-mail *MTJ1@nrc.gov*.

**SUPPLEMENTARY INFORMATION:**

## Background

In December 1979, the President directed the Federal Emergency Management Agency (FEMA), to lead state and local emergency planning and preparedness activities with respect to jurisdictions in proximity to nuclear reactors. FEMA has responsibilities under Executive Order 12148, issued on July 15, 1979, to establish federal policies and to coordinate civil emergency planning within emergency preparedness programs. Consequently, FEMA is the lead authority concerning the direction, recommendations, and determinations with regard to offsite state and local government radiological emergency planning efforts necessary for the public health and safety. FEMA sends its findings to the NRC for final determinations. FEMA implemented Executive Order 12148 in its regulations outlined in 44 CFR Part 350. Within the framework of authority created by Executive Order 12148, FEMA entered into a Memorandum of Understanding (MOU) (58 FR 47966, September 9, 1993) with the NRC to provide acceptance criteria for and determinations as to whether state and local government emergency plans are adequate and capable of being implemented to ensure public health and safety. FEMA's regulations were further amplified by FEMA Guidance Memorandum (GM) EV–2, ''Protective Actions for School Children'' and FEMA–REP–14, ''Radiological Emergency Preparedness Exercise Manual.''

The Commission's emergency planning regulations for nuclear power reactors are contained in 10 CFR Part 50, specifically § 50.33(g), 50.47, 50.54 and Appendix E. As stated in 10 CFR 50.47(a)(1), in order to issue an initial operating license, the NRC must make a finding ''that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency'' to protect the public health and safety. An acceptable way of meeting the NRC's emergency planning requirements is contained in Regulatory Guide (RG) 1.101, Rev. 4, ''Emergency Planning and Preparedness for Nuclear Power Reactors'' (ADAMS Accession No. ML032020276). This guidance document endorses NUREG–0654/FEMA–REP–1, Rev. 1, ''Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants'' (ML040420012; Addenda: ML021050240), an NRC and FEMA joint guidance document intended to provide nuclear facility operators and federal, state, and local government agencies with acceptance criteria and guidance on the creation and review of radiological emergency plans. Together, RG 1.101, Rev. 4, and NUREG–0654, Rev. 1, provide guidance to licensees and applicants on methods acceptable to the NRC staff for complying with the Commission's regulations for emergency response plans and preparedness at nuclear power reactors.

Emergency plans for all nuclear power reactors are required under Part 50, as amplified by NUREG–0654/FEMA–REP–1 and applicable FEMA guidance documents, to have specific provisions for all ''special facility populations,'' which refers not only to pre-schools, nursery schools, and daycare centers, but all kindergarten through twelfth grade (K–12) students, nursing homes, group homes for physically or mentally challenged individuals and those who are mobility challenged, as well as those in correctional facilities. FEMA GM 24, ''Radiological Emergency Preparedness for Handicapped Persons,'' dated April 5, 1984, and GM EV–2, ''Protective Actions for School Children,'' dated November 13, 1986, provide further guidance. These specific plans shall, at a minimum:

- Identify the population of such facilities;
- Determine and provide protective actions for these populations;
- Establish and maintain notification methods for these facilities; and

• Determine and provide for transportation and relocation.

All plans are finalized and submitted to FEMA for review. The plans are tested in a biennial emergency preparedness exercise conducted for each nuclear power station. If plans or procedures are found to be inadequate, they must be corrected.

**Availability of Documents**

The NRC is making the documents identified below available to interested persons through one or more of the following:

*Public Document Room (PDR)*

The NRC Public Document Room is located at 11555 Rockville Pike, Public File Area O–1 F21, Rockville, Maryland. Copies of publicly available NRC documents related to this petition can be viewed electronically on public computers in the PDR. The PDR reproduction contractor will make copies of documents for a fee.

*Rulemaking Web Site (Web)*

The NRC's interactive rulemaking Web site is located at *http://ruleforum.llnl.gov.* Selected documents may be viewed and downloaded electronically via this Web site.

The NRC's public Electronic Reading Room (ADAMS) is located at *http://www.nrc.gov/reading-rm/adams.html.* Through this site, the public can gain access to the NRC's Agencywide Document Access and Management System, which provides text and image files of NRC's public documents.

*NRC Staff Contact (NRC Staff)*

For single copies of documents not available in an electronic file format, contact Michael T. Jamgochian, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–3224, e-mail *MTJ1@nrc.gov.*

| Document | PDR | Web | ADAMS | NRC staff |
|---|---|---|---|---|
| Petition for Rulemaking (PRM–50–79) | X | X | ML023110466 | |
| **Federal Register** Notice—Receipt of Petition for Rulemaking (67 FR 66588; Nov. 1, 2002) | X | X | ML023050008 | |
| **Federal Register** Notice—Receipt of Petition for Rulemaking; Correction (67 FR 67800; Nov. 7, 2002). | X | X | ML040770516 | |
| Public Comments, Part 1 of 2 | X | X | ML040770480 | |
| Public Comments, Part 2 of 2 | X | X | ML040770544 | |
| Additional Public Comments | ..... | X | ML041910013 | |
| Letter of Denial to the Petitioners | X | X | ML053260004 | |
| RG 1.101, Rev. 4, Emergency Planning and Preparedness for Nuclear Power Reactors (July 2003) | X | ..... | ML032020276 | |
| NUREG–0654/FEMA REP–1, Rev. 1 Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants (November 1980). | X | ..... | ML040420012 | |
| NUREG–0654/FEMA–REP–1, Rev. 1 Addenda (March 2002) | X | ..... | ML021050240 | |
| Executive Order 12148, Federal Emergency Management (July 20, 1979) | | | | X |
| MOU Between FEMA and NRC Relating to Radiological Emergency Planning and Preparedness (June 17, 1993). | | | | X |
| FEMA GM 24, Radiological Emergency Preparedness for Handicapped Persons (April 5, 1984) | | | | X |
| FEMA–REP–14, Radiological Emergency Preparedness Exercise Manual (September 1991) | | | | X |
| FEMA GM EV–2, Protective Actions for School Children (November 13, 1986) | | | | X |

**The Petitioners' Request**

This petition for rulemaking (PRM–50–79) generally requests that the NRC establish new rules requiring that emergency planning for daycare centers and nursery schools located in the Emergency Planning Zone (EPZ) be included in the state and local government offsite emergency plans of all NRC nuclear power facility licensees. More specifically, the petition requests that the NRC amend its regulations to ensure that all children attending daycare centers and nursery schools within the EPZ are:

A. Assigned to designated relocation centers established safely outside of the EPZ.

B. Provided with designated transportation to a relocation center in the event of an emergency evacuation.

C. Transported in approved child-safety seats that meet state and federal laws as they pertain to the transportation of children and infants under 50 pounds in weight or 4 feet 9 inches in height.

The petitioners also request that the following be mandated by NRC regulations:

D. The creation and maintenance of working rosters of emergency bus drivers and back-up drivers for daycare center and nursery school evacuation vehicles, and the establishment of a system for notifying these individuals in the event of a radiological emergency. These rosters should be regularly checked and updated, with a designated back-up driver listed for each vehicle and route.

E. Notification of emergency management officials by individual preschools as to the details of each institution's radiological emergency plan.

F. Annual site inspections of daycare centers and nursery schools within the evacuation zone by emergency management officials.

G. Participation of daycare centers and nursery schools within the EPZ in radiological emergency preparedness exercises designed to determine each institution's state of readiness.

H. Creation of identification cards, school attendance lists, and fingerprint records for all children who are to be transported to a relocation center, to ensure no child is left behind or is unable, due to age, to communicate his or her contact information to emergency workers.

I. Development by emergency management officials of educational materials for parents, informing them what will happen to their children in case of a radiological emergency, and where their children can be picked up after an emergency evacuation.

J. Stocking of potassium iodide (KI) pills and appropriate educational materials at all daycare centers and nursery schools within the EPZ.

K. Radiological emergency preparedness training for all daycare center and nursery school employees within the EPZ.

L. Listing of designated relocation centers for daycare centers and nursery schools in area phone directories, so that parents can quickly and easily find where their children will be sent in case of a radiological emergency.

M. Establishment of toll-free or 911-type telephone lines to provide information about radiological emergency plans and procedures for daycare centers and nursery schools within the EPZ.

N. Creation of written scripts for use by the local Emergency Alert System (EAS) that include information about evacuation plans and designated relocation centers for daycare centers and nursery schools.

**Public Comments**

The NRC received 55 public comment letters relating to this petition. Twenty-four letters supported granting the petition (mostly from citizens including three letters with 410 signatures), while 30 letters requested that the petition be denied. Those letters that supported denial of the petition were primarily from state and local governmental agencies, FEMA, and licensees. In addition, the NRC received one letter that discussed KI but did not take a position on the petition.

More specifically;

24 Letters supporting the granting of the petition:

13 Comment letters from citizens supporting the granting of the petition.

1 Comment letter from a citizens group supporting the granting of the petition.

4 Comment letters from local governmental agencies or officials supporting the petition.

3 Comment letters with 410 signatures supporting the petition.

1 Letter from the petitioner supporting the petition. The petitioner also ''suggests a federal model that mirrors the Illinois, Massachusetts, Michigan, or Nebraska* * *'' emergency plans for daycare centers and nursery schools, even though those state plans only meet about 30 percent of the elements requested by the petitioner, while meeting FEMA guidance.

1 Letter from eight local governments that agreed with the concepts of the petition but had reservations about some of the specific requests of the petitioners.

1 Letter from the Governor of Pennsylvania withdrawing an earlier submitted letter, and supporting the granting of the petition.

30 Letters asking the Commission to deny the petition:

4 Letters from two local governments located near the petitioners, and from two citizens to deny the petition but suggested that the daycare centers and nursery schools should be responsible for developing their own emergency plans.

8 Letters from local governmental agencies to deny the petition for rulemaking because they felt that current regulations are adequate.

12 Letters from State governments including two letters from FEMA (Headquarters and Region 7) to deny the petition, based on the opinion that the petitioners' requests are adequately addressed in current regulations and guidance.

4 Letters from licensees or companies that own nuclear utilities, to deny the petition.

1 Nuclear Energy Institute (NEI) letter to deny the petition.

1 Letter representing six licensees to deny the petition.

1 Letter that discusses KI, but does not take a position on the petition.

**NRC Evaluation**

The Commission has reviewed each of the petitioners' requests and provides the following analysis:

1. The petitioners' first and more general request is that daycare centers and nursery schools, located within the 10-mile EPZ, be included in state and local government offsite emergency planning.

*NRC Review:* The current regulatory structure already requires that daycare centers and nursery schools be included in the offsite emergency planning for nuclear power plants. Consequently, no revision to 10 CFR Part 50 is necessary. The Commission's emergency planning regulations, in 10 CFR 50.47, require the NRC to make a finding, before issuing an initial operating license, that there is ''reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.'' Implicit in this regulation is the requirement that offsite emergency plans be protective of all members of the public, including children attending daycare centers and nursery schools, within the 10-mile EPZ. Joint NRC and FEMA implementing guidance, NUREG–0654/FEMA–REP–1, Rev. 1, states that emergency plans must provide specific means for ''protecting those persons whose mobility may be impaired due to such factors as institutional or other confinement.'' NUREG–0654, Section II.J. and Appendix 4, as well as, FEMA GM 24, ''Radiological Emergency Preparedness for Handicapped Persons,'' dated April 5, 1984, also provide guidance. Children in daycare centers and nursery schools are included in the category of persons needing special protection. FEMA GM EV–2, ''Protective Actions for School Children,'' was issued to provide guidance to assist federal officials in evaluating adequacy of state and local government offsite emergency plans and preparedness for protecting school children during a radiological emergency. It specifically addresses licensed and government supported pre-schools and daycare centers, but has been implemented to include all daycare centers and nursery schools with more than 10 children.

FEMA is the federal agency responsible for making findings and determinations as to whether state and local emergency plans are adequate and whether there is reasonable assurance that they can be implemented. FEMA uses the guidance documents discussed above to make such findings. The NRC makes its finding as to whether the emergency plans provide a reasonable assurance that adequate protective measures can and will be taken under 10 CFR 50.47(a)(2). The NRC's findings are based upon FEMA findings and determinations in this area. The NRC would not grant an initial operating license if FEMA found that state and local government emergency plans did not adequately address daycare centers and nursery schools. In accordance with 10 CFR 50.54(s)(2)(ii), if significant deficiencies in a licensee's emergency plan were discovered after its operating license was issued, and those deficiencies were not corrected within four months of discovery (or a plan for correction was not in place), the Commission would determine whether the reactor should be shut down until the deficiencies are remedied or whether some other enforcement action would be appropriate. Based on this information and considering that the existing regulatory structure already has requirements addressing the facilities of concern to the petitioners, no revision to 10 CFR Part 50 is necessary in response to the petitioners' general request.

The more specific elements of the petition follow:

A. Require that children attending daycare centers and nursery schools be assigned to designated relocation centers established safely outside the EPZ.

*NRC Review:* The petitioners' requested revision to 10 CFR Part 50 is not needed because the requested action is already covered by FEMA guidance documents. FEMA's GM EV–2 (pp. 2 and 4) specifies that state and local government offsite emergency plans should designate relocation centers outside of the 10-mile EPZ for all schools, including daycare centers and nursery schools. FEMA assesses offsite emergency plans using this guidance when making a finding that a plan adequately protects the public. Under

the MOU between FEMA and the NRC, the NRC defers to FEMA's expertise in offsite emergency plan requirements and assessments.

B. Require that children attending daycare centers and nursery schools be provided with designated transportation to relocation centers in the event of an emergency evacuation.

*NRC Review:* As previously discussed, FEMA is the federal agency responsible for making findings and determinations as to whether state and local emergency plans are adequate. FEMA's GM EV–2 (pp. 2 and 4) specifies that the state and local government offsite emergency plans should designate transportation to relocation centers outside of the 10-mile EPZ for all schools including daycare centers and nursery schools. FEMA reviews emergency plans to ensure that this provision is addressed. Consequently, a revision to 10 CFR Part 50 is not needed.

C. Require that children attending daycare centers and nursery schools be transported in approved child-safety seats that meet state and federal laws as they pertain to the transportation of children and infants under 50 pounds in weight or 4 feet 9 inches in height.

*NRC Review:* Requiring seat belts or child safety seats on school buses that may be used for evacuating schools is outside NRC statutory authority. Such a requirement would instead need to be promulgated by the Department of Transportation or appropriate state authorities.

D. Require the creation and maintenance of working rosters of emergency bus drivers and back-up drivers for daycare center and nursery school evacuation vehicles, and the establishment of a system for notifying these individuals in the event of a radiological emergency. These rosters should be regularly checked and updated, with a designated back-up driver listed for each vehicle and route.

*NRC Review:* The petitioners' requested revision to 10 CFR Part 50 is not needed because NRC considers the existing requirements and guidance for agreements between bus drivers and local authorities to be similar to the requested detailed driver lists and back-up driver requirements. FEMA's GM EV–2 (p. 10) specifies that bus drivers trained in basic radiological preparedness and dosimetry are to be provided for the evacuation of daycare centers and nursery schools. FEMA's GM EV–2 (p. 10) also specifies that agreements between bus drivers and local authorities are to be established for the drivers to provide their services in an emergency. These agreements eliminate the need for a roster. Under the MOU between FEMA and the NRC, the NRC defers to FEMA's expertise in state and local emergency plan requirements and assessments. NRC has made FEMA aware of the petitioners' concerns, and FEMA recently completed an emergency preparedness exercise at TMI that included issues related to transportation of students attending daycare centers and nursery schools. FEMA's final report on this exercise was issued on August 4, 2005. FEMA identified no deficiencies in this area.

E. Require notification of emergency management officials by individual preschools as to the details of each institution's radiological emergency plan.

*NRC Review:* NRC considers that current NRC and FEMA requirements and guidance are adequate. Although the petition requested that daycare centers and nursery schools have the responsibility for conveying their emergency planning information to government officials, under current requirements, this responsibility resides with state and local government officials. FEMA's GM EV–2 (p. 5) specifies that the state and local government officials should take the initiative to identify and contact all daycare centers and nursery schools within the designated 10-mile plume exposure pathway EPZ to assure that there exists appropriate planning for protecting the health and safety of their students from a commercial nuclear power plant accident.

NRC and FEMA expect local governments to assume responsibility for the emergency planning and preparedness for all schools within their districted area, and to work closely with school officials to coordinate planning efforts. FEMA's GM EV–2 (pp. 5 and 6) specifies that local governments should also ensure that the emergency planning undertaken by schools is integrated within the larger state and local government offsite emergency management framework for the particular nuclear power plant site.

FEMA's GM EV–2 ( pp. 5 and 6) specifies that evacuation planning is to include a separate evacuation plan for all of the schools in each school system. School officials, with the assistance of state and local government offsite authorities, should document in the plan the basis for determining the proper protective action (e.g., evacuation, early preparatory measures, early evacuation, sheltering, early dismissal or combination) including:

- Identification of offsite organization and state and local government officials responsible for both planning and effecting the protective action.
- Institution-specific information:

—Name and location of school;
—Type of school and age grouping (e.g., public elementary school, grades kindergarten through sixth);
—Total population (students, faculty, and other employees);
—Means for implementing protective actions;
—Specific resources allocated for transportation, including supporting letters of agreement if resources are provided from external sources; and
—Name and location of relocation center(s) and transport route(s), if applicable.

- If parts of the institution-specific information apply to many or all schools, then the information may be presented generically.
- Time frames for implementing the protective actions.
- Means for alerting and notifying appropriate persons and groups associated with the schools and the students including:

—Identification of the organization responsible for providing emergency information to the schools;
—The method (e.g., siren, tone-alert radios, and telephone calls) for contacting and activating designated dispatchers and school bus drivers; and
—The method (e.g., Emergency Alert System (EAS) messages) for notifying parents and guardians of the status and location of their children.

Based on the above, the petitioners' requested revision to 10 CFR Part 50 is not required.

F. Require annual site inspections of daycare centers and nursery schools within the evacuation zone by emergency management officials.

*NRC Review:* Inspections of daycare centers and nursery schools are the responsibility of the individual state and are outside NRC statutory authority. The Commission sees no safety reason within the scope of its statutory authority to require annual inspections of daycare centers and nursery schools.

G. Require the participation of daycare centers and nursery schools within the EPZ in radiological emergency preparedness exercises designed to determine each institution's state of readiness.

*NRC Review:* FEMA's GM EV–2 (pp. 6 and 7) specifies that offsite organizations, with assigned responsibilities for protecting daycare centers and nursery schools, are to demonstrate their ability to protect the

students in an exercise. This ensures that in a radiological emergency, plans for protecting daycare centers and nursery schools will be enacted successfully while preventing disruption to the children attending these schools. Current NRC regulations in 10 CFR Part 50, Appendix E, reflect this FEMA guidance. Section F.2 of Appendix E permits exercises without public (including daycare centers and nursery schools) participation. The Commission has determined that exercises can be adequately evaluated without the participation of schools or members of the public. This eliminates safety concerns for students, as well as, the disruption of daycare center and nursery school activities that might arise during exercise participation. In addition, as mentioned in the response to request ''E,'' pursuant to FEMA guidance, state and local government officials should be contacting daycare centers and nursery schools regarding emergency plans for the facilities. The petition has presented no evidence that would cause the NRC to reconsider this determination.

H. Require creation of identification cards, school attendance lists, and fingerprint records for all children who are to be transported to a relocation center, to ensure no child is left behind or is unable, due to age, to communicate his or her contact information to emergency workers.

*NRC Review:* State and local governments have the responsibility for ensuring that licensed daycare centers and nursery schools have mechanisms in place for maintaining child accountability. FEMA, as the authority on offsite emergency planning, has determined that it is unnecessary to require that such detailed mechanisms be a component of emergency plans. The Commission finds no safety reason to justify requiring such detailed mechanisms in its regulations.

I. Require development by emergency management officials of educational materials for parents, informing them what will happen to their children in case of a radiological emergency, and where their children can be picked up after an emergency evacuation.

*NRC Review:* Current NRC and FEMA requirements and guidance adequately address this specific request. FEMA's GM EV–2 (p. 2) specifies that the Emergency Alert System (EAS) notify parents of the status and location of their children in the event of an emergency. The Commission believes that parental notification via the EAS is adequate to assure that parents will be informed of their childrens' location following an emergency evacuation.

J. Require stocking of KI pills and appropriate educational materials at all daycare centers and nursery schools within the 10-mile EPZ.

*NRC Review:* The Commission's regulations, specifically 10 CFR 50.47b.(10), require individual states to consider using KI in the event of an emergency. The regulations require that a range of protective actions be developed for the plume exposure pathway EPZ for emergency workers and the public. In developing this range of actions, consideration was to be given to evacuation, sheltering, and, as a supplement to these, the prophylactic use of KI, as appropriate. Under this regulation, each individual state must decide whether the stockpiling of KI is appropriate for the citizens within its jurisdiction. Once a state decides to stockpile KI, it is incumbent on that state to develop a program for distribution. This program is reviewed by FEMA under the 44 CFR 350 process. The petition did not provide information that would cause the NRC to reconsider this determination.

K. Require radiological emergency preparedness training for all daycare center and nursery school employees within the 10-mile EPZ.

*NRC Review:* The Commission believes that specialized training for daycare center and nursery school employees is unnecessary because they would be using already established and distributed procedures for evacuation. Absent compelling information that specialized training for daycare center and nursery school employees would result in significant safety benefits that justify the additional regulatory burden, the Commission finds no safety reason to justify the requested revision to 10 CFR Part 50.

L. Require listing of designated relocation centers in area phone directories, so that parents can quickly and easily find where their children will be sent in case of a radiological emergency.

*NRC Review:* FEMA's GM EV–2 (p. 4) specifies that state and local government offsite emergency plans are to designate relocation centers outside of the 10-mile EPZ for all schools, including daycare centers and nursery schools. Some states list the relocation centers in telephone directories, some states identify the relocation centers in the yearly public information packages, and some states identify the relocation centers in their offsite emergency plans.[1] The Commission believes that the current publication practices are adequate.

M. Require establishment of toll-free or 911-type telephone lines, to provide information about radiological emergency plans and procedures for daycare centers and nursery schools within the 10-mile EPZ.

*NRC Review:* Although not required by NRC regulations or provided in FEMA guidance, all states provide a toll-free phone number in the yearly public information package where members of the public can acquire emergency preparedness information. The Commission sees no added safety benefits in revising its regulations to require something that all states are already doing.

N. Creation of written scripts for use by the local Emergency Alert System that include information about evacuation plans and designated relocation centers for daycare centers and nursery schools.

*NRC Review:* FEMA's GM EV–2 (p. 6) specifies that a method is to exist (e.g., EAS) for notifying daycare center and nursery school parents of the status and location of their children, in the event of an emergency. FEMA has decided that it is unnecessary to incorporate such a prescriptive requirement into its regulations and guidance, and the petition provided no evidence that the current method of notification is inadequate. As a result, the Commission sees no added safety benefit in requiring a written script.

**Commission Evaluation**

The evaluation of the advantages and disadvantages of the rulemaking requested by the petition with respect to the four strategic goals of the Commission follows:

1. *Ensure Protection of Public Health and Safety and the Environment:* The NRC staff believes that the requested rulemaking would not make a significant contribution to maintaining safety because current NRC and FEMA regulations and guidance already require inclusion of nursery schools and daycare centers in state and local government offsite emergency plans. This was verified by the state governments that submitted comment letters which stated that daycare centers and nursery schools are included in their offsite emergency planning and that this is not an issue requiring a change to the emergency planning regulations. As such, it is a potential

[1] See March 23, 2005 letter from Roy Zimmerman to Eric J. Epstein and March 24, 2005 letter from Roy Zimmerman to Lawrence T. Christian (available on NRC's ADAMS document system under the accession numbers ML050590344 and ML050590357, respectively).

compliance issue that can be resolved using the current regulatory structure.

2. *Ensure the Secure Use and Management of Radioactive Materials:* The requested regulatory amendments would have no impact on the security provisions necessary for the secure use and management of radioactive materials. The petition for rulemaking deals with the taking of protective actions for nursery schools and day care centers by offsite authorities, which is currently required by NRC and FEMA regulations and guidance.

3. *Ensure Openness in Our Regulatory Process:* The requested rulemaking would not enhance openness or public confidence in our regulatory process because the petitioners' requests raise potential issues of compliance with the existing requirements and guidance. The NRC staff does not believe that the contentions identify deficiencies in regulatory requirements. Appendix 4 in NUREG–0654, discusses ''special facility populations.'' Daycare centers and nursery schools fall under the definition of ''special facility populations'' and as such, state and local governments are currently required to ensure that these populations are included in the offsite emergency response plans. It should be noted, however, that 3000 members of the public co-signed the original petition for rulemaking. Additionally, 410 members of the public signed letters supporting the petition. This amount of public support reinforces the importance of NRC and FEMA's continued commitment to providing protection for the public in the event of an emergency which has always included daycare centers and nursery schools.

4. *Ensure that NRC Actions Are Effective, Efficient, Realistic and Timely:* The proposed revisions would decrease efficiency and effectiveness because current NRC and FEMA regulations and guidance already adequately address the petition requests.

Amending the regulations would require licensees and state and local governments to generate additional and more prescriptive information in their emergency plans, and the NRC and FEMA staffs would need to evaluate the additional information. The additional NRC staff and licensee effort would not improve efficiency or effectiveness. In addition, the NRC resources expended to promulgate the rule and supporting regulatory guidance would be significant with little return value.

5. *Ensure Excellence in Agency Management:* The requested rule would have no effect on the excellence in NRC management, but would increase licensee and state and local government burden by requiring the generation of additional, unnecessary, and burdensome information with little expected benefit because current NRC and FEMA regulations and guidance already adequately address the petition requests. This rulemaking would add significant burden on a national scale in order to address a potential local compliance issue.

**Reason For Denial**

The Commission is denying the petition for rulemaking (PRM–50–79) submitted by Mr. Lawrence T. Christian, *et al.* Current NRC requirements and NRC and FEMA guidance, provide reasonable assurance of adequate protection of all members of the public, including children attending daycare centers and nursery schools, in the event of a nuclear power plant incident. Many of the specific requests of the petitioner are either already covered by regulations and/or guidance documents or are inappropriate for inclusion in NRC regulations due to their very prescriptive nature. The Commission does believe, however, that information obtained during the review of the petition does raise questions about local implementation of relevant requirements and guidelines. Accordingly, the NRC staff met with FEMA officials to assure an understanding of this issue for consideration by FEMA as reflected in separate letters to the petitioner and TMI-Alert Chairman, Eric Epstein dated respectively, March 23, 2005 and March 24, 2005.[2] Copies of those letters are available through the NRC's ADAMS document system and can be located using accession numbers ML050590344 and ML050590357, respectively. The NRC staff will continue to work with FEMA to ensure emergency planning exercises are appropriately focused and provide adequate assurance regarding compliance with NRC and FEMA regulations and guidance.

For these reasons, the Commission denies PRM–50–79.

Dated at Rockville, Maryland, this 13th day of December, 2005.

For the Nuclear Regulatory Commission.

**Annette L. Vietti-Cook,**

*Secretary of the Commission.*

[FR Doc. E5–7518 Filed 12–16–05; 8:45 am]

**BILLING CODE 7590–01–P**

[2] FEMA did evaluate a May 3, 2005 Emergency Planning exercise at TMI. NRC understands that during this exercise FEMA reviewed aspects of emergency planning involving nurseries and daycare centers. No deficiencies were identified by FEMA during the exercise. FEMA's final report on the exercise was issued on August 4, 2005.

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Part 1

**[REG–158080–04]**

**RIN 1545–BE79**

## Application of Section 409A to Nonqualified Deferred Compensation Plans; Correction

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Correction to notice of proposed rulemaking.

**SUMMARY:** This document contains corrections to a notice of proposed rulemaking that was published in the **Federal Register** on Tuesday, October 4, 2005 (70 FR 57930) regarding the application of section 409A to nonqualified deferred compensation plans. The regulations affect service providers receiving amounts of deferred compensation, and the service recipients for whom the service providers provide services.

**FOR FURTHER INFORMATION CONTACT:** Stephen Tackney, (202) 927–9639 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**Background**

The notice of proposed rulemaking (REG–158080–04) that is the subject of these corrections are under section 409A of the Internal Revenue Code.

**Need for Correction**

As published, the notice of proposed rulemaking (REG–158080–04) contains errors that may prove to be misleading and are in need of clarification.

**Correction of Publication**

Accordingly, the notice of proposed rulemaking (REG–158080–04), that was the subject of FR Doc. 05–19379, is corrected as follows:

1. On page 57930, column 3, in the preamble under the paragraph heading ''*B. Section 457 Plans*'', second paragraph, third line from the bottom of the column, the language, ''under § 1.409A–1(b)(5) of these'' is corrected to read ''under § 1.409A–1(b)(4) or (5)''.

2. On page 57931, column 1, in the preamble under the paragraph heading ''*B. Section 457 Plans*'', first paragraph of the column, third line from the bottom, the language, ''1(a)(4) of these proposed regulations to'' is corrected to read ''1(a)(5) of these proposed regulations to''.

3. On page 57933, column 1, in the preamble under the paragraph heading

''*B. Short-Term Deferrals*'', first paragraph of the column, last of the paragraph, the language, ''in year 10.'' is corrected to read ''in Year 10.''.

4. On page 57934, column 2, in the preamble under the paragraph heading ''*2. Definition of Service Recipient Stock*'', second paragraph of the column, fourth line, the language, ''provider stock may include American'' is corrected to read ''recipient stock may include American''.

5. On page 57937, column 1, in the preamble under the paragraph heading ''*D. Restricted Property*'', second paragraph of the column, line 21, the language, ''payment for purposes section 409A,'' is corrected to read ''payment for purposes of section 409A,''.

6. On page 57948, column 2, in the preamble under the paragraph heading ''*E. Change in Ownership or Effective Control of the Corporation*'', last paragraph of the column, line 13, the language, ''3(g)(5)(iv)) or a change in the ownership'' is corrected to read ''3(g)(5)(v)) or change in the ownership''.

7–8. On page 57948, column 3, in the preamble under the paragraph heading ''*E. Change in Ownership or Effective Control of the Corporation*'', first paragraph of the column, line 2, the language § 1.409A–3(g)(5)(vi) may be applied by'' is corrected to read'' § 1.409A–3(g)(5)(vii) may be applied by''.

9. On page 57953, column 1, in the preamble under the ''*B. Effective Dates—Calculation of Grandfathered Amount*'', first paragraph, line 7, the language, ''set forth in Notice 2005–1, Q&A–16.'' is corrected to read ''set forth in Notice 2005–1, Q&A,–17.''.

10. On page 57953, column 2, in the preamble under the ''*B. Effective Dates—Calculation of Grandfathered Amount*'', first full paragraph, line 3, the language, ''contained in Notice 2005–1, Q&A–16'' is corrected to read ''contained in Notice 2005–1, Q&A,-17''.

**§ 1.409A–1 [Corrected]**

11. On page 57959, column 2, § 1.409A–1(b)(4)(i), line 5, the language, ''election under § 1.409A–2(a)(4)) to'' is corrected to read ''election under § 1.409A–2(a)(3)) to''.

12. On page 57961, column 1, § 1.409A–1(b)(5)(iii)(B), last line of the paragraph, the language, ''service provider stock.'' is corrected to read ''service recipient stock.''.

13. On page 57961, column 2, § 1.409A–1(b)(5)(iii)(D)(1), line 25, the language, ''constitute service provider stock with'' is corrected to read ''constitute service recipient stock with''.

14. On page 57962, column 2, § 1.409A–1(b)(5)(iv)(B)(2)(iii), line 5, the language, ''(b)(5)(B)(iv)(1) of this section, of an'' is corrected to read ''(b)(5)(iv)(B)(1) of this section, of an''.

15. On page 57962, column 2, § 1.409A–1(b)(5)(iv)(B)(2)(iii), lines 5 and 6 from the bottom of the paragraph, the language, ''§ 1.409A–3(g)(5)(iv) or § 1.409A–3(g)(5)(vi) or make a public offering of'' is corrected to read ''§ 1.409A–3(g)(5)(v) or § 1.409A–3(g)(5)(vii) or make a public offering of''.

16. On page 57962, column 3, § 1.409A–1(b)(5)(iv)(B)(3), line 9 from the bottom of the paragraph, the language, ''the service provider stock to which the'' is corrected to read ''the service recipient stock to which the''.

17. On page 57963, column 2, § 1.409A–1(b)(5)(v)(E), line 7, the language, ''exercised is not a material modification'' is corrected to read ''exercised is not a modification''.

18. On page 57963, column 2, § 1.409A–1(b)(5)(v)(E), line 13, the language, ''§ 1.409A–3(c). Additionally, no''. is corrected to read ''§ 1.409A–3(h). Additionally, no''.

19. On page 57964, column 1, § 1.409A–1(b)(v)(J)(6)(ii), line 14, the language, ''purposes section 409A, including for'' is corrected to read ''purposes of section 409A, including for''.

20. On page 57964, column 2, § 1.409A–1(b)(v)(J)(8)(ii)(B), line 7, the language, ''the compensation would have been'' is corrected to read ''and the compensation would have been''.

21. On page 57965, column 1, § 1.409A–1(b)(v)(9)(iii)(A)(1), line 3, the language, § 1.415–1(d)(2)) for services provided to'' is corrected to read ''§ 1.415–2(d) for services provided to''.

22. On page 57965, column 1, § 1409A–1(b)(v)(9)(iii)(A)(1), line 7, the language, ''1402(a)(1) for services provided to the'' is corrected to read ''1402(a) for services provided to the''.

23. On page 57968, column 1, § 1.409A–1(f)(3)(i)(C), last line of the paragraph, the language, ''sections 267(b)(1) and 707(b)(1).'' is corrected to read ''sections 267(b) and 707(b)(1).''.

24. On page 57969, column 1, § 1.409A–1(h)(2)(ii), line 2, the language, ''paragraph (b)(2) of this section, the plan'' is corrected to read ''paragraph (h)(2)(i) of this section, the plan''.

25. On page 57969, column 1, § 1.409A–1(h)(2)(ii), lines 4 through 8, the language, ''described in paragraph (a) of this section that no amounts deferred under the plan be paid or made available to the participant before the participant has a separation from service with the'' is corrected to read ''described in § 1.409A–3(a)(1) that amounts deferred under the plan may be paid or made available to the participant upon a separation from service with the''.

**§ 1.409A–2 [Corrected]**

26. On page 57971, column 3, § 1.409A–2(a)(9), line 3, the language, ''1(b)(9)(i)) due to an actual involuntary'' is corrected to read ''1(m) due to an actual involuntary''.

27. On page 57973, column 1, § 1.409A–2(b)(3), line 5, the language, ''contained in § 1.409A–3(c), the'' is corrected to read ''contained in § 1.409A–3(h), the''.

**§ 1.409A–3 [Corrected]**

28. On page 57975, column 3, § 1.409A–3(b), line 26, the language, ''§ 1.409A–1(b)(4). An arrangement may'' is corrected to read ''§ 1.409A–2(b). An arrangement may''.

29. On page 57977, column 2, § 1,409A–3(g)(3)(i), line 12 from the top of the column, the language, ''insurance, for example, not as a result'' is corrected to read ''insurance, for example, as a result''.

30. On page 57977, column 3, 1.409A–3(g)(4)(i)(A), line 6, the language, ''result in death or can be expect to last'' is corrected to read ''result in death or can be expected to last''.

31. On page 57981, column 1, § 1.409A–3(h)(4)(viii)(B), line 6, the language, ''defined in § 1.409A–2(g)(4)(i)). For''. is corrected to read ''defined in § 1.409A–3(g)(5)(i)). For''.

**Guy R. Traynor,**

*Federal Register Liaison, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).*

[FR Doc. 05–24169 Filed 12–16–05; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### 32 CFR Part 235

**RIN 0790–AH86**

### Sale of Rental of Sexually Explicit Material on DoD Property (DoD Instruction 4105.70)

**AGENCY:** Department of Defense.

**ACTION:** Proposed rule.

**SUMMARY:** This rule proposes to revise DoD regulations to prohibit the sale or rental of sexually explicit material on

property under DoD jurisdiction. It establishes responsibilities for monitoring compliance, establishes a review board to determine whether a material offered for sale or rental is sexually explicit as consistent with the definition in 10 U.S.C. 2489a, and delineates review board procedures.

**DATES:** Consideration will be given to all comments received on or before February 17, 2006.

**ADDRESSES:** Forward comments to Deputy Under Secretary of Defense (Military Community and Family Policy), 4000 Defense Pentagon, Washington, DC 20301–4000.

**FOR FURTHER INFORMATION CONTACT:** Commander F. Stich, 703–602–4590.

**SUPPLEMENTARY INFORMATION:**

**List of Subjects in 32 CFR Part 235**

Business and industry, Concessions, Government contracts, Military personnel.

Accordingly, title 32 of the Code of Federal Regulations is proposed to be amended by revising Part 235 to read as follows:

## PART 235—SALE OR RENTAL OR SEXUALLY EXPLICIT MATERIAL ON DOD PROPERTY (DOD INSTRUCTION 4105.70)

Sec.
235.1 Purpose.
235.2 Applicability and scope.
235.3 Definitions.
235.4 Policy.
235.5 Responsibilities.
235.6 Procedures.
235.7 Information requirements.

**Authority:** 10 U.S.C. 2489a.

### § 235.1 Purpose.

This part:

(a) Revises 32 CFR part 235 under the authority of the Secretary of Defense memorandum dated November 14, 1996 and the Under Secretary of Defense (USD (P&R)) memorandum dated December 6, 1996.

(b) Implements 10 U.S.C. 2489a, consistent with DoD Directive 1330.9 [1], by providing guidance about restrictions on the sale or rental of sexually explicit materials on property under the jurisdiction of the Department of Defense or by members of the Armed Forces or DoD civilian officers or employees, acting in their official capacities.

### § 235.2 Applicability and scope.

This part:

(a) Applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter referred to as the ''DoD'' Components.'').

(b) Shall not confer rights on any person.

### § 235.3 Definitions.

*Dominant Theme.* A theme of any material that is superior in power, influence, and importance to all other themes in the material combined.

*Lascivious.* Lewd and intended or designed to elicit a sexual response.

*Material.* An audio recording, a film or video recording, or a periodical with visual depictions, produced in any medium.

*Property under the Jurisdiction of the Department of Defense.* Commissaries, facilities operated by the Army and Air Force Exchange Service, the Navy Exchange Service Command, the Navy Resale and Serves Support Office, Marine Corps Exchanges, and ship stores.

*Sexually Explicit Material.* Material, the dominant theme of which is the depiction or description of nudity, including sexual or excretory activities or organs, in a lascivious way.

### § 235.4 Policy.

It is DoD policy that:

(a) No sexually explicit material may be offered for sale or rental on property under the DoD jurisdiction, and no member of the Armed Forces or DoD civilian officer or employee, acting in his or her official capacity, shall offer for sale or rental any sexually explicit material.

(b) Material shall not be deemed sexually explicit because of any message or point of view expressed therein.

### § 235.5 Responsibilities.

(a) The Principal Deputy Under Secretary of Defense for Personnel and Readiness (PDUSD (P&R)), shall:

(1) Monitor and ensure compliance with this part.

(2) Establish a Resale Activities Board of Review (the ''Board'') and approve senior representatives from the Army and Air Force Exchange Service, the Navy Exchange Service, and the Marine Corps Exchange Service; and approve a senior representative from each of the Military Departments, if designated by the Military Department concerned, to serve as board members on the Resale Activities Board.

(3) Appoint a Chair of the Resale Activities Board of Review.

(4) Monitor the activities of the Resale Activities Board of Review and ensure the Board discharges its responsibilities as set forth in § 235.6.

(b) The Secretaries of the Military Departments shall ensure their respective component DoD resale activities comply with this part and may designate a senior representative to serve on the Board.

(c) The Secretary of the Army and the Secretary of the Air Force shall each appoint one senior representative from the Army and Air Force Exchange Service to serve on the Board.

(d) The Secretary of the Navy shall appoint a senior representative from the Navy Exchange Service Command and a senior representative from the Marine Corps Exchange Service to serve on the Board.

### § 235.6 Procedures.

(a) The Board shall have the authority and responsibility periodically to review material offered or to be offered for sale or rental on property under DoD jurisdiction, and to determine whether any such material is sexually explicit in accordance with this part.

(b) If the Board determines that any material offered for sale or rental on property under DoD jurisdiction is sexually explicit, such material shall be withdrawn from all retail outlets where it is sold or rented and returned to distributors or suppliers, and shall not be purchased absent further action by the Board.

(c) The Board shall convene as necessary to determine whether any material offered or to be offered for sale or rental on property under DoD jurisdiction is sexually explicit. The Board members shall, to the extent practicable, maintain and update relevant information about material offered or to be offered for sale or rental on property under DoD jurisdiction.

(d) If any purchasing agent or manager of a retail outlet has reason to believe that material offered or to be offered for sale or rental on property under DoD jurisdiction may be sexually explicit as defined herein, and such material is not addressed by the Board's instructions issued under paragraph (e) of this section, he or she shall request a determination from the Board about such material prior to purchase or as soon as possible.

(e) At the conclusion of each review and, as necessary, the Board shall provide instructions to purchasing agents and managers of retail outlets about the purchase, withdrawal and return of sexually explicit material. The Board may also provide guidance to purchasing agents and managers of

[1] Copies may be obtained at *http://www.dtic.mil/whs/directives/.*

retail outlets about material that it has determined is not sexually explicit. Purchasing agents and managers of retail outlets shall continue to follow their usual purchasing and stocking practices unless instructed otherwise by the Board.

(f) material which has been determined by the Board to be sexually explicit may be submitted for reconsideration every 5 years. If substantive changes in the publication standards occur earlier, the purchasing agent or manager of a retail outlet under DoD jurisdiction may request a review.

**§ 235.7 Information requirements.**

The Chair, Resale Activities Board of Review, shall submit to the PDUSD (P&R) an annual report documenting the activities, decisions, and membership of the Board. Negative reports are required. The annual report shall be due on October 1st of each year. The annual report required by this part is exempt from licensing. Licensing requirements are contained in DoD 8910.1–M.[2]

Dated: December 13, 2005.

**L.M. Bynum,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 05–24160 Filed 12–16–05; 8:45 am]

**BILLING CODE 5001–06–M**

[2] See footnote 1 Sec. 235.1(b).

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R07–OAR–2005–MO–0007; FRL–8009–6]**

## Finding of Substantial Inadequacy of Implementation Plan; Call for Missouri State Implementation Plan Revision

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** Pursuant to our authority in the Clean Air Act to call for plan revisions, EPA is proposing to find that the Missouri State Implementation Plan for lead is substantially inadequate to attain or maintain the National Ambient Air Quality Standard for lead in the portion of Jefferson County within the city limits of Herculaneum, Missouri. The specific State Implementation Plan deficiencies, which form the basis for this proposed finding, are described below. If EPA finalizes this proposed finding of substantial inadequacy, Missouri will be required to revise its State Implementation Plan to correct these deficiencies by a date which will be specified in the final rule. If the state fails to submit a revised State Implementation Plan by the deadline, it will be subject to sanctions under the provisions of the Clean Air Act.

**DATES:** Comments must be received on or before January 18, 2006.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R07–OAR–2005–MO–0007, by one of the following methods:

1. *www.regulations.gov*: Follow the on-line instructions for submitting comments.
2. E-mail: *algoe-eakin.amy@epa.gov*.
3. Mail: Amy Algoe-Eakin, Environmental Protection Agency, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas 66101.
4. Hand Delivery or Courier. Deliver your comments to: Amy Algoe-Eakin, Environmental Protection Agency, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas 66101.

*Instructions:* Direct your comments to Docket ID No. EPA–R07–OAR–2005–MO–0007. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, 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 *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.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 *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas. EPA requests that you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The interested persons wanting to examine these documents should make an appointment with the office at least 24 hours in advance.

**FOR FURTHER INFORMATION CONTACT:** Amy Algoe-Eakin at (913) 551–7942 or by e-mail at *algoe-eakin.amy@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This section provides additional information by addressing the following questions:

What is the background for Doe Run-Herculaneum?
What is the basis for the proposed finding?
How can Missouri correct the inadequacy and when must the correction be submitted?
What action is EPA proposing?

### *What is the background for Doe Run-Herculaneum?*

EPA established the National Ambient Air Quality Standard (NAAQS) for lead on October 5, 1978 (43 FR 46246). The standard for lead is set at a level of 1.5 micrograms (μg) of lead per cubic meter ($m^3$) of air, averaged over a calendar quarter.

During the 1980s and 1990s, Missouri submitted and EPA approved a number of SIP revisions for lead to address ambient lead problems in various areas of the state. One such area was in Herculaneum, Missouri, which is the site of the Doe Run primary lead smelter. Doe Run-Herculaneum is the largest and only currently operating primary lead smelter in the United States.

The city of Herculaneum was designated nonattainment for lead in 1991 (40 CFR 81.326), pursuant to new authorities provided by the Clean Air Act Amendments of 1990 (CAA or Act), and the state became subject to new State Implementation Plan (SIP) requirements in part D, Title I of the Act, added by the 1990 amendments. A revised SIP meeting the part D requirements was subsequently

submitted in 1994. The plan established June 30, 1995, as the date by which the Herculaneum area was to have attained compliance with the lead standard. However, the plan did not result in attainment of the standard and observed lead concentrations in the Herculaneum area continued to show violations of the standard. Therefore, on August 15, 1997, after taking and responding to public comments, EPA published a notice in the **Federal Register** finding that the Herculaneum nonattainment area had failed to attain the lead standard by the June 30, 1995, deadline (62 FR 43647).

On January 10, 2001, Missouri submitted a revised SIP to EPA for the Doe Run-Herculaneum area. The SIP revision was found complete on January 12, 2001. The SIP established August 14, 2002, as the attainment date for the area and satisfied the nonattainment area requirements in the CAA. EPA approved the 2001 SIP on May 16, 2002 (67 FR 18497). The SIP contained control measures to reduce lead emissions to attain the standard, and contingency measures, as required by section 172(c)(9) of the Act, to achieve emission reductions in the event of future violations. Control measures included: (1) The use of a standard operating procedures manual for all baghouses used to control process, process fugitive, or fugitive dust emission sources for lead; (2) installation of emission control equipment; (3) enclosure and ventilation projects to reduce lead emissions; (4) process throughput restrictions and hours of operation limitation; and (5) work practice standards. In addition, the plan outlined contingency measures that would be implemented in the event that there were future violations of the lead standard in Herculaneum. The first contingency measure included enclosures and installation of additional process controls. This measure was to be implemented within six months following the calendar quarter in which the violation occurred. If there was a second violation of the quarterly lead standard, after the implementation of the initial contingency measure, Doe Run-Herculaneum would curtail production utilizing one of three emission and/or production curtailing methods: Method (1), reduce main non-stack emissions by 20 percent; Method (2), limit production to 50,000 short tons/quarter of refined lead produced; and Method (3), adopt Method 1 and limit production of refined lead production based upon the following formula:

$$P = 50{,}000 + (500 \times (1 - A/E) \times 100)$$

P = refined lead production in short tons/quarter;

A = the aggregate actual quarterly emissions from all fugitive and stack lead emission sources at the facility in tons, except from the main stack (30001);

E = the aggregate estimated quarterly emissions from all fugitive and stack lead emission sources at the facility in tons; except from the main stack; where A/E canot be less than .8 or more than 1.0.

Since the April 16, 2002, **Federal Register** rule, which approved the state implementation plan revisions, Doe Run-Herculaneum has implemented both of these contingency measures. The first contingency measure was implemented by Doe Run, prior to any actual violations of the lead NAAQS. Specifically, Doe Run completed the following measures to address the first contingency measure requirement. Doe Run completed modification to the cooler baghouse dilution air intake on December 31, 2002, completed modification to roof monitor in the Sinter Plant Mixing Room with passive filters on October 31, 2003, completed enclosure of north end of the railcar unloader building to prevent wind blow-through fugitive emissions on April 31, 2004, completed enclosure of the north end number 1 trestle and bin storage area on July 31, 2002, and completed modification of inlet ducting to number 3 baghouse by removing number 12 fan restriction from ducting on December 31, 2001. The second contingency measure was implemented as a result of the second violation of the lead standard in the second calendar quarter of 2005. The option selected by Doe Run-Herculaneum, under the second contingency measure, is to limit production to 50,000 tons per quarter of finished lead.

During the first three calendar quarters of 2005, Doe Run's production was 42,289 tons of finished lead, 29,757 tons of finished lead, and 40,619 tons of finished lead, respectively. This production is below the production limit of 50,000 tons per quarter of finished lead, which was required by the second contingency measure.

**What is the basis for the proposed finding?**

After the August 2002 attainment date, the Herculaneum area monitored attainment of the lead standard for 10 consecutive calendar quarters. However, air quality monitors in the area reported exceedances of the standard in the first three calendar quarters in 2005 even though Doe Run has implemented all control measures contained in the 2001 SIP revision. Doe Run has also implemented all of the contingency measures required by the current SIP.

Doe Run and the Missouri Department of Natural Resources (MDNR) operate co-located monitors at the Broad Street monitoring location (in addition to other lead monitoring locations in the nonattainment area) and both sample on a daily basis. In the first calendar quarter of 2005, Doe Run's monitor recorded a quarterly value of 1.928 $\mu g/m^3$, and MDNR's monitor recorded a quarterly value of 1.877 $\mu g/m^3$. In the second calendar quarter of 2005, Doe Run's monitor recorded a quarterly value of 1.615 $\mu g/m^3$. In the third calendar quarter of 2005, MDNR's monitor recorded a violation of 1.60 $\mu g/m^3$. These monitored values have been quality assured by MDNR and properly entered into the Air Quality System, EPA's repository for ambient air monitoring data. The values for each of the three quarters exceed the 1.5 $\mu g/m^3$ lead standard, and therefore constitute violations of the standard for each quarter. Although the violation recorded in the first calendar quarter of 2005 is the first violation of the lead standard in Herculaneum after ten consecutive calendar quarters of ''clean'' monitoring data, the Broad Street monitors, in 2003, experienced quarterly monitoring values that were close to the standard. In fact, in the first calendar quarter of 2003, both the Doe Run and the MDNR monitors at Broad Street, recorded values of 1.464 $\mu g/m^3$ and 1.491 $\mu g/m^3$, respectively.

As such, because the violations recorded in 2005 have occurred despite implementation of all the control measures contained in the SIP, including all contingency measures that were to address the violations, EPA believes the SIP is substantially inadequate to attain and maintain the NAAQS for lead.

**How can Missouri correct the inadequacy and when must the correction be submitted?**

Section 172(d) of the CAA provides that a plan revision required by a SIP call under section 110(k)(5) must correct the deficiencies specified by EPA, and must meet all other applicable plan requirements under section 110 and Part D of Title I of the CAA. EPA believes that MDNR must submit several specific plan elements to EPA in order to correct the inadequacy of the SIP. These specific elements are: (1) A revised emissions inventory; (2) a modeling demonstration showing what reductions will be needed to bring the area back into attainment of the lead NAAQS; (3)

adopted measures to achieve reductions determined necessary by the attainment demonstration, with enforceable schedules for implementing the measures as expeditiously as practicable; and (4) contingency measures meeting the requirements of Section 172(c)(9) of the CAA.

Section 110(k)(5) of the CAA provides that after EPA makes a finding that a plan is substantially inadequate, it may establish a reasonable deadline for correcting the deficiencies, but the date cannot be later than 18 months after the state is notified of the finding. Consistent with this provision, we propose to require the submittal within twelve months following any final finding of substantial inadequacy. We propose that the twelve-month period would begin on the date of signature of the final rulemaking. The state and company officials have been aware of the need for a plan revision for several months. The state issued notices to the Doe Run Company on April 22, 2005, September 8, 2005, and November 9, 2005. As a result of these notices, the state and company officials have held informal discussions to develop new control measures. Thus, based on the fact that discussions have already begun on how to correct the violations and because of the availability of the technical information from past SIP actions regarding emissions controls and because lead is a significant public health concern, we believe that twelve months is a reasonable time period for submission of the revisions. EPA seeks comments on the proposed deadline and on whether an alternate deadline should be established.

Sections 110(k)(5) and 172(d) also provide that EPA may adjust any deadlines with respect to SIPs that are applicable under the Act, except that the attainment date may not be adjusted unless it has elapsed. For lead, the attainment date is as expeditious as practicable, but no later than five years after the area is designated nonattainment, or, if applicable, no later than five years after the date EPA notifies the state that the area has failed to attain the standard under section 179(c). See section 192(a) and sections 179(d)(3) and 172(a)(2). Neither of these deadlines is applicable to a finding under section 110(k)(5). For Herculaneum, the attainment date was August 2002 (five years after the state was notified that the area failed to attain). Because the attainment date has elapsed, and the area is currently not attaining the standard, the attainment date must be adjusted, pursuant to section 110(k)(5) and section 172(d), and the state must provide for attainment as expeditiously as practicable. In addition, because there is considerable technical information available from past SIP measures, and discussions between the Doe Run Company and MDNR have already begun on control measures which can be implemented in the near term, and the significance of lead as a public health concern, we propose to establish an attainment date which is two years from the date of signature of a final rulemaking. We also believe that the attainment date should not be adjusted to provide more than two years because the area is well beyond the 2002 attainment date. We request comment on whether an alternative attainment date should be established.

**What action is EPA proposing?**

EPA proposes the following actions relating to the Missouri SIP for lead for the Herculaneum nonattainment area:

1. Find that the SIP is substantially inadequate to attain and maintain the NAAQS for lead in the area;
2. Require that Missouri revise the SIP to meet all of the applicable requirements of section 110 and part D of Title I of the Act with respect to lead in the nonattainment area;
3. Require the state to submit revisions to the SIP within twelve months of the final rulemaking;
4. Require that the SIP provide for attainment of the lead NAAQS in the Herculaneum nonattainment area as expeditiously as practicable, but no later than two years after issuance of the final rule.

We are soliciting comments on these proposed actions. Final rulemaking will occur after consideration of any comments.

**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). The Administrator certifies that this proposed action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

EPA has determined that this proposed action does not include a Federal mandate that may result in estimated costs of $100 million or more to either state, local, or tribal governments in the aggregate, or to the private sector. This action will require the state of Missouri to revise laws and regulations to meet the NAAQS for lead. This requirement, even if considered a Federal mandate, would not result in aggregate costs over $100 million to either the state or local districts. It is unclear whether a requirement to submit a SIP revision would constitute a Federal mandate. The obligation for a state to revise its SIP that arises out of sections 110(a) and 110(k)(5) 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 the Unfunded Mandates Reform Act (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)).

This proposed action also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it is in keeping with the relationship and the distribution of power and responsibilities between EPA and the states as established by the CAA. This proposed SIP call is required by the CAA because the current SIP is inadequate to attain the lead NAAQS. Missouri's direct compliance costs will not be substantial because the proposed SIP call requires Missouri to submit only those revisions necessary to address the SIP deficiency and applicable CAA requirements.

This proposed action also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

Section 12 of the National Technology Transfer and Advancement Act of 1995

requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with the National Technology Transfer and Advancement Act, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical. In making a finding of a SIP deficiency, EPA's role is to review existing information against previously established standards (in this case, what constitutes a violation of the lead standard). In this context, there is no opportunity to use VCS. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

This proposed action does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

**List of Subjects in 40 CFR Part 52**

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

Dated: December 9, 2005.

**James B. Gulliford,**

*Regional Administrator, Region 7.*

[FR Doc. 05–24201 Filed 12–16–05; 8:45 am]

**BILLING CODE 6560–50–P**

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## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 63

**[FRL–8009–4]**

## NESHAP: National Emission Standards for Hazardous Air Pollutants: Standards for Hazardous Air Pollutants for Hazardous Waste Combustors

**AGENCY:** Environmental Protection Agency.

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing amendments to the national emissions standards for hazardous air pollutants (NESHAP) for hazardous waste combustors which were issued October 12, 2005, under section 112 of the Clean Air Act. In that rule, we inadvertently included three new or revised bag leak detection system requirements for Phase I sources—incinerators, cement kilns, and lightweight aggregate kilns—among implementation requirements taking effect on December 12, 2005, rather than, as intended, after three years when the sources begin complying with the revised emission standards under the NESHAP for hazardous waste combustors. We intended to establish the compliance date for these provisions three years after promulgation—October 14, 2008—because the provisions establish more stringent requirements for Phase I sources, which cannot readily be complied with on short notice, and because these provisions are inextricably tied to the revised emissions standards.

**DATES:** *Comments.* Written comments must be received by January 18, 2006, unless a public hearing is requested by December 29, 2005. If a hearing is requested, written comments must be received by February 2, 2006. *Public Hearing.* If anyone contacts EPA requesting to speak at a public hearing by December 29, 2005, we will hold a public hearing on January 3, 2006.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2004–0022, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- Email: *a-and-r-docket@epa.gov* and *behan.frank@epa.gov.*
- Fax: 202–566–1741.
- Mail: U.S. Postal Service, send comments to: HQ EPA Docket Center (6102T), Attention Docket ID No. EPA–HQ–OAR–2004–0022, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Please include a total of two copies. We request that you also send a separate copy of each comment to the contact person listed below (see **FOR FURTHER INFORMATION CONTACT**).
- Hand Delivery: In person or by courier, deliver comments to: HQ EPA Docket Center (6102T), Attention Docket ID No. EPA–HQ–OAR–2004–0022, 1301 Constitution Avenue, NW., Room B–108, Washington, DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. Please include a total of two copies. We request that you also send a separate copy of each comment to the contact person listed below (see **FOR FURTHER INFORMATION CONTACT**).

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–OAR–2004–0022. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, 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 *www.regulations.gov* or e-mail. Send or deliver information identified as CBI only to the following address: Mr. Roberto Morales, OAQPS Document Control Officer, EPA (C404–02), Attention Docket ID No. EPA–HQ–OAR–2004–0022, Research Triangle Park, NC 27711. Clearly mark the part or all of the information that you claim to be CBI. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

*Docket:* All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the HQ EPA Docket Center, Docket ID No. EPA–HQ–OAR–2004–0022, EPA West Building, Room B–102, 1301 Constitution Ave., NW., Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The HQ EPA Docket Center telephone number is (202) 566–1742. 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. A reasonable fee may be charged for copying docket materials.

*Public Hearing.* If a public is requested, it will be held at 10 a.m. at EPA's Crystal Station office building, 2800 Crystal Drive, Arlington, Virginia, or at an alternate site in the Washington DC metropolitan area. Persons interested in presenting oral testimony or inquiring as to whether a hearing is to be held should contact Mr. Frank Behan, EPA, at telephone number (703) 308–8476 or at e-mail address: *behan.frank@epa.gov*, at least two days in advance of the potential date of the public hearing. Persons interested in attending the public hearing must also call Mr. Behan to verify the time, date, and location of the hearing.

**FOR FURTHER INFORMATION CONTACT:** For more information on this rulemaking, contact Frank Behan at (703) 308–8476, or *behan.frank@epa.gov*, Office of Solid Waste (MC: 5302W), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

**SUPPLEMENTARY INFORMATION:** *Regulated Entities.* Categories and entities potentially regulated by this action include:

| Category | NAICS code | SIC code | Examples of potentially regulated entities |
|---|---|---|---|
| Any industry that combusts hazardous waste as defined in the final rule. | 562211 | 4953 | Incinerator, hazardous waste. |
| | 327310 | 3241 | Cement manufacturing, clinker production. |
| | 327992 | 3295 | Ground or treated mineral and earth manufacturing. |
| | 325 | 28 | Chemical Manufacturers. |
| | 324 | 29 | Petroleum Refiners. |
| | 331 | 33 | Primary Aluminum. |
| | 333 | 38 | Photographic equipment and supplies. |
| | 488, 561, 562 | 49 | Sanitary Services, N.E.C. |
| | 421 | 50 | Scrap and waste materials. |
| | 422 | 51 | Chemical and Allied Products, N.E.C. |
| | 512, 541, 561, | 73 | Business Services, N.E.C. |
| | 812 | 89 | Services, N.E.C. |
| | 512, 514, 541, 711 924 | 95 | Air, Water and Solid Waste Management. |

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists examples of the types of entities EPA is now aware could potentially be regulated by this action. Other types of entities not listed could also be affected. To determine whether your facility, company, business, organization, etc., is regulated by this action, you should examine the applicability criteria in 40 CFR 63.1200. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

*Worldwide Web (WWW).* In addition to being available in the docket, an electronic copy of today's direct final rule will also be available on the WWW at *http://www.epa.gov/hwcmact.*

*Direct Final Rule.* In the Rules and Regulations section of this **Federal Register**, we are taking direct final action on the proposed amendments because we view the amendments as noncontroversial, and we anticipate no adverse comments. We have explained our reasons for the proposed amendments in the preamble to the direct final rule.

If we receive no adverse comments, we will take no further action on the proposed amendments. If we receive adverse comments, we will withdraw the amendments. We will publish a timely withdrawal in the **Federal Register** indicating that the amendments are being withdrawn. If the direct final rule amendments in the Rules and Regulations section of this **Federal Register** are withdrawn, all comments will be addressed in a subsequent final action based on the proposed amendments. We will not institute a second comment period on the subsequent final action. Any parties interested in commenting must do so at this time. If no relevant adverse comments are received, no further action will be taken on the proposal, and the direct final rule will become effective as provided in that action.

The regulatory text for the proposal is identical to that for the direct final rule published in the Rule and Regulations section of this **Federal Register**. For further supplementary information, see the direct final rule.

*Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

## Statutory and Executive Order Reviews

For a complete discussion of all of the administrative requirements applicable to this action, see the direct final rule in the Rules and Regulations section of today's **Federal Register**.

### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities

include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impact of today's amendments on small entities, a 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 the field.

After considering the economic impacts of today's proposed rule amendments on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This action does not create any new regulatory requirements. Rather, they continue to apply existing requirements by delaying the compliance date for new or more stringent requirements. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

**List of Subjects in 40 CFR Part 63**

Environmental protection, Air pollution control, Hazardous substances, Reporting and recordkeeping requirements.

Dated: December 12, 2005.

**Stephen L. Johnson,**

*Administrator.*

[FR Doc. 05–24199 Filed 12–16–05; 8:45 am]

**BILLING CODE 6560–50–P**

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## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 272

**[EPA–R10–RCRA–2005–0465, FRL–8009–9]**

## Idaho: Incorporation by Reference of Approved State Hazardous Waste Management Program

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Resource Conservation and Recovery Act, as amended, 42 U.S.C. 6901 to 6992k (RCRA), allows EPA to authorize State hazardous waste management programs if EPA finds that such programs are equivalent to and consistent with the Federal program and provide adequate enforcement of compliance. Title 40 of the Code of Federal Regulations (CFR) part 272 is used by EPA to codify its decision to authorize individual State programs and incorporates by reference those provisions of the State statutes and regulations that are subject to EPA's inspection and enforcement authorities as authorized provisions of the State's program. This rule proposes to revise the codification of the Idaho authorized program at 40 CFR part 272, subpart N.

**DATES:** Comments on this proposed action must be received by the close of business January 18, 2006. If EPA receives significant comments on this proposed action, EPA will respond to such comments in the **Federal Register** at the time EPA publishes a final rule.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R10–RCRA–2005–0465 by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- E-mail: *hunt.jeff@epa.gov.*
- Mail: Jeff Hunt, U.S. EPA, Region 10, 1200 Sixth Avenue, Mail Stop AWT–122, Seattle, WA 98101.

*Instructions:* Direct your comments to Docket ID No. EPA–R10–RCRA–2005–0465 EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, 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 *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

*Docket:* All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the EPA Region 10 Library, 1200 Sixth Avenue, Seattle, WA 98101. This Docket Facility is open from 8:30 a.m. to 4 p.m. Monday through Friday, excluding legal holidays. The library telephone number is 206–553–1289.

**FOR FURTHER INFORMATION CONTACT:** Jeff Hunt, U.S. EPA, Region 10, 1200 Sixth Avenue, Mail stop WCM–122, Seattle, WA 98101, e-mail: *hunt.jeff@epa.gov,* phone number (206) 553–0256.

**SUPPLEMENTARY INFORMATION:**

### I. Incorporation By Reference

*A. What Is Codification?*

Codification is the process of including the statutes and regulations that comprise the State's authorized hazardous waste management program in the CFR. Section 3006(b) of RCRA, 42 U.S.C. 6926(b), allows the Environmental Protection Agency to authorize State hazardous waste management programs. The State regulations authorized by EPA supplant the federal regulations concerning the same matter with the result that after authorization EPA enforces the authorized regulations. Infrequently, State statutory language which acts to regulate a matter is also authorized by EPA with the consequence that EPA enforces the authorized statutory provision. EPA does not authorize State enforcement authorities and does not authorize State procedural requirements. EPA codifies the authorized State program in 40 CFR part 272 and incorporates by reference State statutes and regulations that make up the approved program which is Federally enforceable. EPA retains independent enforcement authority pursuant to sections 3007, 3008, 3013 and 7003 of RCRA, 42 U.S.C. 6927, 6928, 6934 and 6973, and any other applicable statutory and regulatory provisions.

Today's action proposes to codify EPA's authorization of revisions to Idaho's hazardous waste management program. This proposed codification

reflects the State program in effect at the time EPA authorized revisions to the Idaho hazardous waste management program in a final rule dated July 22, 2005 (70 FR 42273). Notice and an opportunity for comment regarding the revisions to the authorized State program were provided to the public at the time those revisions were proposed. EPA is not reopening its decisions to authorize changes to the State's program nor is EPA requesting comment on those revisions.

*B. What Is the History of the Authorization and Codification of Idaho's Hazardous Waste Management Program?*

Idaho initially received final authorization for its hazardous waste management program, effective April 9, 1990 (55 FR 11015). Subsequently, EPA authorized revisions to the State's program effective June 5, 1992 (57 FR 11580), August 10, 1992 (57 FR 24757), June 11, 1995 (60 FR 18549), January 19, 1999 (63 FR 56086), July 1, 2002 (67 FR 44069), March 10, 2004 (69 FR 11322), and July 22, 2005 (70 FR 42273). EPA first codified Idaho's authorized hazardous waste program effective February 4, 1991 (55 FR 50327), and updated the codification of Idaho's program on June 5, 1992 (57 FR 11580), August 10, 1992 (57 FR 24757), August 24, 1999 (64 FR 34133), and March 8, 2005 (70 FR 11132). In this action, EPA is proposing to revise subpart N of 40 CFR part 272, to include the most recent authorization revision effective July 22, 2005 (70 FR 42273).

*C. What Decisions Have We Proposed in This Action?*

Today's action proposes to codify EPA's authorization of revisions to Idaho's hazardous waste management program. The proposed codification will incorporate by reference the most recent version of the State's authorized hazardous waste management regulations. This proposed action does not reopen any decision EPA previously made concerning the authorization of the State's hazardous waste management program. EPA is not requesting comments on its decisions published in the **Federal Register** as referenced in Section B of this document concerning revisions to the authorized program in Idaho.

EPA is proposing to incorporate by reference the authorized revisions to the Idaho hazardous waste program by revising subpart N of 40 CFR part 272. 40 CFR 272.651 currently incorporates by reference Idaho's authorized hazardous waste program, as amended, through 2004. Section 272.651 also references the demonstration of adequate enforcement authority, including procedural and enforcement provisions, which provide the legal basis for the State's implementation of the hazardous waste management program. In addition, § 272.651 references the Memorandum of Agreement, the Attorney General's Statement and the Program Description which were evaluated as part of the approval process of the hazardous waste management program in accordance with Subtitle C of RCRA. This action proposes to update those demonstrations of adequate enforcement authority, including procedural and enforcement provisions, which provide the legal basis for the State's implementation of the hazardous waste management program, as well as the Memorandum of Agreement, the Attorney General's Statement and the Program Description, all of which were evaluated as part of the approval process for the program revision effective on July 22, 2005.

*D. What Is the Effect of Idaho's Codification on Enforcement?*

EPA retains its independent enforcement authority under statutory provisions, including but not limited to, sections 3007, 3008, 3013 and 7003 of RCRA, and any other applicable statutory and regulatory provisions, to undertake inspections and enforcement actions and to issue orders in all authorized States. With respect to enforcement actions, EPA will rely on Federal sanctions, Federal inspection authorities, and Federal procedures rather than the State analogues to these provisions. Therefore, the EPA is not proposing to incorporate by reference Idaho's inspection and enforcement authorities nor are those authorities part of Idaho's approved State program which operates in lieu of the Federal program. 40 CFR 272.651(b)(2) lists these authorities for informational purposes, and also because EPA considered them in determining the adequacy of Idaho's enforcement authorities. This action proposes to revise this listing for informational purposes where these authorities have changed under Idaho's revisions to State law and were considered by EPA in determining the adequacy of Idaho's enforcement authorities. Idaho's authority to inspect and enforce the State's hazardous waste management program requirements continues to operate independently under State law.

*E. What State Provisions Are Not Proposed as Part of the Codification?*

The public is reminded that some provisions of Idaho's hazardous waste management program are not part of the federally authorized State program. These non-authorized provisions include:

(1) Provisions that are not part of the RCRA subtitle C program because they are ''broader in scope'' than RCRA subtitle C (see 40 CFR 271.1(i));

(2) Federal rules for which Idaho is not authorized, but which have been incorporated into the State regulations because of the way the State adopted federal regulations by reference;

(3) State procedural and enforcement authorities which are necessary to establish the ability of the program to enforce compliance but which do not supplant the Federal statutory enforcement and procedural authorities.

State provisions that are ''broader in scope'' than the federal program are not incorporated by reference in 40 CFR part 272. For reference and clarity, 40 CFR 272.651(b)(3) currently lists the Idaho regulatory provisions which are ''broader in scope'' than the federal program and which are not part of the authorized program being incorporated by reference. This action proposes to update that list for ''broader in scope'' provisions EPA identified in recent authorization actions for revisions to the State program. While ''broader in scope'' provisions are not part of the authorized program and cannot be enforced by EPA, the State may enforce such provisions under State law.

*F. What Will be the Effect of the Proposed Codification on Federal HSWA Requirements?*

With respect to any requirement(s) pursuant to the Hazardous and Solid Waste Amendments of 1984 (HSWA) for which the State has not yet been authorized and which EPA has identified as taking effect immediately in States with authorized hazardous waste management programs, EPA will enforce those Federal HSWA standards until the State is authorized for those provisions.

The proposed Codification does not effect Federal HSWA requirements for which the State is not authorized. EPA has authority to implement HSWA requirements in all States, including States with authorized hazardous waste management programs, until the States become authorized for such requirements or prohibitions unless EPA has identified the HSWA requirement(s) as an optional or as a less stringent requirement of the Federal

program. A HSWA requirement or prohibition, unless identified by EPA as optional or as less stringent, supersedes any less stringent or inconsistent State provision which may have been previously authorized by EPA (50 FR 28702, July 15, 1985).

Some existing State requirements may be similar to the HSWA requirements implemented by EPA. However, until EPA authorizes those State requirements, EPA enforces the HSWA requirements and not the State analogs.

## II. Statutory and Executive Order Reviews

This action proposes to codify EPA-authorized hazardous waste management requirements pursuant to RCRA section 3006 and imposes no requirements other than those imposed by State law (see **SUPPLEMENTARY INFORMATION**). Therefore, EPA has assessed this proposed action for compliance with applicable executive orders and statutory provisions as follows:

### *1. Executive Order 12866*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is ''significant,'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more, or adversely affect in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. EPA has tentatively determined that this proposed rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is therefore not subject to OMB review.

### *2. Paperwork Reduction Act*

The Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*, is intended to minimize the reporting and recordkeeping burden on the regulated community, as well as to minimize the cost of Federal information collection and dissemination. In general, the Act requires that information requests and recordkeeping requirements affecting ten or more non-Federal respondents be approved by OPM. Since this proposed rule does not establish or modify any information or recordkeeping requirements for the regulated community, EPA has tentatively determined that it is not subject to the provisions of the Paperwork Reduction Act.

### *3. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), 5 U.S.C. 601 *et seq.*, generally requires Federal agencies to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined as: (1) A small business, as codified in the Small Business Size Regulations at 13 CFR part 121; (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. EPA has tentatively determined that this proposed action will not have a significant impact on small entities because the proposed action will only have the effect of authorizing pre-existing requirements under State law. After considering the economic impacts of today's proposed action, I propose to certify that this action will not have a significant economic impact on a substantial number of small entities.

### *4. Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act (UMRA) of 1995 (Pub. 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 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 the 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. This proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local or tribal governments or the private sector. It imposes no new enforceable duty on any State, local or tribal governments or the private sector. This proposed rule contains no regulatory requirements that might significantly or uniquely affect small government entities. Thus, EPA has tentatively determined that the requirements of section 203 of the UMRA do not apply to this proposed rule.

### *5. 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 various levels of government.'' This proposed rule does not have federalism

implications. It will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among various levels of government, as specified in Executive Order 13132. This proposed rule addresses the codification of the authorized State hazardous waste program in Idaho. Thus, EPA has tentatively determined that Executive Order 13132 does not apply to this proposed rule.

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

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (59 FR 22951, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This proposed rule does not have tribal implications, as specified in Executive Order 13175. Thus, EPA has tentatively determined that Executive Order 13175 does not apply to this rule.

*7. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks*

Executive Order 13045 applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. EPA has tentatively determined that this proposed rule is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866 and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

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

EPA has tentatively determined that this rule is not subject to Executive Order 13211, ''Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a ''significant regulatory action'' as defined under Executive Order 12866.

*9. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d) (15 U.S.C. 272) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus bodies. The NTTAA directs EPA to provide Congress, through the OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. EPA has tentatively determined that this proposed rule does not involve ''technical standards'' as defined by the NTTAA and is therefore not considering the use of any voluntary consensus standards.

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

To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency must make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health and environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands. Because this proposed rule addresses codifying a revision of the authorized hazardous waste program in the State of Idaho and there are no anticipated significant adverse human health or environmental effects, EPA has tentatively determined that the rule is not subject to Executive Order 12898.

**List of Subjects in 40 CFR Part 272**

Environmental protection, Hazardous materials transportation, Hazardous waste, Incorporation by reference, Intergovernmental relations, Water pollution control, Water supply.

**Authority:** This proposed action is issued under the authority of sections 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act as amended, 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: December 7, 2005.

**Ronald A. Kreizenbeck,**

*Deputy Regional Administrator, EPA Region 10.*

For the reasons set forth in the preamble, EPA proposes to amend 40 CFR part 272 as follows:

## PART 272—APPROVED STATE HAZARDOUS WASTE MANAGEMENT PROGRAMS

1. The authority citation for part 272 continues to read as follows:

**Authority:** Secs. 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended, 42 U.S.C. 6912(a), 6926, and 6974(b).

2. Subpart N is amended by revising § 272.651 to read as follows:

### § 272.651 Idaho State-Administered Program: Final Authorization.

(a) Pursuant to section 3006(b) of RCRA, 42 U.S.C. 6926(b), Idaho has final authorization for the following elements as submitted to EPA in Idaho's base program application for final authorization which was approved by EPA effective on April 9, 1990. Subsequent program revision applications were approved effective on June 5, 1992, August 10, 1992, June 11, 1995, January 19, 1999, July 1, 2002, March 10, 2004, and July 22, 2005.

(b) The State of Idaho has primary responsibility for enforcing its hazardous waste management program. However, EPA retains the authority to exercise its inspection and enforcement authorities in accordance with sections 3007, 3008, 3013, 7003 of RCRA, 42 U.S.C. 6927, 6928, 6934, 6973, and any other applicable statutory and regulatory provisions, regardless of whether the State has taken its own actions, as well as in accordance with other statutory and regulatory provisions.

(c) *State Statutes and Regulations.* (1) The Idaho statutes and regulations cited in this paragraph are incorporated by reference as part of the hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

(i) The EPA-Approved Idaho Statutory and Regulatory Requirements Applicable to the Hazardous Waste Management Program, July 2005.

(ii) [Reserved]

(2) EPA considered the following statutes and regulations in evaluating the State program but is not incorporating them herein for enforcement purposes:

(i) Idaho Code (I.C.) containing the General Laws of Idaho Annotated, Title 39, Chapter 44, ''Hazardous Waste Management'', published in 2002 by the Michie Company, Law Publishers: sections 39–4404; 39–4405 (except 39–4405(8)); 39–4406; 39–4407; 39–4408(4); 39–4409(2) (except first sentence); 39–4409(3); 39–4409(4) (first sentence); 39–4410; 39–4411(1); 39–4411(3); 39–4411(6); 39–4412 through 39–4416; 39–4418; 39–4419; 39–4421; 39–4422; and 39–4423(3) (a)&(b).

(ii) Idaho Code (I.C.) containing the General Laws of Idaho Annotated, Title 39, Chapter 58, ''Hazardous Waste Facility Siting Act'', published in 2002 by the Michie Company, Law Publishers: sections 39–5804; 39–5809; 39–5810; 39–5813(2); 39–5814; 39–5816; 39–5817; and 39–5818(1).

(iii) Idaho Code (I.C.) containing the General Laws of Idaho Annotated, Volume 2, Title 9, Chapter 3, ''Public Writings'', published in 1990 by the Michie Company, Law Publishers, Charlottesville, Virginia: sections 9–337(10); 9–337(11); 9–338; 9–339; and 9–344(2).

(iv) 2002 Cumulative Pocket Supplement to the Idaho Code (I.C.), Volume 2, Title 9, Chapter 3, ''Public Writing'', published in 2002 by the Michie Company, Law Publishers, Charlottesville, Virginia: sections 9–340A, 9–340B, and 9–343.

(v) Idaho Department of Environmental Quality Rules and Regulations, Idaho Administrative Code, IDAPA 58, Title 1, Chapter 5, ''Rules and Standards for Hazardous Waste'', as published July 2004: sections 58.01.05.000; 58.01.05.356.02 through 58.01.05.356.05; 58.01.05.800; 58.01.05.850; 58.01.05.996; 58.01.05.997; and 58.01.05.999.

(3) The following statutory and regulatory provisions are broader in scope than the Federal program, are not part of the authorized program, are not incorporated by reference, and are not federally enforceable:

(i) Idaho Code containing the General Laws of Idaho Annotated, Title 39, Chapter 44, ''Hazardous Waste Management'', published in 2002 by the Michie Company, Law Publishers: sections 39–4403(6) & (14); 39–4427; 39–4428 and 39–4429.

(ii) Idaho Code containing the General Laws of Idaho Annotated, Title 39, Chapter 58, ''Hazardous Waste Siting Act'', published in 2002 by the Michie Company, Law Publishers: section 39–5813(3).

(iii) Idaho Department of Environmental Quality Rules and Regulations, Idaho Administrative Code, IDAPA 58, Title 1, Chapter 5, ''Rules and Standards for Hazardous Waste'', as published July 2004: sections 58.01.05.355; and 58.01.05.500.

(4) *Memorandum of Agreement.* The Memorandum of Agreement between EPA Region 10 and the State of Idaho (IDEQ), signed by the EPA Regional Administrator on August 1, 2001, although not incorporated by reference, is referenced as part of the authorized hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921, *et seq.*

(5) *Statement of Legal Authority.* The ''Attorney General's Statement for Final Authorization,'' signed by the Attorney General of Idaho on July 5, 1988 and revisions, supplements and addenda to that Statement, dated July 3, 1989, February 13, 1992, December 29, 1994, September 16, 1996, October 3, 1997, April 6, 2001, September 11, 2002, and September 22, 2004, although not incorporated by reference, are referenced as part of the authorized hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921, *et seq.*

(6) *Program Description.* The Program Description, and any other materials submitted as part of the original application or as supplements thereto, although not incorporated by reference, are referenced as part of the authorized hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

3. Appendix A to part 272, State Requirements, is amended by revising the listing for ''Idaho'' to read as follows:

## Appendix A to Part 272—State Requirements

* * * * *

### Idaho

(a) The statutory provisions include:

Idaho Code containing the General Laws of Idaho Annotated, Title 39, Chapter 44, ''Hazardous Waste Management'', 2002: sections 39–4402; 39–4403 (except 39–4403(6) & (14)); 39–4408(1)–(3); 39–4409(1) (except fourth and fifth sentences); 39–4409(2) (first sentence); 39–4409(4) (except first sentence); 39–4409(5); 39–4409(6); 39–4409(7); 39–4409(8); 39–4411(2); 39–4411(4); 39–4411(5); 39–4423 (except 39–4423(3)(a) & (b)); and 39–4424.

Idaho Code containing the General Laws of Idaho Annotated, Title 39, Chapter 58, ''Hazardous Waste Facility Siting Act'', published in 2002 by the Michie Company, Law Publishers: sections 39–5802; 39–5803; 39–5808; 39–5811; 39–5813(1); and 39–5818(2).

Copies of the Idaho statutes that are incorporated by reference are available from Michie Company, Law Publishers, 1 Town Hall Square, Charlottesville, VA 22906–7587.

(b) The regulatory provisions include:

Idaho Department of Environmental Quality Rules and Regulations, Idaho Administrative Code, IDAPA 58, Title 1, Chapter 5, ''Rules and Standards for Hazardous Waste'', as published on July 2004: sections 58.01.05.001; 58.01.05.002; 58.01.05.003; 58.01.05.004; 58.01.05.005; 58.01.05.006; 58.01.05.007; 58.01.05.008; 58.01.05.009; 58.01.05.010; 58.01.05.011; 58.01.05.012; 58.01.05.013; 58.01.05.014; 58.01.05.015; 58.01.05.016; 58.01.05.356.01; and 58.01.05.998.

* * * * *

[FR Doc. 05–24202 Filed 12–16–05; 8:45 am]

BILLING CODE 6560–50–P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 64

**[CG Docket No. 02–278; CG Docket No. 05–338; FCC 05–206]**

## Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Junk Fax Prevention Act of 2005 amends section 227 of the Communications Act of 1934 relating to unsolicited facsimile advertisements. The Junk Fax Prevention Act requires the Commission to issue regulations to implement the amendments made by the statute no later than 270 days after the date of enactment of the Act. In this document, the Commission proposes amendments to its unsolicited facsimile advertising rules and seeks comment on related aspects of those rules. Specifically, the Commission seeks comment on the established business relationship (EBR) exception to the rules, the requirement to include an opt-out notice and contact information on facsimile advertisements, and other rules implementing the Junk Fax Prevention Act. The Commission also opens a new docket for all filings in response to this document and those addressing the facsimile advertising rules generally.

**DATES:** Comments due January 18, 2006. Reply comments due February 2, 2006. Written comments on the Paperwork Reduction Act (PRA) proposed information collection requirements must be submitted by the general public, Office of Management and Budget (OMB), and other interested parties on or before February 17, 2006.

**ADDRESSES:** You may submit comments, identified by CG Docket No. 05–338, by any of the following methods:

• Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

• Federal Communications Commission's Web site: *http://www.fcc.gov/cgb/ecfs/.* Follow the instructions for submitting comments.

• People with Disabilities: Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or phone (2020 418–0539 or TTY: (202) 418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document. In addition, a copy of any comments on the Paperwork Reduction Act (PRA) information collection requirements contained herein should be submitted to Leslie Smith, Federal Communications Commission, Room 1–A804, 445 12th Street, SW., Washington, DC 20554, or via the Internet to *Leslie.Smith@fcc.gov,* and to Kristy L. LaLonde, OMB Desk Officer, Room 10234 NEOB, 725 17th Street, NW., Washington, DC 20503, via the Internet to *Kristy_L._LaLonde@omb.eop.gov,* or via fax at (202) 395–5167.

**FOR FURTHER INFORMATION CONTACT:** Erica McMahon or Richard Smith, Consumer & Governmental Affairs Bureau, (202) 418–2512. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Les Smith at (202) 418–0217, or via the Internet at *Leslie.Smith@fcc.gov.*

**SUPPLEMENTARY INFORMATION:** This *Notice of Proposed Rulemaking (NPRM),* CG Docket No. 02–278, FCC 05–206, contains proposed information collection requirements subject to the PRA, Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507 of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the proposed information collection requirements contained in this proceeding. This is a summary of the Commission's *NPRM*, FCC 05–206, adopted December 9, 2005, and released December 9, 2005 in CG Docket No. 02–278 and CG Docket No.05–338. The Commission also opens a new docket—CG Docket No. 05–338—for all filings in response to this document and those addressing the facsimile advertising rules generally. In addition, this *NPRM* is associated with an *Order,* FCC 05–206, adopted December 9, 2005, released December 9, 2005, addressing the delayed effective date of the written consent requirement for sending facsimile advertisements. The Final rule is published elsewhere in this issue of the **Federal Register**.

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415 and 1.419, interested parties may file comments on January 18, 2006 and reply comments on February 2, 2006. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS); (2) the Federal Government's eRulemaking Portal; or (3) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121, May 1, 1998.

• Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs/* or the Federal eRulemaking Portal: *http://www.regulations.gov.* Filers should follow the instructions provided on the Web site for submitting comments.

• For ECFS filers, although multiple docket numbers appear in the caption of this proceeding, filers should transmit one electronic copy of the comments for CG Docket No. 05–338 only. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number, which in this instance is CG Docket No. 05–338. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to *ecfs@fcc.gov,* and include the following words in the body of the message, ''get form.'' A sample form and directions will be sent in response.

• Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing in CG Docket No. 05–338. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

• The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.

• Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

• U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington, DC 20554.

Comments and reply comments must include a short and concise summary of the substantive discussion and questions raised in the *NPRM.* The Commission further directs all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. The Commission strongly encourages that parties track the organization set forth in the *NPRM* in order to facilitate the Commission's internal review process. Comments and reply comments must otherwise comply with § 1.48 of the Commission's rules and all other applicable sections of the Commission's rules. (*See* 47 CFR 1.48).

Pursuant to § 1.1200 of the Commission's rules, 47 CFR 1.1200, this matter shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substances of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. *See* 47 CFR 1.1206(b). Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in § 1.1206(b) of the Commission's rules, 47 CFR 1.1206(b).

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

## Initial Paperwork Reduction Act of 1995 Analysis

This *NPRM* contains proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this *NPRM,* as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comments are due February 17, 2006.

Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how the Commission might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

*OMB Control Number: 3060–XXXX.*

*Title:* Rules and Regulations Implementing the Junk Fax Prevention Act of 2005.

*Form Number:* N/A.

*Type of Review:* New Collection.

*Respondents:* Individuals or households; Business and other for-profit entities; and Not-for-profit institutions.

*Number of Respondents:* 5,000,000—(4 million facsimile advertisement senders and 1,000,000 complainants).

*Number of Responses:* 5,150,000 responses.

*Estimated Time per Response:* 15 seconds to 1 hour.

*Frequency of Responses:* On occasion reporting requirement; monthly recordkeeping; third party.

*Total Annual Burden:* 13,170,000 hours.

*Total Annual Cost:* $60,000,000.

*Privacy Impact Assessment:* Yes.

*Needs and Uses:* On December 9, 2005, the Commission released a *Notice of Proposed Rulemaking, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (NPRM),* which proposes modifications to the Commission's rules on unsolicited facsimile advertisements and seeks comment on related aspects of those rules, pursuant to the Junk Fax Prevention Act. The Commission is considering the adoption of rules governing the transmission of facsimile advertisements. Because the facsimile advertising rules involve different issues and different entities than do the telemarketing rules under the Telephone Consumer Protection Act (TCPA), the Commission believes that it will be easier for the public if the burden hours associated with the facsimile advertising rules are identified in a separate information collection. Therefore, the Commission is initiating a new collection for the proposed facsimile advertising rules described below:

(1) The Junk Fax Prevention Act requires senders of unsolicited facsimile advertisements to include a notice on the first page of the facsimile that informs the recipient of the ability and means to request that they not receive future unsolicited facsimile advertisements from the sender. The NPRM must include a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender, as well as a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement. The telephone and facsimile numbers and cost-free mechanism must permit an individual or business to make such a request at any time on any day of the week. The Commission proposes amending the Commission's rules to require entities to comply with the specific notice requirements in the Junk Fax Prevention Act. The Commission also asks whether a 30-day limitation is the shortest reasonable period in which a sender should comply with a request not to receive future facsimile advertisements.

(2) In addition, the Junk Fax Prevention Act provides that, if a sender relies on an EBR for permission to fax an advertisement, the sender must have obtained the number of the telephone facsimile machine through the voluntary communication of such number, within the context of such EBR or through a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number. This provision does not apply in the case of an advertisement sent based on an established business relationship with the recipient that was in existence before the date of enactment of the Junk Fax Prevention Act (July 9, 2005). The Commission seeks comment on whether to require the sender to make reasonable efforts to confirm with the entity that compiled the numbers that the recipients have voluntarily agreed to allow them to be made publicly available. The Commission also proposes amending the rules, consistent with the Junk Fax Prevention Act, to permit senders to send facsimile advertisements to persons with whom an EBR was formed prior to July 9, 2005, provided the facsimile number was in the sender's possession before July 9, 2005, as well. While there is no ongoing reporting requirement associated with this proposed rule, if a complaint is filed involving the existence of an EBR or the duration of the EBR, the facsimile sender may need to obtain and provide records kept in the usual course of business evidencing the duration of the EBR.

(3) Finally the Commission seeks comment on situations in which a consumer that has made a do-not-fax request of a sender subsequently provides express invitation or permission to receive facsimile advertisements from that entity. Specifically, the Commission asks whether the facsimile sender should bear the burden of proof to demonstrate that it had the consumer's express invitation or permission to send the advertisement. Again, while there is no ongoing recordkeeping or reporting requirement associated with this proposed rule, if a complaint is filed, the facsimile sender may need to obtain and provide records demonstrating that express invitation or permission was subsequently provided by the recipient.

## Synopsis

The Junk Fax Prevention Act of 2005 (the Junk Fax Prevention Act) amends the provisions of section 227 of the Communications Act of 1934 (the Act) relating to unsolicited facsimile advertisements. As required by the Junk Fax Prevention Act, the Commission proposes modifications to the Commission's rules on unsolicited facsimile advertisements and seeks comment on related aspects of those rules. The Junk Fax Prevention Act was signed into law on July 9, 2005. Section 2(h) of the Junk Fax Prevention Act provides that ''not later than 270 days after the date of enactment of this Act, the Federal Communications Commission shall issue regulations to implement the amendments made by this section.'' Therefore, the Commission must issue regulations to implement these amendments no later than April 5, 2006.

## Recognition of an Established Business Relationship Exemption

### *Background*

Section 2(a) of the Junk Fax Prevention Act amends section 227(b)(1)(C) of the Act by adding an established business relationship (EBR) exemption to the prohibition on sending unsolicited facsimile advertisements. Specifically, section 2(a) provides that it shall be unlawful for any person within the United States or any person outside the United States if the recipient is within the United States:

(C) To use any telephone facsimile machine, computer, or other device to

send, to a telephone facsimile machine, an unsolicited advertisement, unless—

(i) The unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) The sender obtained the number of the telephone facsimile machine through—

(I) The voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) A directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution, except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before the date of enactment of the Junk Fax Prevention Act of 2005 if the sender possessed the facsimile machine number of the recipient before such date of enactment; and

(iii) The unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D), except that the exception under clause (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E).

*Discussion*

The Commission proposes amending § 64.1200(a)(3) of the Commission's rules in accordance with the specific requirements in section 2(a) of the Junk Fax Prevention Act regarding the express recognition of an EBR exemption. Specifically, the Commission proposes removing § 64.1200(a)(3)(i) of the Commission's rules which provides that a facsimile advertisement is unsolicited unless ''the recipient has granted the sender prior express invitation or permission to deliver the advertisement, as evidenced by a signed, written statement that * * * clearly indicates the recipient's consent to receive such facsimile advertisements from the sender.'' Congress has concluded that an unsolicited advertisement from a sender with an EBR to the recipient will not be governed by the general prohibition found in section 227(b)(1)(C) of the Act. As discussed further below, in the context of an EBR, such prior express permission may be formed by means other than a signed, written statement that indicates the recipient's consent to receive facsimile advertisements. The Commission seeks comment on these and any other issues that commenters may consider pertinent to this topic.

In addition, the Commission seeks specific comment on whether the Commission should establish parameters defining what it means for a person to provide a facsimile number ''within the context of [an] established business relationship.'' Under what circumstances should the Commission recognize that a person has voluntarily agreed to make a facsimile number available for public distribution? Should the burden rest with the sender to establish that the recipient has agreed to make the number publicly available? When the sender obtains the facsimile number from a directory, advertisement, or site on the Internet, should the sender be required to make reasonable efforts to confirm with the entity that compiled the numbers that the recipients have ''voluntarily'' agreed to allow them to be made publicly available?

Finally, the Junk Fax Prevention Act provides an exception from the requirement that any sender transmitting a facsimile advertisement on the basis of an EBR must have obtained the facsimile number through the ''voluntary communication of such number, within the context of such established business relationship'' or through ''a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution.'' Under the statute, if the EBR was in existence prior to the date of enactment of the statute and the sender also possessed the facsimile number before the date of enactment of the statute, the sender is not required to demonstrate how it obtained the facsimile number. The Commission proposes amending the Commission's rules consistent with this exception, which would permit senders to send facsimile advertisements to persons with whom an EBR was formed prior to July 9, 2005, provided the facsimile number was in the sender's possession before July 9, 2005, as well. If the Commission adopts this proposal, how should the Commission verify that a sender had an EBR and the recipient's facsimile number prior to July 9, 2005? The Commission seeks comment on this proposal and any other issues that relate to the sender's ability to send facsimile advertisements to persons with whom an EBR was formed prior to enactment of the Junk Fax Prevention Act.

**Definition of Established Business Relationship**

*Background*

Section 2(b) of the Junk Fax Prevention Act—Definition of Established Business Relationship—amends section 227(a) of the Act by providing a definition of an EBR to be used in the context of unsolicited facsimile advertisements. Specifically, section 2(b) adds the following language:

(2) The term 'established business relationship', for purposes only of subsection (b)(1)(C)(i) [creating an EBR exemption for unsolicited facsimile advertisements] shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that—

(A) Such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) An established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G).

Paragraph 2(G)'' refers to Section 2(f) of the Junk Fax Prevention Act. That provision authorizes the Commission to limit the duration of the EBR in the context of unsolicited facsimile advertisements. Specifically, Section 2(f) provides that the Commission:

(G)(i) May, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall—

(I) Determine whether the existence of the exception under paragraph

(1)(C) Relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) Determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) Evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) Determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) May not commence a proceeding to determine whether to limit the duration of

the existence of an established business relationship before the expiration of the 3-month period that begins on the date of the enactment of the Junk Fax Prevention Act of 2005.

*Discussion*

As contemplated by section 2(b) of the statute, the Commission seeks comment on whether to incorporate into the Commission's facsimile advertising rules the following definition of an EBR:

For purposes of paragraph (a)(3) of this section, the term established business relationship means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

The Commission notes that this proposed EBR definition differs from the definition of an EBR in the Commission's rules for telephone solicitations in that it expressly extends the exemption to faxes sent to *both* business and residential subscribers, rather than just residential subscribers. This is consistent with the fact that the prohibition on sending unsolicited facsimile advertisements, unlike telephone solicitations, applies to both businesses and residential subscribers.

The Junk Fax Prevention Act authorizes the Commission, after a period of three months from the date of enactment of the Act, to consider limits on the duration of an EBR. Therefore, the Commission takes this opportunity to seek comment on whether to limit the EBR as applied to unsolicited facsimile advertisements. As part of the Commission's review, and as required by the statute, the Commission will evaluate the Commission's complaint data to determine whether the EBR exception has resulted in a significant number of complaints regarding facsimile advertisements, and whether such complaints involve facsimile advertisements sent based on an EBR of a duration that is inconsistent with the reasonable expectations of consumers.

In the context of telephone solicitations, Congress has concluded that the right to call consumers becomes more tenuous over time. *See* House of Representatives Report Number 102–317, page 14. Consistent with the conclusion of the Federal Trade Commission, this Commission has limited the duration of the EBR for telephone solicitations to 18 months following a purchase or transaction and three months after an application or inquiry. The Commission concluded that this 18/3-month limitation on the duration of an EBR strikes an appropriate balance between industry practices and consumers' privacy interests. Accordingly, the Commission seeks comment on whether it is appropriate to limit the EBR duration for unsolicited facsimile advertisements in the same manner as telephone solicitations. To the extent that commenters suggest EBR durations for facsimile advertisements that may vary from those imposed on telephone solicitations, including not adopting any limitation on the duration of the facsimile EBR, the Commission seeks empirical evidence to distinguish the Commission's findings relating to the EBR duration for telephone solicitations.

In addition, as set forth in the Junk Fax Prevention Act, the Commission seeks comment on the benefits to facsimile recipients of limits on the EBR. Are there direct costs to consumers associated with receiving facsimile advertisements, such as costs for paper, toner, and time spent collecting and sorting faxes that weighs in favor of limiting the facsimile EBR? Are there direct benefits to consumers of having an EBR that is not limited in duration? If the Commission adopts any such limits on the EBR, the Commission also asks commenters to describe the costs to senders of demonstrating the existence of an EBR that is limited in duration. Would these costs be overly burdensome, particularly for small businesses?

**Notice of Opt-Out Opportunity**

*Background*

Section 2(c) of the Junk Fax Prevention Act—Required Notice of Opt-Out Opportunity—amends section 227(b)(2) of the Act by adding language that requires senders of unsolicited facsimile advertisements to include a notice on the first page of the facsimile that informs the recipient of the ability and means to request that they not receive future unsolicited facsimile advertisements from the sender. Specifically, section 2(c) requires that the Commission:

(D) Shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—

(i) The notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) The notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) [setting forth the circumstances under which a request to opt-out complies with the Act] is unlawful;

(iii) The notice sets forth the requirements for a request under subparagraph (E);

(iv) The notice includes—

(I) A domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) A cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) The telephone and facsimile machine numbers and cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) The notice complies with the requirements of subsection (d).

*Discussion*

The Commission proposes amending the Commission's rules to comply with the specific notice requirements on unsolicited facsimile advertisements as set forth by Congress in section 2 of the Junk Fax Prevention Act. In addition, the Commission seeks comment on whether it is necessary to set forth in our rules under what circumstances a notice will be considered ''clear and conspicuous.'' If so, the Commission asks commenters to describe those circumstances under which a notice should be considered ''clear and conspicuous.'' As directed by Congress, the Commission also seeks comment on the ''shortest reasonable time'' within which a sender of unsolicited facsimile advertisements must comply with a request not to receive future facsimile advertisements from the sender. The Commission notes that the Commission's rules require that persons or entities making calls for telemarketing purposes must honor a do-not-call request within a reasonable time. The Commission's rules provide that this reasonable period ''may not exceed thirty days from the date of such request.'' The Commission seeks comment on whether this 30-day limitation is the shortest reasonable period in which to expect senders of unsolicited facsimile advertisements to honor a do-not-fax request. If not, the Commission seeks empirical evidence

from commenters to support proposals for longer or shorter periods.

The Commission notes that the Commission's rules currently require senders of facsimile messages to identify themselves on the message, along with the telephone number of the sending machine or the business, other entity, or individual sending the message. The Commission therefore seeks comment on the interplay between this identification requirement and the notice requirement described above for senders of unsolicited facsimile advertisements. The Commission seeks comment on ways to minimize the burdens associated with complying with these separate requirements that are consistent with the goals of the TCPA and its recent amendments.

As provided by the Junk Fax Prevention Act, the Commission also seeks comment on whether to exempt certain classes of small business senders from the requirement to provide a cost-free mechanism for a recipient to transmit a request not to receive future facsimile advertisements. In particular, the Commission seeks empirical information as to whether the costs to such small businesses are unduly burdensome given the revenues generated by such small businesses. Should the Commission decide to exempt certain classes of small businesses from the requirement, the Commission seeks specific information on how such ''classes'' of small businesses may be defined. Do the Small Business Administration's Standard Industrial Classification regulations provide any useful guidance? Are there any legal impediments to adopting a definition of small business or class of small businesses for use in this context that may deviate from the SBA's standard definition? Does the Junk Fax Prevention Act provide sufficient authority to allow the Commission to adopt a small business classification that varies from the SBA? Would such an exemption for small business senders have any adverse impact on consumers and businesses who receive facsimile advertisements from small businesses? Are there alternative mechanisms available so that recipients are able to request of any small business that it not send future unsolicited advertisements?

In addition, the Commission seeks comment on whether the Commission needs to enumerate specific ''cost-free'' mechanisms for a recipient to transmit a do-not-fax request, and, if so, the Commission seeks comment on what those specific mechanisms should be. For instance, should the provision of a toll-free telephone number, website, or email address for receiving do-not-fax requests, comply with this requirement? Should a local telephone number be considered a ''cost-free'' mechanism if the unsolicited facsimile advertisements are sent only to local consumers? The Commission seeks comment on these issues and any other issues commenters may consider pertinent to this topic.

**Request to Opt-Out of Future Unsolicited Advertisements**

*Background*

Section 2(d) of the Junk Prevention Act—Request to Opt-Out of Future Unsolicited Advertisements—amends section 227(b)(2) of the Act by adding language that sets forth when a request not to send future unsolicited facsimile advertisements complies with the Act. Specifically, section 2(d) states that the Commission:

> (E) Shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—
>
> (i) The request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;
>
> (ii) The request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and
>
> (iii) The person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine.

*Discussion*

The Commission proposes adopting the requirements provided in the Junk Fax Prevention Act regarding the making of a request not to receive future unsolicited facsimile advertisements. Section 2(a) of the Junk Fax Prevention Act provides that ''the exception under clauses (i) and (ii) [creating the EBR exemption] shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine* * *.'' The Commission seeks comment on whether the Commission's rules should reflect that a do-not-fax request terminates the EBR exemption with the sender of the facsimile even if the recipient continues to do business with the sender. The Commission seeks comment on whether to specify that if the sender of the facsimile advertisement is a third party agent or fax broadcaster that any do-not-fax request sent to that sender will extend to the underlying business on whose behalf the fax is transmitted. The Commission also seeks comment on whether there are any other methods of communication that the Commission should prescribe for making a do-not-fax request other than those required in the notice section discussed above (*i.e.*, a domestic contact telephone and facsimile number and a cost-free mechanism). Should, for instance, a sender be required to honor a request made by mail or e-mail even if such addresses are not necessarily provided by the sender in the facsimile communication's ''opt-out'' notice? Finally, the Commission seeks comment on situations in which a consumer that has made a do-not-fax request of a sender subsequently provides express invitation or permission to receive facsimile advertisements from that entity. Should the facsimile sender bear the burden of proof to demonstrate that it had the consumer's express invitation or permission to send the facsimile advertisement?

**Authority To Establish Nonprofit Exception**

*Background*

Section 2(e) of the Junk Fax Prevention Act—Authority to Establish Nonprofit Exemption—amends section 227(b)(2) of the Act by adding language that authorizes the Commission to consider exempting nonprofit organizations from the notice requirements discussed above. Specifically, section 2(e) provides that the Commission:

> (F) May, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only—
>
> (i) By regulation issued after public comment; and
>
> (ii) If the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements[.]

*Discussion*

The Commission seeks comment on whether the Commission should allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the associations' tax-exempt purpose that

do not contain the ''opt-out'' notice required by the Junk Fax Prevention Act. In particular, the Commission seeks comment on whether such notice is necessary to protect the ability of members of such associations to stop the sending of any future unsolicited advertisements. For example, how will members of such associations obtain the necessary information to opt-out if associations are not required to provide such information? What benefits, if any, are there to nonprofit organizations if the Commission exempts them from this requirement? How should the Commission determine whether an unsolicited advertisement is sent ''in furtherance of the association's tax-exempt purpose?'' The Commission seeks comment on these issues and any other issues commenters may consider pertinent to this topic.

**Unsolicited Advertisement**

*Background*

Section 2(g) of the Junk Fax Prevention Act—Unsolicited Advertisement—amends section 227(a)(5) of the Act which defines the term ''unsolicited advertisement'' by adding ''in writing or otherwise'' before the period at the end of that section.

*Discussion*

The Commission proposes amending the definition of unsolicited advertisement in § 64.1200(f)(10) of the Commission's rules to read as follows:

> The term unsolicited advertisement means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

In addition, the Commission seeks comment on the phrase ''prior express invitation or permission'' in the definition. In addition to written permission, what other forms of permission should be allowed by our rules? If permission is given orally, for instance, should the facsimile sender bear the burden of proof to demonstrate that it had the consumer's prior express invitation or permission?

*Other Issues: Creation of CG Docket No. 05–338*

In this *NPRM*, the Commission opens a new docket—CG Docket No. 05–338. All filings in response to this *NPRM* and those addressing the Commission's facsimile advertising rules generally, should be filed in CG Docket No. 05–338. Although the Commission urges parties that previously filed in CG Docket No. 02–278 on the facsimile advertising rules to re-file in new CG Docket No. 05–338, such filings nevertheless will be considered in this proceeding. Therefore, the Commission incorporates by reference comments filed in CG Docket No. 02–278 that are responsive to the issues raised in this proceeding. The existing TCPA docket, CG Docket 02–278, will remain open for other TCPA-related filings.

**Initial Regulatory Flexibility Analysis**

As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Notice of Proposed Rulemaking (*NPRM*). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by January 18, 2006. The Commission will send a copy of the *NPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.

*A. Need for, and Objectives of, the Proposed Rules*

On July 9, 2005, the Junk Fax Prevention Act was signed into law amending the provisions of section 227 of the Communications Act. The Junk Fax Prevention Act codifies an established business relationship exemption to the provision which prohibits the sending of unsolicited facsimile advertisements. It also requires the sender of a facsimile advertisement to provide specified notice and contact information on the facsimile that allows recipients to ''opt-out'' of any future facsimile transmissions from the sender. It also requires the Commission to issue regulations to implement the amendments within 270 days of the date of enactment of the statute. Therefore, the proposed rules are necessary to comply with this congressional mandate and to provide additional guidance to regulated entities that must comply with the federal statute. The proposed modifications to the Commission's existing rules are necessary if they are to be consistent with the amendments made by the Junk Fax Prevention Act.

In this *NPRM*, the Commission proposes a number of modifications to the Commission's rules on unsolicited facsimile advertisements. The Commission proposes amending § 64.1200(a)(3) of the Commission's rules to expressly recognize an established business relationship (EBR) exemption. The Commission also proposes removing § 64.1200(a)(3)(i) of the Commission's rules which provides that a facsimile advertisement is unsolicited unless the recipient has granted the sender prior express invitation or permission to deliver the advertisement, as evidenced by a signed, written statement that clearly indicates the recipient's consent to receive such facsimile advertisements from the sender. The Commission also proposes amending the Commission's rules to permit senders to send facsimile advertisements to persons with whom an established business relationship was formed prior to July 9, 2005, provided the facsimile number was in the sender's possession before July 9, 2005. In addition, the Commission proposes incorporating into our rules the definition of ''established business relationship'' that applied to telephone solicitations and was in effect on January 1, 2003. The Commission also seeks comment on whether to limit the duration of the EBR as applied to facsimile advertising.

The Junk Fax Prevention Act requires senders of unsolicited facsimile advertisements to include a notice on the first page of the facsimile that informs the recipient of the ability and means to request that they not receive future unsolicited facsimile advertisements from the sender. Therefore, the Commission proposes amending the Commission's rules consistent with these specific notice requirements and clarifying under what circumstances a notice will be considered ''clear and conspicuous.'' Additionally, the Commission proposes defining the ''shortest reasonable time'' within which a sender of unsolicited facsimile advertisements must comply with a request not to receive future facsimile advertisements from the sender. The Commission also proposes adopting the requirements provided in the Junk Fax Prevention Act regarding the making of a request not to receive future unsolicited facsimile advertisements. The request would need to identify the numbers of the telephone facsimile machine or machines and be made to the sender of the advertisement.

As contemplated by the Junk Fax Prevention Act, the proposed rules also address the ability of professional or trade associations that are tax-exempt nonprofit organizations to send to their members unsolicited advertisements in furtherance of the association's tax-exempt purpose that do not contain the ''opt-out'' notice required by the statute. In addition, the proposed rules address

the ability of small business senders to provide ''cost-free'' mechanisms for recipients to transmit opt-out requests. Finally, the Commission proposes amending the definition of ''unsolicited advertisement'' so that it is consistent with the definition in the Junk Fax Prevention Act.

*B. Legal Basis*

The proposed action is authorized under sections 1–4, 227 and 303(r) of the Communications Act of 1934, as amended; 47 U.S.C. 151–154 and 227, and the Junk Fax Prevention Act of 2005, Public Law Number 109–21, 119 Statute 359.

*C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply*

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

The Commission's rules on the sending of unsolicited facsimile advertisements would apply to any entity, including any telecommunications carrier, that uses the telephone facsimile machine to advertise. Thus, the Commission expects that the proposals in this NPRM could have a significant economic impact on a substantial number of small entities, including the following:

*Interexchange Carriers.* Neither the Commission nor the SBA has developed a specific size standard for small entities specifically applicable to providers of interexchange services. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees. According to the FCC's *Telephone Trends Report* data, 281 carriers reported that their primary telecommunications service activity was the provision of interexchange services. Of these 281 carriers, an estimated 254 have 1,500 or fewer employees, and 27 have more than 1,500 employees. Consequently, the Commission estimates that a majority of interexchange carriers may be affected by the rules.

*Incumbent Local Exchange Carriers.* Neither the Commission nor the SBA has developed a small business size standard for providers of incumbent local exchange services. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees. According to the *FCC's Telephone Trends Report* data, 1,310 incumbent local exchange carriers reported that they were engaged in the provision of local exchange services. Of these 1,310 carriers, an estimated 1,025 have 1,500 or fewer employees and 285 have more than 1,500 employees. Consequently, the Commission estimates that the majority of providers of local exchange service are small entities that may be affected by the rules and policies adopted herein.

*Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of ''Paging'' and ''Cellular and Other Wireless Telecommunications.'' Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year. Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more. Thus, under this category and associated small business size standard, the great majority of firms can be considered small. For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year. Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more. Thus, under this second category and size standard, the great majority of firms can, again, be considered small.

Ordinarily, the Commission does not seek comment on the entities that must comply with proposed rules. However, the proposed rules in this document potentially could apply to any entity, including any telecommunications carrier, that sends an unsolicited advertisement to a telephone facsimile machine. Thus, under these unusual circumstances, the Commission seeks comment on whether the approximately 4.44 million small business firms in the United States, as identified in SBA data, will need to comply with these rules, or whether it is reasonable to assume that only a subset of them will be subject to these rules given that not all small businesses use the facsimile machine for advertising purposes. After evaluating the comments, the Commission will examine further the effect any rule changes might have on small entities not named herein, and will set forth our findings in the final Regulatory Flexibility Analysis.

*D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements*

The *NPRM* seeks comment on a number of rule changes that will affect reporting, recordkeeping and other compliance requirements for entities sending unsolicited facsimile advertisements. The proposed rules will apply to all entities using telephone facsimile machines to send unsolicited advertisements. If the Commission adopts an EBR exemption to the prohibition on sending unsolicited facsimile advertisements, many entities that send such messages only to their EBR customers will not be required to obtain separate permission from recipients, thereby potentially minimizing some of the compliance requirements. However, in the event a question arises about the existence of an EBR or the duration of the EBR, the sender might need to maintain records evidencing the EBR and when the EBR was formed. Such records might also need to demonstrate whether or not the facsimile number was in the sender's possession before date of enactment of the Junk Fax Prevention Act. Because the Commission determined in 1992 that an EBR could evidence permission to send a facsimile advertisement, the Commission believes most senders of facsimile advertisements currently maintain these records and will not be required to take any new action to comply with the proposed rules.

In addition, the *NPRM* proposes adopting the specific notice requirements on unsolicited facsimile advertisements set forth in section 2 of the Junk Fax Prevention Act. As mandated by the Junk Fax Prevention Act, senders of unsolicited advertisements must include a notice on the first page of the facsimile that informs the recipient of the ability and means to request that they not receive future unsolicited advertisements from the sender. Under the Junk Fax Prevention Act, the notice must be on the first page of the advertisement; be clear and conspicuous; include a domestic contact telephone and facsimile machine number for the

recipient to transmit an opt-out request to the sender; and provide a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the advertisement. Finally, the telephone and facsimile machine numbers and cost-free mechanism must permit an individual or business to make such a request at any time on any day of the week. Should the Commission adopt the notice requirements in the Junk Fax Prevention Act, senders would need to take steps to ensure that their facsimile advertisements contained the notice and that such notice meets any specific criteria as outlined above. In addition, senders of facsimile advertisements must implement a cost-free mechanism, if they do not already have one in place, to allow recipients of such messages to request not to receive future advertisements.

The *NPRM* also seeks comment on the ''shortest reasonable time'' within which a sender of facsimile advertisements must comply with a request not to receive future facsimile advertisements from the sender. If the Commission adopts a 30-day limitation, or an alternative time period, within which senders of unsolicited facsimile advertisements must honor a do-not-fax request, entities subject to the rules would need to make sure to utilize some recordkeeping system to ensure that such requests are honored within 30 days or an alternative period of time. Finally, should the Commission require the fax sender to bear the burden of proof to demonstrate that a consumer provided express invitation or permission to receive a facsimile advertisement after the consumer had previously made a do-not-fax request, the sender would likely need to maintain some record of that permission.

*E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered*

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

In proposing rules to implement the Junk Fax Prevention Act, the Commission also considers alternatives that potentially could minimize the burdens on, or simplify compliance requirements for, small businesses. First, the Commission considers exempting certain classes of small business senders from the requirement to provide a cost-free mechanism for a recipient to transmit a request not to receive future facsimile advertisements. In considering this alternative, the Commission will evaluate the costs to such small businesses of providing the cost-free mechanism and whether such costs are unduly burdensome given the revenues generated by small businesses. The Commission also compares and evaluates alternative ''cost-free'' mechanisms that businesses might utilize to minimize burdens on small businesses, but still allow recipients to request of any small business that it not send future facsimile advertisements. Finally, in determining whether to limit the duration of the EBR, the Commission will consider the costs to small businesses of demonstrating the existence of a limited EBR.

In addition, the Commission considers exempting certain nonprofit organizations from the notice requirements in the Junk Fax Prevention Act. This alternative proposal will allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the associations' tax-exempt purpose that do not contain the ''opt-out'' notice required by the Junk Fax Prevention Act. Should the Commission determine that such notice is not necessary to protect the ability of members of such associations to stop the sending of any future unsolicited advertisements, this alternative approach could minimize compliance burdens on those professional and trade associations that are small businesses.

As described above, the Junk Fax Prevention Act requires that senders of facsimile advertisements include notices stating that the recipients may request not to receive any future unsolicited facsimile advertisements. The Commission is considering alternative time periods within which a sender of unsolicited facsimile advertisements must comply with a request not to receive future facsimile advertisements from the sender. The Commission will compare and evaluate these alternative time periods to ensure that they are the ''shortest reasonable time periods'' within which senders can comply with the rules and that they are not overly burdensome to small businesses.

*F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule*

The Commission's proposal in this *NPRM* to expressly recognize an EBR exemption to the prohibition on sending unsolicited facsimile advertisements appears to conflict with § 64.1200(a)(3)(i) of the Commission's existing rules. Therefore, this *NPRM* proposes revising or removing § 64.1200(a)(3)(i) of the Commission's rules, which provides that a facsimile advertisement is unsolicited unless ''the recipient has granted the sender prior express invitation or permission to deliver the advertisement, as evidenced by a signed, written statement that * * * clearly indicates the recipient's consent to receive such facsimile advertisements from the sender.''

**Ordering Clauses**

Pursuant to the authority contained in sections 1–4, 227, and 303(r), of the Communications Act of 1934, as amended; 47 U.S.C. 151–154, 227, and 303(r); the Junk Fax Prevention Act of 2005, and § 64.1200 of the Commission's rules, 47 CFR 64.1200, 64.2401, this *Notice of Proposed Rulemaking* in CG Docket 02–278 *is adopted*.

CG Docket No. 05–338 *shall be* created for this proceeding and for other issues related to the Commission's facsimile advertising rules.

The Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of the *Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. 05–24211 Filed 12–16–05; 8:45 am]

BILLING CODE 6712–01–P

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 648**

**RIN 0648–AT20**

**[Docket No. 051128313–5313–01; I.D. 111705C]**

## Fisheries of the Northeastern United States; Atlantic Bluefish Fisheries; 2006 Atlantic Bluefish Specifications; 2006 Research Set-Aside Project

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes 2006 specifications for the Atlantic bluefish fishery, including state-by-state commercial quotas, a recreational harvest limit, and recreational possession limits for Atlantic bluefish off the east coast of the United States. The intent of these specifications is to establish the allowable 2006 harvest levels and possession limits to attain the target fishing mortality rate (F), consistent with the stock rebuilding program in Amendment 1 to the Atlantic Bluefish Fishery Management Plan (FMP).

**DATES:** Written comments must be received no later than 5 p.m. eastern standard time, on January 3, 2006.

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

- E-mail: *BF2006SPECS@noaa.gov*. Include in the subject line the following identifier: ''Comments on 2006 Bluefish Specifications.''
- Federal e-Rulemaking portal: *http://www.regulations.gov*.
- Mail: Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope: ''Comments on 2006 Bluefish Specifications.''
- Fax: (978) 281–9135.

Copies of the specifications document, including the Environmental Assessment, Regulatory Impact Review, and Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) and other supporting documents for the specifications are available from Daniel Furlong, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South Street, Dover, DE 19901–6790. The specifications document is also accessible via the Internet at *http://www.nero.noaa.gov*.

The Northeast Fisheries Science Center's 41st Stock Assessment Review Committee (SARC) summary and panelist reports are available at *http://www.nefsc.noaa.gov/nefsc/saw/saw41/*.

**FOR FURTHER INFORMATION CONTACT:** Bonnie Van Pelt, Fishery Policy Analyst, (978) 281–9244.

**SUPPLEMENTARY INFORMATION:**

### Background

The regulations implementing the Atlantic Bluefish Fishery Management Plan (FMP) are prepared by the Mid-Atlantic Fishery Management Council (Council) and appear at 50 CFR part 648, subparts A and J. Regulations requiring annual specifications are found at 648.160. The management unit for bluefish (*Pomatomus saltatrix*) is U.S. waters of the western Atlantic Ocean.

The FMP requires that the Council recommend, on an annual basis, total allowable landings (TAL) for the fishery, consisting of a commercial quota and recreational harvest limit. The annual review process for bluefish requires that the Council's Bluefish Monitoring Committee (Monitoring Committee) review and make recommendations based on the best available data including, but not limited to, commercial and recreational catch/landing statistics, current estimates of fishing mortality, stock abundance, discards for the recreational fishery, and juvenile recruitment. Based on the recommendations of the Monitoring Committee, the Council makes a recommendation to the Northeast Regional Administrator (RA). This FMP is a joint plan with the Atlantic States Marine Fisheries Commission (Commission); therefore, the Commission meets during the annual specification process to adopt complimentary measures.

The Council's recommendations must include supporting documentation, concerning the environmental, economic, and social impacts of the recommendations. NMFS is responsible for reviewing these recommendations to assure they achieve the FMP objectives, and may modify them if they do not. NMFS then publishes proposed specifications in the **Federal Register**. After considering public comment, NMFS will publish final specifications in the **Federal Register**.

In July 2005, the Monitoring Committee accepted the most recent bluefish stock assessment as the basis for its specification recommendations to the Council. In August 2005, the Council approved the Monitoring Committee's recommendations and the Commission's Bluefish Board (Board) adopted complementary management measures.

### Proposed Specifications

Stock Assessment

The SARC rejected the previous bluefish assessment in 2004, because of the instability of estimates derived from a catch/effort stock assessment model. A new model, called the age-structured assessment program (ASAP) model was used to assess the bluefish stock in 2005 and was reviewed by the SARC during the 41st Stock Assessment Workshop (SAW–41) in June 2005. The ASAP model is based on new methods for calculating biological reference points and biomass estimates (*i.e.*, thresholds and targets for defining whether bluefish is overfished or whether overfishing is occurring). Although there were opposing viewpoints regarding the use of the ASAP model among the participating SAW–41 panel members, two of the panelists felt that the assessment was adequate for management purposes. The panelists also recognized the need for a recreational catch rate abundance index, better information on discard rates and mortality, and an improved modeling approach (see **ADDRESSES** for link to panelist reports).

According to Amendment 1 to the FMP (Amendment 1), overfishing for bluefish occurs when F exceeds the fishing mortality rate that allows maximum sustainable yield ($F_{MSY}$), or the maximum F threshold. The stock is considered overfished if the biomass (B) falls below the minimum biomass threshold, which is defined as $\frac{1}{2}B_{MSY}$. The Amendment also established that the long term target F ($F_{0.1}$) is 90 percent of $F_{MSY}$, and the long term target B is $B_{MSY}$.

The SAW–41 model results generated new biological reference points: (1) Maximum fishing mortality threshold or $F_{MSY} = 0.19$; (2) $F_{0.1} = 0.18$, the long term fishing mortality target; (3) minimum biomass threshold, or $\frac{1}{2}$ $B_{MSY}$ = 73.5 million lb (33,351 mt); and (4) $B_{MSY}$ = 147 million lb (66,678 mt), the long term biomass target. Based on the new biological reference points, and the 2004 estimate of bluefish stock biomass (104 million lb (47,235 mt)), the bluefish stock is not considered overfished. Estimates of fishing mortality have declined from 0.41 in 1991 to 0.15 in 2004. Therefore, the new model results also conclude that the Atlantic stock of bluefish is not experiencing overfishing, *i.e.*, the model estimated the maximum fishing mortality threshold, $F_{MSY} = 0.19$, and since $F_{2004} = 0.15$, $F_{2004} < F_{MSY}$.

2006 TAL

The FMP specifies that the bluefish stock is to be rebuilt to $B_{MSY}$ over a 9-year period. The FMP requires the Council to recommend, on an annual basis, a level of total allowable catch (TAC) consistent with the rebuilding program in the FMP. An estimate of annual discards is deducted from the TAC to calculate the total allowable landings (TAL) that can be made during the year by the commercial and recreational fishing sectors combined. The TAL is composed of a commercial quota and a recreational harvest limit. The FMP rebuilding program requires the TAC for any given year to be set based either on the target F resulting from the stock rebuilding schedule specified in the FMP (0.31 for 2006), or the F estimated in the most recent fishing year ($F_{2004}$ = 0.15), whichever is lower. Therefore, the 2006 recommendation is based on an estimate F of 0.15. Furthermore, the best information available indicates that the TAC of 29.147 million lb (13,221 mt) could achieve the target F (F = 0.15) in 2006, based on an estimated biomass of 104 million lb (47,235 mt) in 2004.

The TAL for 2006 is derived by subtracting an estimate of discards of 4.348 million lb (1,972 mt), the average discard level from 2000–2004, from the TAC. After subtracting estimated discards, the 2006 TAL would be approximately 24 percent less than the 2005 TAL, or 24.799 million lb (11,249 mt). Based strictly on the percentages specified in the FMP (17 percent commercial, 83 percent recreational), the commercial quota for 2006 would be 4.216 million lb (1,912 mt), and the recreational harvest limit would be 20.583 million lb (9,336 mt) in 2006. In addition, up to 3 percent of the TAL may be allocated as RSA quota. The discussion below describes the recommended allocation of TAL between the commercial and recreational sectors, and its proportional adjustment downward to account for the recommended bluefish RSA quota.

**Proposed Commercial Quota and Recreational Harvest Limit**

The FMP stipulates that in any year in which 17 percent of the TAL is less than 10.500 million lb (4,763 mt), the commercial quota may be increased up to 10.500 million lb (4,763 mt) as long as the recreational fishery is not projected to land more than 83 percent of the TAL in the upcoming fishing year, and the combined projected recreational landings and commercial quota would not exceed the TAL. Given recreational harvest trends in recent years—an average of 12.698 million lb (5,760 mt) over the last 5 years—the Council and the Board recommended that the recreational harvest limit for 2006 approximate 2004 recreational landings (15.146 million lb (6,870 mt)). Therefore, consistent with the FMP and regulations governing the bluefish fishery, the Council recommended, and NMFS proposes, to transfer 5.367 million lb (2,434 mt) from the initial recreational allocation of 20.583 million lb (9,336 mt) resulting in a proposed 2006 recreational harvest limit of 15.216 million lb (6,902 mt) and a proposed commercial quota of 9.583 million lb (4,347 mt). These allocations were also recommended by the Commission to be implemented by the states for fisheries within state waters.

**RSA**

A request for proposals was published to solicit research proposals to utilize RSA in 2006 based on research priorities identified by the Council (April 18, 2005; 70 FR 20104). One research project that would utilize bluefish RSA has been approved by the RA and forwarded to the NOAA Grants Office. Therefore, a 363,677 lb (164,961 kg) RSA quota is proposed. Consistent with the allocation of the bluefish RSA, the proposed commercial quota for 2006 would be reduced to 9.442 million lb (4,283 mt) and the proposed recreational harvest limit is reduced to 14.993 million lb (6,801 mt).

**Proposed Recreational Possession Limit**

The Council recommends, and NMFS proposes, to maintain the current recreational possession limit of up to 15 fish per person to achieve the recreational harvest limit.

**Proposed State Commercial Allocations**

The proposed state commercial allocations for the recommended 2006 commercial quota are shown in Table 1 below, based on the percentages specified in the FMP. The table shows the allocations both before and after the deduction made to reflect the proposed RSA allocation.

TABLE 1.—PROPOSED BLUEFISH COMMERCIAL STATE-BY-STATE ALLOCATIONS FOR 2006

| States | Quota | 2006 Commercial quota | | 2006 Commercial quota | |
|---|---|---|---|---|---|
| | Percent share | (lb) | (kg) | (lb) With research set-aside | (kg) With research set-aside |
| ME | 0.6685 | 64,062 | 29,058 | 63,123 | 28,632 |
| NH | 0.4145 | 39,722 | 18,018 | 39,139 | 17,753 |
| MA | 6.7167 | 643,661 | 291,963 | 634,222 | 287,678 |
| RI | 6.8081 | 652,420 | 295,936 | 642,852 | 291,593 |
| CT | 1.2663 | 121,350 | 55,044 | 119,570 | 54,236 |
| NY | 10.3851 | 995,204 | 451,422 | 980,609 | 444,797 |
| NJ | 14.8162 | 1,419,836 | 644,034 | 1,399,014 | 634,582 |
| DE | 1.8782 | 179,988 | 81,642 | 177,348 | 80,444 |
| MD | 3.0018 | 287,662 | 130,483 | 283,444 | 128,568 |
| VA | 11.8795 | 1,138,412 | 516,381 | 1,121,718 | 508,803 |
| NC | 32.0608 | 3,072,386 | 1,393,625 | 3,027,330 | 1,373,174 |
| SC | 0.0352 | 3,373 | 1,530 | 3,324 | 1,508 |
| GA | 0.0095 | 910 | 413 | 897 | 407 |
| FL | 10.0597 | 964,021 | 437,277 | 949,884 | 430,860 |
| Total | 100.0001 | 9,583,000 | 4,346,820 | 9,442,465 | 4,283,031 |

**Classification**

This rule is exempt from review under Executive Order 12866. The Council prepared an IRFA that describes the impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for the action are provided in the preamble of this proposed rule, and in the IRFA. A copy of the complete IRFA can be obtained from the Council (see **ADDRESSES**). A summary of the economic analysis follows.

All vessels affected by this rulemaking have gross receipts less than $3.5 million and are considered small entities under the Regulatory Flexibility Act. Because there are no large entities participating in this fishery, there are no disproportionate effects on small versus large entities. Information on costs in the fishery are not readily available and vessel profitability cannot be determined directly. Therefore, changes in gross revenues were used as a proxy for profitability. In the absence of quantitative data, qualitative analyses were conducted.

The participants in the commercial sector were defined using two sets of data. First, the Northeast dealer reports were used to identify any vessel that reported having landed 1 or more pounds of bluefish during calendar year 2004 (the last year for which there is complete data). These dealer reports identify 748 vessels that landed bluefish in states from Maine to North Carolina. However, this database does not provide information about fishery participation in South Carolina, Georgia, or Florida. To identify those commercial bluefish vessels, South Atlantic Trip Ticket reports were used to identify 819 vessels [1] that landed bluefish in North Carolina and 591 vessels that landed bluefish on Florida's east coast. The bluefish landings in South Carolina and Georgia represented less than 1/10 of 1 percent of total landings, a negligible proportion of the total bluefish landings along the Atlantic coast in 2004. In recent years, approximately 2,063 party/charter vessels may have been active and/or caught bluefish.

The Council analyzed three alternatives (including the no action/status quo alternative) for allocating the TAL between the commercial and recreational sectors of the fishery. Consistent with FMP's rebuilding schedule and the status of the resource as assessed by SARC–41, all of the alternatives were based on an overall TAL of 24.799 million lb (11,249 mt) and included an RSA quota of 363,677 lb (164,961 kg). The alternatives differed only in the manner in which the TAL was allocated between the commercial and recreational sectors.

The recommended alternative, before RSA deduction, would allocate 9.583 million lb (4,347 mt) to the commercial sector and 15,216 million lb (6,902 mt) to the recreational sector. Alternative 2, the most restrictive alternative would have allocated 4.216 million lb (1,912 mt) to the commercial sector and 20.583 million lb (9,336 mt) to the recreational sector, reflecting the traditional allocations derived from the FMP (i.e., the 17-percent commercial/83-percent recreational sector split). Alternative 3 would have allocated 10.500 million lb (4,763 mt) to the commercial sector and 14.299 million lb (6,486 mt) to the recreational sector, reflecting the commercial level that was place from 2002–2005 (i.e., status quo/no action alternative).

For the commercial sector, the recommended coast wide quota is approximately 23 percent higher than 2004 commercial landings. Impacts on individual commercial vessels were assessed by conducting a threshold analysis using the dealer reports for the 748 vessels that landed bluefish from Maine through North Carolina. The analysis projected that there would be no revenue change for 535 out of 748 vessels, while 191 vessels could incur slight revenue losses of less than 5 percent. Another 22 vessels could incur revenue losses of between 5 percent and 39 percent, with the majority of these vessels identifying home ports in New York and North Carolina. According to a threshold impact analysis that compared 2004 landings from the Northeast dealer reports to the recommended 2006 commercial quota allocation, New York could experience decreases in landings up to 30 percent, while overall coast wide landings would increase by approximately 23 percent.

The impacts of the proposed alternative on commercial vessels in the South Atlantic were assessed using trip ticket data. The analysis concluded that as a consequence of the 2006 recommended allocation compared to 2004 landings, there could be decreased landings in North Carolina and Georgia of up to 20 percent and 50 percent, respectively. On average, the potential decrease in landings in North Carolina is expected to be minimal (approximately 2 percent), with no projected revenue losses for vessels that landed in Florida. While the potential percentage decrease in bluefish landings from Georgia appears high, bluefish landed in Georgia represent a very small proportion of the overall coast wide landings (less than 1/10 of 1 percent), so this would represent a very small decrease in absolute terms. The analysis also noted that the provision that allows commercial quota to be transferred from one state to another is likely to result in transfers of quota to New York and North Carolina, from other states, thus mitigating the potential negative revenue impacts. While not assured, such transfers have been made annually in recent years, including 2003 and 2004.

The analysis of Alternative 2 concluded that, for the commercial sector, there would be a 46-percent decrease in total potential commercial landings in 2006 compared to 2004 landings. The analysis of impacts on individual commercial vessels projected that there would be no revenue change for 62 of the 748 vessels that landed bluefish in 2004, while 606 vessels could incur slight revenue losses (less than 5 percent). Another 61 vessels could incur revenue losses between 5 percent and 39 percent, while 19 could incur revenue losses of greater than 39 percent. Nearly all of the vessels projected to incur revenue losses of greater than 5 percent had home ports in New York, New Jersey, or North Carolina. Again, the commercial quota transfer provision could be expected to mitigate some or all of these impacts, although to a lesser extent than in the other alternatives, as all states would have less quota to transfer.

The impacts of Alternative 2 on commercial vessels in the south Atlantic area were assessed using trip ticket data. The analysis concluded that these impacts would result in revenue reductions associated with allowable landings of approximately 65 percent for vessels that landed in North Carolina. However, on average, reductions in landings would be expected to approximate 8 percent for vessels that land in North Carolina. No projected revenue losses are expected for vessels that land in Florida.

The analysis of Alternative 3 concluded that, for the commercial sector, there would be a 34-percent increase in total potential commercial landings in 2006 compared to actual landings in 2004. The analysis of impacts on individual commercial vessels projected that there would be no revenue change for 535 of the 748 vessels that landed bluefish in 2004, while 198 could incur slight revenue losses (less than 5 percent). Another 15 vessels could incur revenue losses between 5 percent and 39 percent. The vessels projected to incur revenue losses

[1] Some of these vessels were identified in the Northeast dealer data, therefore double counting is possible.

of greater than 5 percent had home ports in New York and North Carolina. These revenue losses result from the fact that these two states received quota transfers in 2004 which allowed them to land more than their initial coast wide quotas; however, in the absence of additional quota from transferring states in 2006 there is the potential for revenues to decrease compared to 2004. Similar to the other alternatives, the commercial quota transfer provision could be utilized to mitigate revenue losses, the extent to which would be dependent on a state's willingness and ability to partake in the transfer.

The impacts of Alternative 3 on commercial vessels in the south Atlantic area were assessed using trip ticket data. The analysis concludes that these impacts would result in revenue reductions associated with allowable landings of approximately 1.5 percent for 819 vessels identified as landing in North Carolina and no revenue reductions for vessels landing in Florida.

For the recreational sector of the fishery, there were no negative revenue impacts projected to occur with regard to the recommended recreational harvest limits because this level would be close to the recreational landings in 2004 (15.146 million lb (6,870 mt)), and well above the 5-year average (2000–2004) of 12.698 million lb (5,760 mt). The recommended recreational harvest limit represents the second lowest harvest level when compared with the two other alternatives, exceeding the average recreational landings over the past 5 years by approximately 15 percent. Given recent trends in bluefish recreational landings, the analysis concludes that landings would remain lower than the proposed recreational harvest limit. The recreational fishery impacts are expected to be similar for Alternatives 2 and 3, compared to the recommended measures under Alternative 1. Although there is very little empirical evidence regarding the sensitivity of charter/party anglers to regulation, it is anticipated that the proposed harvest levels will not affect the demand for charter/party boat trips.

The Council also analyzed the impacts on revenues of the proposed RSA amount and found that the social and economic impacts are minimal. Assuming that the full RSA of 363,677 lb (164,961 kg) is landed and sold to support the proposed research project (a supplemental finfish survey in the Mid-Atlantic) then all of the participants in the fishery would benefit from the anticipated improvements in the data underlying the stock assessments. Because the recommended overall commercial quota is higher than 2004 landings, no overall negative impacts are expected in the commercial sector. Based on recent trends in the recreational fishery, recreational landings will more than likely remain below the recommended harvest level in 2006. A full analysis is available from the Council (see **ADDRESSES**).

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

Dated: December 13, 2005.

**James W. Balsiger,**

*Acting Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

[FR Doc. 05–24208 Filed 12–16–05; 8:45 am]

**BILLING CODE 3510–22–P**

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## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 648

**[I.D. 022505B]**

## Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries; Amendment 11 Atlantic Mackerel Limited Access Program

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

**ACTION:** Supplemental notice of intent.

**SUMMARY:** On March 4, 2005, the Mid-Atlantic Fishery Management Council (Council), in cooperation with NMFS, announced its intent to prepare a programmatic supplemental environmental impact statement (SEIS) and Amendment 9 to the Atlantic Mackerel, Squid, and Butterfish Fishery Management Plan (FMP). As a result of that notice, the Council received public comment on the issue of whether or not to consider measures to control or limit future access to the Atlantic mackerel fishery in Amendment 9. Based on public comment received during that scoping comment period, the Council notified the public in a subsequent notice on June 9, 2005, of its intention to move the consideration of the development of a limited access program for mackerel to Amendment 10 to the FMP. Since then, the Council has been notified that it must develop a stock rebuilding program for butterfish as a result of that stock being designated as overfished. Consequently, Amendment 10 will now include a plan to rebuild the overfished butterfish stock. As a result, the Council hereby notifies the public that the mackerel limited access program will now be developed in Amendment 11 to the FMP. While the Council believes that this action will result in a slight delay in the development of a limited access program for Atlantic mackerel, no other changes are anticipated.

**FOR FURTHER INFORMATION CONTACT:** Eric Jay Dolin, Fishery Policy Analyst, 978–281–9259; fax 978–281–9135. e-mail: *eric.dolin@noaa.gov*.

**SUPPLEMENTARY INFORMATION:** Atlantic mackerel (*Scomber scombrus*) is a migratory species that supports important recreational and commercial fisheries along the Atlantic coast of the United States and Canada. The Council has considered the possibility of limiting entry to the Atlantic mackerel fishery for more than a decade. In April 2002, because the Council was concerned about rapid expansion of harvesting capacity in the fishery, possible overcapitalization, and the fact that nearly 5 years had passed since the most recent control date for the fishery was established, the Council requested that a new control date for the Atlantic mackerel fishery be established. As a result, NMFS published an advance notice of proposed rulemaking (ANPR) on July 5, 2002 (67 FR 44792), which established that date as the new control date for the Atlantic mackerel fishery. The ANPR was intended to discourage speculative entry into the fishery while potential management regimes to control access into the fishery were considered by the Council, and to help the Council distinguish established participants from speculative entrants to the fishery, should such a program be developed.

On March 4, 2005 (70 FR 10605), the Council published a notice of intent to prepare an SEIS to consider impacts of alternatives for limiting access to the Atlantic mackerel fishery. The Council subsequently conducted scoping meetings on the development of a limited access program for Atlantic mackerel, which the Council planned to include in Amendment 9 to the FMP. The first scoping meeting was held on March 17, 2005, in Kill Devil Hills, NC, and the second meeting was held on March 28, 2005, in Newport, RI. However, because the Council decided to complete and submit for review by the Secretary of Commerce several other measures in Amendment 9 that were further along in their development than the mackerel limited access program, the Council voted on May 4, 2005, to complete Amendment 9 without a limited access program for the Atlantic mackerel fishery, and to pursue the

Atlantic mackerel limited access program in Amendment 10 to the FMP. NMFS informed the public of the Council's decision in a subsequent notice on June 9, 2005 (70 FR 33728).

Since then, the Council has been notified that it must develop a stock rebuilding program for butterfish as a result of that stock being designated as overfished. The Council was also informed that the stock rebuilding program for butterfish must be developed in an amendment to the FMP rather than in a framework adjustment as the Council had originally intended. Consequently, Amendment 10 will now include a plan to rebuild the overfished butterfish stock. The Council has concluded that Amendment 10 will require only an Environmental Assessment under the requirements of the National Environmental Policy Act (NEPA). As a result, the Council hereby notifies the public that the mackerel limited access program will now be developed in Amendment 11 to the FMP. Other than the sequencing of the amendments to this FMP and a slight time delay, the Council anticipates that the development of the limited access program for mackerel will proceed as described in previous notices to the public. The public will have the opportunity to comment on the measures and alternatives being considered by the Council for Amendment 11 through public meetings and public comment periods required by NEPA, the Magnuson-Stevens Fishery Conservation and Management Act, and the Administrative Procedure Act. This notification also reminds the public that interested participants should locate and preserve records that substantiate and verify their participation in the Atlantic mackerel fishery in Federal waters.

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

Dated: December 13, 2005.

**Alan D. Risenhoover,**

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

[FR Doc. 05–24206 Filed 12–16–05; 8:45 am]

BILLING CODE 3510–22–S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 660

**[Docket No. 051014263–5330–02; I.D. 120805A]**

**RIN 0648–AU00**

## Fisheries Off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Specifications and Management Measures

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes a rule to implement revisions to the 2006 commercial and recreational groundfish fishery management measures for groundfish taken in the U.S. exclusive economic zone (EEZ) off the coasts of Washington, Oregon, and California. Proposed management measures that are new for 2006 are intended to: achieve but not exceed optimum yields (OYs); prevent overfishing; rebuild overfished species; and reduce and minimize the bycatch and discard of overfished and depleted stocks. NMFS additionally proposes to revise the 2006 darkblotched rockfish OY, at the request of the Pacific Fishery Management Council (Pacific Council), and under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). These actions, which are authorized by the Pacific Coast Groundfish Fishery Management Plan (FMP) and the Magnuson-Stevens Act, are intended allow fisheries to access more abundant groundfish stocks while protecting overfished and depleted stocks. Finally, NMFS announces with this **Federal Register** document that the coastwide lingcod stock is no longer considered overfished and is fully rebuilt.

**DATES:** Comments on this proposed rule will be accepted through January 15, 2006.

**ADDRESSES:** You may submit comments, identified by I.D. 120805A by any of the following methods:

- E-mail: *GroundfishInseason6.nwr@noaa.gov*. Include the I.D. number 120805A in the subject line of the message.
- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Fax: 206–526–4646, Attn: Jamie Goen.
- Mail: D. Robert Lohn, Administrator, Northwest Region, NMFS, Attn: Jamie Goen, 7600 Sand Point Way NE, Seattle, WA 98115–0070.

**FOR FURTHER INFORMATION CONTACT:** Jamie Goen (Northwest Region, NMFS), phone: 206–526–6140; fax: 206–526–6736; and e-mail: *jamie.goen@noaa.gov*.

**SUPPLEMENTARY INFORMATION:**

### Electronic Access

This **Federal Register** document is available on the Government Printing Office's website at: *www.gpoaccess.gov/fr/index.html*.

Background information and documents are available at the NMFS Northwest Region website at: www.nwr.noaa.gov/1sustfsh/gdfsh01.htm and at the Pacific Council's website at: www.pcouncil.org.

### Background

The Pacific Coast Groundfish FMP and its implementing regulations at title 50 in the Code of Federal Regulations (CFR), part 660, subpart G, regulate fishing for over 80 species of groundfish off the coasts of Washington, Oregon, and California. Groundfish specifications and management measures are developed by the Pacific Council, and are implemented by NMFS. The specifications and management measures for 2005–2006 were codified in the CFR (50 CFR part 660, subpart G). They were published in the **Federal Register** as a proposed rule on September 21, 2004 (69 FR 56550), and as a final rule on December 23, 2004 (69 FR 77012). The final rule was subsequently amended on March 18, 2005 (70 FR 13118); March 30, 2005 (70 FR 16145); April 19, 2005 (70 FR 20304); May 3, 2005 (70 FR 22808); May 4, 2005 (70 FR 23040); May 5, 2005 (70 FR 23804); May 16, 2005 (70 FR 25789); May 19, 2005 (70 FR 28852); July 5, 2005 (70 FR 38596); August 22, 2005 (70 FR 48897); August 31, 2005 (70 FR 51682); October 5, 2005 (70 FR 58066); October 20, 2005 (70 FR 61063); October 24, 2005 (70 FR 61393); and November 1, 2005 (70 FR 65861).

Acceptable biological catches (ABCs) and OYs are established for each year. Management measures are established at the start of the biennial period, and are adjusted throughout the biennial management period, to keep harvest within the OYs. At the Pacific Council's October 31 - November 4, 2005, meeting in San Diego, CA, the Pacific Council's Groundfish Management Team (GMT) considered 2005 catch data and new West Coast Groundfish Observer

Program (WCGOP) data and made recommendations to adjust groundfish management measures for December 2005 and for all of 2006. Those adjustments were implemented via an inseason action (70 FR 72385, December 5, 2005). The management measures for the remainder of 2006 (March through December) are being implemented through this proposed rule.

The following changes to current groundfish management measures for March through December 2006 were recommended by the Pacific Council, in consultation with Pacific Coast Treaty Indian Tribes and the States of Washington, Oregon, and California, at its October 31–November 4, 2005, meeting in San Diego, CA. The changes recommended by the Pacific Council include: (1) adjustments to the limited entry fixed gear and open access sablefish daily trip limit (DTL) fishery north of 36° N. lat., (2) adjustments to limited entry trawl cumulative limits for sablefish, thornyheads, Dover sole, other flatfish, petrale sole, arrowtooth flounder, slope rockfish, splitnose rockfish, and lingcod, (3) adjustments to limited entry fixed gear and open access cumulative limits for shelf, shortbelly, and widow rockfish south of 34°27′ N. lat. and minor nearshore and black rockfish between 42° N. lat. and 40°10′ N. lat., (4) adjustments to the Rockfish Conservation Area (RCA) boundaries, (5) adjustments to Washington, Oregon and California's recreational groundfish fisheries, (6) establishment of limited entry trawl, limited entry fixed gear, and open access trip limits for Pacific cod and spiny dogfish, (7) adjustments to the tribal management measures for Pacific cod, spiny dogfish and thornyheads and (8) clarification of the non-groundfish trawl rockfish conservation area (RCA). Pacific Coast groundfish landings will be monitored throughout the year, and further adjustments to trip limits, RCAs, or management measures will be made as necessary to allow achievement of, or to avoid exceeding, OYs.

**Limited Entry Trawl Fisheries**

The trawl bycatch model was updated with bycatch and discard rates based on new WCGOP data from September 2004 through April 2005. This update also incorporated four months of data (January through April 2005) from when selective flatfish gear was required shoreward of the trawl RCA north of 40°10′ N. lat. The GMT used the updated trawl bycatch model to analyze adjustments to trawl RCA boundaries and bimonthly limits for target species (sablefish, thornyheads, Dover sole, petrale sole, other flatfish, arrowtooth, slope rockfish, and splitnose rockfish) for 2006. Management measures for March through December are being proposed in this rule.

The Pacific Council recommended adjustments to limited entry trawl cumulative limits for certain target species coastwide, such as sablefish, thornyheads, Dover sole, other flatfish, and arrowtooth flounder, based on projections from the trawl bycatch model. These adjustments for 2006 are projected to keep harvest within the OYs. NMFS concurs with this recommendation; and therefore, is proposing adjusted cumulative limits for these species during March through December 2006 are shown in Table 3 (North) and Table 3 (South). Adjustments to limited entry trawl cumulative limits for other target species are described in detail below.

**Petrale Sole**

In order to avoid exceeding the petrale sole ABC in 2006 and promote year round fishing opportunities, the Pacific Council recommended establishing cumulative limits in the bottom trawl fishery during Period 6 (November through December). In the past, petrale sole landings were not limited during this period. NMFS concurs with this recommendation; and therefore, is proposing that north of 40°10′ N. lat., limited entry trawl large and small footrope limits would be 60,000 lb (27,216 kg) per 2 months during November and December. North of 40°10′ N. lat., limited entry selective flatfish trawl limits would be 25,500 lb (11,567 kg) per 2 months during November and December. South of 40°10′ N. lat., limited entry trawl limits would be 60,000 lb (27,216 kg) per 2 months during November and December.

In response to higher than anticipated catches of petrale sole in 2005, trawl RCA boundaries were adjusted inseason (70 FR 58066, October 5, 2005) to reduce the catch of petrale sole in Period 6. The implementation of petrale sole cumulative limits for Periods 1 and 6 of 2006 should prevent these higher than anticipated catches from reoccurring in 2006. Therefore, the Pacific Council recommended for 2006, to restore the position of the trawl RCA that was initially scheduled for Period 6 in 2005. NMFS concurs with this recommendation; and therefore, is proposing the position of the trawl RCA during Period 6 would be defined by coordinates approximating the following depth contours: (1) north of 40°10′ N. lat., it extends between the 200–fm (366–m), modified to exclude certain petrale sole areas from the RCA, and the 75–fm (137–m) depth contours; (2) between 40°10′ N. lat. and 34°27′ N. lat., it extends between the 150–fm (274–m) and the 75–fm (137–m) depth contours; and (3) south of 34°27′ N. lat., it extends between the 150–fm (274–m) and the 75–fm (137–m) depth contours along the mainland coast and between the 150–fm (274–m) depth contour and the shoreline around islands.

**Slope and Splitnose Rockfish Limits Between 40°10′ N. lat. and 38° N. lat.**

At the most recent Pacific Council meeting, the GMT considered a request to liberalize management measures for minor slope and splitnose rockfish in 2006. The harvest of these species has been constrained in recent years because they co-occur with darkblotched rockfish, an overfished rockfish species.

Darkblotched rockfish are not distributed uniformly along the coast but instead are most concentrated in waters off Washington and northern Oregon, with a gradient of decreasing density extending south. Only about three percent of the NMFS triennial bottom trawl survey's cumulative catch-per-unit-effort of darkblotched rockfish occurs south of 38° N. lat. This observation of decreased density led to implementation of a management line at 38° N. lat. that allows slope management south of 38° N. lat. to be separated from management actions needed to rebuild darkblotched, and allows the severity of management measures between 40°10′ N. lat. and 38° N. lat. to be intermediate to those for areas south of 38° N. lat. and north of 40°10′ N. lat.

Darkblotched rockfish bycatch rates between 40°10′ N. lat. and 38° N. lat. at depths greater than 150–fm (274–m) are considerably lower than those for the same depth range north of 40°10′ N. lat. When bycatch rates for darkblotched rockfish between 40°10′ N. lat. and 38° N. lat. are compared to bycatch rates from depths greater than 200 fm (366 m) north of 40°10′ N. lat., the rates are similar. Given this information, the GMT does not recommend greatly increasing slope and splitnose rockfish cumulative limits as well as implementing a shallower trawl RCA, such as the trawl RCA that is in place south of 38° N. lat., in the area between 40°10′ N. lat. and 38° N. lat. Cumulative slope and splitnose rockfish limits on the order of 20,000 lb (9,072 kg) per 2 months could likely be allowed if the seaward trawl RCA boundary approximated the 200–fm (366–m) depth contour. However, availability of slope and splitnose rockfish species is limited at depths greater than 200–fm

(366–m). Alternatively, slope and splitnose rockfish cumulative limits of 8,000 lb (3,628 kg) per 2 months could be used in conjunction with a seaward trawl RCA boundary approximating the 150–fm (274–m) depth contour. The Pacific Council continues to recommend management measures for this area that are intermediate in severity to those used in the areas north of 40°10′ N. lat. and south of 38° N. lat. After feedback from the Pacific Council's Groundfish Advisory Panel and the trawl industry, the Pacific Council recommended minor adjustments to cumulative limits and the position of the trawl RCA.

NMFS concurs with this recommendation. Therefore, slope and splitnose rockfish cumulative limits are proposed to be increased from 4,000 (1,814 kg) per 2 months to 8,000 lb (3,628 kg) per 2 months and the seaward trawl RCA boundary would approximate the 150–fm (274–m) depth contour, rather than the 200–fm (366–m) depth contour for the area between 40°10′ N. lat. and 38° N. lat for 2006. This regulatory change is expected to allow trawl fisheries in this area to access more abundant slope rockfish species while still maintaining a low incidental catch of darkblotched rockfish.

**Lingcod**

Lingcod has rebuilt quickly in recent years and is being caught in greater numbers in a range of fisheries coastwide. WCGOP data shows that there is considerable discard of lingcod in the limited entry bottom trawl fishery and suggests that allowing increased retention of lingcod may reduce discard. In 2005, north of 40°10′N. lat., the lingcod selective flatfish trawl limit was 800 lb (363 kg) per 2 months for January through April and September through December, while it was 1,000 lb (454 kg) per 2 months for May through July. The lingcod large and small footrope limits for 2005 were 500 lb (227 kg) per 2 months. South of 40°10′N. lat., the lingcod small footrope limit was 800 lb (363 kg) per 2 months for January through April and September through December, and was 1,000 lb (454 kg) per 2 months for May through July. The lingcod midwater limit south of 40°10′N. lat. was 500 lb (227 kg) per 2 months. In 2005, the lingcod large footrope limits were the same north and south of 40°10′ N. lat. While a substantial increase in lingcod cumulative limits may encourage targeting of lingcod and allow additional bycatch of overfished species (which tend to reside in areas of similar rocky habitat), the Pacific Council believed that a modest increase in lingcod retention could be allowed without negatively affecting lingcod or co-occurring overfished species. In 2004 and 2005, lingcod harvest has been well under its rebuilding OY (by more than 100 mt) and these cumulative limit increases are not projected to affect total lingcod mortality but instead change lingcod discard into landings.

Therefore, the Pacific Council recommended that lingcod cumulative limits in the limited entry trawl fishery be increased to 1,200 lb (544 kg) per 2 months coastwide for all gear types. NMFS concurs with this recommendation and proposes to implement this adjustment.

**Canary Rockfish**

Based on landings of canary rockfish in the 2005 fishery and discard rate estimates from the WCGOP, the mortality of canary rockfish in the limited entry bottom trawl fishery is higher than originally predicted for the year. In order to reduce mortality of canary rockfish in the 2006 fishery, the GMT modeled options expanding the size of the trawl RCA north of 40°10′ N. lat. by moving the shoreward boundary from approximating the 100–fm (183–m) depth contour to approximating the 75–fm (137–m) depth contour during Periods 2 , 3, and 5. This expansion should reduce the catch of canary rockfish catch shoreward of the trawl RCA in areas north of 40°10′ N. lat.

By applying the discard rates from the WCGOP inseason, it was estimated that the limited entry trawl fishery had caught 9.5 mt of canary rockfish by the end of September 2005. The position of the trawl RCA (extending between the 250–fm (457–m) depth contour to the shoreline) from October 1 - December 31, 2005, is anticipated to effectively keep canary total catch at 9.5 mt through the end of 2005. Using the revised bycatch rates from the WCGOP, including data through April 2005, the proposed limited entry trawl trip limits for 2006 would result in an estimated canary rockfish impact of 7.3 mt. When these revised bycatch rates are used in conjunction with 2005 management measures, the bycatch model is able to closely approximate the amount of canary rockfish estimated to be taken during 2005. However, the updated model does not include new bycatch data beyond Period 2 in 2005 and the Pacific Council and NMFS are still concerned with the degree of uncertainty in projections of the catch of overfished species with selective flatfish trawl gear. Groundfish fisheries will continue to be monitored in 2006 and further inseason adjustments may be necessary.

Therefore, the Pacific Council recommended and NMFS is proposing a trawl RCA that extends between specific latitude and longitude coordinates approximating the 200–fm (366–m) depth contour to coordinates approximating the 75–fm (137–m) depth contour for Periods 2, 3, and 5 north of 40°10′ N. lat. During Period 4, in the area north of 40°10′ N. lat., the trawl RCA would extend between coordinates approximating the 200–fm (366–m) depth contour and the 100–fm (183–m) depth contour as was previously scheduled.

*Limited Entry Fixed Gear and Open Access Fisheries Sablefish Limits North of 36° N. lat.*

In recent years, the sablefish daily trip limit (DTL) fishery north of 36° N. lat. has caught substantially less than its allocation. Therefore, the GMT believes that some liberalization of sablefish DTL cumulative limits is warranted. In 2005, the sablefish limited entry and open access DTL limits for January through September were 300 lb (136 kg) per day, or 1 landing per week up to 900 lb (408 kg), not to exceed 3,600 lb (1,633 kg) per 2 months. These sablefish DTL cumulative limits were increased for October through December to 500 lb (227 kg) per day, or 1 landing per week up to 1,500 lb (680 kg), not to exceed 9,000 lb (4,082 kg) per 2 months. The GMT is concerned with the lack of effort controls in this fishery and recommended a cautious approach to increasing its cumulative sablefish limits. The Pacific Council considered two options for increasing sablefish DTL limits. The first option maintained the previously scheduled daily limit of 300 lb (136 kg) per day, increased the weekly limit to 1,000 lb (454 kg), and increased the two month limit to 5,000 lb (2,268 kg). The second option increased the daily limit to 400 lb (181 kg), increased the weekly limit to 1,200 lb (544 kg), and increased the 2–month limit to 4,800 lb (2,177 kg). Because radical changes in effort for this fishery have historically been driven by changes in the daily and weekly limit, there is a greater risk of needing to restrict the fishery later in the year associated with the second option. Total catch in the sablefish DTL fishery can be managed under either option, but restricting the fishery later in the year may result in an inequitable distribution of catch and revenues because this fishery starts earlier in southern areas than in northern areas.

Therefore, the Pacific Council recommended and NMFS is proposing sablefish limited entry fixed gear and open access cumulative limits of 300 lb

(136 kg) per day, or 1 landing per week up to 1,000 lb (454 kg), not to exceed 5,000 lb (2,268 kg) per 2 months for the area north of 36° N. lat.

*Shelf, Shortbelly, and Widow Rockfish South of 34°27′ N. lat.*

At its most recent meeting, the Pacific Council also considered a request to increase shelf rockfish, shortbelly, and widow rockfish cumulative limits from 2,000 lb (907 kg) per 2 months to 3,000 lb (1,361 kg) per 2 months for limited entry fixed gear and from 500 lb (227 kg) per 2 months to 750 lb (340 kg) per 2 months for open access fixed gear. In 2005, these cumulative limit increases were implemented inseason for July through December. After reviewing the GMT's analysis of landings during 2005, the Pacific Council determined that the requested increase could be accommodated in 2006.

Therefore, the Pacific Council recommended and NMFS is proposing a shelf, shortbelly, and widow rockfish limited entry cumulative limit of 3,000 lb (1,361 kg) per 2 months and an open access cumulative limit of 750 lb (340 kg) per 2 months for the area south of 34°27′ N. lat.

*Minor Nearshore and Black Rockfish between 40°10′ N. lat. and 42° N. lat.*

In 2005, the minor nearshore and black rockfish limited entry fixed gear and open access limits were increased inseason from 5,000 lb (2,268 kg) per 2 months, no more than 1,200 lb (544 kg) of which may be species other than black or blue rockfish, to 6,000 lb (2,722 kg) per 2 months, no more than 1,200 lb (544 kg) of which may be species other than black or blue rockfish, for July through December. As with the previously discussed adjustments to cumulative limits, the Pacific Council received a request to continue these 2005 inseason adjustments into 2006. A review of 2005 PacFIN data revealed no higher than anticipated catch of black rockfish, particularly with respect to black rockfish state harvest guidelines and commercial/recreational catch sharing.

Therefore, the Pacific Council recommended and NMFS is proposing the minor nearshore and black rockfish limited entry fixed gear and open access cumulative limit of 6,000 lb (2,722 kg) per 2 months, no more than 1,200 lb (544 kg) of which may be species other than black or blue rockfish.

*Establish Trip Limits for Pacific Cod and Spiny Dogfish*

Recent harvest levels and the potential for new markets developing off the West Coast has highlighted the potential need for further management measures, such as trip limits, to control harvest of Pacific cod and spiny dogfish in 2006.

Both of these stocks have harvest specifications (also known as acceptable biological catch (ABC) and OY) set for 2005 and 2006. Pacific cod has its own ABC/OY north of 43° N. lat. and Pacific cod (south of 43° N. lat. only) and spiny dogfish are included in the ''other fish'' ABC/OY.

The ABC levels for Pacific cod and ''other fish'' have been based on historical landings. When determining numerical OYs for individual species and species groups for which the ABC is based on a non-quantitative assessment, the Pacific Council may apply precautionary adjustments. Since 2000, the Pacific Council has adjusted the OYs for several unassessed stocks to 50 percent of the historical average catch levels. Although the ABCs for Pacific cod and ''other fish'' have been based on historical landings, precautionary adjustments were not used to establish OYs until the 2005–2006 biennial management cycle.

Neither Pacific cod nor spiny dogfish has ever been formally assessed on the West Coast. A formal stock assessment for West Coast spiny dogfish is recommended for the next assessment cycle (2007). Even in the absence of a formal assessment, life history information indicates that characteristics of the spiny dogfish (slow growing, late maturing, low fecundity) make it susceptible to overfishing. Dogfish populations have been depressed as a result of fishing in areas of Puget Sound and have been declared overfished off the U.S. East Coast. Pacific cod, on the other hand, is a transboundary stock with most of its biomass distributed north of the U.S.-Canada border. Pacific cod stocks are depressed off the West Coast of Canada.

In recent years, commercial fishermen targeting spiny dogfish have been constrained by their assumed bycatch of yelloweye and canary rockfish, two species which have been declared overfished, and are managed under rebuilding plans. To provide protection for these overfished stocks, NMFS implemented RCAs, which are large areas closed to fishing with designated gear types. While there are limited entry programs in place for trawl and fixed gear, there is also an open access fishery, which is allowed to target groundfish with fixed gear. Since effort is not limited, the fishery has a potential to overharvest spiny dogfish and Pacific cod and/or exceed the projected bycatch associated with the fisheries inseason, even with the RCAs in place. To address the potential of exceeding the estimated amounts of canary and yelloweye rockfish bycatch, which was anticipated for the open access fishery in 2005, the NMFS adopted an emergency rule to set bycatch limits for the directed groundfish open access fishery. These limits were originally set at 1.0 mt for canary rockfish and 0.6 mt for yelloweye rockfish; these limits were raised inseason to 3.0 mt of each species, based on updated projections using WCGOP data.

Based on the life history characteristics of spiny dogfish, their status in other areas, and the lack of effort control in this fishery, the Council recommended that NMFS adopt harvest control regulations (i.e., trip limits), beginning in 2006. Given that a spiny dogfish assessment is likely to occur in 2007, the Council decided to set a separate ABC and OY for spiny dogfish following the next assessment cycle (i.e., for the 2009–2010 management period).

Neither stock has had management measures, such as trip limits, specified in the past. This is a potential management concern given the conservation issues of these stocks and, for Pacific cod, 2004 harvests that approached the 2005 OY. Under the Pacific Coast Groundfish FMP at 6.2.1, new routine management measures must be established through a full rulemaking process (proposed and final rule). This action follows the Pacific Coast Groundfish FMP's guidance at 6.2.1 for spiny dogfish and Pacific cod.

In order to develop trip limits for spiny dogfish and Pacific cod, the GMT did trip frequency analyses for both species using fish ticket data from the 2000–2004 fisheries. The trip limits recommended by the Pacific Council were developed to generally accommodate current harvest levels on a two-month cumulative basis. It is anticipated that, if participation in the groundfish fishery remains at the current level, these trip limits would keep total fishing mortality during each year within the ABC/OY established for that year.

In addition, the Makah Tribe has requested a harvest guideline for Pacific cod of 350–400 mt to accommodate the tribal fisheries. While the Makah Tribe requested and the Pacific Council recommended a range of 350–400 mt to be set aside from the Pacific cod OY, NMFS will implement the more conservative end of the Pacific Council's request for the tribes, 400 mt. Tribal harvest of Pacific cod was 254 mt in 2003 and 350 mt in 2004, which is a substantial portion of the harvest off the northern Washington coast. Currently,

this tribal harvest is accounted for in the overall OY, which is shared by tribal and non-tribal fisheries. As proposed, the tribal harvest guideline would be subtracted from the overall OY, and would reduce the amount of the commercial harvest guideline that is available for non-tribal fisheries. The proposed trip limits for the non-tribal fisheries may need to be adjusted inseason to stay within the non-tribal portion of the OY.

In 2005, concerns over unanticipated participants in the open access fisheries, and the estimated amounts of targeted species harvest and potential bycatch of overfished rockfish, were addressed through bycatch limits for canary and yelloweye rockfish that were established for the open access sector through emergency rule (70 FR 23804, May 5, 2005; revised at 70 FR 38596, July 5, 2005; renewed at 70 FR 65861, November 1, 2005) and were extended through May 1, 2006. If trip limits for spiny dogfish and Pacific cod are implemented for March through December 2006, the Pacific Council recommended that the bycatch limits for canary and yelloweye rockfish for the open access sector not be extended into 2006. Thus, if this rule is implemented, NMFS proposes to remove the bycatch limits with implementation of a final rule for this action.

Therefore, the Pacific Council recommended and NMFS is proposing a tribal harvest guideline of 400 mt of the 2006 Pacific cod OY, removal of open access bycatch caps, designating trip limits as routine for spiny dogfish and Pacific cod at § 660.370(c), and establishing trip limits for Pacific cod and spiny dogfish as follows: (1) Limited entry trawl trip limits for Pacific cod coastwide will be 30,000 lb (13,608 kg) per 2 months in Periods 2 (March-April) and 6 (November-December) and 70,000 lb (31,752 kg) per 2 months in Periods 3 through 5 (May-October); (2) Limited entry fixed gear and open access trip limits coastwide for Pacific cod will be 1,000 lb (454 kg) per 2 months in Periods 2 through 6; (3) Limited entry trawl, limited entry fixed gear and open access trip limits for spiny dogfish coastwide will be 200,000 lb (90,719 kg) per 2 months in Period 2, 150,000 lb (68,039 kg) per 2 months in Period 3 (May-June), and 100,000 lb (45,359 kg) per 2 months in Periods 4–6 (July-December).

At the November Pacific Council meeting, the Pacific Council also recommended and NMFS is proposing that the tribes manage tribal dogfish fisheries within the non-tribal dogfish trip limits.

**Tribal Commercial Fisheries**

The Makah Tribe is planning a bottom trawl fishery targeting Dover sole, longspine thornyheads, shortspine thornyheads, and sablefish (DTS) for 2006. In order to prosecute a DTS fishery, the tribes would need a modification of their current management regime. Rather than fish under the current 300 lb (136 kg) per trip limit of combined thornyhead species, the Makah Tribe proposes to operate under the limited entry trawl trip limits for both shortspine and longspine thornyheads. The Pacific Council agreed with this proposal.

Therefore, in addition to the tribal harvest guideline of 400 mt being proposed for Pacific cod and the tribal fisheries for spiny dogfish operating under trip limits as mentioned above in the preamble, the Pacific Council recommended and NMFS is proposing to allow the tribes to operate under the limited entry trawl trip limits for both shortspine and longspine thornyheads.

**RCAs**

This rule also proposes revisions to specific latitude and longitude coordinates that comprise RCA boundaries. In general, these revisions correct mistakes such as the transposition of latitude and longitude coordinates, single coordinates that are either incorrect or missing, and single coordinates that deviate from the depth contour. Affected RCA boundaries are the 30–fm (55–m) and 60–fm (110–m) boundaries around the northern Channel Islands and the coastwide 150–fm (274–m) boundary.

**Non-Groundfish Trawl RCA**

The non-groundfish trawl RCA has, in the past, generally followed the same RCA boundary lines as the limited entry trawl RCA. Therefore, when referring generally to the ''trawl RCA,'' it has meant both limited entry trawl and non-groundfish trawl. However, RCA boundaries for these two sectors, limited entry trawl and non-groundfish trawl, may differ. The trip limit tables for these sectors, Tables 3 and 5, differentiate the trawl RCAs by calling those in Table 5 (open access trip limit table), non-groundfish trawl RCA. However, in Section 660.383 of the regulations, open access fishery management measures, the general term ''trawl RCA'' is used.

Therefore, in order to be more clear, NMFS proposes to replace the term ''trawl RCA'' in Section 660.383 with the term ''non-groundfish trawl RCA.''

**Washington's Recreational Groundfish Fishery**

The Washington Department of Fish and Wildlife (WDFW) took inseason action in August 2005 to close the Washington recreational bottomfish fisheries seaward of the recreational RCA, a line approximating the 30–fm (55–m) depth contour north of Leadbetter Pt., WA (46°38.17′ N. lat.), since the canary and yelloweye rockfish catches were approaching the state's recreational harvest targets for those species. NMFS took conforming action through the inseason action published in the **Federal Register** on October 5, 2005 (70 FR 58066). Because the state recreational harvest targets are annual targets that are used to stay within joint WA/OR annual harvest guidelines, the Pacific Council recommended that the prohibition on fishing seaward of a boundary line approximating the 30–fm (55–m) depth contour be removed for the 2006 Washington recreational fishery, beginning January 1, 2006, but remain available as an option for inseason action in 2006 should the canary or yelloweye rockfish harvest target be approached.

Therefore, the Pacific Council recommended and NMFS proposes removing the prohibition on fishing seaward of the 30–fm (55–m) boundary line between the U.S./Canada border and 46°38.17′ N. lat. (Leadbetter Point, WA) and maintaining the availability of that boundary for inseason management in 2006.

**Oregon's Recreational Groundfish Fishery**

In addition to other bag limit reductions in 2005, the Oregon Department of Fish and Wildlife (ODFW) took inseason action in July 2005 to reduce the daily recreational marine fish bag limit from 8 fish to 5 fish to slow the harvest of black rockfish. ODFW took additional action in August 2005 to prohibit retention of cabezon in the recreational ocean boat fishery, due to attainment of the annual state harvest guideline for cabezon. NMFS took conforming action on both of these items through the inseason action published in the **Federal Register** on October 5, 2005 (70 FR 58066). The Federal and state harvest guidelines are set on an annual basis, and the inseason actions taken in 2005 were in response to attainment of harvest guidelines set for the 2005 fishing year. The Pacific Council recommended that the recreational bag limit regulations that were in place in January 2005 be implemented in January 2006 to allow fisheries access to available harvest. In

March 2005, NMFS published an inseason action (70 FR 16145, March 30, 2005) which, in part, revised the Federal marine fish species list for Oregon to match the list used in Oregon state regulation. Therefore, in addition to the wording in the January 2005 regulations, NMFS will include the revised species list in the 2006 Oregon recreational language. ODFW anticipates requesting Federal inseason action on their recreational regulations in March 2006, pending Oregon Department of Fish and Wildlife Commission approval of regulations governing the 2006 recreational fishery.

Therefore, the Pacific Council recommended and NMFS is proposing recreational groundfish fishery regulations off of Oregon as they read at the beginning of 2005, with the exception that NMFS is maintaining the revised species list as published in the **Federal Register** on March 30, 2005 (70 FR 16145) so that it is clear that Oregon's marine fish bag limit also excludes salmonids, hybrid bass, and offshore pelagic species.

**California's Recreational Groundfish Fishery**

The Pacific Council recommended a change in the recreational RCAs south of 34°27′ N. lat. for 2006 from a closed shoreward of a boundary line approximating the 30–fm (55–m) depth contour and a closed seaward of a boundary line approximating the 60–fm (110–m) depth contour (i.e., open between the 30–fm (55–m) and 60–fm (110–m) boundary lines) to closed either seaward of a boundary line approximating the 30–fm (55–m) depth contour or closed seaward of a boundary line approximating the 60–fm (110–m) depth contour, depending on the season. This change is expected to alleviate confusion among recreational anglers on what depths are closed to fishing and provide for a more enforceable depth restriction. The California Department of Fish and Game conducted an impact analysis using projected catch estimates for 2006 (based on 2004 California Recreational Fisheries Survey estimates). The analysis indicated that this change will not significantly increase groundfish catches in this area during this time period and will keep the harvest within the current harvest targets.

In addition, management measures for recreational fisheries off California in December 2006 are adjusted to conform Federal and state regulations for the recreational RCA between 40°10′ N. lat. and 36° N. lat. At the Pacific Council's April 2005 meeting, the Pacific Council recommended, in part, that the recreational RCA prohibit fishing seaward of the 20–fm (37–m) depth contour for July through December. NMFS inadvertently missed this recommendation as it applied to December in the May inseason action (70 FR 23040, May 4, 2005) and, therefore, Federal regulations implemented a recreational RCA extending between the shoreline and the EEZ during December.

Therefore, the Pacific Council recommended and NMFS is proposing 2006 California recreational groundfish fishery RCA regulations as follows:

(1) Between 40°10′ N. lat. and 36° N. lat., recreational fishing for all groundfish (except ''other flatfish'') is prohibited seaward of the 20–fm (37–m) depth contour along the mainland coast and along islands and offshore seamounts from July 1 through December 31; and is closed entirely from January 1 through June 30 (i.e., prohibited seaward of the shoreline).

(2) South of 34°27.00′ N. latitude, recreational fishing for all groundfish (except California scorpionfish and ''other flatfish'') is prohibited seaward of a boundary line approximating the 60–fm (110–m) depth contour from March 1 through August 30 and November 1 through December 31 along the mainland coast and along islands and offshore seamounts; recreational fishing is also prohibited seaward of a boundary line approximating the 30–fm (55–m) depth contour from September 1 through October 31; except in the CCAs where fishing is prohibited seaward of the 20–fm (37–m) depth contour when the fishing season is open. Recreational fishing for all groundfish (except ''other flatfish'') is closed entirely from January 1 through February 28 (i.e., prohibited seaward of the shoreline). Recreational fishing for California scorpionfish south of 34°27.00′ N. latitude is prohibited seaward of a boundary line approximating the 30–fm (55–m) depth contour from October 1 through October 31, and seaward of the 60–fm (110–m) depth contour from November 1 through December 31, except in the CCAs where fishing is prohibited seaward of the 20–fm (37–m) depth contour when the fishing season is open. Recreational fishing for California scorpionfish south of 34°27.00′ N. latitude is closed entirely from January 1 through September 30 (i.e., prohibited seaward of the shoreline).

**Reduction to the 2006 Darkblotched Rockfish OY**

In August 2005, the agency received a Court of Appeals ruling in Natural Resources Defense Council v. National Marine Fisheries Service, 421 F.3d 872 (9th Cir. 2005). The Court of Appeals reversed an earlier District Court's holding that the Agency had not violated the Magnuson-Stevens Act in setting its 2002 harvest specifications for darkblotched rockfish. The Court of Appeals also remanded the case to the District Court for any further proceedings.

At this November 2005 meeting, the Pacific Council began consideration of the groundfish harvest specifications and management measures for 2007–2008. The Council is next scheduled to address this issue in April 2006, with final adoption in June 2006. NMFS will then publish the Council's recommendations for the 2007–2008 harvest specifications and management measures in the **Federal Register** for public notice and comment. The agency expects to implement the 2007–2008 groundfish specifications and management measures by January 1, 2007. When considering both the Court of Appeals ruling and its own schedule for developing 2007–2008 harvest specifications and management measures, the Council recommended interim measures to address darkblotched rockfish rebuilding in 2006 and a process for revising all of the overfished species rebuilding plans for 2007 and beyond.

For darkblotched rockfish in 2006, the Council asked its GMT to analyze the expected effects on darkblotched rockfish of reducing the previously adopted 2006 OY of 294 mt, using the conclusions of the 2005 darkblotched stock assessment, the best available science. (A draft assessment document was reviewed in May 2005 by a Council-sponsored Stock Assessment Review (STAR) Panel, which included two independent reviewers from the Center for Independent Experts. Following changes to the model and document based on the STAR Panel review, the assessment was reviewed by the Council's Scientific and Statistical Committee, which recommended the assessment to the Council at its September 2005 meeting. At the same meeting, the Council approved the assessment.) In order to illustrate the effects of different OYs on darkblotched rebuilding, the GMT analyzed a variety of potential 2006 OYs ranging from 0–696 mt. The GMT estimated that with a darkblotched OY of zero, the stock would be rebuilt by June 2009; with an OY of 200 mt, the stock would be rebuilt by March 2010; and with the OY based on the current harvest rate (OY of 269 mt in 2005 and 294 mt in 2006), the stock would be rebuilt by June 2010.

Darkblotched rockfish harvest in 2005 was much lower than the available OY

due to management measures intended to protect canary rockfish, which can co-occur with darkblotched at some depths and in some areas. The GMT analysis of a 2006 OY level of 200 mt is based on the projected estimates of darkblotched rockfish assuming a continuation of the currently planned management measures, which are intended to constrain the total catch of all overfished species. At a 2006 darkblotched rockfish OY of 200 mt, the stock is expected to rebuild to the MSY level by March 2010. An OY of 200 mt is not expected to noticeably alter the economic impacts of the 2005–2006 harvest specifications and management measures on the public, since darkblotched rockfish harvest is projected to already be constrained at this level by measures intended to protect canary rockfish.

This action proposes using Magnuson-Stevens Act authority at Section 305(c)(2)(B) to implement an interim measure to reduce the 2006 darkblotched rockfish OY from 294 mt to 200 mt. The Pacific Council recommended this reduction in consideration of the recent 9th Circuit Court of Appeals decision in Natural Resources Defense Council v. NMFS, 421 F.3d 872 (9th Cir. 2005). In response to that decision, the Pacific Council is developing Amendment 16–4 to revise all rebuilding time periods to be ''as short as possible,'' while taking into account the status and biology of the overfished stocks, the needs of the fishing communities, and the interaction of the overfished stocks within the marine ecosystem.

For 2006, the Pacific Council recommended establishing the darkblotched OY at 200 mt, which is based on the most recent information to derive projections of 2006 catch of darkblotched (192 mt), assuming the current restrictive management measures remain in place. Of the 200 mt, 5.2 mt are anticipated to be taken during research activity, leaving 194.8 mt available to the commercial fishery. This revised OY would minimize the potential that the actual harvest in 2006 could exceed the amount that is currently estimated to be harvested under on the current management regime. In making this recommendation, the Council rejected a harvest rate of zero (and corresponding OY of zero) because it would ignore entirely the needs of fishing communities and would have devastating economic impacts while at the same time reducing by less than one year the time to rebuild the stock, relative to an OY of 200 mt.

NMFS agrees with the recommendation of the Pacific Council. It represents a good faith interim step to maintain, during the development and implementation for 2007 of a revised rebuilding period and associated measures, the darkblotched rockfish mortality at current levels without increasing the economic impacts on the already heavily restricted fishery. NMFS proposes to implement the reduction via this proposed rule in order to give the public the opportunity to comment on the reduction before it is promulgated as a final rule. On December 2, 2005, District Judge Breyer ordered that: this proposed rule be filed by December 15, 2005; the comment period shall run through January 15, 2006; and the final rule shall be filed no later than February 15, 2006. NMFS would intend for the reduction in the 2006 darkblotched rockfish OY to be in effect for all of 2006, once implemented.

For 2007 and beyond, the Council adopted a revised schedule for developing the 2007–2008 groundfish harvest specifications and management measures that includes revisions to all of the overfished species rebuilding plans. While developing the 2007–2008 groundfish specifications and management measures, the Council intends to develop Amendment 16–4 to the FMP. Amendment 16–4 would revise all of the rebuilding plans in the FMP using the Court of Appeals guidance to set target dates for rebuilding plans and associated allowable harvest levels for overfished species.

**Lingcod Rebuilt**

At its October 31 – November 4 meeting, the Council adopted the 2005 groundfish stock assessments that will be used to derive the 2007–2008 harvest specifications and management measures. Council adoption of stock assessments follows the detailed Stock Assessment Review panel (STAR) process, which culminates in Scientific and Statistical Committee (SSC) review of the stock assessments and STAR panel reviews of those assessments. The SSC makes recommendations to the Council on the appropriateness of using the different stock assessments for management, after which the Council considers whether to adopt those stock assessments.

Lingcod was initially declared overfished in 1999 (64 FR 49092, September 10, 1999.) The 2005 lingcod stock assessment estimates that the coastwide lingcod stock in 2005 is at 64 percent of its unfished biomass level, with the northern component of the stock (north of Cape Mendocino, CA) at 87 percent of its unfished biomass level and the southern component of the stock at 27 percent of its unfished biomass level. Because lingcod is managed as a single coastwide stock, the stock is considered to be rebuilt above the MSY level, which the FMP sets as 40 percent of a stock's unfished biomass. The SSC endorsed the 2005 lingcod stock assessment as the best available science, and the Council adopted the assessment for use in 2007–2008 management.

Based on the recommendations of the SSC and the Council, this **Federal Register** document announces that NMFS considers the lingcod stock off the U.S. West Coast to be rebuilt. Because the 2006 lingcod harvest levels were set through a biennial management process based on a 2003 stock assessment, lingcod harvest in 2006 will continue to be constrained by the lingcod rebuilding plan. As the Council develops Amendment 16–4 to the FMP, it plans to consider removing the lingcod rebuilding plan from the FMP.

**Classification**

NMFS has determined that the proposed rule is consistent with the FMP and has preliminarily determined that the rule is consistent with the Magnuson-Stevens Act and other applicable laws and is based on the most recent data available. The aggregate data upon which these actions are based are available for public inspection at the Office of the Administrator, Northwest Region, NMFS, (see **ADDRESSES**) during business hours.This action contains a variety of proposed revisions to management measures and harvest specifications. With respect to the Regulatory Flexibility Act (RFA), all of the revisions proposed in this action, except trip limits for Pacific cod and spiny dogfish, are within the scope of the analysis conducted for the proposed and final rules to implement the 2005–2006 groundfish harvest specifications and management measures. The Initial Regulatory Flexibility Analysis (IRFA) for the 2005–2006 specifications and management measures was summarized in the preamble to the proposed rule published on September 21, 2004 (69 FR 56550,) at pages 56572–56573, and concluded that the then proposed action would have intermediary effects between the different specifications and management measures alternatives considered. The Final Regulatory Flexibility Analysis was summarized in the final rule published on December 23, 2004 (69 FR 77012,) at pages 77025–77026, and confirmed the conclusions of the IRFA with regard to the effects of the action on small entities. A copy of

this analysis is available from the Council (see **ADDRESSES**).

For the management measures that are new for 2006, trip limits for spiny dogfish and Pacific cod, NMFS prepared an IRFA as required by section 603 of the RFA. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained in the preamble. A copy of this analysis is available from NMFS (see **ADDRESSES**). A summary of the analysis follows.

The Pacific coast groundfish fisheries, which include fisheries for spiny dogfish and Pacific cod, are covered by the Pacific Coast Groundfish FMP and developed by the Pacific Council in collaboration with the NMFS. The proposed rule would establish management measures to constrain total fishing mortality to within harvest specifications for spiny dogfish and Pacific cod, and co-occurring species. These management measures will be established for the calendar year 2006, although they are considered within the context of past management and long-term sustainability of managed fish stocks. Separate harvest specifications (ABC/OY) have already been established for each year, 2005 and 2006; management measures are intended to keep total fishing mortality during each year within the ABC/OY established for that year.

The management measures in this proposed rule would constrain commercial harvests in 2006 to levels that will ensure the spiny dogfish and Pacific cod stocks, and co-occurring species, are maintained at, or restored to, sizes and structures that will produce the highest net benefit to the nation, while balancing environmental and social values. Currently, there are no specific effort controls on the Pacific cod and dogfish fisheries. Although there is a limited entry program for Pacific Coast groundfish, there is also an open access fishery and neither of these fisheries has specific trip limits. In response to a potential increase in effort and capacity from new entrants in the open access portion of the fishery, NMFS implemented an emergency rule in 2005. This rule set bycatch limits in the directed open access groundfish fishery, which includes spiny dogfish and Pacific cod (70 FR 23804, May 5, 2005; revised at 70 FR 38596, July 5, 2005; renewed at 70 FR 65861, November 1, 2005). These limits were set to specifically assure that an increase in effort in the spiny dogfish fishery would not lead to overfishing on canary and yelloweye rockfish and thus lead to potential closures of economically important commercial and recreational groundfish fisheries off the West Coast. As described in the Environmental Assessment/Regulatory Impact Review/IRFA, there is not only a concern about the bycatch of overfished species, but also about the spiny dogfish and Pacific cod resources as well. Neither of these resources has been formally assessed, while neighboring stocks are depressed (i.e., Puget sound spiny dogfish and Canadian Pacific cod). The management measures in this proposed rule will ensure spiny dogfish and Pacific cod are harvested within ABC/OY limits during 2006 and in a manner consistent with the Groundfish FMP and National Standards Guidelines (50 CFR 600 Subpart D), using routine management tools available to the specifications and management measures process (FMP at 6.2.1, 50 CFR 660.370(c)).

The economic impact of these management measures for Pacific cod and spiny dogfish will be shared among groundfish buyers and commercial harvesters. It is estimated there are about 730 groundfish buyers and 1,700 commercial vessels coastwide that may be affected by these actions. Most of these entities would likely qualify as small businesses under the Small Business Administration's criteria, with the exception of fewer than 5 buyers/processors. The proposed action would affect commercial fisheries primarily off the coasts of Washington and Oregon.

The alternatives analyzed for this action ranged from Alternative 1, status quo or unlimited trip limits for spiny dogfish and Pacific cod, to Alternative 3, the most conservative or constraining trip limits. Alternatives 2 and 2a are intermediate trip limit levels. The preferred alternatives, proposed via this action are Alternative 2 for Pacific cod and Alternative 2a for spiny dogfish. Alternatives 2, 2a and 3 vary only slightly in their trip limit levels and were structured to maintain current participation in the fishery without encouraging new participation. The alternatives accommodate most of the recent harvest levels in the fishery, with Alternative 3 being slightly constraining to some vessels.

Because the alternatives analyzed for this action are intended to maintain current levels of fishery participation without opening the possibility of large-scale new entrants to the fishery, all of the alternatives are expected to have little to no impact on current fishery participants. However, this action could foreclose opportunity for large vessels that may wish to enter the fishery in the future, since the trip limits proposed via this action are based on harvest levels commonly taken by the current smaller-sized participating vessels.

All of the management measures in this proposed rule, except the spiny dogfish and Pacific cod trip limits, are within the scope of the EIS prepared for the 2005–2006 Pacific Coast groundfish specifications and management measures. NMFS prepared and EA for the spiny dogfish and Pacific cod trip limits which discussed a range of alternative trip limits which were considered by the Pacific Council. The alternatives ranged from Alternative 1, status quo or unlimited trip limits for spiny dogfish and Pacific cod, to Alternative 3, the most conservative or constraining trip limits. Alternatives 2 and 2a are intermediate trip limit levels. The preferred alternatives were Alternative 2 for Pacific cod and Alternative 2a for spiny dogfish. Alternatives 2, 2a and 3 vary only slightly in their trip limit levels and were structured to maintain current participation in the fishery without encouraging new participation. The alternatives accommodate most of the recent harvest levels in the fishery, with Alternative 3 being slightly constraining to some vessels. No significant economic impacts are expected for small entities from this action.

There are no new reporting or record-keeping requirements that are proposed as part of this action. No Federal rules have been identified that duplicate, overlap, or conflict with the alternatives. Public comment is hereby solicited, identifying such rules, if any.

In accordance with E.O. 13175, this proposed rule was developed after meaningful consultation and collaboration with the tribal representative on the Pacific Council and tribal officials from the tribes affected by this action. Under the Magnuson-Stevens Act at 16 U.S.C. 1852(b)(5), one of the voting members of the Pacific Council must be a representative of an Indian tribe with federally recognized fishing rights from the area of the Council's jurisdiction. The tribal representative on the Council made a motion to adopt the management measures in this rule that would affect tribal fishery participants, which was passed by the Council.

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

**List of Subjects in 50 CFR Part 660**

Administrative practice and procedure, American Samoa, Fisheries, Fishing, Guam, Hawaiian Natives, Indians, Northern Mariana Islands, Reporting and recordkeeping requirements.

Dated: November 13, 2005.

**James W. Balsiger,**

*Acting Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 660 is proposed to be amended as follows:

## PART 660—FISHERIES OFF WEST COAST STATES AND IN THE WESTERN PACIFIC

1. The authority citation for part 660 continues to read as follows:

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

2. In § 660.370, paragraph (c)(1)(i) introductory text, (c)(1)(ii), and (d) are revised and paragraphs (c)(1)(iii), (c)(1)(iv) and (i) are removed to read as follows:

### § 660.370 Specifications and management measures.

* * * * *

(c) * * *

(1) * * *

(i) *Trip landing and frequency limits, size limits, all gear.* Trip landing and frequency limits have been designated as routine for the following species or species groups: widow rockfish, canary rockfish, yellowtail rockfish, Pacific ocean perch, yelloweye rockfish, black rockfish, blue rockfish, splitnose rockfish, chilipepper rockfish, bocaccio, cowcod, minor nearshore rockfish or shallow and deeper minor nearshore rockfish, shelf or minor shelf rockfish, and minor slope rockfish; DTS complex which is composed of Dover sole, sablefish, shortspine thornyheads, and longspine thornyheads; petrale sole, rex sole, arrowtooth flounder, Pacific sanddabs, and the flatfish complex, which is composed of those species plus any other flatfish species listed at § 660.302; Pacific whiting; lingcod; Pacific cod; spiny dogfish; and ''other fish'' as a complex consisting of all groundfish species listed at § 660.302 and not otherwise listed as a distinct species or species group. Size limits have been designated as routine for sablefish and lingcod. Trip landing and frequency limits and size limits for species with those limits designated as routine may be imposed or adjusted on a biennial or more frequent basis for the purpose of keeping landings within the harvest levels announced by NMFS, and for the other purposes given in paragraphs (c)(1)(i)(A) and (B) of this section.

* * * * *

(ii) *Differential trip landing limits and frequency limits based on gear type, closed seasons.* Trip landing and frequency limits that differ by gear type and closed seasons may be imposed or adjusted on a biennial or more frequent basis for the purpose of rebuilding and protecting overfished or depleted stocks. To achieve the rebuilding of an overfished or depleted stock, the Pacific whiting primary seasons described at § 660.373(b), may be closed for any or all of the fishery sectors identified at § 660.373(a) before the sector allocation is reached if any of the bycatch limits identified at § 660.373(b)(4) are reached.

* * * * *

(d) *Automatic actions.* Automatic management actions may be initiated by the NMFS Regional Administrator without prior public notice, opportunity to comment, or a Council meeting. These actions are nondiscretionary, and the impacts must have been taken into account prior to the action. Unless otherwise stated, a single notice will be published in the **Federal Register** making the action effective if good cause exists under the Administrative Procedure Act to waive notice and comment. Automatic actions are used in the Pacific whiting fishery to close the fishery or reinstate trip limits when a whiting harvest guideline, commercial harvest guideline, or a sector's allocation is reached, or is projected to be reached; or to reapportion unused allocation to other sectors of the fishery.

* * * * *

3. In § 660.383, paragraph (c)(4) is revised and paragraph (f) is removed to read as follows:

### § 660.383 Open access fishery management measures.

* * * * *

(c) * * *

(4) *Non-groundfish Trawl Rockfish Conservation Areas for the open access non-groundfish trawl fisheries.* (i) Fishing with any non-groundfish trawl gear in the open access fisheries is prohibited within the non-groundfish trawl RCA coastwide, except as authorized in this paragraph. Trawlers operating in the open access fisheries with legal groundfish trawl gear are considered to be operating in the non-groundfish trawl fishery and are, therefore, prohibited from fishing in the non-groundfish trawl RCA. Coastwide, it is unlawful to take and retain, possess, or land any species of fish taken with non-groundfish trawl gear within the non-groundfish trawl RCA, except as permitted in this paragraph for vessels participating in the pink shrimp and ridgeback prawn trawl fisheries. Boundaries for the non-groundfish trawl RCA throughout the year in the open access fishery are provided in Table 5 (North) and Table 5 (South) of this subpart and may be modified by NMFS inseason pursuant to § 660.370(c). Non-groundfish trawl RCA boundaries are defined by specific latitude and longitude coordinates which are specified below at §§ 660.390 through 660.394. The non-groundfish trawl RCA is closed coastwide to open access non-groundfish trawl fishing, except as follows:

(A) Pink shrimp trawling is permitted in the non-groundfish trawl RCA, and

(B) When the shoreward line of the non-groundfish trawl RCA is shallower than 100–fm (183–m), the ridgeback prawn trawl fishery south of 34°27.00′ N. lat. may operate out to the 100–fm (183–m) boundary line specified at § 660.393 (i.e., the shoreward boundary of the non-groundfish trawl RCA is at the 100–fm (183–m) boundary line all year for the ridgeback prawn trawl fishery in this area).

(ii) For the non-groundfish trawl gear fisheries, non-groundfish trawl RCAs, if applicable, are generally described in the non-groundfish trawl gear sections at the bottom of Tables 5 (North) and 5 (South) of this subpart. Retention of groundfish caught by non-groundfish trawl gear is prohibited in the designated RCAs, except that:

(A) pink shrimp trawl may retain groundfish caught both within and shoreward and seaward of the non-groundfish trawl RCA subject to the limits in Tables 5 (North) and 5 (South) of this subpart, and

(B) South of 34°27′ N. lat., ridgeback prawn trawl may retain groundfish caught both within the non-groundfish trawl RCA out to 100–fm (183–m) when the shoreward boundary of the non-groundfish trawl RCA is shallower than 100–fm (183–m) (i.e., the shoreward boundary of the non-groundfish trawl RCA is at the 100–fm (183–m) boundary line all year for the ridgeback prawn trawl fishery in this area) and shoreward and seaward of the non-groundfish trawl RCA subject to the limits in Tables 5 (North) and 5 (South) of this subpart.

(iii) If a vessel fishes in the non-groundfish trawl RCA, it may not participate in any fishing on that trip that is prohibited by the restrictions that apply within the non-groundfish trawl RCA. [For example, if a vessel participates in the pink shrimp fishery within the RCA, the vessel cannot on the same trip participate in the DTS fishery seaward of the RCA.] Nothing in these Federal regulations supercedes any state regulations that may prohibit trawling shoreward of the 3–nm state waters boundary line.

* * * * *

4. In § 660.384, paragraphs (c)(1)(i)(B), (c)(2)(i) and (iii), (c)(3)(i)(A)(*2*) and (*4*) are revised to read as follows:

**§ 660.384 Recreational fishery management measures.**

* * * * *

(c) * * *

(1) * * *

(i) * * *

(B) *Recreational Rockfish Conservation Area.* Fishing for groundfish with recreational gear is prohibited within the recreational RCA. It is unlawful to take and retain, possess, or land groundfish taken with recreational gear within the recreational RCA. A vessel fishing in the recreational RCA may not be in possession of any groundfish. [For example, if a vessel participates in the recreational salmon fishery within the RCA, the vessel cannot be in possession of groundfish while in the RCA. The vessel may, however, on the same trip fish for and retain groundfish shoreward of the RCA on the return trip to port.] Off Washington, if recreational fishing for all groundfish is prohibited seaward of a boundary line approximating the 30–fm (55–m) depth contour, a document will be published in the **Federal Register** inseason pursuant to § 660.370(c). Coordinates for the boundary line approximating the 30–fm (55–m) depth contour are listed in § 660.391.

* * * * *

(c) * * *

(2) * * *

(i) *Recreational Groundfish Conservation Areas off Oregon.* Fishing for groundfish with recreational gear is prohibited within the recreational RCA, a type of closed area or GCA. It is unlawful to take and retain, possess, or land groundfish taken with recreational gear within the recreational RCA. A vessel fishing in the recreational RCA may not be in possession of any groundfish. [For example, if a vessel participates in the recreational salmon fishery within the RCA, the vessel cannot be in possession of groundfish while in the RCA. The vessel may, however, on the same trip fish for and retain groundfish shoreward of the RCA on the return trip to port.] Off Oregon, from June 1 through September 30, recreational fishing for groundfish is prohibited seaward of a recreational RCA boundary line approximating the 40–fm (73–m) depth contour. Coordinates for the boundary line approximating the 40–fm (73–m) depth contour are listed at § 660.391. Recreational fishing for all groundfish may be prohibited inseason seaward of the 20–fm (37–m) depth contour or seaward of a boundary line approximating the 30–fm (55–m) depth contour. If the closure seaward of the 20–fm (37–m) depth contour or a boundary line approximating the 30–fm (55–m) depth contour is implemented inseason, a document will be published in the **Federal Register** pursuant to § 660.370(c). Coordinates for the boundary line approximating the 30–fm (55–m) depth contour are listed at § 660.391.

* * * * *

(iii) *Bag limits, size limits.* The bag limits for each person engaged in recreational fishing in the EEZ seaward of Oregon are two lingcod per day, which may be no smaller than 24 in (61 cm) total length; and 10 marine fish per day, which excludes Pacific halibut, salmonids, tuna, perch species, sturgeon, sanddabs, lingcod, striped bass, hybrid bass, offshore pelagic species and baitfish (herring, smelt, anchovies and sardines), but which includes rockfish, greenling, cabezon and other groundfish species. The minimum size limit for cabezon retained in the recreational fishery is 16 in (41 cm) and for greenling is 10 in (26 cm). Taking and retaining canary rockfish and yelloweye rockfish is prohibited.

* * * * *

(c) * * *

(3) * * *

(i) * * *

(A) * * *

(*2*) *Between 40°10′ N. lat. and 36° N. lat.*, recreational fishing for all groundfish (except ''other flatfish'') is prohibited seaward of the 20–fm (37–m) depth contour along the mainland coast and along islands and offshore seamounts from July 1 through December 31; and is closed entirely from January 1 through June 30 (i.e., prohibited seaward of the shoreline). Closures around the Farallon Islands (see paragraph (c)(3)(i)(C) of this section) and Cordell Banks (see paragraph (c)(3)(i)(D) of this section) also apply in this area.

* * * * *

(*4*) *South of 34°27.00′ N. latitude*, recreational fishing for all groundfish (except California scorpionfish as specified below in this paragraph and in paragraph (v) and ''other flatfish'' as specified in paragraph (c)(3)(iv) of this section) is prohibited seaward of a boundary line approximating the 60–fm (110–m) depth contour from March 1 through August 30 and November 1 through December 31 along the mainland coast and along islands and offshore seamounts; and is prohibited seaward of a boundary line approximating the 30–fm (55–m) depth contour from September 1 through October 31; except in the CCAs where fishing is prohibited seaward of the 20–fm (37–m) depth contour when the fishing season is open (see paragraph (c)(3)(i)(B) of this section). Recreational fishing for all groundfish (except ''other flatfish'') is closed entirely from January 1 through February 28 (i.e., prohibited seaward of the shoreline). Recreational fishing for California scorpionfish south of 34°27.00′ N. latitude is prohibited seaward of a boundary line approximating the 30–fm (55–m) depth contour from October 1 through October 31, and seaward of the 60–fm (110–m) depth contour from November 1 through December 31, except in the CCAs where fishing is prohibited seaward of the 20–fm (37–m) depth contour when the fishing season is open. Recreational fishing for California scorpionfish south of 34°27.00′ N. latitude is closed entirely from January 1 through September 30 (i.e., prohibited seaward of the shoreline). Coordinates for the boundary line approximating the 30–fm (55–m) and 60–fm (110–m) depth contours are specified in § 660.391 and 660.392.

* * * * *

5. In § 660.385, paragraphs (b)(2) and (d) are revised and paragraphs (f) and (g) are added to read as follows:

**§ 660.385 Washington coastal tribal fisheries management measures.**

* * * * *

(b) * * *

(2) The tribe will manage their fisheries so that fishermen are either subject to a 300 lb trip limit for thornyheads or subject to the limited entry trip limits for thornyheads.

* * * * *

(d) *Flatfish and other fish.* Treaty fishing vessels using bottom trawl gear are subject to the limits applicable to the non-tribal limited entry trawl fishery for English sole, rex sole, arrowtooth flounder, and other flatfish that are published at the beginning of the year. Treaty fishing vessels are restricted to a 50,000 lb (22,680 kg) per 2–month limit for petrale sole for the entire year.

* * * * *

(f) There is a tribal harvest guideline of 400 mt of Pacific cod. The tribes will manage their fisheries within this harvest guideline.

(g) The tribes will manage their spiny dogfish fishery within the trip limits for the non-tribal fisheries.

* * * * *

6. In § 660.391, paragraph (e) is revised to read as follows:

**§ 660.391 Latitude/longitude coordinates defining the 27 fm (49 m) through 40 fm (73 m) depth contours.**

(e) The 30 fm (55 m) depth contour around the northern Channel Islands off the state of California is defined by straight lines connecting all of the following points in the order stated:

(1) 34°00.98′ N. lat., 119°20.46′ W. long.;

(2) 34°00.53′ N. lat., 119°20.98′ W. long.;

(3) 34°00.17′ N. lat., 119°21.83′ W. long.;

(4) 33°59.65′ N. lat., 119°24.45′ W. long.;

(5) 33°59.68′ N. lat., 119°25.20′ W. long.;

(6) 33°59.95′ N. lat., 119°26.25′ W. long.;

(7) 33°59.87′ N. lat., 119°27.27′ W. long.;

(8) 33°59.55′ N. lat., 119°28.02′ W. long.;

(9) 33°58.63′ N. lat., 119°36.48′ W. long.;

(10) 33°57.62′ N. lat., 119°41.13′ W. long.;

(11) 33°57.00′ N. lat., 119°42.20′ W. long.;

(12) 33°56.93′ N. lat., 119°48.00′ W. long.;

(13) 33°56.45′ N. lat., 119°49.12′ W. long.;

(14) 33°58.54′ N. lat., 119°52.80′ W. long.;

(15) 33°59.95′ N. lat., 119°54.49′ W. long.;

(16) 33°59.83′ N. lat., 119°56.00′ W. long.;

(17) 33°59.18′ N. lat., 119°57.17′ W. long.;

(18) 33°57.83′ N. lat., 119°56.74′ W. long.;

(19) 33°55.71′ N. lat., 119°56.89′ W. long.;

(20) 33°53.89′ N. lat., 119°57.68′ W. long.;

(21) 33°52.93′ N. lat., 119°59.80′ W. long.;

(22) 33°52.79′ N. lat., 120°01.81′ W. long.;

(23) 33°52.51′ N. lat., 120°03.08′ W. long.;

(24) 33°53.12′ N. lat., 120°04.88′ W. long.;

(25) 33°53.12′ N. lat., 120°05.80′ W. long.;

(26) 33°52.94′ N. lat., 120°06.50′ W. long.;

(27) 33°54.03′ N. lat., 120°10.00′ W. long.;

(28) 33°54.58′ N. lat., 120°11.82′ W. long.;

(29) 33°57.08′ N. lat., 120°14.58′ W. long.;

(30) 33°59.50′ N. lat., 120°16.72′ W. long.;

(31) 33°59.63′ N. lat., 120°17.88′ W. long.;

(32) 34°00.30′ N. lat., 120°19.14′ W. long.;

(33) 34°00.02′ N. lat., 120°19.68′ W. long.;

(34) 34°00.08′ N. lat., 120°21.73′ W. long.;

(35) 34°00.94′ N. lat., 120°24.82′ W. long.;

(36) 34°01.09′ N. lat., 120°27.29′ W. long.;

(37) 34°00.96′ N. lat., 120°28.09′ W. long.;

(38) 34°01.56′ N. lat., 120°28.71′ W. long.;

(39) 34°01.80′ N. lat., 120°28.31′ W. long.;

(40) 34°03.60′ N. lat., 120°28.87′ W. long.;

(41) 34°05.20′ N. lat., 120°29.38′ W. long.;

(42) 34°05.35′ N. lat., 120°28.20′ W. long.;

(43) 34°05.30′ N. lat., 120°27.33′ W. long.;

(44) 34°05.65′ N. lat., 120°26.79′ W. long.;

(45) 34°05.69′ N. lat., 120°25.82′ W. long.;

(46) 34°07.24′ N. lat., 120°24.98′ W. long.;

(47) 34°06.00′ N. lat., 120°23.30′ W. long.;

(48) 34°05.64′ N. lat., 120°21.44′ W. long.;

(49) 34°03.61′ N. lat., 120°18.40′ W. long.;

(50) 34°03.25′ N. lat., 120°16.64′ W. long.;

(51) 34°04.33′ N. lat., 120°14.22′ W. long.;

(52) 34°04.11′ N. lat., 120°11.17′ W. long.;

(53) 34°03.72′ N. lat., 120°09.93′ W. long.;

(54) 34°03.81′ N. lat., 120°08.96′ W. long.;

(55) 34°03.36′ N. lat., 120°06.52′ W. long.;

(56) 34°04.80′ N. lat., 120°04.00′ W. long.;

(57) 34°03.48′ N. lat., 120°01.75′ W. long.;

(58) 34°04.00′ N. lat., 120°01.00′ W. long.;

(59) 34°03.99′ N. lat., 120°00.15′ W. long.;

(60) 34°03.51′ N. lat., 119°59.42′ W. long.;

(61) 34°03.79′ N. lat., 119°58.15′ W. long.;

(62) 34°04.72′ N. lat., 119°57.61′ W. long.;

(63) 34°05.14′ N. lat., 119°55.17′ W. long.;

(64) 34°04.66′ N. lat., 119°51.60′ W. long.;

(65) 34°03.79′ N. lat., 119°48.86′ W. long.;

(66) 34°03.79′ N. lat., 119°45.46′ W. long.;

(67) 34°03.27′ N. lat., 119°44.17′ W. long.;

(68) 34°03.29′ N. lat., 119°43.30′ W. long.;

(69) 34°01.71′ N. lat., 119°40.83′ W. long.;

(70) 34°01.74′ N. lat., 119°37.92′ W. long.;

(71) 34°02.07′ N. lat., 119°37.17′ W. long.;

(72) 34°02.93′ N. lat., 119°36.52′ W. long.;

(73) 34°03.48′ N. lat., 119°35.50′ W. long.;

(74) 34°03.56′ N. lat., 119°32.80′ W. long.;

(75) 34°02.72′ N. lat., 119°31.84′ W. long.;

(76) 34°02.20′ N. lat., 119°30.53′ W. long.;

(77) 34°01.49′ N. lat., 119°30.20′ W. long.;

(78) 34°00.66′ N. lat., 119°28.62′ W. long.;

(79) 34°00.66′ N. lat., 119°27.57′ W. long.;

(80) 34°01.41′ N. lat., 119°26.91′ W. long.;

(81) 34°00.91′ N. lat., 119°24.28′ W. long.;

(82) 34°01.51′ N. lat., 119°22.06′ W. long.;

(83) 34°01.41′ N. lat., 119°20.61′ W. long.; and

(84) 34°00.98′ N. lat., 119°20.46′ W. long.

* * * * *

7. In § 660.392, paragraph (g) is revised to read as follows:

**§ 660.392 Latitude/longitude coordinates defining the 50 fm (91 m) through 75 fm (137 m) depth contours.**

(g)The 30 fm (55 m) depth contour around Santa Catalina Island off the state of California is defined by straight lines connecting all of the following points in the order stated:

(1) 34°09.16′ N. lat., 120°26.31′ W. long.;

(2) 34°06.69′ N. lat., 120°16.43′ W. long.;

(3) 34°06.38′ N. lat., 120°04.00′ W. long.;

(4) 34°07.36′ N. lat., 119°52.06′ W. long.;

(5) 34°04.84′ N. lat., 119°36.94′ W. long.;

(6) 34°04.84′ N. lat., 119°35.50′ W. long.;

(7) 34°05.04′ N. lat., 119°32.80′ W. long.;

(8) 34°04.00′ N. lat., 119°26.70′ W. long.;

(9) 34°02.80′ N. lat., 119°21.40′ W. long.;

(10) 34°02.36′ N. lat., 119°18.97′ W. long.;

(11) 34°00.65′ N. lat., 119°19.42′ W. long.;

(12) 33°59.45′ N. lat., 119°22.38′ W. long.;

(13) 33°58.68′ N. lat., 119°32.36′ W. long.;

(14) 33°56.14′ N. lat., 119°41.09′ W. long.;

(15) 33°55.84′ N. lat., 119°48.00′ W. long.;

(16) 33°57.22′ N. lat., 119°52.09′ W. long.;

(17) 33°59.32′ N. lat., 119°55.59′ W. long.;

(18) 33°57.52′ N. lat., 119°55.19′ W. long.;

(19) 33°56.10′ N. lat., 119°54.25′ W. long.;

(20) 33°50.28′ N. lat., 119°56.02′ W. long.;

(21) 33°48.51′ N. lat., 119°59.67′ W. long.;

(22) 33°49.14′ N. lat., 120°03.58′ W. long.;

(23) 33°51.93′ N. lat., 120°06.50′ W. long.;

(24) 33°54.36′ N. lat., 120°13.06′ W. long.;

(25) 33°58.53′ N. lat., 120°20.46′ W. long.;

(26) 34°00.12′ N. lat., 120°28.12′ W. long.;

(27) 34°08.09′ N. lat., 120°35.85′ W. long.;

(28) 34°08.80′ N. lat., 120°34.58′ W. long.; and

(29) 34°09.16′ N. lat., 120°26.31′ W. long.

* * * * *

8. In § 660.393, paragraph (h)(157) is revised to read as follows:

**§ 660.393 Latitude/longitude coordinates defining the 100 fm (183 m) through 150 fm (274 m) depth contours.**

* * * * *

(h) * * *

* * * * *

(157) 40°21.90′ N. lat., 124°25.18′ W. long.;

* * * * *

9. In part 660, subpart G, Tables 2a and 2b are revised to read as follows:

BILLING CODE 3510–22–S

Table 2a. 2006, and Beyond, Specifications of Acceptable Biological Catch (ABC), Optimum Yields (OYs), Harvest Guidelines (HGs), and Limited Entry and Open Access Allocations, by management Area (weights in metric tons).

| Species | ACCEPTABLE BIOLOGICAL CATCH (ABC) | | | | | | OY (Total catch) | Commercial Harvest guidelines (Total Catch) | Allocations total catch | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Vancouver a/ | Columbia | Eureka | Monterey | Conception | Total Catch | | | Limited Entry | | Open Access | |
| | | | | | | | | | Mt | % | Mt | % |
| ROUNDFISH | | | | | | | | | | | | |
| Lingcod b/ north of 42° N. lat. | 1,694 | | 1,021 | | | 2,716 | 1,801 | 214.7 | -- | 81.0 | -- | 19.0 |
| Lingcod south of 42° N. lat. | | | | | | | 612 | | | | | |
| Pacific Cod d/ | 3,200 | | c/ | | | 3,200 | 1,600 | 1,200 | -- | -- | -- | -- |
| Pacific Whiting e/ | 114,297 - 457,186 | | | | | 114,297-457,186 | 114,297-457,186 | | -- | -- | -- | -- |
| Sablefish f/ north of 36° | 8,175 | | | | | 8,175 | 7,363 | 6,522 | 5,909 | 90.6 | 613 | 9.4 |
| Sablefish g/ south of 36° | | | | | | | 271 | 271 | -- | -- | -- | -- |
| Cabezon h/ south of 42°N. lat. | c/ | | 108 | | | 108 | 69 | -- | -- | -- | -- | -- |
| FLATFISH | | | | | | | | | | | | |
| Dover sole i/ | 8,589 | | | | | 8,589 | 7,564 | 7,504 | -- | -- | -- | -- |
| English sole j/ | 2,000 | | 1,100 | | | 3,100 | 3,100 | - | - | - | - | - |
| Petrale sole k/ | 1,262 | | 500 | 800 | 200 | 2,762 | 2,762 | - | - | - | - | - |
| Arrowtooth flounder l/ | 5,800 | | | | | 5,800 | 5,800 | - | - | - | - | - |
| Other flatfish m/ | 6,781 | | | | | 6,781 | 4,090 | - | - | - | - | - |

| Species | ACCEPTABLE BIOLOGICAL CATCH (ABC) | | | | | | OY (Total catch) | Commercial Harvest guidelines (Total Catch) | Allocations total catch | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Vancouver | Columbia | Eureka | Monterey | Conception | ABC | | | Limited Entry | | Open Access | |
| | | | | | | | | | Mt | % | Mt | % |
| ROCKFISH: | | | | | | | | | | | | |
| Pacific ocean perch n/ | 934 | | | | | 934 | 447 | 102.6 | -- | -- | -- | -- |
| Shortbelly o/ | 13,900 | | | | | 13,900 | 13,900 | 13,888 | -- | -- | -- | -- |
| Widow p/ | 3,059 | | | | | 3,059 | 289 | 285.6 | -- | 97.0 | -- | 3.0 |
| Canary q/ | 270 | | | | | 270 | 47.1 | 22.7 | -- | 87.7 | -- | 12.3 |
| Chilipepper r/ | c/ | | | 2,700 | | 2,700 | 2,000 | 1,964 | 1,094 | 55.7 | 870 | 44.3 |
| Bocaccio s/ | c/ | | | 549 | | 549 | 308 | 75.2 | -- | 52.7 | -- | 44.3 |
| Splitnose t/ | c/ | | | 615 | | 615 | 461 | 461 | -- | -- | -- | -- |
| Yellowtail u/ | 3,681 | | | c/ | | 3,681 | 3,681 | 3655 | 3,352 | 91.7 | 303 | 8.3 |
| Shortspine thornyhead v/ north of 34°27' | 1,077 | | | | | 1,077 | 1018 | 1011 | 984 | 99.7 | 27 | 0.27 |
| Longspine thornyhead w/ north of 36° | 2,461 | | | | -- | 2,461 | 2,461 | 2449 | -- | -- | -- | -- |
| south of 36° x/ | -- | | | | 390 | 390 | 195 | 195 | -- | -- | -- | -- |
| Cowcod y/ | c/ | | | 19 | -- | 19 | 2.1 | 0 | -- | -- | -- | – |
| | c/ | | | -- | 5 | 5 | 2.1 | 0 | -- | -- | -- | -- |
| Darkblotched z/ | 294 | | | | | 294 | 200 | 194.8 | -- | -- | -- | -- |
| Yelloweye aa/ | 55 | | | | | 55 | 27 | 6.4 | -- | -- | -- | -- |
| Black bb/ north of 46°16' N. lat. | 540 | | | | | 540 | 540 | | – | – | -- | -- |
| Black bb/ south of 46°16' N. lat. | 736 | | | | | 736 | 736 | | | | | |

| Species | ACCEPTABLE BIOLOGICAL CATCH (ABC) | | | | | | OY (Total catch) | Commercial Harvest guidelines (Total Catch) | Allocations total catch | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Vancouver | Columbia | Eureka | Monterey | Conception | Total Catch | | | Limited Entry | | Open Access | |
| | | | | | | | | | Mt | % | Mt | % |
| Minor Rockfish north cc/ | 3,680 | | | -- | | 3,680 | 2,250 | 2,172 | 1,992 | 91.7 | 180 | 8.3 |
| Minor Rockfish south dd/ | -- | | | 3,412 | | 3,412 | 1,968 | 1,525 | 849 | 55.7 | 676 | 44.3 |
| Remaining Rockfish | 1,612 | | | 854 | | -- | -- | -- | -- | -- | -- | -- |
| bank ee/ | c/ | | | 350 | | 350 | -- | -- | -- | -- | -- | -- |
| blackgill ff/ | c/ | | | 75 | 268 | 343 | -- | -- | -- | -- | -- | -- |
| bocaccio north | 318 | | | | | 318 | -- | -- | -- | -- | -- | -- |
| chilipepper north | 32 | | | | | 32 | -- | -- | -- | -- | -- | -- |
| redstripe | 576 | | | c/ | | 576 | -- | -- | -- | -- | -- | -- |
| sharpchin | 307 | | | 45 | | 352 | -- | -- | -- | -- | -- | - |
| silvergrey | 38 | | | c/ | | 38 | -- | -- | -- | -- | -- | -- |
| splitnose | 242 | | | c/ | | 242 | -- | -- | -- | -- | -- | -- |
| yellowmouth | 99 | | | c/ | | 99 | -- | -- | -- | -- | -- | -- |
| yellowtail south | | | | 116 | | 116 | -- | -- | -- | -- | -- | -- |
| Other rockfish gg/ | 2,068 | | | 2,558 | | -- | -- | -- | -- | -- | -- | -- |
| SHARKS/SKATES/RATFISH/MORIDS/GRENADIERS | | | | | | | | | | | | |
| OTHER FISH ee/ | 2,500 | 7,000 | 1,200 | 3,900 | | 14,600 | 7,300 | -- | -- | -- | -- | -- |

Table 2b. 2006, and Beyond, OYs for minor rockfish by depth sub-groups (weights in metric tons).

| Species | Total Catch ABC | OY (Total Catch) | | | Harvest Guidelines (total catch) | | | |
|---|---|---|---|---|---|---|---|---|
| | | | | | Limited Entry | | Open Access | |
| | | Total Catch OY | Recreational Estimate | Commercial HG for minor rockfish and depth sub-groups | Mt | % | Mt | % |
| Minor Rockfish north cc/ | 3,680 | 2,250 | 78 | 2,172 | 1,992 | 91.7 | 180 | 8.3 |
| Nearshore | | 122 | 68 | 54 | | | | |
| Shelf | | 968 | 10 | 958 | | | | |
| Slope | | 1,160 | 0 | 1,160 | | | | |
| Minor Rockfish south dd/ | 3,412 | 1,968 | 443 | 1,390 | 774 | 55.7 | 616 | 44.3 |
| Nearshore ii/ | | 615 | 383 | 97 | | | | |
| Shelf | | 714 | 60 | 654 | | | | |
| Slope | | 639 | 0 | 639 | | | | |

a/ ABCs apply to the U.S. portion of the Vancouver area, except as noted under individual species.

b/ Lingcod was declared overfished on March 3, 1999. A coastwide stock assessment was prepared in 2003. Lingcod was believed to be at 25 percent of its unfished biomass coastwide in 2002, 31 percent in the north and 19 percent in the south. The ABC projection for 2006 is 2,716 mt and was calculated using an $F_{MSY}$ proxy of F45%. The total catch OY of 2,414 mt (the sum of 1,891 mt in the north and 612 mt in the south) is based on the rebuilding plan with a 70 percent probability of rebuilding the stock to $B_{MSY}$ by the year 2009 ($T_{MAX}$). The harvest control rule will be F=0.17 in the north and F=0.15 in the south. Out of the OY, it is estimated that 693 mt will be taken in the recreational fishery, 7.2 mt will be taken during research activity, and 2.8 mt will be taken in non-groundfish fisheries. Under the 2006 management measures, it is anticipated that 214.7 mt will be taken in the commercial fisheries (which is being set as a commercial HG), leaving a residual amount of 1,496.3 mt to be used as necessary during the fishing year. There is a recreational harvest guideline of 271 mt for the area north of 42° N. Lat. and a recreational harvest guideline of 422 mt for the area south of 42° N. Lat. The tribes do not have a specific allocation at this time, but are expected to take 25.1 mt of the commercial HG.

c/ "Other species", these are neither common nor important to the commercial and recreational fisheries in the areas footnoted. Accordingly, Pacific cod is included in the non-commercial HG of "other fish" and rockfish species are included in either "other rockfish" or "remaining rockfish" for the areas footnoted.

d/ Pacific Cod - The 3,200 mt ABC is based on historical landings data and is set at the same level as it was in 2004. The 1,600 mt OY is the ABC reduced by 50 percent as a precautionary adjustment. The OY is reduced by 400 mt for the tribal harvest guideline, resulting in a commercial harvest guideline of 1,200 mt.

e/ Pacific whiting - The most recent stock assessment was prepared in early 2004, and the whiting biomass was estimated to be above 40 percent of its unfished biomass in 2003. A range is presented for the ABC and OY values because final adoption of the ABC and OY have been deferred until the Council's March 2006 meeting. It is anticipated that an assessment update will be available in early 2006 and the results of the new assessment will be used to set the 2006 ABC and OY.

f/ Sablefish north of 36° N. lat. - A coastwide sablefish stock assessment was prepared in 2001 and updated for 2002. Following the 2002 stock assessment update, the sablefish biomass north of 34° 27 'N. lat. was believed to be between 31 percent and 38 percent of its unfished biomass. The coastwide ABC of 8,175 mt is based on environmentally driven projections with the $F_{MSY}$ proxy of F45%. The ABC for the management area north of 36° N. lat. is 7,885 mt (96.45 percent of the coastwide ABC). The coastwide OY of 7,634 mt (the sum of 7,363 mt in the north and 271 mt in the south) is based on the density-dependent model and the application of the 40-10 harvest policy. The total catch OY for the area north of 36° N. lat is 7,363 mt and is 96.45 percent of the coastwide OY. The OY is reduced by 10 percent (736 mt) for the tribal allocation. Out of the remaining OY, 86 mt will be taken during research activity, and 19 mt will be taken in non-groundfish fisheries, resulting in a commercial HG of 6,522 mt. The open access allocation is 9.4 percent (613 mt) of the commercial HG and the limited entry allocation is 90.6 percent (5,909 mt) of the commercial HG. The limited entry allocation is further divided with 58 percent (3,427 mt) allocated to the trawl fishery and 42 percent (2,482 mt) allocated to the fixed-gear fishery. To provide for bycatch in the at-sea whiting fishery, 15 mt of the limited entry trawl allocation will be set aside.

g/ Sablefish south of 36° N. lat. - The ABC of 290 mt is 3.55 percent of the ABC from the 2002 coastwide stock assessment update. The total catch OY of 271 mt is 3.55 percent of the OY from the 2002 coastwide stock assessment update. There are no limited entry or open access allocations in the Conception area at this time.

h/ Cabezon was first assessed in 2003 and was believed to be at 34.7 percent of its unfished biomass. The ABC of 108 mt is based on a harvest rate proxy of $F_{45\%}$. The OY of 69 mt is based on a constant harvest level for 2005 and 2006..

i/ Dover sole north of 34° 27' N. lat. was assessed in 2001 and was believed to be at 29 percent of its unfished biomass. The ABC of 8,589 mt is the 2006 projection from the 2001 assessment with an $F_{MSY}$ proxy of F40%. Because the biomass is estimated to be in the precautionary zone, the 40-10 harvest rate policy was applied, resulting in a total catch OY of 7,564 mt. The OY is reduced by 60 mt for the amount estimated to be taken as research catch, resulting in a commercial HG of 7,504 mt.

j/ English sole - Research catch is estimated to be 9.7 mt.

k/ Petrale Sole was believed to be at 42 percent of its unfished biomass following a 1999 stock assessment. For 2006, the ABC for the Vancouver-Columbia area (1,262 mt) is based on a four year average projection from 2000-2003 with a F40% $F_{MSY}$ proxy. The ABCs for the Eureka, Monterey, and Conception areas (1,500 mt) are based on historical landings data and continue at the same level as 2005. Management measures to constrain the harvest of overfished species, have reduced the availability of these stocks to the fishery during the past several years. Because the harvest assumptions (from the most recent stock assessment in the Vancouver-Columbia area) used to forecast future harvest were likely overestimates, carrying the previously used ABCs and OYs forward into 2006 was considered to be conservative and based on the best available data. Research catch is estimated to be 2.9 mt and will be taken out of the OY.

l/ Arrowtooth flounder was last assessed in 1993 and was believed to be above 40 percent of its unfished biomass. Research catch is estimated to be 13.6 mt and will be taken out of the OY.

m/ Other flatfish are those species that do not have individual ABC/OYs and include butter sole, curlfin sole, flathead sole, Pacific sand dab, rex sole, rock sole, sand sole, and starry flounder. The ABC is based on historical catch levels. The ABC of 6,781 mt is based on the highest landings for sanddabs (1995) and rex sole (1982) for the 1981-2003 period and on the average landings from the 1994-1998 period for the remaining other flatfish species. The OY of 4,909 mt is based on the ABC with a 25 percent precautionary adjustment for sanddabs and rex sole and a 50 percent precautionary adjustment for the remaining species. Research catch is estimated to be 20.5 mt and will be taken out of the OY.

n/ POP was declared overfished on March 3, 1999. A stock assessment was prepared in 2003 and POP was determined to be at 25 percent of its unfished biomass. The ABC of 934 mt was projected from the 2003 stock assessment and is based on an $F_{MSY}$ proxy of F50%. The OY of 447 mt is based on a 70 percent probability of rebuilding the stock to $B_{MSY}$ by the year 2042 ($T_{MAX}$). The harvest control rule will be F=0.0257. Out of the OY it is anticipated that 4.6 mt will be taken during research activity and 102.6 mt in the commercial fishery (which is being set as a commercial HG), leaving a residual amount of 339.8 mt to be used as necessary during the fishing year.

o/ Shortbelly rockfish remains as an unexploited stock and is difficult to assess quantitatively. A 1989 stock assessment provided 2 alternative yield calculations of 13,900 mt and 47,000 mt. NMFS surveys have shown poor

recruitment in most years since 1989, indicating low recent productivity and a naturally declining population in spite of low fishing pressure. The ABC and OY therefore are set at 13,900 mt, the low end of the range in the stock assessment. The available OY is reduced by 12 mt for the amount estimated to be taken as research catch, resulting in a commercial HG of 13,888 mt.

p/ The widow rockfish stock was declared overfished on January 11, 2001 (66 FR 2338). The most recent stock assessment was prepared for widow rockfish in 2003. The spawning stock biomass is believed to be at 22.4 percent of its unfished biomass in 2002. The ABC of 3,059 mt is based an F50% $F_{MSY}$ proxy. The 289 mt OY is based on a 60 percent probability of rebuilding the stock to $B_{MSY}$ by the year 2042 ($T_{MAX}$). The harvest control rule is F=0.0093. Out of the OY, it is anticipated that 1.0 mt will be taken during the research activity, 2.3 mt will be taken in the recreational fishery, 0.1 mt will be taken in non-groundfish fisheries, and 285.6 mt will be taken in the commercial fishery (which is being set as the commercial HG). Specific open access/limited entry allocations have been suspended during the rebuilding period as necessary to meet the overall rebuilding target while allowing harvest of healthy stocks. Tribal vessels are estimated to land about 40 mt of widow rockfish in 2006, but do not have a specific allocation at this time. The set asides of widow rockfish taken in the Pacific whiting fisheries will likely be limited to 243.2 mt.

q/ Canary rockfish was declared overfished on January 4, 2000 (65 FR 221). A stock assessment was completed in 2002 for canary rockfish and the stock was believed to be at 8 percent of its unfished biomass coastwide in 2001. The coastwide ABC of 279 mt is based on a $F_{MSY}$ proxy of F50%. The coastwide OY of 47.1 mt is based on the rebuilding plan, which has a 60 percent probability of rebuilding the stock to $B_{MSY}$ by the year 2076 ($T_{MAX}$) and a catch sharing arrangement which has 58 percent of the OY going to the commercial fisheries and 42 percent going to the recreational fishery. The harvest control rule will be F=0.0220. Out of the OY, it is anticipated that 2.7 mt will be taken during the research activity, 17.8 mt will be taken in the recreational fishery, 2.1 mt will be taken in non-groundfish fisheries, and 22.7 mt will be taken in the commercial fishery (which is being set as the commercial HG), leaving a residual amount of 1.8 mt. The residual amount will be further divided with 0.9 mt being available as needed for the recreational and 0.9 mt being available as needed for the commercial fisheries. A recreational HG for the area north of 42° N. lat. will be 8.5 mt. For the area south of 42° N. lat., the recreational HG will be 9.3 mt. Specific open access/limited entry allocations have been suspended during the rebuilding period as necessary to meet the overall rebuilding target while allowing harvest of healthy stocks. Tribal vessels are estimated to land about 2.6 mt of canary rockfish under the commercial HG, but do not have a specific allocation at this time.

r/ Chilipepper rockfish - the ABC (2,700 mt) for the Monterey-Conception area is based on a three year average projection from 1999-2001 with a F50% $F_{MSY}$ proxy. Because the unfished biomass is believed to be above 40 percent, the default OY could be set equal to the ABC. However, the OY is set at 2,000 mt to discourage effort on chilipepper, which is taken with bocaccio. Management measures to constrain the harvest of overfished species have reduced the availability of these stocks to the fishery during the past several years. Because the harvest assumptions (from the most recent stock assessment) used to forecast future harvest were likely overestimates, carrying the previously used ABCs and OYs forward into 2006 was considered to be conservative and based on the best available data. The OY is reduced by 15 mt for the amount estimated to be taken in the recreational fishery and 21 mt for the amount estimated to be taken during research activity, resulting in a commercial HG of 1,964 mt. Open access is allocated 44.3 percent (870 mt) of the commercial HG and limited entry is allocated 55.7 percent (1,094 mt) of the commercial HG.

s/ Bocaccio was declared overfished on March 3, 1999. A new stock assessment

and a new rebuilding analysis were prepared for bocaccio in 2003. The bocaccio stock was believed to be at 7.4 percent of its unfished biomass in 2002. The ABC of 549 mt is based on a F50% $F_{MSY}$ proxy. The OY of 308 mt is based on the rebuilding analysis and has a 70 percent probability of rebuilding the stock to $B_{MSY}$ by the year 2032 ($T_{MAX}$). The harvest control rule is F=0.0498. Out of the OY, it is anticipated that 0.6 mt will be taken during the research activity, 43.0 mt will be taken in the recreational fishery, 1.3 mt will be taken in non-groundfish fisheries, and 75.2 mt will be taken in the commercial fishery (which is being set as the commercial HG), leaving a residual amount of 187.9 mt to be used as necessary during the fishing year.

t/ Splitnose rockfish - The ABC is 615 mt in the southern area (Monterey-Conception). The 461 mt OY for the southern area reflects a 25 percent precautionary adjustment because of the less rigorous stock assessment for this stock. In the north, splitnose is included in the minor slope rockfish OY. Because the harvest assumptions (from the most recent stock assessment) used to forecast future harvest were likely overestimates, carrying the previously used ABCs and OYs forward into 2006 was considered to be conservative and based on the best available data.

u/ Yellowtail rockfish - A yellowtail rockfish stock assessment was prepared in 2003 for the Vancouver-Columbia-Eureka areas. Yellowtail rockfish was believed to be at 46 percent of its unfished biomass in 2002. The ABC of 3,681 mt is based on the 2003 stock assessment with the $F_{MSY}$ proxy of F50%. The OY of 3,681 mt was set equal to the ABC, because the stock is above the precautionary threshold. The OY is reduced by 15 mt for the amount estimated to be taken in the recreational fishery, 5 mt for the amount estimated to be taken during research activity, and 6 mt for the amount taken in non-groundfish fisheries, resulting in a commercial HG of 3,655 mt. The open access allocation (303 mt) is 8.3 percent of the commercial HG. The limited entry allocation (3,352 mt) is 91.7 percent the commercial HG. Tribal vessels are estimated to land about 506 mt of yellowtail rockfish in 2006, but do not have a specific allocation at this time.

v/ Shortspine thornyhead was last assessed in 2001 and the stock was believed to be between 25 and 50 percent of its unfished biomass. The ABC (1,077 mt) for the area north of Pt. Conception (34° 27' N. lat.) is based on a F50% $F_{MSY}$ proxy. The OY of 1,018 mt is based on the 2001 survey with the application of the 40-10 harvest policy. The OY is reduced by 7 mt for the amount estimated to be taken during research activity, resulting in a commercial HG of 1,011 mt. Open access is allocated 0.27 percent (27 mt) of the commercial HG and limited entry is allocated 99.73 percent (984 mt) of the commercial HG. There is no ABC or OY for the southern Conception area. Tribal vessels are estimated to land about 6.6 mt of shortspine thornyhead in 2006, but do not have a specific allocation at this time.

w/ Longspine thornyhead north of 36° is believed to be above 40 percent of its unfished biomass. The ABC (2,461 mt) in the north (Vancouver-Columbia-Eureka-Monterey) is based on a F50% $F_{MSY}$ proxy. Because the harvest assumptions (from the most recent stock assessment) used to forecast future harvest were likely overestimates, carrying the previously used ABCs and OYs forward into 2006 was considered to be conservative and based on the best available data. The total catch OY (2,461 mt) is set equal to the ABC. The OY is reduced by 12 mt for the amount estimated to be taken during research activity, resulting in a commercial HG of 2,449 mt.

x/ Longspine thornyhead south of 36° - A separate ABC (390 mt) is established for the Conception area and is based on historical catch for the portion of the Conception area north of 34°27' N. lat. (Point Conception). To address uncertainty in the stock assessment due to limited information, the ABC was reduced by 50 percent to obtain the OY, 195 mt. There is no ABC or OY for the southern Conception Area.

y/ Cowcod in the Conception area was assessed in 1999 and was believed to be less than 10 percent of its unfished biomass. Cowcod was declared as overfished on January 4, 2000 (65 FR 221). The ABC in the Conception area (5 mt) is based on the 1999 stock assessment, while the ABC for the Monterey area (19 mt) is based on average landings from 1993-1997. The OY of 4.2 mt (2.1 mt in each area) is based on the rebuilding plan adopted under Amendment 16-3, which has a 60 percent probability of rebuilding the stock to $B_{MSY}$ by the year 2099 ($T_{MAX}$). The harvest control rule is F=0.009. Cowcod retention will not be permitted in 2006. The OY will be used to accommodate discards of cowcod rockfish resulting from incidental take.

z/ Darkblotched rockfish was assessed in 2000 and a stock assessment update was prepared in 2003. Following the 2003 stock assessment update, the Darkblotched rockfish stock was believed to be at 11 percent of its unfished biomass. A new darkblotched rockfish assessment was prepared for 2005. The 2005 darkblotched rockfish stock assessment found that darkblotched has been rebuilding at a faster rate than had been shown in the 2003 stock assessment. Darkblotched rockfish stock was declared overfished on January 11, 2001 (66 FR 2338). The ABC of 294 mt was projected from the 2003 assessment update and is based on an FMSY proxy of F50%. The 2006 OY will be 200 mt. This OY is 94 mt below the 294 mt OY originally in place for 2006, which was based on the rebuilding plan adopted under Amendment 16-2 and a harvest control rule of F=0.032 [69 FR 77012.] Based on the results of the 2005 assessment, NMFs estimates that reducing the 2006 OY to 200 mt is projected to rebuild the darkblotched rockfish stock to $B_{MSY}$ by March 2010 as compared to the July 2010 rebuilding date that was projected with a 294 mt OY. Out of the OY, it is anticipated that 5.2 mt will be taken during research activity, leaving 194.8 mt available to the commercial fishery.

aa/ Yelloweye rockfish was assessed in 2001 and updated for 2002. On January 11, 2002, yelloweye rockfish was declared overfished (67 FR 1555). In 2002 following the stock assessment update, yelloweye rockfish was believed to be at 24.1 percent of its unfished biomass coastwide. The 55 mt coastwide ABC is based on an $F_{MSY}$ proxy of F50%. The OY of 27 mt, based on a revised rebuilding analysis (August 2002) and the rebuilding plan proposed under Amendment 16-3, have a 80 percent probability of rebuilding to $B_{MSY}$ by the year 2071 ($T_{MAX}$) and a harvest control rule of F=0.0153. Out of the OY, it is anticipated that 10.4 mt will be taken in the recreational fishery, 1.0 will be taken during research activity, 0.8 mt will be taken in non-groundfish fisheries and 6.4 mt will be taken in the commercial fishery (which is being set as a commercial HG), leaving a residual amount of 8.4 mt to be used as necessary during the fishing year. Tribal vessels are estimated to land about 2.3 mt of yelloweye rockfish of the commercial HG in 2006, but do not have a specific allocation at this time.

bb/ Black rockfish was last assessed in 2003 for the Columbia and Eureka area and in 2000 for the Vancouver area. The ABC for the area north of 46°16' N. lat. is 540 mt and the ABC for the area south of 46°16' N. lat. is 736 mt. Because of an overlap in the assessed areas between Cape Falcon and the Columbia River, projections from the 2000 stock assessment were adjusted downward by 12 percent to account for the overlap. The ABCs were derived using an $F_{MSY}$ proxy of F50%. The unfished biomass is believed to be above 40 percent. Therefore, the OYs were set equal to the ABCs, 540 mt for the area north of 46°16' N. lat. and 736 mt for the area south of 46°16' N. lat. A harvest guideline of 30,000 lb (13.6 mt) is set for the tribes. The black rockfish OY in the area south of 46°16' N. lat is subdivided with separate HGs being set for the area north of 42° N. lat (427 mt/58 percent) and for the area south of 42° N. lat (309 mt/42 percent). For the 427 mt attributed to the area north of 42° N. lat. 290-360 mt is estimated to be taken in the recreational fishery, resulting in a commercial HG of 67-137 mt. A range is being provided because the recreational and commercial shares are not currently available. Of the 309 mt of black rockfish attributed to the area south of 42° N. lat., a HG of 185

mt (60 percent) will be applied to the area north of 40°10' N. lat. and a HG of 124 mt (40 percent) will be applied to the area south of 40°10' N. lat. For the area between 42° N. lat. and 40°10 min N. lat., 74 mt is estimated to be taken in the recreational fishery, resulting in a commercial HG of 111 mt. For the area south of 40°10' N. lat., 101 mt is estimated to be taken in the recreational fishery, resulting in a commercial HG of 23 mt. Black rockfish was included in the minor rockfish north and other rockfish south categories until 2004.

cc/ Minor rockfish north includes the "remaining rockfish" and "other rockfish" categories in the Vancouver, Columbia, and Eureka areas combined. These species include "remaining rockfish", which generally includes species that have been assessed by less rigorous methods than stock assessments, and "other rockfish", which includes species that do not have quantifiable stock assessments. The ABC of 3,680 mt is the sum of the individual "remaining rockfish" ABCs plus the "other rockfish" ABCs. The remaining rockfish ABCs continue to be reduced by 25 percent (F=0.75M) as a precautionary adjustment. To obtain the total catch OY of 2,250 mt, the remaining rockfish ABCs were further reduced by 25 percent and other rockfish ABCs were reduced by 50 percent. This was a precautionary measure to address limited stock assessment information. The OY is reduced by 78 mt for the amount estimated to be taken in the recreational fishery, resulting in a 2,172 mt commercial HG. Open access is allocated 8.3 percent (180 mt) of the commercial HG and limited entry is allocated 91.7 percent (1,992 mt) of the commercial HG. Tribal vessels are estimated to land about 28 mt of minor rockfish in 2006, but do not have a specific allocation at this time.

dd/ Minor rockfish south includes the "remaining rockfish" and "other rockfish" categories in the Monterey and Conception areas combined. These species include "remaining rockfish" which generally includes species that have been assessed by less rigorous methods than stock assessment, and "other rockfish" which includes species that do not have quantifiable stock assessments. The ABC of 3,412 mt is the sum of the individual "remaining rockfish" ABCs plus the "other rockfish" ABCs. The remaining rockfish ABCs continue to be reduced by 25 percent (F=0.75M) as a precautionary adjustment. To obtain a total catch OY of 1,968 mt, the remaining rockfish ABCs are further reduced by 25 percent, with the exception of blackgill rockfish, the other rockfish ABCs were reduced by 50 percent. This was a precautionary measure due to limited stock assessment information. The OY is reduced by 443 mt for the amount estimated to be taken in the recreational fishery, resulting in a 1,525 mt HG for the commercial fishery. Open access is allocated 44.3 percent (676 mt) of the commercial HG and limited entry is allocated 55.7 percent (849 mt) of the commercial HG.

ee/ Bank rockfish -- The ABC is 350 mt which is based on a 2000 stock assessment for the Monterey and Conception areas. This stock contributes 263 mt towards the minor rockfish OY in the south.

ff/ Blackgill rockfish was believed to be at 51 percent of its unfished biomass in 1997. The ABC of 343 mt is the sum of the Conception area ABC of 268 mt, based on the 1998 stock assessment with an $F_{MSY}$ proxy of F50%, and the Monterey area ABC of 75 mt. This stock contributes 306 mt towards minor rockfish south (268 mt for the Conception area ABC and 38 mt for the Monterey area). The OY for the Monterey area is the ABC reduced by 50 percent as a precautionary measure because of the lack of information.

gg/ "Other rockfish" includes rockfish species listed in 50 CFR 660.302 and California scorpionfish. The ABC is based on the 1996 review of commercial Sebastes landings and includes an estimate of recreational landings. These species have never been assessed quantitatively. The amount expected to be taken during research activity is reduced by 22.1 mt.

hh/ "Other fish" includes sharks, skates, rays, ratfish, morids, grenadiers,

kelp greenling, and other groundfish species noted above in footnote c/. The amount expected to be taken during research activity is 55.7 mt.

ii/ Minor nearshore rockfish south - The total catch OY is 615 mt. Out of the OY it is anticipated that the recreational fishery will take 383 mt, and 97 mt will be taken by the commercial fishery (which is being set as a commercial HG), leaving a residual amount of 135 mt to be used as necessary during the fishing year.

10. In part 660, subpart G, Tables 3 (both North and South), Tables 4 (both North and South) and Tables 5 (both North and South) are revised to read as follows:

**Table 3 (North) to Part 660, Subpart G -- 2006 Trip Limits for Limited Entry Trawl Gear North of 40°10' N. Lat.**

**Other Limits and Requirements Apply -- Read § 660.301 - § 660.390 before using this table** 122005

| | | JAN | FEB | MAR-APR | MAY-JUN | JUL-AUG | SEP-OCT | NOV-DEC |
|---|---|---|---|---|---|---|---|---|
| | **Rockfish Conservation Area (RCA)[6/]:** North of 40°10' N. lat. | 75 fm - modified 200 fm [7/] | | 75 - 200 fm | | 100 - 200 fm | 75 fm - 200 fm | 75 fm - modified 200 fm [7/] |
| | Selective flatfish trawl gear is required shoreward of the RCA; all trawl gear (large footrope, selective flatfish trawl, and small footrope trawl gear) is permitted seaward of the RCA. Midwater trawl gear is permitted only for vessels participating in the primary whiting season. | | | | | | | |
| | **See § 660.370 and § 660.381 for Additional Gear, Trip Limit, and Conservation Area Requirements and Restrictions. See §§ 660.390-660.394 for Conservation Area Descriptions and Coordinates (including RCAs, YRCA, CCAs, Farallon Islands, and Cordell Banks).** | | | | | | | |
| | State trip limits may be more restrictive than federal trip limits, particularly in waters off Oregon and California. | | | | | | | |
| 1 | **Minor slope rockfish[2/] & Darkblotched rockfish** | 2,000 lb/ month | | 4,000 lb/ 2 months | | | | |
| 2 | **Pacific ocean perch** | 1,500 lb/ month | | 3,000 lb/ 2 months | | | | |
| 3 | **DTS complex** | | | | | | | |
| 4 | Sablefish | | | | | | | |
| 5 | large & small footrope gear | 7,000 lb/ month | | 14,000 lb/ 2 months | 20,000 lb/ 2 months | | | 14,000 lb/ 2 months |
| 6 | selective flatfish trawl gear | 2,500 lb/ month | | 7,000 lb/ 2 months | 13,500 lb/ 2 months | | 7,000 lb/ 2 months | 5,000 lb/ 2 months |
| 7 | multiple bottom trawl gear [8/] | 2,500 lb/ month | | 7,000 lb/ 2 months | 13,500 lb/ 2 months | | 7,000 lb/ 2 months | 5,000 lb/ 2 months |
| 8 | Longspine thornyhead | | | | | | | |
| 9 | large & small footrope gear | 7,500 lb/ month | | 15,000 lb/ 2 months | 23,000 lb/ 2 months | | | 15,000 lb/ 2 months |
| 10 | selective flatfish trawl gear | 1,500 lb/ month | | 3,000 lb/ 2 months | | | | |
| 11 | multiple bottom trawl gear [8/] | 1,500 lb/ month | | 3,000 lb/ 2 months | | | | |
| 12 | Shortspine thornyhead | | | | | | | |
| 13 | large & small footrope gear | 2,000 lb/ month | | 4,000 lb/ 2 months | 5,800 lb/ 2 months | | | 4,000 lb/ 2 months |
| 14 | selective flatfish trawl gear | 1,500 lb/ month | | 3,000 lb/ 2 months | | | | |
| 15 | multiple bottom trawl gear [8/] | 1,500 lb/ month | | 3,000 lb/ 2 months | | | | |
| 16 | Dover sole | | | | | | | |
| 17 | large & small footrope gear | 25,000 lb/ month | | 50,000 lb/ 2 months | 35,000 lb/ 2 months | | | |
| 18 | selective flatfish trawl gear | 10,000 lb/ month | | 28,000 lb/ 2 months | | | | 20,000 lb/ 2 months |
| 19 | multiple bottom trawl gear [8/] | 10,000 lb/ month | | 28,000 lb/ 2 months | | | | 20,000 lb/ 2 months |

TABLE 3 (North)

*Table 3 (North). Continued*

| | | | | | | |
|---|---|---|---|---|---|---|
| 20 | **Flatfish** (except Dover sole) | | | | | TABLE 3 (North) con't |
| 21 | Other flatfish [3/], English sole & Petrale sole | | | | | |
| 22 | large & small footrope gear for Other flatfish[3/] & English sole | 55,000 lb/ month | 110,000 lb/ 2 months, no more than 30,000 lb/ 2 months of which may be petrale sole. | | 110,000 lb/ 2 months | |
| 23 | large & small footrope gear for Petrale sole | 30,000 lb/ month | | | 60,000 lb/ 2 months | |
| 24 | selective flatfish trawl gear for Other flatfish[3/] & English sole | 45,000 lb/ month | 90,000 lb/ 2 months, no more than 25,000 lb/ 2 months of which may be petrale sole. | 90,000 lb/ 2 months, no more than 28,000 lb/ 2 months of which may be petrale sole. | 90,000 lb/ 2 months | |
| 25 | selective flatfish trawl gear for Petrale sole | 12,500 lb/ month | | | 25,000 lb/ 2 months | |
| 26 | multiple bottom trawl gear [8/] | Other flatfish[3/] and English sole: 45,000 lb/ month Petrale sole: 12,500 lb/ month | 90,000 lb/ 2 months, no more than 25,000 lb/ 2 months of which may be petrale sole. | 90,000 lb/ 2 months, no more than 28,000 lb/ 2 months of which may be petrale sole. | Other flatfish[3/] and English sole: 90,000 lb/ 2 months Petrale sole: 25,000 lb/ 2 months | |
| 27 | Arrowtooth flounder | | | | | |
| 28 | large & small footrope gear | 50,000 lb/ month | 100,000 lb/ 2 months | | | |
| 29 | selective flatfish trawl gear | 40,000 lb/ month | 80,000 lb/ 2 months | | | |
| 30 | multiple bottom trawl gear [8/] | 40,000 lb/ month | 80,000 lb/ 2 months | | | |
| 31 | **Whiting** | | | | | |
| 32 | midwater trawl | Before the primary whiting season: CLOSED -- During the primary season: mid-water trawl permitted in the RCA. See §660.373 for season and trip limit details. -- After the primary whiting season: CLOSED | | | | |
| 33 | large & small footrope gear | Before the primary whiting season: 20,000 lb/trip -- During the primary season: 10,000 lb/trip - After the primary whiting season: 10,000 lb/trip | | | | |
| 34 | **Minor shelf rockfish[1/], Shortbelly, Widow & Yelloweye rockfish** | | | | | |
| 35 | midwater trawl for Widow rockfish | Before the primary whiting season: CLOSED -- During primary whiting season: In trips of at least 10,000 lb of whiting, combined widow and yellowtail limit of 500 lb/ trip, cumulative widow limit of 1,500 lb/ month. Mid-water trawl permitted in the RCA. See §660.373 for primary whiting season and trip limit details. -- After the primary whiting season: CLOSED | | | | |
| 36 | large & small footrope gear | 150 lb/ month | 300 lb/ 2 months | | | |
| 37 | selective flatfish trawl gear | 300 lb/ month | | 1,000 lb/ month, no more than 200 lb/ month of which may be yelloweye rockfish | 300 lb/ month | |
| 38 | multiple bottom trawl gear [8/] | 300 lb/ month | | 300 lb/ 2 months, no more than 200 lb/ month of which may be yelloweye rockfish | 300 lb/ month | |

*Table 3 (North). Continued*

| | | | | | | |
|---|---|---|---|---|---|---|
| 39 | **Canary rockfish** | | | | | |
| 40 | large & small footrope gear | CLOSED | | | | |
| 41 | selective flatfish trawl gear | 100 lb/ month | 300 lb/ month | 100 lb/ month | | |
| 42 | multiple bottom trawl gear [8/] | CLOSED | | | | |
| 43 | **Yellowtail** | | | | | |
| 44 | midwater trawl | Before the primary whiting season: CLOSED -- During primary whiting season: In trips of at least 10,000 lb of whiting: combined widow and yellowtail limit of 500 lb/ trip, cumulative yellowtail limit of 2,000 lb/ month. Mid-water trawl permitted in the RCA. See §660.373 for primary whiting season and trip limit details. -- After the primary whiting season: CLOSED | | | | |
| 45 | large & small footrope gear | 150 lb/ month | 300 lb/ 2 months | | | |
| 46 | selective flatfish trawl gear | 1,000 lb/ month | 2,000 lb/ 2 months | | | |
| 47 | multiple bottom trawl gear [8/] | 150 lb/ month | 300 lb/ 2 months | | | |
| 48 | **Minor nearshore rockfish & Black rockfish** | | | | | |
| 49 | large & small footrope gear | CLOSED | | | | |
| 50 | selective flatfish trawl gear | 300 lb/ month | | | | |
| 51 | multiple bottom trawl gear [8/] | CLOSED | | | | |
| 52 | **Lingcod** [4/] | | | | | |
| 53 | large & small footrope gear | 600 lb/ month | 1,200 lb/ 2 months | | | |
| 54 | selective flatfish trawl gear | | | | | |
| 55 | multiple bottom trawl gear [8/] | | | | | |
| 56 | **Pacific cod** | Not limited | 30,000 lb/ 2 months | 70,000 lb/ 2 months | | 30,000 lb/ 2 months |
| 57 | **Spiny dogfish** | Not limited | 200,000 lb/ 2 months | 150,000 lb/ 2 months | 100,000 lb/ 2 months | |
| 58 | **Other Fish** [5/] | Not limited | | | | |

TABLE 3 (North) con't

1/ Bocaccio, chilipepper and cowcod are included in the trip limits for minor shelf rockfish.
2/ Splitnose rockfish is included in the trip limits for minor slope rockfish.
3/ "Other flatfish" are defined at § 660.302 and include butter sole, curlfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, sand sole, and starry flounder.
4/ The minimum size limit for lingcod is 24 inches (61 cm) total length.
5/ "Other fish" are defined at § 660.302 and include sharks, skates, ratfish, morids, grenadiers, and kelp greenling. Cabezon is included in the trip limits for "other fish."
6/ The Rockfish Conservation Area is a gear and/or sector specific closed area generally described by depth contours but specifically defined by lat/long coordinates set out at § 660.390.
7/ The "modified 200 fm" line is modified to exclude certain petrale sole areas from the RCA.
8/ If a vessel has both selective flatfish gear and large or small footrope gear on board during a cumulative limit period (either simultaneously or successively), the most restrictive cumulative limit for any gear on board during the cumulative limit period applies for the entire cumulative limit period.

**To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.**

**Table 3 (South) to Part 660, Subpart G -- 2006 Trip Limits for Limited Entry Trawl Gear South of 40°10' N. Lat.**

**Other Limits and Requirements Apply -- Read § 660.301 - § 660.390 before using this table** 122005

| | JAN | FEB | MAR-APR | MAY-JUN | JUL-AUG | SEP-OCT | NOV-DEC |
|---|---|---|---|---|---|---|---|
| **Rockfish Conservation Area (RCA)[6/]:** | | | | | | | |
| 40°10' - 38° N. lat. | 75 fm - 150 fm | | 100 fm - 150 fm | | | | 75 fm - 150 fm |
| 38° - 34°27' N. lat. | 75 fm - 150 fm | | 100 fm - 150 fm | | | | 75 fm - 150 fm |
| South of 34°27' N. lat. | 75 fm - 150 fm along the mainland coast; shoreline - 150 fm around islands | | 100 fm - 150 fm along the mainland coast; shoreline - 150 fm around islands | | | | 75 fm - 150 fm along the mainland coast; shoreline - 150 fm around islands |
| Small footrope gear is required shoreward of the RCA; all trawl gear (large footrope, midwater trawl, and small footrope gear) is permitted seaward of the RCA. | | | | | | | |
| **See § 660.370 and § 660.381 for Additional Gear, Trip Limit, and Conservation Area Requirements and Restrictions. See §§ 660.390-660.394 for Conservation Area Descriptions and Coordinates (including RCAs, YRCA, CCAs, Farallon Islands, and Cordell Banks).** | | | | | | | |
| State trip limits may be more restrictive than federal trip limits, particularly in waters off Oregon and California. | | | | | | | |
| 1 **Minor slope rockfish[2/] & Darkblotched rockfish** | | | | | | | |
| 2 40°10' - 38° N. lat. | 4,000 lb/ month | | 8,000 lb/ 2 months | | | | |
| 3 South of 38° N. lat. | 20,000 lb/ month | | 40,000 lb/ 2 months | | | | |
| 4 **Splitnose** | | | | | | | |
| 5 40°10' - 38° N. lat. | 4,000 lb/ month | | 8,000 lb/ 2 months | | | | |
| 6 South of 38° N. lat. | 20,000 lb/ month | | 40,000 lb/ 2 months | | | | |
| 7 **DTS complex** | | | | | | | |
| 8 Sablefish | 8,500 lb/ month | | 17,000 lb/ 2 months | | | | |
| 9 Longspine thornyhead | 9,500 lb / month | | 19,000 lb/ 2 months | | | | |
| 10 Shortspine thornyhead | 2,450 lb/ month | | 4,900 lb/ 2 months | | | | |
| 11 Dover sole | 25,000 lb/ month | | 50,000 lb/ 2 months | 35,000 lb/ 2 months | | | |
| 12 **Flatfish** (except Dover sole) | | | | | | | |
| 13 Other flatfish[3/] & English sole | | | | | | | |
| 14 40°10' - 38° N. lat. | 55,000 lb/ month | | Other flatfish, English sole & Petrale sole: 110,000 lb/ 2 months, no more than 30,000 lb/ 2 months of which may be petrale sole. | | | | 110,000 lb/ 2 months |
| 15 South of 38° N. lat. | | | | | | | |
| 16 Petrale sole | 30,000 lb/ month | | | | | | 60,000 lb/ 2 months |

TABLE 3 (South)

*Table 3 (South). Continued*

| | | | | | | |
|---|---|---|---|---|---|---|
| 17 | Arrowtooth flounder | | | | | |
| 18 | 40°10' - 38° N. lat. | 5,000 lb/ month | 10,000 lb/ 2 months | | | |
| 19 | South of 38° N. lat. | | | | | |
| 20 | **Whiting** | | | | | |
| 21 | midwater trawl | Before the primary whiting season: CLOSED -- During the primary season: mid-water trawl permitted in the RCA. See §660.373 for season and trip limit details. -- After the primary whiting season: CLOSED | | | | |
| 22 | large & small footrope gear | Before the primary whiting season: 20,000 lb/trip -- During the primary season: 10,000 lb/trip - After the primary whiting season: 10,000 lb/trip | | | | |
| 23 | **Minor shelf rockfish[1/], Chilipepper, Shortbelly, Widow, & Yelloweye rockfish** | | | | | |
| 24 | large footrope or midwater trawl for Minor shelf rockfish & Shortbelly | 300 lb/ month | | | | |
| 25 | large footrope or midwater trawl for Chilipepper | 1,000 lb/ months | 2,000 lb/ 2 months | 12,000 lb/ 2 months | 8,000 lb/ 2 months | |
| 26 | large footrope or midwater trawl for Widow & Yelloweye | CLOSED | | | | |
| 27 | small footrope trawl | 300 lb/ month | | | | |
| 28 | **Bocaccio** | | | | | |
| 29 | large footrope or midwater trawl | 150 lb/ month | 300 lb/ 2 months | | | |
| 30 | small footrope trawl | CLOSED | | | | |
| 31 | **Canary rockfish** | | | | | |
| 32 | large footrope or midwater trawl | CLOSED | | | | |
| 33 | small footrope trawl | 100 lb/ month | | 300 lb/ month | 100 lb/ month | |
| 34 | **Cowcod** | CLOSED | | | | |
| 35 | **Minor nearshore rockfish & Black rockfish** | | | | | |
| 36 | large footrope or midwater trawl | CLOSED | | | | |
| 37 | small footrope trawl | 300 lb/ month | | | | |
| 38 | **Lingcod[4/]** | | | | | |
| 39 | large footrope or midwater trawl | 600 lb/ month | 1,200 lb/ 2 months | | | |
| 40 | small footrope trawl | | | | | |
| 41 | **Pacific cod** | Not limited | 30,000 lb/ 2 months | 70,000 lb/ 2 months | | 30,000 lb/ 2 months |
| 42 | **Spiny dogfish** | Not limited | 200,000 lb/ 2 months | 150,000 lb/ 2 months | 100,000 lb/ 2 months | |
| 43 | **Other Fish[5/] & Cabezon** | Not limited | | | | |

**TABLE 3 (South) con't**

1/ Yellowtail is included in the trip limits for minor shelf rockfish.
2/ POP is included in the trip limits for minor slope rockfish
3/ "Other flatfish" are defined at § 660.302 and include butter sole, curlfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, sand sole, and starry flounder.
4/ The minimum size limit for lingcod is 24 inches (61 cm) total length.
5/ Other fish are defined at § 660.302 and include sharks, skates, ratfish, morids, grenadiers, and kelp greenling.
6/ The Rockfish Conservation Area is a gear and/or sector specific closed area generally described by depth contours but specifically defined by lat/long coordinates set out at § 660.390.
7/ The "modified 200 fm" line is modified to exclude certain petrale sole areas from the RCA.
**To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.**

**Table 4 (North) to Part 660, Subpart G -- 2006 Trip Limits for Limited Entry Fixed Gear North of 40°10' N. Lat.**

**Other Limits and Requirements Apply -- Read § 660.301 - § 660.390 before using this table** 122005

| | | JAN-FEB | MAR-APR | MAY-JUN | JUL-AUG | SEP-OCT | NOV-DEC |
|---|---|---|---|---|---|---|---|
| | **Rockfish Conservation Area (RCA)[6/]:** | | | | | | |
| | North of 46°16' N. lat. | shoreline - 100 fm | | | | | |
| | 46°16' N. lat. - 40°10' N. lat. | 30 fm - 100 fm | | | | | |
| | **See § 660.370 and § 660.382 for Additional Gear, Trip Limit, and Conservation Area Requirements and Restrictions. See §§ 660.390-660.394 for Conservation Area Descriptions and Coordinates (including RCAs, YRCA, CCAs, Farallon Islands, and Cordell Banks).** | | | | | | |
| | State trip limits may be more restrictive than federal trip limits, particularly in waters off Oregon and California. | | | | | | |
| 1 | **Minor slope rockfish[2/] & Darkblotched rockfish** | 4,000 lb/ 2 months | | | | | |
| 2 | **Pacific ocean perch** | 1,800 lb/ 2 months | | | | | |
| 3 | **Sablefish** | 300 lb/ day, or 1 landing per week of up to 1,000 lb, not to exceed 5,000 lb/ 2 months | | | | | |
| 4 | **Longspine thornyhead** | 10,000 lb/ 2 months | | | | | |
| 5 | **Shortspine thornyhead** | 2,000 lb/ 2 months | | | | | |
| 6 | **Dover sole** | 5,000 lb/ month<br>South of 42° N. lat., when fishing for "other flatfish," vessels using hook-and-line gear with no more than 12 hooks per line, using hooks no larger than "Number 2" hooks, which measure 11 mm (0.44 inches) point to shank, and up to 1 lb (0.45 kg) of weight per line are not subject to the RCAs. | | | | | |
| 7 | **Arrowtooth flounder** | | | | | | |
| 8 | **Petrale sole** | | | | | | |
| 9 | **English sole** | | | | | | |
| 10 | **Other flatfish[1/]** | | | | | | |
| 11 | **Whiting** | 10,000 lb/ trip | | | | | |
| 12 | **Minor shelf rockfish[2/], Shortbelly, Widow, & Yellowtail rockfish** | 200 lb/ month | | | | | |
| 13 | **Canary rockfish** | CLOSED | | | | | |
| 14 | **Yelloweye rockfish** | CLOSED | | | | | |
| 15 | **Minor nearshore rockfish & Black rockfish** | | | | | | |
| 16 | North of 42° N. lat. | 5,000 lb/ 2 months, no more than 1,200 lb of which may be species other than black or blue rockfish [3/] | | | | | |
| 17 | 42° - 40°10' N. lat. | 6,000 lb/ 2 months, no more than 1,200 lb of which may be species other than black or blue rockfish [3/] | | | | | |
| 18 | **Lingcod[4/]** | CLOSED | | 800 lb/ 2 months | | | CLOSED |
| 19 | **Pacific cod** | Not limited | 1,000 lb/ 2 months | | | | |
| 20 | **Spiny dogfish** | Not limited | 200,000 lb/ 2 months | 150,000 lb/ 2 months | 100,000 lb/ 2 months | | |
| 21 | **Other fish[5/]** | Not limited | | | | | |

TABLE 4 (North)

1/ "Other flatfish" are defined at § 660.302 and include butter sole, curlfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, sand sole, and starry flounder.
2/ Bocaccio, chilipepper and cowcod are included in the trip limits for minor shelf rockfish and splitnose rockfish is included in the trip limits for minor slope rockfish.
3/ For black rockfish north of Cape Alava (48°09.50' N. lat.), and between Destruction Is. (47°40' N. lat.) and Leadbetter Pnt. (46°38.17' N. lat.), there is an additional limit of 100 lb or 30 percent by weight of all fish on board, whichever is greater, per vessel, per fishing trip.
4/ The minimum size limit for lingcod is 24 inches (61 cm) total length.
5/ "Other fish" are defined at § 660.302 and include sharks, skates, ratfish, morids, grenadiers, and kelp greenling. Cabezon is included in the trip limits for "other fish."
6/ The Rockfish Conservation Area is a gear and/or sector specific closed area generally described by depth contours but specifically defined by lat/long coordinates set out at § 660.390.
**To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.**

**Table 4 (South) to Part 660, Subpart G -- 2006 Trip Limits for Limited Entry Fixed Gear South of 40°10' N. Lat.**

**Other Limits and Requirements Apply -- Read § 660.301 - § 660.390 before using this table** 122005

| | | JAN-FEB | MAR-APR | MAY-JUN | JUL-AUG | SEP-OCT | NOV-DEC |
|---|---|---|---|---|---|---|---|
| | **Rockfish Conservation Area (RCA)[5/]:** 40°10' - 34°27' N. lat. | 30 fm - 150 fm | | 20 fm - 150 fm | | 30 fm - 150 fm | |
| | South of 34°27' N. lat. | 60 fm - 150 fm (also applies around islands) | | | | | |
| | **See § 660.370 and § 660.382 for Additional Gear, Trip Limit, and Conservation Area Requirements and Restrictions. See §§ 660.390-660.394 for Conservation Area Descriptions and Coordinates (including RCAs, YRCA, CCAs, Farallon Islands, and Cordell Banks).** | | | | | | |
| | State trip limits may be more restrictive than federal trip limits, particularly in waters off Oregon and California. | | | | | | |
| 1 | **Minor slope rockfish[2/] & Darkblotched rockfish** | 40,000 lb/ 2 months | | | | | |
| 2 | **Splitnose** | 40,000 lb/ 2 months | | | | | |
| 3 | **Sablefish** | | | | | | |
| 4 | 40°10' - 36° N. lat. | 300 lb/ day, or 1 landing per week of up to 1,000 lb, not to exceed 5,000 lb/ 2 months | | | | | |
| 5 | South of 36° N. lat. | 350 lb/ day, or 1 landing per week of up to 1,050 lb | | | | | |
| 6 | **Longspine thornyhead** | 10,000 lb / 2 months | | | | | |
| 7 | **Shortspine thornyhead** | 2,000 lb/ 2 months | | | | | |
| 8 | **Dover sole** | 5,000 lb/ month When fishing for "other flatfish," vessels using hook-and-line gear with no more than 12 hooks per line, using hooks no larger than "Number 2" hooks, which measure 11 mm (0.44 inches) point to shank, and up to 1 lb (0.45 kg) of weight per line are not subject to the RCAs. | | | | | |
| 9 | **Arrowtooth flounder** | | | | | | |
| 10 | **Petrale sole** | | | | | | |
| 11 | **English sole** | | | | | | |
| 12 | **Other flatfish[1/]** | | | | | | |
| 13 | **Whiting** | 10,000 lb/ trip | | | | | |
| 14 | **Minor shelf rockfish[2/], Shortbelly, & Widow rockfish** | | | | | | |
| 15 | 40°10' - 34°27' N. lat. | 300 lb/ 2 months | CLOSED | 200 lb/ 2 months | | 300 lb/ 2 months | |
| 16 | South of 34°27' N. lat. | 3,000 lb/ 2 months | | | | | |
| 17 | **Chilipepper rockfish** | 2,000 lb/ 2 months, this opportunity only available seaward of the nontrawl RCA | | | | | |
| 18 | **Canary rockfish** | CLOSED | | | | | |
| 19 | **Yelloweye rockfish** | CLOSED | | | | | |
| 20 | **Cowcod** | CLOSED | | | | | |
| 21 | **Bocaccio** | | | | | | |
| 22 | 40°10' - 34°27' N. lat. | 200 lb/ 2 months | CLOSED | 100 lb/ 2 months | 300 lb/ 2 months | | |
| 23 | South of 34°27' N. lat. | 300 lb/ 2 months | | 300 lb/ 2 months | | | |
| 24 | **Minor nearshore rockfish & Black rockfish** | | | | | | |
| 25 | Shallow nearshore | 300 lb/ 2 months | CLOSED | 500 lb/ 2 months | 600 lb/ 2 months | 500 lb/ 2 months | 300 lb/ 2 months |
| 26 | Deeper nearshore | | | | | | |
| 27 | 40°10' - 34°27' N. lat. | 500 lb/ 2 months | CLOSED | 500 lb/ 2 months | | 400 lb/ 2 months | 500 lb/ 2 months |
| 28 | South of 34°27' N. lat. | | | 600 lb/ 2 months | | | 400 lb/ 2 months |
| 29 | California scorpionfish | 300 lb/ 2 months | CLOSED | 300 lb/ 2 months | 400 lb/ 2 months | | 300 lb/ 2 months |

TABLE 4 (South)

*Table 4 (South). Continued*

| | | | | | | |
|---|---|---|---|---|---|---|
| *30* | **Lingcod**[3/] | CLOSED | | 800 lb/ 2 months | CLOSED | |
| *31* | **Pacific cod** | Not limited | 1,000 lb/ 2 months | | | |
| *32* | **Spiny dogfish** | Not limited | 200,000 lb/ 2 months | 150,000 lb/ 2 months | 100,000 lb/ 2 months | |
| *33* | **Other fish**[4/] **& Cabezon** | Not limited | | | | |

1/ "Other flatfish" are defined at § 660.302 and include butter sole, curlfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, sand sole, and starry flounder.
2/ POP is included in the trip limits for minor slope rockfish. Yellowtail is included in the trip limits for minor shelf rockfish.
3/ The minimum size limit for lingcod is 24 inches (61 cm) total length.
4/ "Other fish" are defined at § 660.302 and include sharks, skates, ratfish, morids, grenadiers, and kelp greenling.
5/ The Rockfish Conservation Area is a gear and/or sector specific closed area generally described by depth contours but specifically defined by lat/long coordinates set out at § 660.390.
**To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.**

**Table 5 (North) to Part 660, Subpart G -- 2006 Trip Limits for Open Access Gears North of 40°10' N. Lat.**

**Other Limits and Requirements Apply -- Read § 660.301 - § 660.390 before using this table** 122005

| | | JAN-FEB | MAR-APR | MAY-JUN | JUL-AUG | SEP-OCT | NOV-DEC |
|---|---|---|---|---|---|---|---|
| | **Rockfish Conservation Area (RCA)[6/]:** | | | | | | |
| | North of 46°16' N. lat. | shoreline - 100 fm | | | | | |
| | 46°16' N. lat. - 40°10' N. lat. | 30 fm - 100 fm | | | | | |
| | **See § 660.370 and § 660.383 for Additional Gear, Trip Limit, and Conservation Area Requirements and Restrictions. See §§ 660.390-660.394 for Conservation Area Descriptions and Coordinates (including RCAs, YRCA, CCAs, Farallon Islands, and Cordell Banks).** | | | | | | |
| | State trip limits may be more restrictive than federal trip limits, particularly in waters off Oregon and California. | | | | | | |
| 1 | **Minor slope rockfish[1/] & Darkblotched rockfish** | Per trip, no more than 25% of weight of the sablefish landed | | | | | |
| 2 | **Pacific ocean perch** | 100 lb/ month | | | | | |
| 3 | **Sablefish** | 300 lb/ day, or 1 landing per week of up to 1,000 lb, not to exceed 5,000 lb/ 2 months | | | | | |
| 4 | **Thornyheads** | CLOSED | | | | | |
| 5 | **Dover sole** | 3,000 lb/month, no more than 300 lb of which may be species other than Pacific sanddabs. South of 42° N. lat., when fishing for "other flatfish," vessels using hook-and-line gear with no more than 12 hooks per line, using hooks no larger than "Number 2" hooks, which measure 11 mm (0.44 inches) point to shank, and up to 1 lb (0.45 kg) of weight per line are not subject to the RCAs. | | | | | |
| 6 | **Arrowtooth flounder** | | | | | | |
| 7 | **Petrale sole** | | | | | | |
| 8 | **English sole** | | | | | | |
| 9 | **Other flatfish[2/]** | | | | | | |
| 10 | **Whiting** | 300 lb/ month | | | | | |
| 11 | **Minor shelf rockfish[1/], Shortbelly, Widow, & Yellowtail rockfish** | 200 lb/ month | | | | | |
| 12 | **Canary rockfish** | CLOSED | | | | | |
| 13 | **Yelloweye rockfish** | CLOSED | | | | | |
| 14 | **Minor nearshore rockfish & Black rockfish** | | | | | | |
| 15 | North of 42° N. lat. | 5,000 lb/ 2 months, no more than 1,200 lb of which may be species other than black or blue rockfish[3/] | | | | | |
| 16 | 42° - 40°10' N. lat. | 6,000 lb/ 2 months, no more than 1,200 lb of which may be species other than black or blue rockfish[3/] | | | | | |
| 17 | **Lingcod[4/]** | CLOSED | | 300 lb/ month | | | CLOSED |
| 18 | **Pacific cod** | Not limited | 1,000 lb/ 2 months | | | | |
| 19 | **Spiny dogfish** | Not limited | 200,000 lb/ 2 months | 150,000 lb/ 2 months | 100,000 lb/ 2 months | | |
| 20 | **Other Fish[5/]** | Not limited | | | | | |
| 21 | **PINK SHRIMP NON-GROUNDFISH TRAWL** *(not subject to RCAs)* | | | | | | |
| 22 | North | **Effective April 1 - October 31:** groundfish 500 lb/day, multiplied by the number of days of the trip, not to exceed 1,500 lb/trip. The following sublimits also apply and are counted toward the overall 500 lb/day and 1,500 lb/trip groundfish limits: lingcod 300 lb/month (minimum 24 inch size limit); sablefish 2,000 lb/month; canary, thornyheads and yelloweye rockfish are PROHIBITED. All other groundfish species taken are managed under the overall 500 lb/day and 1,500 lb/trip groundfish limits. Landings of these species count toward the per day and per trip groundfish limits and do not have species-specific limits. The amount of groundfish landed may not exceed the amount of pink shrimp landed. | | | | | |
| 23 | **SALMON TROLL** | | | | | | |
| 24 | North | Salmon trollers may retain and land up to 1 lb of yellowtail rockfish for every 2 lbs of salmon landed, with a cumulative limit of 200 lb/month, both within and outside of the RCA. This limit is within the 200 lb per month combined limit for minor shelf rockfish, widow rockfish and yellowtail rockfish, and not in addition to that limit. All groundfish species are subject to the open access limits, seasons and RCA restrictions listed in the table above. | | | | | |

**TABLE 5 (North)**

1/ Bocaccio, chilipepper and cowcod rockfishes are included in the trip limits for minor shelf rockfish. Splitnose rockfish is included in the trip limits for minor slope rockfish.
2/ "Other flatfish" are defined at § 660.302 and include butter sole, curlfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, sand sole, and starry flounder.
3/ For black rockfish north of Cape Alava (48°09.50' N. lat.), and between Destruction Is. (47°40' N. lat.) and Leadbetter Pnt. (46°38.17' N. lat.), there is an additional limit of 100 lbs or 30 percent by weight of all fish on board, whichever is greater, per vessel, per fishing trip.
4/ The size limit for lingcod is 24 inches (61 cm) total length.
5/ "Other fish" are defined at § 660.302 and include sharks, skates, ratfish, morids, grenadiers, and kelp greenling. Cabezon is included in the trip limits for "other fish."
6/ The Rockfish Conservation Area is a gear and/or sector specific closed area generally described by depth contours but specifically defined by lat/long coordinates set out at § 660.390.
**To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.**

**Table 5 (South) to Part 660, Subpart G -- 2006 Trip Limits for Open Access Gears South of 40°10' N. Lat.**

**Other Limits and Requirements Apply -- Read § 660.301 - § 660.390 before using this table** 122005

| | | JAN-FEB | MAR-APR | MAY-JUN | JUL-AUG | SEP-OCT | NOV-DEC |
|---|---|---|---|---|---|---|---|
| | **Rockfish Conservation Area (RCA)[5/]:** 40°10' - 34°27' N. lat. | 30 fm - 150 fm | | 20 fm - 150 fm | | 30 fm - 150 fm | |
| | South of 34°27' N. lat. | 60 fm - 150 fm (also applies around islands) | | | | | |
| | **See § 660.370 and § 660.383 for Additional Gear, Trip Limit, and Conservation Area Requirements and Restrictions. See §§ 660.390-660.394 for Conservation Area Descriptions and Coordinates (including RCAs, YRCA, CCAs, Farallon Islands, and Cordell Banks).** | | | | | | |
| | State trip limits may be more restrictive than federal trip limits, particularly in waters off Oregon and California. | | | | | | |
| 1 | **Minor slope rockfish[1/] & Darkblotched rockfish** | | | | | | |
| 2 | 40°10' - 38° N. lat. | Per trip, no more than 25% of weight of the sablefish landed | | | | | |
| 3 | South of 38° N. lat. | 10,000 lb/ 2 months | | | | | |
| 4 | **Splitnose** | 200 lb/ month | | | | | |
| 5 | **Sablefish** | | | | | | |
| 6 | 40°10' - 36° N. lat. | 300 lb/ day, or 1 landing per week of up to 1,000 lb, not to exceed 5,000 lb/ 2 months | | | | | |
| 7 | South of 36° N. lat. | 350 lb/ day, or 1 landing per week of up to 1,050 lb | | | | | |
| 8 | **Thornyheads** | | | | | | |
| 9 | 40°10' - 34°27' N. lat. | CLOSED | | | | | |
| 10 | South of 34°27' N. lat. | 50 lb/ day, no more than 1,000 lb/ 2 months | | | | | |
| 11 | **Dover sole** | 3,000 lb/month, no more than 300 lb of which may be species other than Pacific sanddabs. When fishing for "other flatfish," vessels using hook-and-line gear with no more than 12 hooks per line, using hooks no larger than "Number 2" hooks, which measure 11 mm (0.44 inches) point to shank, and up to 1 lb of weight per line are not subject to the RCAs. | | | | | |
| 12 | **Arrowtooth flounder** | | | | | | |
| 13 | **Petrale sole** | | | | | | |
| 14 | **English sole** | | | | | | |
| 15 | **Other flatfish[2/]** | | | | | | |
| 16 | **Whiting** | 300 lb/ month | | | | | |
| 17 | **Minor shelf rockfish[1/], Shortbelly, Widow & Chilipepper rockfish** | | | | | | |
| 18 | 40°10' - 34°27' N. lat. | 300 lb/ 2 months | CLOSED | 200 lb/ 2 months | | 300 lb/ 2 months | |
| 19 | South of 34°27' N. lat. | 750 lb/ 2 months | | | | | |
| 20 | **Canary rockfish** | CLOSED | | | | | |
| 21 | **Yelloweye rockfish** | CLOSED | | | | | |
| 22 | **Cowcod** | CLOSED | | | | | |
| 23 | **Bocaccio** | | | | | | |
| 24 | 40°10' - 34°27' N. lat. | 200 lb/ 2 months | CLOSED | 100 lb/ 2 months | | 200 lb/ 2 months | |
| 25 | South of 34°27' N. lat. | 100 lb/ 2 months | | 100 lb/ 2 months | | | |
| 26 | **Minor nearshore rockfish & Black rockfish** | | | | | | |
| 27 | Shallow nearshore | 300 lb/ 2 months | CLOSED | 500 lb/ 2 months | 600 lb/ 2 months | 500 lb/ 2 months | 300 lb/ 2 months |
| 28 | Deeper nearshore | | | | | | |
| 29 | 40°10' - 34°27' N. lat. | 500 lb/ 2 months | CLOSED | 500 lb/ 2 months | | 400 lb/ 2 months | 500 lb/ 2 months |
| 30 | South of 34°27' N. lat. | | | 600 lb/ 2 months | | | 400 lb/ 2 months |
| 31 | California scorpionfish | 300 lb/ 2 months | CLOSED | 300 lb/ 2 months | 400 lb/ 2 months | | 300 lb/ 2 months |

TABLE 5 (South)

*Table 5 (South). Continued*

| | | | | | | |
|---|---|---|---|---|---|---|
| 32 | **Lingcod**[3/] | CLOSED | | 300 lb/ month, when nearshore open | | CLOSED |
| 33 | **Pacific cod** | Not limited | 1,000 lb/ 2 months | | | |
| 34 | **Spiny dogfish** | Not limited | 200,000 lb/ 2 months | 150,000 lb/ 2 months | 100,000 lb/ 2 months | |
| 35 | **Other Fish**[4/] **& Cabezon** | Not limited | | | | |
| 36 | **PINK SHRIMP NON-GROUNDFISH TRAWL GEAR** *(not subject to RCAs)* | | | | | |
| 37 | South | **Effective April 1 - October 31:** Groundfish 500 lb/day, multiplied by the number of days of the trip, not to exceed 1,500 lb/trip. The following sublimits also apply and are counted toward the overall 500 lb/day and 1,500 lb/trip groundfish limits: lingcod 300 lb/ month (minimum 24 inch size limit); sablefish 2,000 lb/ month; canary, thornyheads and yelloweye rockfish are PROHIBITED. All other groundfish species taken are managed under the overall 500 lb/day and 1,500 lb/trip groundfish limits. Landings of these species count toward the per day and per trip groundfish limits and do not have species-specific limits. The amount of groundfish landed may not exceed the amount of pink shrimp landed. | | | | |
| 38 | **RIDGEBACK PRAWN AND, SOUTH OF 38°57.50' N. LAT., CA HALIBUT AND SEA CUCUMBER NON-GROUNDFISH TRAWL** | | | | | |
| 39 | **NON-GROUNDFISH TRAWL Rockfish Conservation Area (RCA) for CA Halibut and Sea Cucumber:** | | | | | |
| 40 | 40°10' - 38° N. lat. | 75 fm - modified 200 fm [7/] | 100 fm - 200 fm | 100 fm - 150 fm | | 75 fm - 150 fm |
| 41 | 38° - 34°27' N. lat. | 75 fm - 150 fm | 100 fm - 150 fm | | | |
| 42 | South of 34°27' N. lat. | 75 fm - 150 fm along the mainland coast; shoreline - 150 fm around islands | 100 fm - 150 fm along the mainland coast; shoreline - 150 fm around islands | | | 75 fm - 150 fm along the mainland coast; shoreline - 150 fm around islands |
| 43 | **NON-GROUNDFISH TRAWL Rockfish Conservation Area (RCA) for Ridgeback Prawn:** | | | | | |
| 44 | 40°10' - 38° N. lat. | 75 fm - modified 200 fm [7/] | 100 fm - 200 fm | 100 fm - 150 fm | | 75 fm - 150 fm |
| 45 | 38° - 34°27' N. lat. | 75 fm - 150 fm | 100 fm - 150 fm | | | |
| 46 | South of 34°27' N. lat. | 100 fm - 150 fm along the mainland coast; shoreline - 150 fm around islands | | | | |
| 47 | | Groundfish 300 lb/trip. Trip limits in this table also apply and are counted toward the 300 lb groundfish per trip limit. The amount of groundfish landed may not exceed the amount of the target species landed, except that the amount of spiny dogfish landed may exceed the amount of target species landed. Spiny dogfish are limited by the 300 lb/trip overall groundfish limit. The daily trip limits for sablefish coastwide and thornyheads south of Pt. Conception and the overall groundfish "per trip" limit may not be multiplied by the number of days of the trip. Vessels participating in the California halibut fishery south of 38°57'30" N. lat. are allowed to (1) land up to 100 lb/day of groundfish without the ratio requirement, provided that at least one California halibut is landed and (2) land up to 3,000 lb/month of flatfish, no more than 300 lb of which may be species other than Pacific sanddabs, sand sole, starry flounder, rock sole, curlfin sole, or California scorpionfish (California scorpionfish is also subject to the trip limits and closures in line 31). | | | | |

**TABLE 5 (South) con't**

1/ Yellowtail rockfish is included in the trip limits for minor shelf rockfish and POP is included in the trip limits for minor slope rockfish.
2/ "Other flatfish" are defined at § 660.302 and include butter sole, curlfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, sand sole, and starry flounder.
3/ The size limit for lingcod is 24 inches (61 cm) total length.
4/ "Other fish" are defined at § 660.302 and include sharks, skates, ratfish, morids, grenadiers, and kelp greenling.
5/ The Rockfish Conservation Area is a gear and/or sector specific closed area generally described by depth contours but specifically defined by lat/long coordinates set out at § 660.390.
6/ The "modified 200 fm" line is modified to exclude certain petrale sole areas from the RCA.
**To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.**

[FR Doc. 05–24205 Filed 12–14–05; 3:57 pm]
BILLING CODE 3510–22–C

# Notices

Federal Register

Vol. 70, No. 242

Monday, December 19, 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.

## ADVISORY COUNCIL ON HISTORIC PRESERVATION

### Notice Seeking Public Input on ACHP Formal Comments Regarding the Spent Fuel Storage Project in Skull Valley, UT

**AGENCY:** Advisory Council on Historic Preservation.

**ACTION:** Notice seeking public input on ACHP formal comments regarding the spent fuel storage project in Skull Valley, Utah.

**SUMMARY:** The Advisory Counsel on Historic Preservation will be accepting public comments in preparation for issuing formal comments, under the National Historic Preservation Act, to the Nuclear Regulatory Commission regarding its intent to issue a permit for a spent fuel storage facility project in Skull Valley, Utah.

**DATES:** Comments must be received on or before December 30, 2005.

**ADDRESS:** Address all comments to John L. Nau, III, Chairman, c/o Carol Legard, Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue, NW., Suite 809, Washington, DC 20004. Fax (202) 606–8672. Comments may also be submitted by electronic mail to: *clegard@achp.gov.*

**FOR FURTHER INFORMATION CONTACT:** Carol Legard, (202) 606–8505, E-mail: *clegard@achp.gov.* In her absence, please contact Don Klima, (202) 606–8505. E-mail: *dklima@achp.gov.* Further information may be found in the ACHP Web site: *www.achp.gov.*

**SUPPLEMENTARY INFORMATION:** The Advisory Council on Historic Preservation (ACHP) is an independent Federal agency, established by the National Historic Preservation Act (NHPA), that promotes the preservation, enhancement, and productive use of our Nation's historic resources, and advises the President and Congress on national historic preservation policy. Among other things, the ACHP issues formal comments to Federal agencies per Section 106 of the NHPA.

Section 106 0f the NHPA requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the ACHP a reasonable opportunity to comment on such undertakings. The procedures in 36 CFR part 800 define how Federal agencies meet these statutory responsibilities.

When a Federal agency is unable to reach an agreement to avoid, minimize or mitigate the adverse effects of its undertaking, it must seek the formal comments from the ACHP. 36 CFR § 800.7. The Nuclear Regulatory Commission (NRC) has informed the ACHP that it has terminated the consultation towards reaching such an agreement with regard to the undertaking described below, and has requested the formal comments of the ACHP. This notice seeks public input on the ACHP formal comments that will be sent to the NRC.

#### Undertaking Summary

The NRC is considering a license application from Private Fuel Storage (PFS) to construct and operate an independent spent fuel storage installation on the Reservation of the Skull Valley Band of Goshute Indians in Tooele County, Utah. Spent nuclear fuel would be transported by rail from existing U.S. commercial reactor sites to Skull Valley. To transport the spent nuclear fuel from the existing rail line to the proposed facility, PFS proposes to construct and operate a 32-mile long rail line from the existing rail line near Low, Utah, to the Reservation.

The PFS proposal requires approval from four Federal agencies: NRC, Bureau of Indian Affairs (BIA), Bureau of Land Management (BLM), and the U.S. Surface Transportation Board (STB). These agencies have agreed to have NRC serve as lead federal agency for purposes of compliance with the National Environmental Policy Act. NRC published a final environmental Impact Statement (FEIS) for the project in December 2001, in which BIA, BLM and STB joined as cooperating Federal agencies. NRC also took the lead in completing Section 106 review for the undertaking with participation by BIA, BLM and STB (BLM later became the ''lead Federal agency'' because all the identified, potentially affected historic properties are on BLM lands).

#### Affected Historic Properties

No historic properties were identified on the site of the proposed storage facility itself. However, eight (8) historic properties were identified within the area of potential effects (APE) of the project based on the proposed rail line. All eight are linear features located on BLM lands. The cooperating Federal agencies have determined that construction of the rail line may adversely affect these properties within the APE:

(1) Part of the Emigrant Trail/Hastings Cutoff—a section of the California/Oregon National Historic Trail (1846);
(2) A portion of the roadbed and paved surface of historic U.S. Route 40 (1920s–1966);
(2) Several segments of the ''New'' Victory Highway, later designated as U.S. Route 40 (1925–1940);
(4) A portion of the ''Old'' Victory Highway (1916–1925);
(5) Two segments of a late 1800's-early 1900s telegraph line (posts and cross beams);
(6) Western Pacific Railroad (1907-present)—a modern rail bed and tracks and a railroad bridge/road underpass;
(7) Deep Creek Road (mid-1800s-early 1900s); and
(8) Road to Sulphur Spring/Eight-Mile Spring (mid-1800s to early 1900s).

#### History of Consultation

NRC initiated consultation with the cooperating agencies and other parties in October 2000. NRC identified 14 consulting parties for purposes of Section 106, including: Bureau of Land Management; Bureau of Indian Affairs; Surface Transportation Board; Skull Valley Band of Goshute Indians; Utah State Historic Preservation Officer; Private Fuel Storage, L.L.C.; Confederated Tribes of the Goshute Reservation; Tribal Council of the Te-Moak Western Shoshone Indians of Nevada; Utah Historic Trails Consortium; Ohngo Gaudadeh Devia; National Park Service, Long Distance Trails Office; Paiute Indian Tribe of Utah; Utah Chapter of the Lincoln Highway Association; and Utah Chapter of the Oregon-California Trail Association.

NRC, BLM, STB and BIA met with various consulting parties beginning in October 2000 and provided the parties with opportunities to provide input on the identification, evaluation, and treatment of historic properties. Of particular interest in negotiating a Memorandum of Agreement to avoid, minimize or mitigate the effects on historic properties was the effect of the project on the Hastings Cutoff of the California Trail. NRC requested the ACHP to participate in consultation, and the ACHP agreed to do so on December 18, 2000.

After ACHP became involved in consultation, NRC and BLM met with various consulting parties and transmitted drafts of a proposed Treatment Plan and Memorandum of Agreement (MOA) to all of the consulting parties for review and comment.

**Attempted Resolution of Adverse Effects**

The most significant adverse effect would be the destruction of a small portion of the Hastings Cutoff of the California Trail, which the proposed rail line crosses at approximately a right angle. The seven other historic properties, all linear features, pass in close proximity to or transect the proposed rail line on lands managed by the BLM.

Through consultation during 2001, the consulting parties, except for SHPO, were able to reach agreement on the terms of a MOA. The draft MOA calls for PFS to finalize, in consultation with the consulting parties, a treatment plan for the eight affected historic properties and for properties that may be inadvertently discovered during project construction. A draft Treatment Plan (attached to the MOA) includes measures for the interim protection of the historic properties; funding for public outreach and education regarding the Emigrant Trail/Hastings Cutoff and the Road to Sulphur Spring; and detailed recordation of portions of the historic roads, rail road, and telegraph line that will be damaged or altered. The draft treatment plan also includes specific requirements for the curation of artifacts and documents according to Federal standards and a plan for treating historic properties that may be inadvertently discovered during construction. The MOA, as currently drafted, requires BLM to finalize the plan in consultation with the other parties and provides BLM with the flexibility to revise the final mitigation measures. The FEIS for the PFS facility discusses these potential impacts and states that, if an NRC license is issued for the facility, PFS will be required to perform the mitigation measures set forth in the MOA.

When the MOA was finalized in October 2001, BLM declined to sign the agreement. Citing a moratorium on BLM carrying out land management planning contained in the National Defense Authorization Act, BLM's Field Office Director requested that NRC wait until both agencies were closer to a decision before executing the MOA. ACHP staff offered to include language in the MOA to clarify that signing that MOA did not constitute a decision to approve the license or the right-of-way, but the State Director, BLM made a decision that BLM would not sign the MOA until the agencies were closer to making a Record of Decision and the project was closer to licensing. NRC agreed to set aside the final MOA for a year or so, until it was closer to making a decision on the license application. On January 24, 2003, NRC again circulated for signature the final MOA with an attached draft Treatment Plan and Discovery Plan BLM again declined to sign the MOA.

The Utah SHPO had initially commented to NRC on the identification of historic properties, but after June 1999, it ceased active participation in Section 106 review. The Governor's designated SHPO provided comments on the draft MOA on August 6, 2001. These comments were taken into account in finalizing a new draft on the MOA. With the impending decision to approve PFS's application for a license, NRC again circulated the MOA for signature on May 26, 2005. The MOA was signed by NRC, BIA, STB, the Skull Valley Band of Goshute Indians, PFS, the NPS Long Distance Trails Office, and the Utah Historic Trails Consortium. On June 7, 2005, the SHPO wrote to BLM asking to defer signing the MOA until it was further along in considering PFS's application for rights-of-way for the proposed rail line. BLM again declined to sign the MOA.

Since the MOA could not be fully executed without BLM and SHPO signatures, NRC terminated consultation and, on November 25, 2005, requested ACHP formal comment.

Again, the ACHP seeks public input on those formal comments that ACHP will send to NRC. The ACHP formal comments must be sent to NRC on or before January 9, 2006.

Dated: December 13, 2005.

**John M. Fowler,**

*Executive Director.*

[FR Doc. 05–24181 Filed 12–16–05; 8:45am]

BILLING CODE 4310–K6–M

## DEPARTMENT OF AGRICULTURE

### Submission for OMB Review; Comment Request

December 13, 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), *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) 720–8958.

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.

**Animal & Plant Health Inspection Service**

*Title:* Animal Welfare.

*OMB Control Number:* 0579–0036.

*Summary of Collection:* The Laboratory Animal Welfare Act (AWA) (Pub. L. 890544) enacted August 24, 1966, required the U.S. Department of Agriculture, (USDA), to regulate the humane care and handling of dog, cats, guinea pigs, hamster, rabbits, and nonhuman primates. The legislation was the result of extensive demand by

organized animal welfare groups and private citizens requesting a Federal law covering the transportation, care, and handling of laboratory animals. The Animal and Plant Health Inspection Service (APHIS), Regulatory Enforcement and Animal Care (AC) has the responsibility to enforce the Animal Welfare Act (7 U.S.C. 2131–2156) and the provisions of 9 CFR, Subchapter A, which implements the Animal Welfare Act. The purpose of the AWA is to insure that animal use in research facilities or exhibition purposes are provided humane care and treatment. To assure humane treatment of the animal during transportation in commerce and to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen. APHIS will collect information using several forms.

*Need and Use of the Information:* APHIS will collect health certificates, program of veterinary care, application for license and record of acquisition, disposition and transportation of animals. The information is used to ensure those dealers, exhibitors, research facilities, carriers, etc., are in compliance with the Animal Welfare Act and regulations and standards promulgated under this authority of the Act.

*Description of Respondents:* Business or other for-profit.

*Number of Respondents:* 7,293.

*Frequency of Responses:* Recordkeeping; Reporting: On occasion; Weekly; Semi-annually; Annually.

*Total Burden Hours:* 99,083.

**Ruth Brown,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. E5–7483 Filed 12–16–05; 8:45 am]

BILLING CODE 3410–34–P

## DEPARTMENT OF COMMERCE

### Submission for OMB Review; Comment Request

The Department of Commerce (DOC) has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

*Agency:* Bureau of Industry and Security (BIS).

*Title:* Procedure to Initiate an Investigation under section 232 of the Trade Expansion Act of 1962, as amended.

*Agency Form Number:* n/a.

*OMB Approval Number:* 0694–0120.

*Type of Request:* Extension of a Currently Approved Collection.

*Burden:* 3,000 hours.

*Average Time Per Response:* 5,000 hours.

*Number of Respondents:* 0.6 (6 respondents in 10 years).

*Needs and Uses:* Commerce/BIS, upon request shall initiate an investigation to determine the effects of imports of certain commodities on the national security, and will make the findings known to the President for possible adjustments to imports through tariffs. The findings are made publicly available and are reported to Congress. The purpose of this collection is to account for the public burden associated with submitting such a request from any interested party, including other government departments or by the Secretary of Commerce.

*Affected Public:* Individuals, businesses or other for-profit institutions.

*Respondent's Obligation:* Voluntary.

*OMB Desk Officer:* David Rostker.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, DOC Paperwork Clearance Officer, Office of the Chief Information Officer, (202) 482–0266, Department of Commerce, Room 6625; 14th and Constitution Avenue, NW., Washington, DC 20230.

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, Room 10202, New Executive Office Building, Washington, DC 20230.

Dated: December 13, 2005.

**Madeleine Clayton,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. E5–7466 Filed 12–16–05; 8:45 am]

BILLING CODE 3510–JT–P

## DEPARTMENT OF COMMERCE

### Submission for OMB Review; Comment Request

The Department of Commerce (DOC) has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

*Agency:* Bureau of Industry and Security (BIS).

*Title:* Offsets in Military Exports.

*Agency Form Number:* N/A.

*OMB Approval Number:* 0694–0084.

*Type of Request:* Extension of a currently approved collection of information.

*Burden:* 270 hours.

*Average Time Per Response:* 9 hours.

*Number of Respondents:* 30 respondents.

*Needs and Uses:* This collection is required by The Defense Production Act. This law requires United States firms to furnish information to the Department of Commerce regarding offset agreements exceeding $5,000,000 in value associated with sales of weapon systems or defense-related items to foreign countries or foreign firms. Offsets are industrial or commercial compensation practices required as a condition of purchase in either government-to-government or commercial sales of defense articles and/or defense services as defined by the Arms Export Control Act and the International Traffic in Arms Regulations. Such offsets are required by most major trading partners when purchasing U.S. military equipment or defense related items.

*Affected Public:* Businesses or other for-profit institutions.

*Respondent's Obligation:* Required.

*OMB Desk Officer:* David Rostker.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, DOC Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230.

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, e-mail address, *David_Rostker@omb.eop.gov,* or fax number, (202) 395–7285.

Dated: December 13, 2005.

**Madeleine Clayton,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. E5–7475 Filed 12–16–05; 8:45 am]

BILLING CODE 3510–33–P

## DEPARTMENT OF COMMERCE

### Census Bureau

### Manufacturers' Shipments, Inventories, and Orders (M3) Survey

**ACTION:** Proposed collection; comment request.

**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, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

**DATES:** Written comments must be submitted on or before February 17, 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 Chris Savage, Census Bureau, FOB #4 Room 2232, Washington, DC 20233–6913, (301) 763–4834 or (via the Internet at *john.c.savage@census.gov*).

**SUPPLEMENTARY INFORMATION**

## I. Abstract

The U.S. Census Bureau plans to request an extension of the current Office of Management and Budget (OMB) clearance of the Manufacturers' Shipments, Inventories, and Orders (M3) survey. The M3 survey requests data from a sample of domestic manufacturers on form M–3 (SD), which will be mailed at the end of each month. Data requested are shipments, new orders, unfilled orders, total inventory, materials and supplies, work-in-process, and finished goods. It is currently the only survey that provides broad-based monthly statistical data on the economic conditions in the domestic manufacturing sector.

The M3 survey is designed to measure current industrial activity and to provide an indication of future production commitments. The value of shipments measures the value of goods delivered during the month by domestic manufacturers. Estimates of new orders serve as an indicator of future production commitments and represent the current sales value of new orders received during the month, net of cancellations. Substantial accumulation or depletion of unfilled orders measures excess or deficient demand for manufactured products. The level of inventories, especially in relation to shipments, is frequently used to monitor the business cycle.

We do not plan any changes to the M–3 (SD) form or any increase in annual burden.

## II. Method of Collection

Respondents submit data on form M–3 (SD) via mail, facsimile machine, Touchtone Data Entry (TDE), Voice Recognition Entry (VRE), or via the Internet. Analysts call respondents who have not reported in time to prepare the monthly estimates.

## III. Data

*OMB Number:* 0607–0008.
*Form Number:* M–3 (SD).
*Type of Review:* Regular.
*Affected Public:* Businesses, large and small, or other for profit.
*Estimated Number of Respondents:* 3,500.
*Estimated Time Per Response:* 20 min.
*Estimated Total Annual Burden Hours:* 14,000.
*Estimated Total Annual Cost:* $345,380.
*Respondent's Obligation:* Voluntary.

**Legal Authority:** Title 13, United States Code, sections 131 and 182.

## 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: December 13, 2005.

**Madeleine Clayton,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. E5–7476 Filed 12–16–05; 8:45 am]

BILLING CODE 3510–07–P

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# DEPARTMENT OF COMMERCE

## Minority Business Development Agency

## Proposed Information Collection; Comment Request; Online Performance Database, the Online Phoenix Database, and the Online Opportunity Database

**AGENCY:** Minority Business Development Agency (MBDA).

**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 February 17, 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 Ronald Marin, (202) 482–3341 or via the Internet at *rmarin@mbda.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Abstract

Currently, as part of its service delivery programs, MBDA awards cooperative agreements each year. The recipient of each cooperative agreement is competitively selected to operate a client service center: (1) Minority Business Development Center (MBDC); or (2) Native American Business Development Center (NABDC) or (3) a Minority Business Opportunity Committee (MBOC) at one or more of the 50 sites serviced by MBDA. In accordance with the Government Performance and Results Act (GPRA), MBDA requires center operators to report client service activities quarterly (PERFORMANCE database); to list minority business enterprises (MBEs) doing business in the United States (PHOENIX database); and to match those MBEs with opportunities (OPPORUNITY database) entered in the system by public and private sector entities.

## II. Method of Collection

Electronic transfer of performance data.

## III. Data

*OMB Number:* 0640–0002.
*Form Number:* None.
*Type of Review:* Regular submission.
*Affected Public:* Business or other for-profit organizations; individuals or households; not-for-profit institutions; Federal Government; State, Local, or Tribal Government.

*Estimated Number of Respondents:* 2,670.

*Estimated Time Per Response:* 3 to 15 minutes per function.

*Estimated Total Annual Burden Hours:* 5,473.

*Estimated Total Annual Cost to Public:* $0.

**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: December 13, 2005.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. E5–7467 Filed 12–16–05; 8:45 am]

BILLING CODE 3510–21–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Proposed Information Collection; Comment Request; Pacific Billfish Angler Survey

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA), DOC.

**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 February 17, 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 David Holts, Southwest Fishery Science Center, 8604 La Jolla Shores Drive, La Jolla, CA 92037–1508 (phone 858–546–7186 or *David.Holts@noaa.gov*.)

**SUPPLEMENTARY INFORMATION:**

**I. Abstract**

The Billfish Angler Survey provides the only estimates of billfish angling activities in the Pacific and Indian Oceans. This collection of recreational billfish catch and effort data began in 1969 and now provides a 37 year index of fishing success in many areas of the Pacific. The catch per unit of effort (CPUE) is measured in catch of billfish per angler fishing day. This time series of angler success provides a measure of relative abundance and is the only survey independent of commercial fisheries in the Pacific. Trends tracked over time indicate changes in the health and size of billfish stocks. This index of relative abundance is an important component of stock assessments, developing management options and monitoring domestic and international fishery interactions.

**II. Method of Collection**

A paper form the size of a postcard is used.

**III. Data**

*OMB Number:* 0648–0020.

*Form Number:* NOAA Form 88–162.

*Type of Review:* Regular submission.

*Affected Public:* Individuals or households.

*Estimated Number of Respondents:* 1,500.

*Estimated Time Per Response:* 5 minutes.

*Estimated Total Annual Burden Hours:* 125.

*Estimated Total Annual Cost to Public:* $0.

**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: December 13, 2005.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. E5–7468 Filed 12–16–05; 8:45 am]

BILLING CODE 3510–22–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Proposed Information Collection; Comment Request; Highly Migratory Species Tournament Reporting

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA), DOC.

**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 February 17, 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 Margo Schulze-Haugen, Chief, Highly Migratory Species Management Division (F/SF1), Office of Sustainable Fisheries, National Marine Fisheries Service (NMFS), 1315 East-West Highway, Silver Spring, MD 20910 (301–713–2347 or *Margo.Schulze-Haugen@noaa.gov*.)

**SUPPLEMENTARY INFORMATION:**

### I. Abstract

NMFS would require that operators of fishing tournaments involving Highly Migratory species (HMS), specifically Atlantic tunas, swordfish, billfish and sharks, provide advance identification of the tournament date(s), location, operator, and target species, and then provide information after the tournament on the HMS that are caught, whether they were kept or released, the length and weight of the fish, and other information. Most of the data required for post-tournament reporting are already collected in the routine course of tournament operations. The data collected are needed by NMFS to estimate the total annual catch of these species and to evaluate the impact of tournament fishing in relation to other types of fishing.

### II. Method of Collection

A paper form the size of a postcard is used.

### III. Data

*OMB Number:* 0648–0323.
*Form Number:* None.
*Type of Review:* Regular submission.
*Affected Public:* Business or other for-profit organizations, and not-for-profit institutions.
*Estimated Number of Respondents:* 300.
*Estimated Time Per Response:* 2 minutes for a registration form; and 20 minutes for a tournament summary report.
*Estimated Total Annual Burden Hours:* 70.
*Estimated Total Annual Cost to Public:* $0.

### 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: December 13, 2005.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. E5–7469 Filed 12–16–05; 8:45 am]

BILLING CODE 3510–22–P

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## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## Proposed Information Collection; Comment Request; Economic Surveys for U.S. Commercial Fisheries

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA), DOC.

**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 February 17, 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 Rita Curtis, 301–713–2328 or *rita.curtis@noaa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Abstract

The economic data for selected U.S. commercial fisheries will be collected for each of the following groups of operations: (1) Processors, including onshore plants, floating processing plants, mothership vessels, and catcher/processor vessels; (2) catcher vessels; and (3) for-hire vessels. Companies associated with these groups will be surveyed for expenditure, earnings, effort, ownership, and employment data; and basic demographic data on fishing and processing crews. In general, questions will be asked concerning ex-vessel and wholesale prices and revenue, variable and fixed costs, expenditures, effort, ownership, dependence on the fisheries, and fishery employment. The data collection efforts will be coordinated to reduce the additional burden for those who participate in multiple fisheries. Participation in these data collections will be voluntary.

The data will be used for the following purposes: (1) To monitor the economic performance of these fisheries through primary processing; (2) to analyze the economic performance effects of current management measures; and (3) to analyze the economic performance effects of alternative management measures.

The measures of economic performance to be supported by this data collection program include the following: (1)Contirbution to net national benefit; (2) contribution to income of groups of participants in the fisheries (i.e., fishermen, vessel owners, processing plant employees, and processing plant owners); (3) employment; (4) regional economic impacts (income and employment); and (5) factor utilizations rates. As required by law, the confidentiality of the data will be protected.

Data collections will focus each year on a different component of the U.S. commercial fisheries, with only limited data collected in previously surveyed components of these fisheries. The latter will be done to update the models that will be used to track economic performance and to evaluate the economic effects of alternative management actions. This cycle of data collection will facilitate economic performance data being available and updated for all the components of the U.S. commercial fisheries identified above.

### II. Method of Collection

Data will be collected via mailed questionnaires, and telephone and in-person interviews.

### III. Data

*OMB Number:* 0648–0369.
*Form Number:* None.
*Type of Review:* Regular submission.
*Affected Public:* Business or other for-profits organizations.
*Estimated Number of Respondents:* 7,000.
*Estimated Time Per Response:* 1 hour and 30 minutes for a response from a catcher vessel or for-hire vessel for operating cost, annual cost, revenue, effort, employment, ownership, and limited demographic data; 25 minutes per response from a catcher vessel or for-hire vessel for operating cost data; 1 hour per response from a catcher vessel or for-hire vessel for annual expenditure and demographic data; 8 hours for a response from a West Coast or Alaska

processor, including catcher/processor vessels, mothership vessels, floating processing plants, and onshore plants; 1 hour and 30 minutes for a response from an East Coast or Gulf processor.

*Estimated Total Annual Burden Hours:* 7,000.

*Estimated Total Annual Cost to Public:* $0.

## 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: December 13, 2005.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. E5–7474 Filed 12–16–05; 8:45 am]

BILLING CODE 3510–22–P

## COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

### Adjustment of Import Limits for Certain Wool and Man-Made Fiber Textile Products Produced or Manufactured in Belarus

December 13, 2005.

**AGENCY:** Committee for the Implementation of Textile Agreements (CITA).

**ACTION:** Issuing a directive to the Commissioner, Bureau of Customs and Border Protection adjusting limits.

**EFFECTIVE DATE:** December 16, 2005.

**FOR FURTHER INFORMATION CONTACT:** Ross Arnold, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port, call (202) 344-2650, or refer to the Bureau of Customs and Border Protection website at http://www.cbp.gov. For information on embargoes and quota re-openings, refer to the Office of Textiles and Apparel website at http://otexa.ita.doc.gov.

**SUPPLEMENTARY INFORMATION:**

**Authority:** Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The current limits for certain categories are being increased for carryover.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 69 FR 57270, published on September 24, 2004.

**Philip J. Martello,**

*Acting Chairman, Committee for the Implementation of Textile Agreements.*

**Committee for the Implementation of Textile Agreements**

December 13, 2005.

Commissioner,

*Bureau of Customs and Border Protection, Washington, DC 20229.*

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on September 20, 2004, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain wool and man-made fiber textile products, produced or manufactured in Belarus and exported during the twelve-month period which began on January 1, 2005 and extends through December 31, 2005.

Effective on December 16, 2005, you are directed to adjust the limits for the following categories, as provided for under the agreement between the Governments of the United States and Belarus dated January 10, 2003, as amended May 13, 2004:

| Category | Twelve-month restraint limit [1] |
|---|---|
| 448 | 39,265 dozen. |
| 622 | 1,870,794 square meters of which not more than 11,349,484 square meters shall be in Category 622-L [2] and not more than 699,661 square meters shall be in Category 622-N [3]. |

[1] The limits have not been adjusted to account for any imports exported after December 31, 2004.

[2] Category 622-L: only HTS numbers 7019.51.9010, 7019.52.4010, 7019.52.9010, 7019.59.4010, and 7019.59.9010.

[3] Category 622-N: only HTS numbers 7019.52.40.21, 7019.52.90.21, 7019.59.40.21, 7019.59.90.21.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C.553(a)(1).

Sincerely,

Philip J. Martello,

*Acting Chairman, Committee for the Implementation of Textile Agreements.*

[FR Doc. 05–24176 Filed 12–16–05; 8:45 am]

BILLING CODE 3510–DS–S

## COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

### Adjustment of Import Limits for Certain Cotton and Man-Made Fiber Textiles and Textile Products Produced or Manufactured in the Socialist Republic of Vietnam

December 13, 2005.

**AGENCY:** Committee for the Implementation of Textile Agreements (CITA).

**ACTION:** Issuing a directive to the Commissioner, U.S. Customs and Border Protection.

**EFFECTIVE DATE:** December 16, 2005.

**FOR FURTHER INFORMATION CONTACT:** Ross Arnold, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the U.S. Customs and Border Protection website (http://www.cbp.gov), or call (202) 344-2650. For information on embargoes and quota re-openings, refer to the Office of Textiles and Apparel website at http://otexa.ita.doc.gov.

**SUPPLEMENTARY INFORMATION:**

**Authority:** Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The Bilateral Textile Agreement of July 17, 2003, as amended on July 22, 2004, between the Governments of the United States and the Socialist Republic of Vietnam, establishes limits for certain cotton, wool and man-made fiber textiles and textile products, produced or manufactured in the Socialist Republic of Vietnam. The current limits for certain categories are being adjusted for carryforward, carryover, and the recrediting of unused 2004 carryforward.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff

Schedule of the United States (refer to the Office of Textiles and Apparel website at http://otexa.ita.doc.gov). See 69 Fed. Reg. 57272 (September 24, 2004).

**Philip J. Martello,**

*Acting Chairman, Committee for the Implementation of Textile Agreements.*

**Committee for the Implementation of Textile Agreements**

December 13, 2005.

Commissioner,
*U.S. Customs and Border Protection, Washington, DC 20229*

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on September 20, 2004, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool, and man–made fiber textiles and textile products, produced or manufactured in Vietnam and exported during the twelve-month period which began on January 1, 2005 and extends through December 31, 2005.

Effective on December 16, 2005, you are directed to adjust the limits for the following categories, as provided for under the terms of the current bilateral textile agreement between the Governments of the United States and Vietnam:

| Category | Restraint limit [1] |
|---|---|
| 334/335 | 761,848 dozen. |
| 338/339 | 16,329,744 dozen. |
| 340/640 | 2,419,387 dozen. |
| 342/642 | 655,586 dozen. |
| 347/348 | 8,162,880 dozen. |
| 638/639 | 1,534,305 dozen. |
| 647/648 | 2,488,940 dozen. |

[1] The limits have not been adjusted to account for any imports exported after December 31, 2004.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,
Philip J. Martello,
*Acting Chairman, Committee for the Implementation of Textile Agreements.*

[FR Doc. 05–24177 Filed 12–16–05; 8:45 am]

BILLING CODE 3510–DS–S

## COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

### Establishment of Import Limits for Certain Cotton, Wool and Man-Made Fiber Textiles and Textile Products Produced or Manufactured in the Socialist Republic of Vietnam

December 13, 2005.

**AGENCY:** Committee for the Implementation of Textile Agreements (CITA).

**ACTION:** Issuing a directive to the Commissioner, Bureau of Customs andBorder Protection establishing limits

**EFFECTIVE DATE:** January 1, 2006.

**FOR FURTHER INFORMATION CONTACT:** Ross Arnold, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce (202) 482–4212. For information on the quota status of these limits, refer to the Bureau of Customs and Border Protection website (http://www.cbp.gov), or call (202) 344-2650. For information on embargoes and quota re-openings, refer to the Office of Textiles and Apparel website at http://otexa.ita.doc.gov.

**SUPPLEMENTARY INFORMATION:**

**Authority:** Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The Bilateral Textile Agreement of July 17, 2003, as amended on July 22, 2004, between the Governments of the United States and the Socialist Republic of Vietnam, establishes limits for certain cotton, wool and man-made fiber textiles and textile products, produced or manufactured in the Socialist Republic of Vietnam and exported during the period January 1, 2006 through December 31, 2006.

In the letter published below, the Chairman of CITA directs the Commissioner, Bureau of Customs and Border Protection to establish the 2006 limits.

These limits may be revised if Vietnam becomes a member of the World Trade Organization (WTO) and the United States applies the WTO agreement to Vietnam.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (refer to the Office of Textiles and Apparel website at http://otexa.ita.doc.gov).

**Philip J. Martello,**

*Acting Chairman, Committee for the Implementation of Textile Agreements.*

**Committee for the Implementation of Textile Agreements**

December 13, 2005.

Commissioner,
*Bureau of Customs and Border Protection, Washington, DC 20229.*

Dear Commissioner: Pursuant to section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); and Executive Order 11651 of March 3, 1972, as amended, and the bilateral textile agreement of July 17, 2003, as amended on July 22, 2004, between the Governments of the United States and the Socialist Republic of Vietnam, you are directed to prohibit, effective on January 1, 2006, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton, wool and man-made fiber textiles and textile products in the following categories, produced or manufactured in Vietnam and exported during the twelve-month period beginning on January 1, 2006 and extending through December 31, 2006 in excess of the following levels of restraint:

| Category | Restraint limit |
|---|---|
| 200 | 367,513 kilograms. |
| 301 | 833,029 kilograms. |
| 332 | 1,225,043 dozen pairs. |
| 333 | 44,101 dozen. |
| 334/335 | 790,375 dozen. |
| 338/339 | 16,402,811 dozen. |
| 340/640 | 2,433,201 dozen. |
| 341/641 | 932,969 dozen. |
| 342/642 | 661,770 dozen. |
| 345 | 348,969 dozen. |
| 347/348 | 8,325,564 dozen. |
| 351/651 | 584,933 dozen. |
| 352/652 | 2,228,480 dozen. |
| 359–C/659–C [1] | 397,928 kilograms. |
| 359-S/659-S [2] | 643,148 kilograms. |
| 434 | 17,191 dozen. |
| 435 | 42,416 dozen. |
| 440 | 2,653 dozen. |
| 447 | 55,183 dozen. |
| 448 | 33,959 dozen. |
| 620 | 7,796,174 square meters. |
| 632 | 612,522 dozen pairs. |
| 638/639 | 1,462,269 dozen. |
| 645/646 | 236,437 dozen. |
| 647/648 | 2,377,827 dozen. |

[1] Category 359-C: only HTS numbers 6103.42.2025, 6103.49.8034, 6104.62.1020, 6104.69.8010, 6114.20.0048, 6114.20.0052, 6203.42.2010, 6203.42.2090, 6204.62.2010, 6211.32.0010, 6211.32.0025 and 6211.42.0010; Category 659-C: only HTS numbers 6103.23.0055, 6103.43.2020, 6103.43.2025, 6103.49.2000, 6103.49.8038, 6104.63.1020, 6104.63.1030, 6104.69.1000, 6104.69.8014, 6114.30.3044, 6114.30.3054, 6203.43.2010, 6203.43.2090, 6203.49.1010, 6203.49.1090, 6204.63.1510, 6204.69.1010, 6210.10.9010, 6211.33.0010, 6211.33.0017 and 6211.43.0010.

[2] Category 359-S: only HTS numbers 6112.39.0010, 6112.49.0010, 6211.11.8010, 6211.11.8020, 6211.12.8010 and 6211.12.8020; Category 659-S: only HTS numbers 6112.31.0010, 6112.31.0020, 6112.41.0010, 6112.41.0020, 6112.41.0030, 6112.41.0040, 6211.11.1010, 6211.11.1020, 6211.12.1010 and 6211.12.1020.

The limits set forth above are subject to adjustment pursuant to the current bilateral agreement between the Governments of the United States and the Socialist Republic of Vietnam.

Products in the above categories exported during 2005 shall be charged to the applicable category limits for that year (see directive dated September 20, 2004) to the extent of any unfilled balances. In the event the limits established for that period have been exhausted by previous entries, such products shall be charged to the limits set forth in this directive.

These limits may be revised if Vietnam becomes a member of the World Trade Organization (WTO) and the United States applies the WTO agreement to Vietnam.

In carrying out the above directions, the Commissioner of Customs and Border Protection should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception of the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Philip J. Martello,

*Acting Chairman, Committee for the Implementation of Textile Agreements.*

[FR Doc. 05–24178 Filed 12–16–05; 8:45 am]

BILLING CODE 3510–DS

## DEPARTMENT OF DEFENSE

### Department of the Air Force

### Privacy Act of 1974; System of Records

**AGENCY:** Department of the Air Force, DoD.

**ACTION:** Notice to add a record system.

**SUMMARY:** The Department of the Air Force proposes to add a system of records notice to its inventory of records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

**DATES:** The actions will be effective on January 18, 2006 unless comments are received that would result in a contrary determination.

**ADDRESSES:** Send comments to the Air Force Privacy Act Officer, Office of Warfighting Integration and Chief Information Officer, SAF/XCISI, 1800 Air Force Pentagon, Suite 220, Washington, DC 20330–1800.

**FOR FURTHER INFORMATION CONTACT:** Ms. Novella Hill at (703) 588–7855.

**SUPPLEMENTARY INFORMATION:** The Department of the Air Force's record system notices for records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 522a(r) of the Privacy Act of 1974, as amended, was submitted on December 7, 2005, to the House Committee on Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: December 12, 2005.

**L.M. Bynum,**

*OSD Federal Register Liaison Officer, Department of Defense.*

### F032 AF ILE

**SYSTEM NAME:**

Enterprise Environmental, Safety and Occupational Health-Management Information System (EESOH–MIS).

**SYSTEM LOCATION:**

The centralized Web-enabled database system is located on servers hosted by Headquarters Electronic Systems Center, Headquarters Air Force Material Command, DISA–GCSS–AF, Bldg. 857, Room 200, 501 E. Moore Drive, Maxwell AFT-Gunter Annex, AL 36114.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

All personnel involved in the environmental processes to include active duty, guard (including state employees), and reserve personnel as well as Department of Defense civilians (DoD) and contractors.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Name, Social Security Number (SSN), gender, Race, Date of Birth, citizenship, Mailing Address, home telephone number, work telephone number, home e-mail, personnel type, occupation, pay grade, rank, assigned Unit Identification (UIC), service affiliation, agency, and work e-mail.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

10 U.S.C. 9832, Property Accountability: Regulations; and E.O. 9397 (SSN).

**PURPOSE(S):**

The purpose of this system is to establish a management system where personnel having responsibilities and duties for Environmental Safety and Occupational Health (ESOH) programs are identified for purposes of ensuring that such personnel possess the authority to take specified actions required or necessitated by the program.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:**

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the (DoD) as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The (DoD) 'Blanket Routine Uses' publilshed at the beginning of the Air Force's compilation of record system notices apply to this system.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

All records are stored in electronic media only.

**RETRIEVABILITY:**

Records are retrieved by Social Security Number.

**SAFEGUARDS:**

Records are accessed by person(s) responsible for servicing the records system in performance of their official duties and by authorized personnel who are properly screened and cleared for need-to-know. Records stored in locked rooms, cabinets, and in computer storage devices protected by computer system software.

**RETENTION AND DISPOSAL:**

Records are deleted when superseded, obsolete, or no longer needed.

**SYSTEM MANAGER(S) AND ADDRESS:**

Chief, AF Enterprise Environmental, Safety and Occupational Health Integration, AF–IOH–RSHC, HQ AFCESA/CEOI, 139 Barnes Drive, Suite 1, Tyndall AFB, FL 32403.

**NOTIFICATION PROCEDURE:**

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to or visit the Chief, AF Enterprise Environmental, Safety and Occupational Health Integration, AF–IOH–RSHC, HQ AFCESA/CEOI, 139 Barnes Drive, Suite 1, Tyndall AFB, FL 32403.

**RECORD ACCESS PROCEDURES:**

Individuals seeking to access records about themselves contained in this system should address written inquiries to or visit the Chief, AF Enterprise Environmental, Safety and Occupational Health Integration, AF–IOH–RSHC, HQ AFCESA/CEOI, 139 Barnes Drive, Suite 1, Tyndall AFB, FL 32403.

**CONTESTING RECORDS PROCEDURES:**

The Air Force rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Air Force Instruction 33–332; 32 CFR part 806b; or may be obtained from the system manager.

**RECORD SOURCE CATEGORIES:**

Defense Manpower Data Center.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

[FR Doc. 05–24161 Filed 12–16–05; 8:45 am]

**BILLING CODE 5001–06–M**

## DEPARTMENT OF DEFENSE

### Department of the Army

### Notice of Intent To Grant Exclusive Patent License to Akoura Biometrics, Inc.

**AGENCY:** Department of the Army, DoD.

**ACTION:** Notice of intent.

**SUMMARY:** In compliance with 37 CFR 404 *et seq.*, the Department of the Army hereby gives notice of its intent to grant to Akoura Biometrics Incorporated, a corporation having its principle place of business at 9990 Waterford Trail Chagrin Falls, OH 44023, an exclusive or partially exclusive license relative to ARL patents U.S. Patent 6,557,103 B1 entitled, ''Spread Spectrum Steganography''; April 29, 2003, Boncelet, Jr., *et al.* and U.S. Patent 6,831,990 B2 entitled, ''System and Method for Image Tamper Detection via Thumbnail Hiding''; December 14, 2004; Marvel *et al.*

**DATES:** Anyone wishing to object to the grant of this license must file written objections along with supporting evidence, if any, not later than 15 days from the date of this notice.

**ADDRESSES:** Send written objections to Michael D. Rausa, U.S. Army Research Laboratory, Office of Research and Technology Applications, ATTN: AMSRD–ARL–DP–T/Bldg. 454, Aberdeen Proving Ground, MD 21005–5425.

**FOR FURTHER INFORMATION CONTACT:** Michael D. Rausa, telephone (410) 278–5028.

**SUPPLEMENTARY INFORMATION:** None.

**Brenda S. Bowen,**

*Army Federal Register Liaison Officer.*

[FR Doc. 05–24188 Filed 12–16–05; 8:45 am]

**BILLING CODE 3710–08–M**

## DEPARTMENT OF DEFENSE

### Department of the Army

### Notice of Intent To Grant Exclusive Patent License; Martin Marietta Composites, Inc.

**AGENCY:** Department of the Army, DoD.

**ACTION:** Notice of intent.

**SUMMARY:** In compliance with 37 CFR 404 *et seq.,* the Department of the Army hereby gives notice of its intent to grant to Martin Marietta Composites, Inc., a corporation having its principle place of business at 2700 Wycliff Road, Raleigh, NC 27622–0013, exclusive license to practice in the United States, the Government-owned invention described in US Patent 6,586,054 issued July 1, 2003 entitled, ''Apparatus and method for selectively distributing and controlling a means for impregnation of fibrous articles''.

**DATES:** Anyone wishing to object to the grant of this license file written objections along with supporting evidence, if any, not later than 15 days from the date of this notice.

**ADDRESSES:** Send written objections to Michael D. Rausa, U.S. Army Research Laboratory, Office of Research and Technology Applications, ATTN: AMSRD–ARL–DP–T/Bldg. 454, Aberdeen Proving Ground, MD 21005–5425.

**FOR FURTHER INFORMATION CONTACT:** Michael D. Rausa, telephone (410) 278–5028.

**SUPPLEMENTARY INFORMATION:** None.

**Brenda S. Bowen,**

*Army Federal Register Liaison Officer.*

[FR Doc. 05–24189 Filed 12–16–05; 8:45 am]

**BILLING CODE 3710–08–M**

## DEPARTMENT OF EDUCATION

**RIN 1820–ZA41**

### The Individuals With Disabilities Education Act Multi-Year Individualized Education Program Demonstration Program

**AGENCY:** Office of Special Education and Rehabilitative Services, Department of Education.

**ACTION:** Notice of proposed requirements and selection criteria.

**SUMMARY:** The Assistant Secretary for Special Education and Rehabilitative Services proposes requirements and selection criteria for a competition in which the Department will select up to 15 States to participate in a pilot program, the Multi-Year Individualized Education Program (IEP) Demonstration Program (Multi-Year IEP Program). State proposals approved under this program would create opportunities for participating local educational agencies (LEAs) to improve long-term planning for children with disabilities through the development and use of comprehensive multi-year IEPs. Additionally, the proposed requirements and selection criteria focus on an identified national need to reduce the paperwork burden associated with IEPs while preserving students' civil rights and promoting academic achievement.

The requirements and selection criteria proposed in this notice will be used for a single, one-time-only competition under this program.

**DATES:** We must receive your comments on or before March 6, 2006.

**ADDRESSES:** Address all comments about this notice to Troy Justesen, U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center Plaza, room 5126, Washington, DC 20202–2641. If you prefer to send your comments through the Internet, you may address them to us at the following address: *comments@ed.gov*.

You must include the term ''Multi-Year IEP Public Comment'' in the subject line of your electronic message. Please submit your comments only one time, in order to ensure that we do not receive duplicate copies.

**FOR FURTHER INFORMATION CONTACT:** Troy R. Justesen. Telephone: 202–245–7468.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

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

**SUPPLEMENTARY INFORMATION:**

#### Invitation To Comment

We invite you to submit comments regarding the proposed requirements and selection criteria. To ensure that your comments have maximum effect in developing the notice of final requirements and selection criteria, we urge you to identify clearly the specific proposed requirement or selection criterion that each comment addresses.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from the proposed requirements and selection criteria. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect all public comments about this notice in room 5126, 550 12th Street, SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

**Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record**

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

**Statutory Background of the Multi-Year IEP Program**

On December 3, 2004, President Bush signed into law Public Law 108–446, 118 Stat. 2647, the Individuals with Disabilities Education Improvement Act of 2004, reauthorizing and amending the Individuals with Disabilities Education Act (Act). This new law reflects the importance of strengthening our nation's efforts to ensure every child with a disability has available a free appropriate public education (FAPE) that is (1) of high quality and (2) designed to achieve the high standards established in the No Child Left Behind Act of 2001.

The Multi-Year IEP Program is one of two demonstration programs authorized under the new law that is designed to increase the resources and time available for classroom instruction and other activities focused on improving educational and functional results of children with disabilities. This program is also intended to enhance long-term educational planning and collaboration among IEP team members.

Through the Multi-Year IEP Program, established under section 614(d)(5) of the Act, the Secretary may approve no more than 15 proposals from States, including Puerto Rico, the District of Columbia, and outlying areas (States) to offer parents, in participating LEAs, the option of comprehensive, multi-year IEPs to improve long-term planning, which would cover natural transition points for participating children. Under section 614(d)(5)(C) of the Act, the term ''natural transition points'' means those periods that are close in time to the transition of a child with a disability from preschool to elementary grades, from elementary grades to middle or junior high school grades, from middle or junior high school grades to secondary school grades, and from secondary school grades to post-secondary activities, but in no case a period longer than three years (for the full text of section 614(d)(5) of the Act, go to: *http://www.gpoaccess.gov/plaws/index.html*).

These multi-year IEPs are intended to focus parents and teachers on long-term planning for student achievement, reduce the paperwork teachers must complete, and increase teacher instructional time. Under the Multi-Year IEP Program, multi-year IEPs cannot exceed three years and their development is optional for parents, requiring informed parental consent.

Under the Act, an IEP must contain measurable annual goals for a student's progress, and must be reviewed at least annually by the IEP team. Many parents have indicated that they would like the opportunity to engage their LEA in long-term planning for their child, rather than focusing on only one year at a time. A multi-year IEP would include long-term goals for academic achievement and functional performance, coinciding with natural transition points, and the progression of annual goals leading to achievement of the long-term goals.

**Statutory Requirements for Multi-Year IEP Program**

The Act establishes the following requirements that States must follow in developing and implementing their Multi-Year IEP Program proposals:

1. A State applying for approval under this program must propose to conduct demonstrations using a comprehensive multi-year IEP (not to exceed three years) that coincides with natural transition points for each participating child.

2. Except as specifically provided for under this program, all of the Act's requirements regarding provision of FAPE to children with disabilities (including requirements related to the content, development, review, and revision of the IEP under section 614(d) of the Act and procedural safeguards under section 615 of the Act) apply to participants in this Multi-Year IEP Program.

3. A State submitting a proposal under the Multi-Year IEP Program must include the following material in its proposal:

(a) Assurances that if an LEA offers parents the option of a multi-year IEP, development of the multi-year IEP is voluntary.

(b) Assurances that the LEA will obtain informed consent from parents before a comprehensive multi-year IEP is developed for their child.

(c) A list of all required elements for a comprehensive multi-year IEP, including:

(i) Measurable long-term goals not to exceed three years, coinciding with natural transition points for the child, that will enable the child to be involved in and make progress in the general education curriculum and that will meet the child's other needs that result from the child's disability.

(ii) Measurable annual goals for determining progress toward meeting the long-term goals, coinciding with natural transition points for the child, that will enable the child to be involved in and make progress in the general education curriculum and that will meet the child's other needs that result from the child's disability.

(d) A description of the process for the review and revision of a multi-year IEP, including:

(i) A review by the IEP team of the child's multi-year IEP at each of the child's natural transition points.

(ii) In years other than a child's natural transition points, an annual review of the child's IEP to determine the child's current levels of progress and whether the annual goals for the child are being achieved, and a requirement to amend the IEP, as appropriate, to enable the child to continue to meet the measurable goals set forth in the IEP.

(iii) If the IEP team determines, on the basis of a review, that the child is not making sufficient progress toward the goals described in the multi-year IEP, a requirement that within 30 calendar days of the IEP team's determination, the LEA shall ensure that the IEP team carries out a more thorough review of the IEP in accordance with section 614(d)(4) of the Act.

(iv) A requirement that, at the request of the parent, the IEP team will conduct an immediate review of the child's multi-year IEP, rather than at the child's next transition point or annual review.

**Background for Proposed Requirements and Selection Criteria**

Although the Act sets out the previously-described requirements, it does not provide for other requirements that are necessary for implementation of this program. For instance, the Act does not address the relationship among the content requirements of an IEP, the new content requirements of the multi-year IEP, and informed parental consent requirements. The Act also does not establish selection criteria for the Department to use to evaluate State proposals. Thus, in this notice, we are proposing additional Multi-Year IEP Program requirements to address these and other implementation issues and selection criteria that we will use to evaluate State proposals.

Under section 614(d)(5)(B) of the Act, the Department is required to report on the effectiveness of the Multi-Year IEP Program. In this notice, we also are

proposing requirements with which States must comply that will allow the Department to evaluate the effectiveness of this program. To accomplish this, the Institute of Education Sciences (Institute) will conduct an evaluation using a quasi-experimental design that collects data on the following outcomes: Educational and functional results for students with disabilities, time and resource expenditures by IEP team members and teachers, quality of long-term education plans incorporated in IEPs, and degree of collaboration among IEP members. These outcomes will be compared for students whose parents consent to their child's participation in a multi-year IEP and students who are matched on type of disability, age, prior educational outcomes, and to the extent feasible, the nature of the special education services, who do not participate in the multi-year IEP. Specifics of the design will be confirmed during discussions with the evaluator, a technical workgroup, and the participating States during the first several months of the study.

Participating States will play a crucial supportive role in this evaluation. They will, at minimum, assist in developing the specifics of the evaluation plan, assure that districts participating in the multi-year IEP will participate in the evaluation, supply data relevant to the outcomes being measured from State data sources (*e.g.*, student achievement and functional outcome data, complaint numbers), provide background information on relevant State policies and practices, provide access to current student IEPs during Year 1 of the evaluation, and complete questionnaires and participate in interviews. Data collection and analysis will be the responsibility of the Institute through its contractor.

States can expect to allocate resources for this purpose at a minimum during Year 1 to assist with planning the details of the evaluation, ensuring the participation of involved districts, providing access to relevant State records, and completing questionnaires or participating in interviews. Over the course of the evaluation, participating States will receive an annual incentive payment (described in the next section) that will offset the cost of participating in the evaluation.

We will announce the final requirements and selection criteria in a notice in the **Federal Register**. We will determine the final requirements and selection criteria after considering responses to this notice and other information available to the Department.

**Note:** An application and award for the Multi-Year IEP Program does not preclude an application and award for the Paperwork Waiver Demonstration Program, which is the subject of a separate notice of proposed requirements and selection criteria.

**Note:** This notice does *not* solicit applications. We will invite applications through a notice in the **Federal Register** at a later date.

**Proposed Additional Requirements for Multi-Year IEP Program**

The Secretary proposes the following additional requirements for the Multi-Year IEP Program:

1. The Secretary will not grant a State approval to participate in this program if the Secretary determines that the State currently meets the conditions under section 616(d)(2)(A)(iii) or (iv) of the Act relative to its implementation of Part B of the Act.

2. The Secretary may terminate any Multi-Year IEP Program project if the Secretary determines that the State (a) Needs assistance under section 616(d)(2)(A)(ii) of the Act and the State's participation in this program has contributed to or caused the need for assistance; (b) needs intervention under 616(d)(2)(A)(iii) of the Act or needs substantial intervention under section 616(d)(2)(A)(iv) of the Act; or (c) failed to appropriately implement its project.

3. States submitting a proposal under the Multi-Year IEP Program must include the following material in their proposal:

(a) Assurances that before an LEA requests a parent's informed consent to the development of a multi-year IEP, the LEA will inform the parent in writing of (i) any differences between the requirements relating to the content, development, review, and revision of IEPs under section 614(d) of the Act and the State's requirements relating to the content, development, review, and revision of IEPs under the State's approved Multi-Year IEP Program proposal; and (ii) the parent's right to revoke consent and the LEA's responsibility to conduct, within 30 calendar days after revocation by the parent, an IEP meeting to develop an IEP that meets the requirements of section 614(d)(1)(A) of the Act.

(b) A description of how the State obtained input from school and district personnel and parents in developing the list of required elements for each multi-year IEP and the description of the process for the review and revision of each multi-year IEP.

(c) A description of how the State obtained broad stakeholder input on its Multi-Year IEP Program proposal.

(d) Assurances that the State will cooperate fully, if selected, in a national evaluation of the Multi-Year IEP Program. Cooperation includes devoting a minimum of 4 months between the State's award and subsequent implementation of this program to conduct joint planning with the evaluator. It also includes participation by the State educational agency (SEA) in the following evaluation activities:

(i) Providing to the evaluator the list of required elements for the multi-year IEP and the description of the process for the review and revision of the multi-year IEP submitted as part of the State's application for this program. Ensuring that the evaluator will have access to the most recent IEP created before participating in the Multi-Year IEP Program and the multi-year IEP(s) created during the project for each participating child (multi-year IEP participants and matched participants who not not have a multi-year IEP), together with a general description of the process for completing both versions of the IEP.

(ii) Recruiting districts or schools to participate in the evaluation (as established in the evaluation design) and ensuring their continued cooperation with the evaluation. Providing a list of districts and schools that have been recruited and have agreed to implement the proposed Multi-Year IEP Program, allow data collection to occur, and cooperate fully with the evaluation. For each participating school or district providing basic demographic information such as student enrollment, district wealth and ethnicity breakdowns, the number of children with disabilities by category, and the number or type of personnel, as requested by the evaluator.

(iii) Serving in an advisory capacity to assist the evaluator in identifying valid and reliable data sources and improving the design of data collection instruments and methods.

(iv) Providing to the evaluator an inventory of existing State-level data relevant to the evaluation questions or consistent with the identified data sources. Supplying requested State-level data in accordance with the timelines specified in the evaluation design.

(v) If necessary to the final design of the study, providing assistance to the evaluator on the collection of data from parents, including obtaining informed consent, for parents to participate in interviews and respond to surveys and questionnaires.

(vi) Designating a coordinator for the project who will monitor the implementation of the project and work

with the evaluator. This coordinator also will serve as the primary point of contact for the Office of Special Education Programs (OSEP) project officer.

4. Each State receiving approval to participate in the Multi-Year IEP Program will be awarded an annual incentive payment of $10,000 to be used exclusively to support program-related evaluation activities, including one trip to Washington, DC, annually to meet with the project officer and the evaluator. Each participating State will receive an additional incentive payment of $15,000 annually from the contractor to support evaluation activities in the State. Incentive payments may also be provided to participating districts to offset the costs of their participation in the evaluation of the Multi-Year IEP Program.

**Proposed Selection Criteria**

We propose that the following selection criteria be used to evaluate State proposals submitted under this program. These particular criteria were selected because they address the statutory requirements and proposed program requirements and permit applicants to propose a distinctive approach to addressing these requirements.

**Note:** The maximum score for all of these criteria will be 100 points. We will inform applicants of the points or weights assigned to each criterion and sub-criterion in a notice published in the **Federal Register** inviting States to submit applications for this program.

1. *Significance.* The Secretary considers the significance of the proposed project. In determining the significance of the proposed project, the Secretary considers the following factors:

(a) The extent to which the proposed project involves the development or demonstration of promising new strategies that build on, or are alternatives to, existing strategies.

(b) The likelihood that the proposed project will result in improvements in the IEP process, especially long-term planning for children with disabilities.

2. *Quality of the project design.* The Secretary considers the quality of the design of the proposed project. In determining the quality of the design of the proposed project, the Secretary considers the following factors:

(a) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified, measurable, and address active participation in the program evaluation.

(b) The extent to which the design of the proposed project will improve long-term planning and address the need to reduce the paperwork burden associated with IEPs.

(c) The extent to which the proposed project encourages consumer involvement, including parental involvement.

3. *Quality of the management plan.* The Secretary considers the quality of the management plan for the proposed project. In determining the quality of the management plan for the proposed project, the Secretary considers the following factors:

(a) The adequacy of procedures for ensuring feedback and continuous improvement in the operation of the proposed project.

(b) The extent to which the applicant has devoted sufficient resources to the evaluation of the Multi-Year IEP Program.

(c) How the applicant will ensure that a diversity of perspectives are brought to bear in the operation of the proposed project, including those of parents, teachers, related services providers, administrators, or others, as appropriate.

**Executive Order 12866**

This notice of proposed requirements and selection criteria has been reviewed in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with this regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of the actions proposed in this notice, we have determined that the benefits of the proposed requirements and selection criteria justify the costs.

We have also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

**Intergovernmental Review**

This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

**Electronic Access to This Document**

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *www.ed.gov/news/fedregister*.

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC area at (202) 512–1530.

**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html*.

**Program Authority:** 20 U.S.C. 1414.

Dated: December 14, 2005.

**John H. Hager,**

*Assistant Secretary for Special Education and Rehabilitative Services.*

[FR Doc. E5–7506 Filed 12–16–05; 8:45 am]

BILLING CODE 4000–01–P

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## DEPARTMENT OF EDUCATION

**RIN 1820–ZA42**

## The Individuals With Disabilities Education Act Paperwork Waiver Demonstration Program

**AGENCY:** Office of Special Education and Rehabilitative Services, Department of Education.

**ACTION:** Notice of proposed requirements and selection criteria.

**SUMMARY:** The Assistant Secretary for Special Education and Rehabilitative Services proposes requirements and selection criteria for a competition in which the Department will select up to 15 States to participate in a pilot program, the Paperwork Waiver Demonstration Program (Paperwork Waiver Program). State proposals approved under this program would create opportunities for participating States to reduce paperwork burdens and other administrative duties in order to increase time for instruction and other activities to improve educational and functional results for children with disabilities. The proposed requirements and selection criteria focus on an identified national need to reduce the paperwork burden associated with the requirements of Part B of the Individuals with Disabilities Education Act, as amended, while preserving students' civil rights and promoting academic achievement.

The requirements and selection criteria proposed in this notice will be used for a single, one-time-only competition under this program.

**DATES:** We must receive your comments on or before March 6, 2006.

**ADDRESSES:** Address all comments about this notice to Troy Justesen, U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center Plaza, room 5126, Washington, DC 20202–2641. If you prefer to send your comments through the Internet, you may address them to us at the following address: *comments@ed.gov*.

You must include the term ''Paperwork Waiver Public Comment'' in the subject line of your electronic message. Please submit your comments only one time, in order to ensure that we do not receive duplicate copies.

**FOR FURTHER INFORMATION CONTACT:** Troy Justesen. Telephone: 202–245–7468.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

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

**SUPPLEMENTARY INFORMATION:**

## Invitation to Comment

We invite you to submit comments regarding the proposed requirements and selection criteria. To ensure that your comments have maximum effect in developing the notice of final requirements and selection criteria, we urge you to identify clearly the specific proposed requirement or selection criterion that each comment addresses.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from the proposed requirements and selection criteria. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect all public comments about this notice in room 5126, 550 12th Street, SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

## Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

## Statutory Background of the Paperwork Waiver Program

On December 3, 2004, President Bush signed into law Public Law 108–446, 118 Stat. 2647, the Individuals with Disabilities Education Improvement Act of 2004, reauthorizing and amending the Individuals with Disabilities Education Act (Act). This new law reflects the importance of strengthening our Nation's efforts to ensure every child with a disability has available a free appropriate public education (FAPE) that is (1) of high quality and (2) designed to achieve the high standards established in the No Child Left Behind Act of 2001.

The Paperwork Waiver Program is one of two demonstration programs authorized under the new law that is designed to address parents', special educators' and States' desire to reduce excessive and repetitious paperwork, administrative burden, and non-instructional teacher time and, at the same time, to increase the resources and time available for classroom instruction and other activities focused on improving educational and functional results of children with disabilities.

Paperwork burden in special education affects (1) the time school staff can devote to instruction or service provision and (2) retention of staff, particularly special education teachers. In 2002, the Office of Special Education Programs (OSEP) funded a nationally representative study of teachers' perceptions of sources of paperwork burden, the hours devoted to these activities, and possible explanations for variations among teachers in the hours devoted to these tasks. Among the findings related to the Individualized Education Program (IEP), student evaluations, progress reporting, and case management was that teachers whose administrative duties and paperwork exceeded four hours per week were more likely to perceive these responsibilities as interfering with their job of teaching. Moreover, the study found that the mean number of hours reported by teachers to be devoted to these tasks was 6.3 hours per week.

Through the Paperwork Waiver Program, established under section 609(a) of the Act, the Secretary may grant waivers of certain statutory and regulatory requirements under Part B of the Act to not more than 15 States, including Puerto Rico, the District of Columbia, and the outlying areas (States) based on State proposals to reduce excessive paperwork and non-instructional time burdens that do not assist in improving educational and functional results for children with disabilities. The Secretary is authorized to grant these waivers for a period of up to four years.

Although the purpose of the Paperwork Waiver Program is to reduce the paperwork burden associated with the Act, not all statutory and regulatory requirements under Part B of the Act may be waived. Specifically, the Secretary may not waive any statutory or regulatory provisions relating to applicable civil rights requirements or procedural safeguards. Furthermore, waivers may not affect the right of a child with a disability to receive FAPE. In short, State proposals must preserve the basic rights of students with disabilities.

## Statutory Requirements for Paperwork Waiver Program

The Act establishes the following requirements to govern the Paperwork Waiver Program proposals:

1. States applying for approval under this program must submit a proposal to reduce excessive paperwork and non-instructional time burdens that do not assist in improving educational and functional results for children with disabilities.

2. A State submitting a proposal for the Paperwork Waiver Program must include in its proposal a list of any statutory requirements of, or regulatory requirements relating to, Part B of the Act that the State desires the Secretary to waive, in whole or in part (not including civil rights requirements and procedural safeguards as noted elsewhere in this notice); and a list of any State requirements that the State proposes to waive or change, in whole or in part, to carry out the waiver granted to the State by the Secretary. Waivers may be granted for a period of up to four years.

3. The Secretary is prohibited from waiving any statutory requirements of, or regulatory requirements relating to applicable civil rights requirements or procedural requirements under section 615 of the Act. A waiver may not affect the right of a child with a disability to receive FAPE (as defined in section 602(9) of the Act).

4. The Secretary will not grant any waiver to a State if the Secretary has determined that the State currently meets the conditions under section 616(d)(2)(A)(iii) or (iv) of the Act relative to its implementation of Part B of the Act.

5. The Secretary will terminate a State's waiver granted as part of this program if the Secretary determines that the State (a) needs assistance under section 616(d)(2)(A)(ii) of the Act and that the waiver has contributed to or caused the need for assistance; (b) needs intervention under section 616(d)(2)(A)(iii) of the Act or needs substantial intervention under section 616(d)(2)(A)(iv) of the Act; or (c) fails to appropriately implement its waiver.

**Background for Proposed Requirements and Selection Criteria**

Although the Act sets out the previously-described situations in which requirements cannot be waived, it does not provide specificity as to the particular requirements that are not subject to waiver or provide for other requirements that are necessary for implementation of this program. For instance, the Act does not address what requirements States may propose to waive without affecting the right of a child with a disability to receive FAPE. The Act also does not establish the selection criteria for the Department to use to evaluate State proposals. Thus, in this notice, we are proposing additional Paperwork Waiver Program requirements to address these and other implementation issues and selection criteria that we will use to evaluate State proposals.

Under section 609(b) of the Act, the Department is required to report on the effectiveness of the waiver program. In this notice, we are proposing requirements with which States must comply that will allow the Department to evaluate the effectiveness of this program. To accomplish this, the Institute of Education Sciences (Institute) will conduct an evaluation using a quasi-experimental design that collects data on the following outcomes: (a) Educational and functional results for students with disabilities, (b) allocation and engagement of instructional time for students with disabilities, (c) administrative duties, paperwork requirements, and resources by teaching and related services personnel, (d) quality of special education services and plans incorporated in IEPs, and (e) teacher, parent and administrator satisfaction. These outcomes will be compared for students who participate in the Paperwork Waiver Demonstration Program, and students who are matched on disability and prior educational outcomes who do not participate in the paperwork waiver program. Specifics of the design will be confirmed during discussion with the evaluator, a technical workgroup, and the participating States during the first several months of the study.

Participating States will play a crucial supportive role in this evaluation. They will, at minimum, assist in developing the evaluation plan, assure that districts participating in the Paperwork Waiver Demonstration Program will collaborate with the evaluation, provide background information on relevant State policies and practices, and supply data relevant to the outcomes from State data sources (*e.g.*, student achievement and functional performance data, complaint numbers), provide access to current student IEPs (if appropriate and paperwork waiver affects an IEP) during Year 1 of the evaluation, and complete questionnaires, surveys, and participate in interviews. Data collection and analysis will be the responsibility of the Institute through its contractor. States can expect to allocate resources for this purpose at minimum during Year 1 to assist with planning the details of the evaluation, ensuring participation of involved districts, providing access to relevant State records, and completing questionnaires or participating in interviews. Over the course of the evaluation, participating States will receive an annual incentive payment (described in the next section) that will offset the cost of participating in the evaluation.

We will announce the final requirements and selection criteria in a notice in the **Federal Register**. We will determine the final requirements and selection criteria after considering responses to this notice and other information available to the Department.

**Note:** An application and award for the Paperwork Waiver Program does not preclude application and award for the Multi-Year Individualized Education Program Demonstration Program, which is the subject of a separate notice of proposed requirements and selection criteria.

**Note:** This notice does *not* solicit applications. We will invite applications through a notice in the **Federal Register** at a later date.

**Proposed Additional Requirements for Paperwork Waiver Program**

The Secretary proposes the following additional requirements for the Paperwork Waiver Program.

1. A State submitting a proposal under the Paperwork Waiver Program must include the following material in its proposal:

(a) A description of how the State obtained input from school and district personnel and parents in selecting the requirements it is proposing for waiver and a description of any specific proposals for changing those requirements to reduce paperwork.

(b) A detailed description of how the State obtained broad stakeholder input on the proposal.

(c) A description of the procedures the State will employ to ensure that, if the waiver is granted, it will not result in a denial of the right to FAPE to any child with a disability.

(d) Assurances that parents will be given notice of any statutory requirements that will be waived.

(e) If a State is applying for a waiver of any paperwork requirements related to IEPs, assurances that the State will require that (i) any participating local educational agency (LEA) obtain informed consent from the parents before an IEP that does not meet the requirements of 614(d) of the Act is developed for a child; and (ii) before an LEA requests a parent's informed consent, the LEA inform the parent in writing of (A) Any differences between the requirements of section 614(d) of the Act relating to the content, development, review and revision of IEPs and the requirements relating to the content, development, review and revision of IEPs under the State's approved Paperwork Waiver Program proposal; (B) the parent's right to revoke consent to the use of the IEP under the Paperwork Waiver Program proposal at any time; and (C) the LEA's responsibility to conduct, within 30 calendar days after revocation by the parent, an IEP meeting to develop an IEP that meets all the requirements of section 614(d) of the Act.

(f) Assurances that the State will cooperate fully, if selected, in a national evaluation of the Paperwork Waiver Program. Cooperation includes devoting a minimum of 4 months between the award and the implementation of the State's waiver to conduct joint planning with the evaluator. It also includes participation by the State educational agency (SEA) in the following evaluation activities:

(i) For each item in the list of statutory, regulatory, or State requirements submitted pursuant to paragraph 2 in the *Statutory Requirements for Paperwork Waiver Program* section of this notice, ensuring that the evaluator will have access to the original and all subsequent new versions of the associated documents for each child involved in the evaluation, together with a general description of the process for completing each of the documents. For example, if elements of the IEP process are waived, the evaluator shall have access to the most recent IEP created under previous guidelines for each participating child,

as well as all of the new IEPs created under the waiver, along with a description of the process for completing both types of IEPs.

(ii) Recruiting districts or schools to participate in the evaluation (as established in the evaluation design) and ensuring their continued cooperation with the evaluation. Providing a list of districts and schools that have been recruited and have agreed to implement the proposed Paperwork Waiver Program, allow data collection to occur, and cooperate fully with the evaluation. For each participating school or district, providing basic demographic information such as student enrollment, district wealth and ethnicity breakdowns, the number of children with disabilities by category, and the number or type of personnel, as requested by the evaluator.

(iii) Serving in an advisory capacity to assist the evaluator in identifying valid and reliable data sources and improving the design of data collection instruments and methods.

(iv) Providing to the evaluator an inventory of existing State-level data relevant to the evaluation questions or consistent with the identified data sources. Supplying requested State-level data in accordance with the timeline specified in the evaluation design.

(v) Providing assistance to the evaluator with the collection of data from parents, including obtaining informed consent, for parent interviews and responses to surveys and questionnaires, if necessary to the final design of the evaluation.

(vi) Designating a coordinator for the project who will monitor the implementation of the project and work with the evaluator. This coordinator also will serve as the primary point of contact for the OSEP project officer.

2. For purposes of the statutory requirement prohibiting the Secretary from waiving any statutory requirements of, or regulatory requirements relating to, but not limited to, applicable civil rights requirements, the term *applicable civil rights requirements* as used in this notice includes all civil rights requirements in: (a) Section 504 of the Rehabilitation Act of 1973, as amended; (b) Title VI of the Civil Rights Act of 1964; (c) Title IX of the Education Amendments of 1972; (d) Title II of the Americans with Disabilities Act of 1990; and (e) Age Discrimination Act of 1975 and their implementing regulations. The term does not include other requirements under the Act.

3. Each State receiving approval to participate in the Paperwork Waiver Program will be awarded an annual incentive payment of $10,000 to be used exclusively to support program-related evaluation activities, including one trip to Washington, DC, annually to meet with the project officer and the evaluator. Each participating State will receive an additional incentive payment of $15,000 annually from the evaluation contractor to support evaluation activities in the State. Incentive payments may also be provided to participating districts to offset the cost of their participation in the evaluation of the Paperwork Waiver Demonstration Program.

**Proposed Selection Criteria**

We propose that the following selection criteria be used to evaluate State proposals submitted under this program. These particular criteria were selected because they address the statutory requirements and proposed program requirements and permit applicants to propose a distinctive approach to addressing these requirements.

**Note:** The maximum score for all of these criteria will be 100 points. We will inform applicants of the points or weights assigned to each criterion and sub-criterion in a notice published in the **Federal Register** inviting States to submit applications for this program.

1. *Significance*. The Secretary considers the significance of the proposed project. In determining the significance of the proposed project, the Secretary considers the following factors:

(a) The extent to which the proposed project involves the development or demonstration of promising new strategies that build on, or are alternatives to, existing strategies.

(b) The likelihood that the proposed project will reduce the paperwork burden and increase instructional time and improve academic achievement.

2. *Quality of the project design*. The Secretary considers the quality of the design of the proposed project. In determining the quality of the design of the proposed project, the Secretary considers the following factors:

(a) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified, measurable, and address active participation in the program evaluation.

(b) The extent to which the design of the proposed project will successfully reduce excessive paperwork and increase instructional time.

(c) The extent to which the proposed project encourages consumer involvement, including parental involvement.

3. *Quality of the management plan*. The Secretary considers the quality of the management plan for the proposed project. In determining the quality of the management plan for the proposed project, the Secretary considers the following factors:

(a) The adequacy of procedures for ensuring feedback and continuous improvement in the operation of the proposed project.

(b) The extent to which the applicant has devoted sufficient resources to the evaluation of the waiver program.

(c) How the applicant will ensure that a diversity of perspectives are brought to bear in the operation of the proposed project, including those of parents, teachers, related services providers, school administrators, or others, as appropriate.

**Executive Order 12866**

This notice of proposed requirements and selection criteria has been reviewed in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with this regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of the actions proposed in this notice, we have determined that the benefits of the proposed requirements and selection criteria justify the costs.

We have also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

**Intergovernmental Review**

This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

**Electronic Access to This Document**

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**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

**Program Authority:** 20 U.S.C. 1408.

Dated: December 14, 2005.

**John H. Hager,**

*Assistant Secretary for Special Education and Rehabilitative Services.*

[FR Doc. E5–7507 Filed 12–16–05; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF ENERGY

### Office of Environmental Management; Record of Decision for the Idaho High-Level Waste and Facilities Disposition Final Environmental Impact Statement

**AGENCY:** Department of Energy.

**ACTION:** Record of Decision.

**SUMMARY:** DOE is making decisions pursuant to the *Idaho High-Level Waste and Facilities Disposition Final Environmental Impact Statement* (Final EIS) (DOE/EIS–287), issued in October 2002. The Final EIS presents the analysis of a proposed action containing two sets of alternatives:

(1) *Waste processing alternatives* for treating, storing and disposing of liquid mixed (radioactive and hazardous) transuranic (TRU) waste/sodium-bearing waste (SBW) [1] and newly-generated liquid radioactive waste (NGLW) stored in below-grade tanks and solid high-level radioactive waste (HLW) calcine stored in bin sets at the Idaho Nuclear Technology and Engineering Center (INTEC) on the Idaho National Laboratory (INL) Site, previously named the Idaho National Engineering and Environmental Laboratory (INEEL); and

(2) *Facility disposition alternatives* for final disposition of facilities directly related to the HLW Program at INTEC after their missions are complete, including any new facilities necessary to implement the waste processing alternatives.

DOE plans a phased decision making process. DOE considered the information in the Final EIS, a related Supplement Analysis (DOE/EIS–0287–SA–01) (SA), and comments received on the **Federal Register** Notice (70 FR 44598; August 3, 2005) that announced DOE's preferred treatment technology for SBW when making the decisions in this ROD. This first ROD addresses SBW treatment, facilities disposition, excluding the INTEC Tank Farm Facility (Tank Farm) and bin sets closure, and DOE's strategy for HLW calcine.

DOE has decided to treat SBW using the steam reforming technology. The Department's preferred disposal path for this waste is disposal as TRU waste at the Waste Isolation Pilot Plant (WIPP) near Carlsbad, New Mexico. Until such time as the regulatory approvals are obtained and a determination that the waste is TRU is made, the Department will manage the waste to allow disposal at WIPP or at a geologic repository for spent nuclear fuel (SNF) and HLW.

For facilities disposition, DOE has decided to conduct performance-based closure (to contamination levels below those that would impact the human health and the environment as established by applicable regulations and DOE Orders as determined on a case-by-case basis depending on risk) of existing facilities directly related to the HLW Program at INTEC once their missions are complete. Newly constructed waste processing facilities needed to implement the decisions in this ROD, such as the steam reforming facility for SBW treatment, will be designed consistent with clean closure methods and planned to be clean closed when their missions are complete, regardless of the classification of the waste they treat. All INTEC facilities directly related to the HLW Program will be closed in accordance with applicable regulations and DOE Orders.

Further, consistent with DOE's *Environmental Management Performance Management Plan for Accelerating Cleanup at the INEEL* (July 2002), DOE's strategy for HLW calcine is to retrieve the calcine for disposal outside the State of Idaho. Accordingly, DOE will develop calcine retrieval demonstration processes and conduct risk-based analyses, including disposal options, focused on the calcine stored at the INTEC.

After the Final EIS was issued, the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (NDAA), Pub. L. 108–375, was enacted. Section 3116 of the NDAA provides that certain waste resulting from reprocessing of SNF is not high-level waste if the Secretary of Energy, in consultation with the Nuclear Regulatory Commission (NRC), makes certain determinations. Therefore, DOE plans to issue an amended ROD in 2006 specifically addressing closure of the Tank Farm Facility, which stored certain wastes resulting from reprocessing, in coordination with the Secretary of Energy's determination, in consultation with the NRC, under Section 3116.

In a future ROD, DOE will decide the final strategy for HLW calcine retrieval, including determining whether and how to further treat, if applicable, package, and store calcine pending disposal. DOE expects to issue the amended ROD for HLW calcine disposition and bin set closure in 2009.

The State of Idaho participated as a cooperating agency in the preparation of the *Idaho High-Level Waste and Facilities Disposition Environmental Impact Statement.* The State provided the following input to DOE's decisions for waste processing and facility disposition.

*Waste Processing:* The State of Idaho concurs with DOE's selection of steam reforming as the technology for solidifying remaining INTEC Tank Farm liquids, provided DOE obtains required permits for its treatment facility and post-treatment storage, and produces a waste form acceptable for disposal at a repository outside Idaho.

*Facility Disposition:* The State concurs with the performance-based closure of existing facilities directly related to the high-level waste program at INTEC, once their missions are complete, subject to the State's separate approval of individual closure plans under the Idaho Hazardous Waste Management Act and compliance with section 3116 of the NDAA. The State also concurs with DOE's decision to clean close newly constructed waste processing facilities.

*Remaining Decisions:* The State will provide additional input on DOE's remaining decisions for HLW facility disposition and calcine treatment, which DOE must make by December 31, 2009, in accordance with our 1995 Settlement Agreement. The State will continue to coordinate with DOE and the NRC as appropriate regarding the classification of tank residuals under Section 3116 of the NDAA, as well as the classification of other wastes.

**FOR FURTHER INFORMATION CONTACT:** For further information on the ROD and the Idaho Cleanup Project, contact Joel Case, Team Lead, U.S. Department of Energy, Idaho Operations Office, 1955 Fremont Avenue, MS–1222, Idaho Falls, ID 83415, Telephone: (208) 526–6795.

For general information on DOE's National Environmental Policy Act (NEPA) process, please 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, Telephone: (202) 586–4600 or leave a message at (800) 472–2756.

[1] The Final EIS refers to SBW as mixed transuranic waste/SBW. However a determination that SBW is transuranic waste has not been made.

**SUPPLEMENTARY INFORMATION:**

## I. Background

From 1952 to 1991, DOE and its predecessor agencies reprocessed SNF at INTEC, prior to 1998 known as the Idaho Chemical Processing Plant, on the INL Site. Reprocessing operations used solvent extraction systems to remove mostly uranium-235 from SNF. The waste product from the first extraction cycle of the reprocessing operation was liquid HLW mixed with hazardous materials. Subsequent extraction cycles, treatment processes, and follow-on decontamination activities generated additional liquids that were combined to form liquid SBW, which is generally much less radioactive than HLW generated from the first extraction cycle. These liquid wastes were stored in eleven 300,000-gallon below-grade storage tanks. The last campaign of SNF reprocessing at INTEC was in 1991 and HLW is no longer generated at INTEC. From 1963 to 1998, DOE processed HLW and some SBW through calcination that converted the liquid waste into a dry powder calcine. Additional SBW was processed by calcination from 1998 to 2000. At present, approximately 4,400 cubic meters of HLW calcine remain stored in six bin sets (a series of reinforced concrete vaults, each containing three to seven stainless steel storage bins), and approximately one million gallons of SBW remain in three 300,000 gallon below-grade tanks. Liquid SBW and newly generated liquid waste (NGLW) has continued to accumulate in the tanks from the calcination process, decontamination, and other activities. NGLW continued to be collected in the tank farm tanks from a number of sources at INTEC (*e.g.,* laboratory drains, snow melt, sumps, and evaporator operations) until September 2005 and is now being stored in other permitted storage tanks.

As a result of litigation, DOE and the State of Idaho reached an agreement in 1995 referred to as the Idaho Settlement Agreement/Consent Order (Settlement Agreement) that, among other things, provides for DOE to complete calcination of SBW liquid wastes by a target date of December 31, 2012. Although the agreement requires treatment of SBW by calcination, it also provides for modifying this requirement if supported by analysis and decisions under NEPA. The agreement also sets a target date of December 31, 2035, for treating all HLW and SBW to be ''road-ready'' for shipment out of Idaho.

In 1997, DOE issued a Notice of Intent to prepare an EIS to evaluate the environmental impacts of the range of reasonable alternatives for treating Idaho HLW calcine, SBW, associated radioactive waste such as NGLW, and for the disposition of related HLW Program facilities at INTEC. The State of Idaho participated as a cooperating agency in the development of the EIS to support the Settlement Agreement and to facilitate the EIS review process.

In January 2000, DOE issued the Draft *Idaho High-Level Waste and Facilities Disposition Environmental Impact Statement* (Draft EIS) (DOE/EIS–0287D) for public review and comment. Subsequently, DOE and the State of Idaho received approximately 1,000 comments on the Draft EIS and considered those comments while revising the EIS.

DOE issued the *Idaho High-Level Waste and Facilities Disposition Final Environmental Impact Statement* (Final EIS) (DOE/EIS–0287) in October 2002. The Final EIS presents the analysis of a proposed action containing two sets of alternatives: (1) *Waste processing alternatives* for treating, storing and disposing of liquid SBW and NGLW stored in below-grade tanks and solid HLW calcine stored in bin sets at the INTEC on the INL Site; and (2) *facility disposition alternatives* for final disposition of facilities directly related to the HLW Program after their missions are complete, including any new facilities necessary to implement the waste processing alternatives.

After the Final EIS was issued, DOE conducted four workshops to inform the public about the five technologies that the DOE was considering for treatment of the SBW with the preferred disposition at WIPP. The five technologies were Direct Vitrification, Cesium Ion Exchange with a grout waste form, Calcination with Maximum Achievable Control Technology upgrades, Direct Evaporation, and Steam Reforming. Workshops were held from March 13 to April 28, 2003, in Jackson, Wyoming, and Idaho Falls, Twin Falls, and Fort Hall, Idaho. In addition, briefings were held with individual stakeholders through June 2003. The public was given the opportunity to provide comments on all technologies presented through August 31, 2003, via e-mail or regular mail.

During the workshops and briefings, DOE informed the public that the DOE strategy was to select one of the five technologies for treatment of the SBW. Subsequently, DOE modified this strategy by incorporating the requirement for a contractor to propose a treatment technology for SBW in a draft Request for Proposals (RFP) for the Idaho Cleanup Project (ICP) contract. At public meetings of the Idaho Environmental Management Citizens Advisory Board (CAB), public meetings conducted by the National Academy of Sciences in Idaho, and other meetings with local stakeholders, DOE informed the public that the DOE would identify a preferred treatment technology for SBW after the contract was awarded. At these meetings, DOE also informed the public that they would have an opportunity to provide comments on the draft RFP.

DOE issued the draft RFP for the ICP contract for comment in February 2004. The draft RFP required bidders to propose technologies for treating SBW for disposal at WIPP and an alternative technical approach to prepare this waste for disposal as HLW in a geologic repository for SNF/HLW if this waste could not be disposed of at WIPP. The RFP also included the DOE strategy to meet the settlement agreement milestones for HLW calcine, facilities disposition, and segregating the NGLW from the Tank Farm Facility to other storage by September 30, 2005. DOE responded to comments received on the draft RFP and issued the final RFP in July 2004.

On October 28, 2004, the NDAA was enacted. Among other provisions of the Act, section 3116 of this NDAA provides that certain wastes from reprocessing is not HLW if the Secretary of Energy (the Secretary), in consultation with the Nuclear Regulatory Commission (NRC), determines that the criteria in 3116 have been met. Section 3116 provides that with respect to materials stored at a DOE site in Idaho, which activities are regulated by Idaho pursuant to closure plans or permits issued by the State, the term ''high-level radioactive waste'' does not include radioactive waste resulting from the reprocessing of SNF if the Secretary, in consultation with the NRC, makes certain determinations. Section 3116 is related to the requirements for the INTEC Tank Farm closure; therefore, tank closure will be addressed in an amended ROD in coordination with the Secretary's determination.

In July 2005, DOE issued a SA (DOE/EIS–0287–SA–01) that documented DOE's review of changes in the proposed action and new information obtained (*e.g.,* updated waste inventory) since the 2002 Final EIS was issued. Based on the analysis in the SA, DOE determined that there were no substantial changes in the proposed action and no significant new circumstances or information relevant to environmental concerns bearing on the proposed action or its impacts, and that a supplemental EIS was not required.

DOE then issued a **Federal Register** Notice (70 FR 44598, August 3, 2005) that announced steam reforming as DOE's preferred treatment technology for SBW.

## II. Waste Processing Alternatives Considered

The Final EIS analyzed six waste processing alternatives for HLW calcine, SBW, and NGLW: No Action; Continued Current Operations; Separations with three treatment options; Non-Separations with four treatment options; Minimum INEEL Processing; and Direct Vitrification with two treatment options. These alternatives are briefly described as follows:

*No Action Alternative*

Under this alternative, the New Waste Calcining Facility (NWCF) calciner would remain in standby, the SBW would remain in the Tank Farm, and the calcine would remain in the bin sets indefinitely.

*Continued Current Operations Alternative*

This alternative involves calcining the SBW and adding it to the bin sets, where it would be stored indefinitely with calcined HLW. Under this alternative, the NWCF calciner would remain in standby pending receipt of a RCRA permit from the State of Idaho and upgrades to air emission controls required by the U.S. Environmental Protection Agency (EPA).

*Separations Alternative*

This alternative comprises three treatment options, each of which would use a chemical separations process, such as solvent extraction, to divide the SBW and calcine into fractions suitable for disposal in either a geologic repository or a low-level waste disposal facility, depending on waste characteristics. Separating the radionuclides in the waste into fractions would decrease the amount of waste that would have to be shipped to a geologic repository, saving repository space and reducing disposal costs. The three waste treatment options under the Separations Alternative are described below.

1. Full Separations Option

This option would separate the radioisotopes in the SBW and the HLW calcine into high-level and low-level waste fractions. The HLW fraction would be vitrified in a new facility at INTEC, placed in stainless steel canisters, and stored onsite until shipped to a storage facility or geologic repository. DOE would dispose of the low-level waste fraction on site, or at an offsite DOE or commercial low-level waste disposal facility.

2. Planning Basis Option

This option reflects previously announced DOE decisions and agreements with the State of Idaho regarding the management of HLW and SBW. The NWCF calciner would remain in standby, pending receipt of a RCRA permit from the State and upgrades to air emission controls required by EPA. It is similar to the Full Separations Option, except that, prior to separation, the SBW would be calcined and stored in the bin sets along with the HLW calcine. After separations, the HLW fraction would be vitrified in a new facility at INTEC, placed in stainless steel canisters, and stored onsite until shipped to a storage facility or geologic repository. DOE would dispose of the low-level waste fraction at an offsite DOE or commercial low-level waste disposal facility.

3. Transuranic Separations Option

This option would consist of separating the HLW and SBW into two fractions. The resulting fractions would be managed as TRU and low-level waste. There would be no HLW after separations under this option. The TRU fraction would be solidified, packaged, and shipped to WIPP for disposal. DOE would dispose of the low-level waste fraction on site or at an offsite DOE or commercial low-level waste disposal facility.

*Non-Separations Alternative*

This alternative includes four treatment options for solidifying HLW calcine and SBW. In the Hot Isostatic Pressed Waste Option and Direct Cement Waste Option, SBW would be removed from the Tank Farm and, after receipt of a RCRA permit from the State and upgrades to air emission controls required by the EPA, treated in the NWCF calciner. In the Early Vitrification Option and Steam Reforming Option, SBW would be retrieved from the Tank Farm and sent directly to a treatment facility. The four treatment options are briefly described as follows:

1. Hot Isostatic Pressed Waste Option

Under this option, SBW would be calcined and added to the 4,400 cubic meters of HLW calcine currently stored in the bin sets. HLW and SBW calcine would then be treated in a high pressure, high temperature process that would convert the calcine into a glass-ceramic waste form. The final product would be packaged for storage and subsequent disposal in a geologic repository.

2. Direct Cement Waste Option

Under this option the remaining SBW would be calcined and placed in the bin sets. HLW and SBW calcine would then be retrieved, mixed with cement, poured into stainless-steel canisters, and cured at elevated temperature and pressure. The canisters would be placed in storage for subsequent disposal in a geologic repository. Some secondary waste (*e.g.,* tank farm heels) would be treated and sent to WIPP.

3. Early Vitrification Option

This option would involve vitrifying both the HLW calcine and the SBW into a glass-like solid. The vitrified SBW would be sent to WIPP for disposal and the vitrified HLW would be placed in interim storage pending disposal in a geologic repository.

4. Steam Reforming Option

This option would involve treatment of SBW by steam reforming. The central feature of the steam reforming process is the reformer, a fluidized bed reactor in which steam is used as the fluidizing gas. A solid, remote-handled waste form consisting of primarily inorganic salts is produced that is similar in form to HLW calcine. This option also includes packaging of HLW calcine without additional treatment for shipment to a geologic repository.

*Minimum INEEL Processing Alternative*

This alternative would minimize the amount of waste treatment at the INEEL by using the vitrification facility planned for the DOE Hanford Site in the State of Washington. The HLW calcine would be placed into shipping containers and sent to the Hanford Site where it would be vitrified. The SBW would be treated at INTEC where it would be separated into fractions in an ion exchange column to remove cesium. The HLW fraction would be packaged and sent to the Hanford Site for treatment with the calcine. The remaining TRU fraction would be grouted and disposed of at WIPP.

*Direct Vitrification Alternative*

This alternative includes two treatment options: Vitrification without Calcine Separations and Vitrification with Calcine Separations. The option to vitrify SBW and calcine without separations would be similar to the Early Vitrification Option. The option to vitrify SBW and the HLW fraction from calcine separations would be similar to the Full Separations Option. Under either option, SBW would be retrieved

from the Tank Farm, vitrified, and disposed of in an appropriate disposal facility. Under the Vitrification with Calcine Separations Option, calcine would be retrieved from the bin sets, chemically separated into a HLW fraction to be vitrified and a low-level waste (LLW) fraction to be grouted. Under the Vitrification without Calcine Separations Option, calcine would be directly vitrified. Under either option, vitrified HLW would be stored pending disposal in a geologic repository.

Under either option, DOE would segregate NGLW from the SBW. The post-2005 NGLW could be vitrified in the same facility as the SBW or DOE could construct a separate facility to grout the NGLW. The vitrified or grouted waste would be packaged and disposed of as low-level or TRU waste, depending on its characteristics.

*Preferred Waste Processing Alternatives*

From the range of waste processing alternatives/options analyzed, two Preferred Alternatives were identified in the Final EIS, one by DOE and one by the State of Idaho. The Preferred Alternatives were identified after consideration of public comment and the following factors: Technical maturity, environment, safety and health (ES&H), cost, schedule, and programmatic risk.

The DOE Preferred Alternative identified in the Final EIS for waste processing was to implement the proposed action by selecting from among the action alternatives, options, and technologies analyzed in the Final EIS. The selection of any one of, or combination of, technologies or options used to implement the proposed action would be based on the performance criteria of technical maturity, ES&H, consideration of public comment, cost, schedule and programmatic risk. Options excluded from DOE's preferred alternative were storage of calcine in bin sets for an indefinite period of time (analyzed under the Continued Current Operations Alternative), shipment of calcine to the Hanford Site for treatment (analyzed under the Minimum INEEL Processing Alternative), and disposal of mixed-LLW at INEEL (analyzed under multiple alternatives). On August 3, 2005, after the Final EIS was issued, DOE published a **Federal Register** Notice (70 FR 44598) identifying steam reforming as its preferred treatment technology for SBW. Steam Reforming is one of the options under the Non-Separations Alternative in the Final EIS.

The State of Idaho Preferred Alternative identified in the Final EIS for waste processing was the Direct Vitrification Alternative. The State of Idaho preferred vitrification based on the belief that it was the treatment alternative with the lowest technical and regulatory uncertainty for meeting waste removal goals and provided a clear baseline for fulfilling the objectives of removal of waste from Idaho within the timelines envisioned by the Settlement Agreement. The State of Idaho was willing to consider other waste treatment options, if they were comparable or better than the Direct Vitrification Alternative in terms of environmental impact, schedule and/or cost.

**III. Facility Disposition Alternatives Considered**

The Final EIS analyzed six facility disposition alternatives: No Action, Clean Closure, Performance-Based Closure, Closure to Landfill Standards, Performance-Based Closure with Class A Grout Disposal, and Performance-Based Closure with Class C Grout Disposal. These alternatives reflect different ways to address the final risk component of the proposed action and close facilities directly related to the HLW Program at INTEC after their missions are complete. These alternatives differ in the degree to which land is considered ''cleaned up'' and in the type of use that could be made of the land as a result. These alternatives are briefly described as follows:

*No Action Alternative*

Under this alternative, DOE would not close the facilities identified in the Final EIS. Nevertheless, over the period of analysis through 2035, many of the facilities could be placed in an industrially safe condition (deactivated). Surveillance and maintenance of facilities would be performed to ensure the safety and health of workers and the public until 2095. For purposes of analysis, DOE assumed that institutional controls to protect human health and the environment would not be in effect after 2095.

*Clean Closure Alternative*

Under this alternative, hazardous wastes and radiological contaminants, including contaminated equipment, would be removed from the site or treated so the hazardous and radiological contaminants are indistinguishable from background concentrations.

*Performance-Based Closure Alternative*

Under this alternative, contamination would remain that is below the levels that would impact human health and the environment as established by applicable regulations (*e.g.,* RCRA, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)), and by DOE Orders. Once the performance-based levels are achieved, the unit/facility is considered closed according to RCRA and/or DOE requirements. The residual contaminants would no longer pose an unacceptable risk to workers, the public, or the environment. Closure methods would be determined on a case-by-case basis.

*Closure to Landfill Standards Alternative*

Under this alternative, the facilities would be closed as established by regulations such as RCRA or CERCLA, and by DOE Orders for closure of landfills. Once the wastes within tanks, vaults, and piping are removed to the extent practicable and the remaining residuals are stabilized, protection of the public, workers, and the environment would be ensured by installing an engineered cap, installing a groundwater monitoring system, and providing post-closure monitoring. Care of the waste containment system would be provided, appropriate for the type of contaminants. Also, a landfill closure would include post closure activities such as monitoring and plans for appropriate response/corrective actions to be taken in the event of migration of contaminants above health based action levels.

*Performance-Based Closure With Class A Grout Disposal Alternative*

This is one of two alternatives that would accommodate the potential use of the Tank Farm and bin sets for disposal of the low-level waste fraction. These facilities would be closed as described above for the Performance-Based Closure Alternative. Following completion of those activities, the Tank Farm or bin sets would be used to dispose of low-level waste Class A-type grout (suitable for near surface disposal and would have radioactive concentrations in the grout that are less than Class A concentration limits specified in NRC regulation 10 CFR 61.55).

*Performance-Based Closure With Class C Grout Disposal Alternative*

This alternative would also accommodate the potential use of the Tank Farm and bin sets for disposal of the low-level waste fraction. The facility would be closed as described above for the Performance-Based Closure Alternative. Following completion of those activities, the Tank Farm or bin sets would be used to dispose of low-level waste Class C-type grout (suitable

for near surface disposal but would have higher radioactive concentrations in the grout than Class A-type grout, but would not exceed Class C concentration limits specified in 10 CFR 61.55).

*Preferred Facility Disposition Alternative*

In the Final EIS, both DOE and the State of Idaho identified performance-based closure methods as the Preferred Alternative for disposition of existing facilities directly related to the HLW Program at INTEC. These methods encompass three of the six facility disposition alternatives analyzed in the Final EIS: Clean Closure, Performance-Based Closure, and Closure to Landfill Standards. Performance-based closure methods would be implemented in accordance with applicable regulations and DOE Orders. Also, as analyzed in the Final EIS, consistent with the objectives and requirements of DOE Order 430.1B, *Real Property Asset Management* (previously DOE Order 430.1A, *Life Cycle Management*), and DOE Order 435.1 and Manual 435.1–1, *Radioactive Waste Management and its Manual*, all newly constructed facilities necessary to implement the waste processing alternatives would be designed and constructed consistent with measures that facilitate clean closure. Therefore, the preferred alternative for disposition of new facilities is clean closure. DOE and the State of Idaho weighed several factors in selecting the Preferred Alternative for facility disposition, including size and complexity of facilities, volume of waste streams generated during facility disposition, residual waste/contaminant risk reduction, technical and economic feasibility, and protection of the workers, public and environment.

**IV. Environmentally Preferable Alternative**

The Final EIS presents the environmental impacts for 14 areas of interest for the waste processing alternatives and the facility disposition alternatives. DOE considered those impacts in its evaluation of the environmentally preferable alternatives as described below.

*Waste Processing*

In 9 of the 14 areas of interest, the Final EIS indicates little or no environmental impact would occur under all of the action alternatives. In the remaining 5 areas analyzed (air, traffic and transportation, health and safety, waste and materials, and facility accidents), the results indicate short-term impacts from routine exposures, but they are small and do not differ significantly among action alternatives. Under normal operations, none of the waste processing action alternatives analyzed in the Final EIS would result in large short-term or long-term impacts to human health or the environment. Also, none of the action alternatives would result in appreciably different impacts on historic, cultural and natural resources.

Under normal operations, the risk to workers and the public in terms of anticipated latent cancer fatalities over the life cycle of any waste treatment alternative (including No Action) would be less than one. Under the No Action and Continued Current Operations waste treatment alternatives, however, waste would remain in storage at INTEC indefinitely and would result in continued long-term risks. Under the No Action Alternative liquid SBW and solid HLW calcine would remain in storage indefinitely, and under the Continued Current Operations Alternative liquid SBW would be calcined, but the calcine would remain stored in the bin sets indefinitely. Though much of the radioactivity in the liquid SBW and solid HLW calcine would decay during the first 500 years, the material would continue to present a long-term risk to human health and the environment from potential releases of both radiological and hazardous waste.

Waste processing alternatives that result in indefinite waste storage exhibit the longest window of vulnerability to accidental releases and therefore the highest anticipated risk of environmental impact. The Final EIS shows that, although unlikely, the estimated probability of the maximum reasonably foreseeable accident for the No Action and Continued Current Operations Alternatives is a factor of nine more likely than the comparable accidents for the other waste treatment alternatives that place waste in a road-ready form over a 35-year period.

For these reasons, any of the waste treatment alternatives that place SBW and calcine in a waste form suitable for disposal would be environmentally preferable compared to the No Action and Continued Current Operations Alternatives.

*Facilities Disposition*

The Final EIS also evaluates the impacts of the facilities disposition alternatives. Under normal operations, the risk to workers and the public in terms of anticipated latent cancer fatalities over the life cycle of any facility disposition alternative would be less than one. Clean closure of facilities would restore the land to a condition that ''presents no risk to workers or the public'' and would be environmentally preferable in the long-term, but such action also would pose the highest short-term risk to workers because clean closure would require the most activity and result in the most impacts. Performance-based closure of facilities would also be protective of the public and environment in the short- and long-term, but would balance the risk to workers by tailoring activity to risk reduction.

Under the facilities disposition No Action alternative, it is assumed for analytical purposes that institutional control would be lost after 2095. After that date, access would be uncontrolled, natural processes would degrade the facilities, and they could also be breached and the contents dispersed by human and animal activity. The deteriorating facilities would present some risk to the environment and human health over a long, indefinite period of time. It is estimated that 270 latent cancer fatalities could result from seismic induced failure of a degraded calcine bin set after 500 years. Also, the likelihood of an external event resulting in a release would increase over time.

The maximum reasonably foreseeable impact from accidents during implementation of the facility disposition action alternatives result in an estimated two fatalities from non-radiological hazards, such as trauma, fire, spills, or falls, during clean closure of the Tank Farm.

For these reasons, any of the facility disposition alternatives that actively close facilities under environmentally based standards would be environmentally preferable to the No Action Alternative.

**V.A. Comments on the Final EIS**

DOE received two letters commenting on the Final EIS.

By letter dated November 18, 2002, the EPA raised four issues:

(1) Reclassification of HLW and the nature and extent of separations or decontamination necessary to meet the requirements of DOE Manual 435.1–1, *Radioactive Waste Management Manual*, which poses programmatic risk due to ongoing litigation and regulatory uncertainty, (2) the viability of the Minimum INEEL Processing Alternative (option of treating waste at Hanford), (3) DOE identifying a broad scoped Preferred Alternative in the Final EIS, which the EPA said did not meet the objectives of NEPA, and (4) the viability of the calciner as an alternative, its cost, and use of the EIS to delay closure of the calciner.

DOE provides the following responses to the EPA comments:

1. The Final EIS presents the analysis of the potential environmental impacts of retrieving and treating HLW, SBW, NGLW, and facilities disposition using various technologies and managing the wastes as either HLW, TRU waste, or LLW. Moreover, the analysis is not based on particular waste classification but is based on the estimated volume and radioisotopic content of the HLW, SBW, NGLW, and waste from facilities disposition. By preparing the analysis in a manner that is not dependent on waste classification, DOE has mitigated the impact of litigation and reduced the programmatic risks. Specifically, for SBW some EIS alternatives included an evaluation of retrieved SBW as HLW to be treated for disposal at a geologic repository for SNF/HLW; some alternatives evaluate retrieved SBW as TRU to be treated and disposed of at the Waste Isolation Pilot Plant; and some alternatives evaluate SBW to be separated into HLW, TRU waste and LLW fractions. Moreover, DOE will manage the SBW to permit disposal at either WIPP or at a geologic repository for SNF/HLW and will evaluate the waste form to determine its suitability for disposal.

2. The Final EIS presents an alternative that would treat INL Site waste at Hanford by taking advantage of a national investment in significant waste treatment capabilities and facilities in the State of Washington. Both the INL Site and Hanford are DOE facilities in the Northwest region of the U.S. and have wastes derived from similar sources. INL Site wastes could be treated using treatment processes being developed at Hanford prior to being transported to WIPP or a geologic repository for SNF/HLW for disposal. Therefore, DOE believes this alternative is reasonable and analyzed the alternative as required by NEPA. Further, DOE believes it is important to inform national and state decision makers of this alternative for treating INL Site wastes at Hanford, especially in view of the costs and risk involved in developing the same capabilities at two sites about 550 miles apart. The Final EIS presents associated risks, including transportation, and considers issues associated with meeting Hanford's schedule for waste treatment of Hanford waste.

3. Regarding EPA's concern with DOE's broad expression of its preferred alternative in the Final EIS, DOE believes that the phased decision making process under this EIS not only meets the objectives of NEPA, but also includes meaningful public participation opportunities that substantially exceed the applicable regulatory requirements.

DOE identified its preferred alternative in the Final EIS as follows: ''DOE's preferred waste processing alternative is to implement the proposed action by selecting from among the action alternatives, options and technologies analyzed in this EIS. The selection of any one of, or combination of, technologies or options used to implement the proposed action would be based on performance criteria that include risk, cost, time, and compliance factors.'' DOE did not identify a preference for a specific SBW treatment technology in this expression of preferred alternative. Rather, DOE first provided additional opportunities for public participation as part of its evaluation of the alternative technologies analyzed in the EIS, which included steam reforming, the technology that DOE is selecting today.

Under this phased decision making strategy, after issuing the Final EIS, DOE conducted four public workshops to inform the public about the five technologies that DOE was considering. Further, DOE provided additional public comment opportunities on the draft RFP for the Idaho Cleanup Project, which required bidders to propose technologies for SBW treatment. Finally, DOE announced its preference for a specific SBW treatment technology, steam reforming, in a **Federal Register** Notice (70 FR 44598; August 3, 2005), and again provided the opportunity for the public to comment. Section V.B. summarizes the comments received and DOE's responses.

4. DOE has determined that the alternative of reconfiguring the calciner in the New Waste Calcining Facility with Maximum Achievable Control Technology (MACT) upgrades is reasonable because calcination is a proven process for reliably placing liquid HLW and SBW into a powder form. The Final EIS analyzes the potential environmental impacts of operating the calciner with MACT air emission upgrades. Compliance requirements and potential conflicts with state and Federal law are also considered. Prematurely taking irreversible closure actions on the calciner would limit the choice of reasonable alternatives analyzed in the Final EIS.

In a November 21, 2002 letter, the INEEL CAB raised some of the same issues expressed by the EPA. In addition, the CAB recommended that DOE re-issue the Final EIS or issue a supplemental EIS and that DOE provide meaningful opportunities for the public to review and comment on the selection of technologies.

DOE provides the following response to the INEEL CAB (Now the INL EM CAB) comments:

As described in Section I of this ROD, DOE prepared a Supplement Analysis to examine whether a supplemental EIS is required. Based on the Supplement Analysis, DOE determined that there has been no change in the proposed action or significant new information or circumstances relevant to environmental concerns that would require DOE to re-issue the Final EIS or prepare a supplemental EIS. If DOE were to re-issue the Final EIS or prepare a supplemental EIS that identified a preferred alternative focusing on a single technology, it would not enhance the detail or precision of the environmental analysis. As part of continued public involvement, DOE held workshops in 2003 to obtain public input on the technologies being considered for treatment of the SBW.

Further, as described above, DOE provided meaningful opportunities for the public to participate in identifying their concerns related to the proposed technologies for treatment of the SBW in the DOE technology selection process. The public also was provided an opportunity to comment on the draft RFP. DOE believes that these public participation opportunities, which exceed DOE's obligations under NEPA, were responsive to the CAB's comment.

### V.B. Comments in Response to the August 3, 2005, Federal Register Notice of Preferred Sodium Bearing Waste Treatment Technology (70 FR 44599), That Invited Public Comments on DOE's Preferred Treatment Technology

DOE received comments from the Shoshone-Bannock Tribes, INL EM Citizens Advisory Board, Coalition 21, Snake River Alliance, Mr. Barry O'Brian, Mr. G.V. Wieg, and Mr. D. Siemer in response to the August 3, 2005, Notice. The comments in these documents did not raise any new issues relevant to environmental concerns that were not addressed in the Final EIS.

The commentors expressed five general areas of concern: (1) Several commentors expressed concerns regarding the disposition uncertainty for the treated SBW and recommended deferral of the SBW treatment decision until a waste determination is made for the SBW and a disposal facility is identified (*i.e.*, WIPP or a geologic repository for SNF/HLW). Commentors also stated if the Department does make a SBW treatment technology selection, the selected treatment method should be neutral with regard to repository

requirements; (2) Several commentors questioned whether DOE adequately considered all the alternatives for the treatment of SBW and some suggested that vitrification is the best technology for the treatment of SBW; (3) There were several comments related to the type and availability of shipping containers and the mode of transportation; (4) Several commentors expressed concerns related to the design of the steam reformer facility and the type of product created, and whether that waste form can be properly disposed of; and (5) Some commentors recommended that facilities disposition decisions should be addressed in a future, separate, ROD.

DOE provides the following responses to the comments received:

1. DOE believes that delaying the SBW treatment technology decision does not support both the Department's and the State of Idaho's priority to reduce potential risk to the Snake River Plain Aquifer. In addition, the product resulting from steam reforming is neutral regarding repository requirements and can be integrated with the calcine disposition path if it cannot be disposed of at WIPP.

2. During the NEPA process, DOE evaluated the environmental impacts of the range of reasonable alternatives, including vitrification, in the preparation of the Final EIS. DOE identified steam reforming as its preferred treatment technology for SBW after consideration of public comment and the following factors: Technical maturity, environment, safety and health (ES&H), schedule, and programmatic risk, as presented in the Final EIS. DOE also considered the cost of the various alternatives. This technology supports the Settlement Agreement milestone to treat SBW by December 31, 2012 (see Section VII of this ROD, Basis for Decision).

3. DOE evaluated the environmental impacts of transportation in the Final EIS, which shows that transportation risks would be small. It should be noted that the Department of Transportation regulates the shipment of the waste while the NRC regulates the packaging of the material for shipment. DOE will ship all wastes in accordance with applicable regulations regardless of the mode of shipment. There are no known regulatory issues associated with the packaging and shipping of the reformed product.

4. The steam reformer facility will be designed and constructed to meet all applicable regulatory and safety requirements (*e.g.*, emission and radiological controls). DOE must also obtain the appropriate permits to construct and operate the facility. Presently, DOE is planning to create a carbonate waste product from the steam reformer which is similar in form to the HLW calcine. DOE anticipates the solid waste form will be acceptable for disposal at WIPP, or if not acceptable at WIPP, would be integrated into the strategy for management of HLW calcine.

5. The Department believes it is prudent to proceed with facilities disposition decisions at INTEC to reduce the overall risk to the Snake River Plain Aquifer and to support the cleanup at the INL Site.

## VI. Decision

DOE plans a phased decision making process. This first ROD focuses on SBW treatment, NGLW, facilities disposition excluding the Tank Farm Facility and bin sets closure, and DOE's strategy for HLW calcine.

*SBW Treatment:* The existing INTEC Evaporators will continue to operate to reduce SBW volume to enable DOE to cease use of the Tank Farm tanks by December 31, 2012, pursuant to the Notice of Noncompliance Consent Order between DOE and State of Idaho. DOE has decided that SBW will be treated using the steam reforming technology. The Department's preference for this treated waste is disposal as TRU waste at WIPP near Carlsbad, New Mexico. Until such time as the regulatory approvals are obtained and a determination the waste is TRU is made, the Department will manage the waste to allow disposal at WIPP or at a geologic repository for SNF and HLW.

The State of Idaho concurs with DOE's selection of steam reforming as the technology for solidifying remaining INTEC Tank Farm liquids, provided DOE obtains required permits for its treatment facility and post-treatment storage, and produces a waste form acceptable for disposal at a repository outside Idaho.

*NGLW:* NGLW is no longer being sent to the Tank Farm and is being stored in other permitted storage tanks. This NGLW may be treated in the same facility and with the same technology used to treat SBW, or grouted in a facility constructed for that purpose, and disposed of as either low-level or TRU waste, depending on its radioactive waste characteristics, at an offsite DOE or commercial facility.

The State of Idaho concurs with DOE's decision to segregate newly generated liquid waste at INTEC and manage it in compliance with the Idaho Hazardous Waste Management Act and other legal requirements.

*Facilities Disposition:* DOE has decided to conduct performance-based closure of existing facilities directly related to the HLW Program at INTEC, excluding the tank farm and bin sets, once their missions are complete. Performance based closure activities will be implemented in accordance with applicable regulations and DOE Orders. The method of closure for specific facilities will be determined on a case-by-case basis depending on risk, and may include closure to landfill standards. Newly constructed waste processing facilities, such as the steam reforming treatment facility, at INTEC necessary to implement the decisions in this ROD will be designed consistent with clean closure methods in accordance with the objectives and requirements of DOE Order 430.1B, *Real Property Asset Management* (previously DOE Order 430.1A, *Life Cycle Management*), and DOE Order 435.1 and Manual 435.1–1, *Radioactive Waste Management and its Manual* and closed when their missions are complete regardless of the characteristics of the waste they treat. These closure activities are analyzed in the Final EIS.

The State concurs with the performance-based closure of existing facilities directly related to the high-level waste program at INTEC, once their missions are complete, subject to the State's separate approval of individual closure plans under the Idaho Hazardous Waste Management Act and compliance with section 3116 of the NDAA, where applicable. The State also concurs with DOE's decision to clean close newly constructed waste processing facilities.

*HLW Calcine:* Consistent with DOE's *Environmental Management Performance Management Plan for Accelerating Cleanup at INEEL*, DOE's strategy for HLW calcine is to retrieve the calcine for disposal outside the State of Idaho. Accordingly, DOE will develop calcine retrieval demonstration processes and conduct risk-based analyses, including disposal options, focused on the calcine stored at the INTEC. This strategy will culminate in the issuance of a future ROD, as discussed below.

The State of Idaho will provide additional input on DOE's remaining decisions for calcine treatment, which DOE must make by December 31, 2009 in accordance with the Settlement Agreement.

### *Future RODs*

DOE will issue an amended ROD addressing closure of the Tank Farm in coordination with the Secretary's determination, in consultation with the NRC, as to whether or not the waste residuals in the tank system, the tanks,

vaults, piping and associated ancillary equipment are HLW in accordance with Section 3116 the NDAA. That determination and amended ROD are expected to be issued in calendar year 2006. The State of Idaho has stated that: The State will continue to coordinate with DOE and the NRC as appropriate regarding the classification of tank residuals under Section 3116 of the NDAA, as well as the classification of other wastes.

DOE plans to issue another amended ROD in 2009 that will contain DOE's decision on the final strategy for HLW calcine retrieval and the technology for additional treatment, if necessary, packaging and safe storage based on transportation and disposal requirements. Following that amended ROD, DOE would begin to manage the HLW calcine so it is ready to be moved out of Idaho for disposal by a target date of 2035, in accordance with the 1995 Settlement Agreement. Additionally, it is DOE's goal to complete calcine retrieval, packaging, additional treatment (if required) and shipping to a geologic repository for SNF/HLW by December 2035, as described in DOE's *Environmental Management Performance Management Plan for Accelerating Cleanup at INEEL.* In addition, the amended ROD will address closure of the bin sets and their associated facilities.

**VII. Basis for Decision**

Based on the analysis in the Final EIS, all of the waste processing alternatives that treat the SBW and remove the calcine would have small environmental impacts. The long-term impacts of the No Action and Continued Current Operations alternatives (*i.e.*, the uncertainty of leaving the SBW and calcine in storage), however, are uncertain and could be high. Implementing any of the action alternatives through the technologies or options analyzed in the Final EIS and a related SA (DOE/EIS–0287–SA–01) would eliminate the element of uncertainty and provide the most certain long-term protection of the environment.

DOE's decision to use the steam reforming technology for the treatment of SBW is based on DOE's consideration of environmental impacts, programmatic needs, safety and health risks, technical viability, ability to meet regulatory requirements and agreement milestones, public comments, and cost. DOE believes steam reforming provides the best value to the Government and meets its need for treatment flexibility, acceptable cost, and probability of success.

DOE's decision to defer a final decision on calcine is based on the need to continue detailed evaluation of repository performance criteria, regulatory requirements, cost, schedule, and programmatic risk.

DOE's decision to implement performance-based closure methods for disposition of existing facilities directly related to the HLW Program at INTEC and plan to clean close newly constructed facilities, such as the steam reforming facility for SBW treatment, was based on the analysis of the potential environmental impacts identified in the Final EIS as well as to meet regulatory requirements, such as RCRA, and because each method of closure is determined on a case-by-case basis.

DOE's decision to defer a final decision for closure of the Tank Farm was based on DOE's intent to coordinate this decision with the Secretary's determination, in consultation with the NRC, under Section 3116 of the NDAA that will allow DOE to decide the appropriate performance-based closure method.

No impact resulting from normal operations under any of the alternatives or options analyzed would require specifically designed mitigation measures. DOE will, however, adopt all practicable means to avoid or minimize environmental harm when implementing the actions described in this ROD. Those measures include employing engineering design features to address flooding, emission controls to reduce or eliminate releases of pollutants and meet regulatory requirements, maintaining a rigorous health and safety program to protect workers from radiological and chemical contaminates, and continuing efforts to reduce the generation of wastes.

These decisions are also consistent with the objectives of the DOE *Environmental Management Performance Management Plan for Accelerating Cleanup at INEEL.*

Issued in Washington, DC, this 13th day of December 2005.

**James A. Rispoli,**

*Assistant Secretary for Environmental Management.*

[FR Doc. E5–7497 Filed 12–16–05; 8:45 am]

BILLING CODE 6450–01–P

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–RCRA–2005–0009; FRL–8009–7]**

## Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Used Oil Management Standards Recordkeeping and Reporting Requirements (Renewal), EPA ICR Number 1286.07, OMB Control Number 2050–0124

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. This ICR is scheduled to expire on December 31, 2005. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. This ICR describes the nature of the information collection and its estimated burden and cost.

**DATES:** Additional comments may be submitted on or before January 18, 2006.

**ADDRESSES:** Submit your comments, referencing docket ID number EPA–HQ–RCRA–2005–0009, to (1) EPA online using *http://www.regulations.gov* (our preferred method), by e-mail to *RCRA-docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, RCRA Docket, Mail Code 5305T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Michael Svizzero, Office of Solid Waste, Mail Code 5303W, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 703–308–0046; fax number: 703–308–8617; e-mail address: *svizzero.michael@epamail.epa.gov.*

**SUPPLEMENTARY INFORMATION:** EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On July 21, 2005 (70 FR 42060), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–RCRA–2005–0009, which is available for public viewing at the RCRA Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the RCRA Docket is (202) 566–0270. An electronic version of the public docket is available at *http://www.regulations.gov.* Use *http://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA and OMB within 30 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in *http://www.regulations.gov*. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in *http://www.regulations.gov.* For further information about the electronic docket go to *http://www.regulations.gov.*

*Title:* Used Oil Management Standards Recordkeeping and Reporting Requirements (Renewal).

*Abstract:* The Used Oil Management Standards, which include information collection requests, were developed in accordance with section 3014 of the Resource Conservation and Recovery Act (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), which directs EPA to ''promulgate regulations * * * as may be necessary to protect public health and the environment from the hazards associated with recycled oil'' and, at the same time, to not discourage used oil recycling. In 1985 and 1992, EPA established mandatory regulations that govern the management of used oil (see 40 CFR part 279). To document and ensure proper handling of used oil, these regulations establish notification, testing, tracking and recordkeeping requirements for used oil transporters, processors, re-refiners, marketers, and burners. They also set standards for the prevention and cleanup of releases to the environment during storage and transit, and for the safe closure of storage units and processing and re-refining facilities to mitigate future releases and damages. EPA believes these requirements minimize potential hazards to human health and the environment from the potential mismanagement of used oil by used oil handlers, while providing for the safe recycling of used oil. Information from these information collection requirements is used to ensure compliance with the Used Oil Management Standards.

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 and are identified on the form and/or instrument, if applicable.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to range from 6 minutes to 23 hours per response. 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.

*Respondents/Affected Entities:* Entities potentially affected by this action are Business or other for profit.

*Estimated Number of Respondents:* 1,640.

*Frequency of Response:* Biennially.

*Estimated Total Annual Hour Burden:* 460,286.

*Estimated Total Annual Cost:* $22,478,000, which includes $0 annualized startup/capital costs, $10,011,000 annual O&M costs and $12,467,000 annual labor costs.

There is no change in the burden estimates for this ICR.

Dated: December 12, 2005.

**Oscar Morales,**

*Director, Collection Strategies Division.*

[FR Doc. E5–7498 Filed 12–16–05; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–8010–3]**

## Notification of a Partially Closed Consultation of the Science Advisory Board's Homeland Security Advisory Committee (HSAC)

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The Environmental Protection Agency (EPA) announces a partially closed consultation of the HSAC.

**DATES:** The consultation will take place on January 30–31, 2006.

**ADDRESSES:** This consultation will take place at the EPA's SAB Conference Center located at the Woodies Building, 1025 F Street, NW., Room 3705, Washington, DC 20004.

**FOR FURTHER INFORMATION CONTACT:** Members of the public who wish to obtain further information regarding this announcement may contact Ms. Vivian Turner, Designated Federal Officer, by telephone: (202) 343–9697 or by e-mail at: *turner.vivian@epa.gov.* The SAB Mailing address is: U.S. EPA Science Advisory Board (1400F), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC, 20460. General information about the SAB, as well as any updates concerning the consultation announced in this notice, may be found in the SAB Web site at: *http://www.epa.gov/sab.*

**SUPPLEMENTARY INFORMATION:** The EPA's Office of Water (OW) and Office of Research and Development (ORD) have requested a consultation with the SAB's Homeland Security Advisory Committee (HSAC) to obtain the individual advice of the HSAC members on the development of EPA's WaterSentinel (WS) program and Standard Analytical Methods (SAM). The WS program is being developed by the EPA in partnership with drinking water utilities and other key stakeholders in response to Homeland Security Presidential

Directive 9. The initiative involves designing, deploying, and evaluating a model contamination warning system for drinking water security. Another essential component is the need for standardized analytical methods (SAM) to be used by all laboratories for responding to incidents that require rapid analysis. The EPA and other Federal parties, including the Centers for Disease Control and Prevention, the Food and Drug Administration, the Department of Homeland Security, the Federal Bureau of Investigation, the Department of Defense, the Department of Agriculture, and the U.S. Geological Survey, have evaluated the suitability of existing methodologies and selected a set of methods for use by EPA and contract laboratories to analyze environmental samples in times of national emergency. The methods are limited to chemical, biological, radiochemical, and biotoxin analytes in environmental media. The purpose of the consultation is to seek early advice from the individual members of the SAB HSAC regarding the proposed approach, design, adequacy and the future implementation for the WS program and the scientific soundness and adequacy of SAM.

The SAB was established by 42 U.S.C. 4365 to provide independent scientific and technical advice to the EPA Administrator. The SAB formed the HSAC as a subcommittee of the Chartered SAB to provide independent scientific and technical advice on matters pertaining to the environmental and health consequences of terrorism in response to an EPA request. Background on the HSAC and its charge was provided in a **Federal Register** Notice published on July 30, 2003 (68 FR 44761–44762). For this consultation, the HSAC will be augmented with experts from other SAB committees or individuals previously identified on the HSAC ''Short List'' (see, *http://www.epa.gov/sab/panels/hsacadhoc.html*).

It is EPA's policy to follow the provisions of the Federal Advisory Committee Act (FACA) for subcommittees of its chartered advisory committees. Accordingly, in accordance with FACA, EPA has determined that a portion of the SAB's HSAC consultation on WS will be closed to the public pursuant to section 552b(c)(9)(B) of the Government in the Sunshine Act (5 U.S.C. 552b(c)(9)(B)), which allows closure of a meeting if the ''premature disclosure of [the information to be discussed] would * * * be likely to significantly frustrate implementation of a proposed agency action * * *.'' This discussion will involve sensitive national security information relating to specific water sector vulnerabilities and emergency response tactics, including sensitive information relating to intentional contamination events. Also, EPA will present detailed findings about the emergency response capabilities of public health agencies and water utilities. The disclosure of this sensitive national security information would significantly frustrate the Agency's efforts to protect the nation's drinking water systems. Therefore, pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, 5 U.S.C. App. 2, 10(d), I have determined that the topics identified above will concern matters that, if prematurely disclosed, would significantly frustrate implementation of proposed agency actions. Accordingly, pursuant to 5 U.S.C. 552b(c)(9)(B), this portion of the meeting will be closed to the public.

*Availability of Meeting Materials:* The agenda and other meeting materials for this consultation will be available prior to the meeting date on the SAB Web site: *http://www.epa.gov/sab.* EPA's technical documents on the WS program may be found at: *http://www.cfpub.epa.gov/safewater/watersecurity/index.cfm.* EPA's technical documents on SAM may be found at: *http://www.epa.gov/ordnhsrc/pubs/reportSAM092905.pdf.*

*Procedures for Providing Public Comment:* The SAB Staff Office accepts written public comments of any length, and will accommodate oral public comments whenever possible.

*Oral Comments:* Requests to provide oral comments must be *in writing* (e-mail, fax or mail) and received by Ms. Turner no later than January 20, 2006 to reserve time on the January 30–31, 2006 meeting agenda. Opportunities for oral comments will be limited to five minutes per speaker.

*Written Comments:* Written comments should be received in the SAB Staff Office by January 20, 2006 so that the comments may be made available to the members of the HSAC for their consideration. Comments should be supplied to Ms. Turner at the contact information provided above, in the following formats: One hard copy (original signature optional), or one electronic copy via e-mail (acceptable file format: Adobe Acrobat PDF, WordPerfect, Word, or Rich Text files (in IBM–PC/Windows 98/2000/XP format)).

*Accessibility:* For information on access or services for individuals with disabilities, please contact Ms. Turner at the phone number or e-mail noted above, preferably at least 10 days prior to the consultation, to give EPA as much time as possible to process your request.

Dated: December 13, 2005.

**Stephen L. Johnson,**

*Administrator.*

[FR Doc. E5–7505 Filed 12–16–05; 8:45 am]

BILLING CODE 6560–50–P

## FARM CREDIT ADMINISTRATION

### Sunshine Act Meeting; Farm Credit Administration Board; Regular Meeting

**AGENCY:** Farm Credit Administration.

**SUMMARY:** Notice is hereby given, pursuant to the Government in the Sunshine Act (5 U.S.C. 552b(e)(3)), that the January 12, 2006 regular meeting of the Farm Credit Administration Board (Board) has been rescheduled. The regular meeting of the Board will be held Friday, January 6, 2006 starting at 9 a.m. An agenda for this meeting will be published at a later date.

**FOR FURTHER INFORMATION CONTACT:** Jeanette C. Brinkley, Secretary to the Farm Credit Administration Board, (703) 883–4009, TTY (703) 883–4056.

**ADDRESSES:** Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090.

Dated: December 14, 2005.

**Jeanette C. Brinkley,**

*Secretary, Farm Credit Administration Board.*

[FR Doc. 05–24236 Filed 12–14–05; 5:01 pm]

BILLING CODE 6705–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the Secretary

### Findings of Scientific Misconduct

**AGENCY:** Office of the Secretary, HHS.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that on November 23, 2005, the Department of Health and Human Services (HHS) Debarring Official, on behalf of the Secretary of HHS, issued a final notice of debarment based on the scientific misconduct findings of the U.S. Public Health Service (PHS) in the following case:

*Jessica Lee Grol, University of Pittsburgh:* Based on the report of an investigation conducted by the University of Pittsburgh (UP) and additional analysis conducted by the Office of Research Integrity (ORI) in its oversight review, HHS found on October 17, 2005, that Ms. Grol, former Research Project Coordinator, Department of Neurological Surgery, UP, engaged in

scientific misconduct by fabricating study research records for 15 subjects, including the patient interview data, the forms tracking data, and the medical record extraction data in a study on the management of cerebral aneurysms. The research was supported by National Institute of Neurological Disorders and Stroke (NINDS), National Institutes of Health (NIH), career development award K23 NS02159.

In a final decision dated November 23, 2005, the HHS Debarring Official, on behalf of the Secretary of HHS, issued the final debarment notice based on the PHS findings of scientific misconduct finding. The following actions have been implemented for a period of three (3) years, beginning on November 23, 2005:

(1) Ms. Grol has been debarred from any contracting or subcontracting with any agency of the United States Government and from eligibility for or involvement in nonprocurement programs of the United States Government as defined in the debarment regulations at 45 CFR part 76; and

(2) Ms. Grol is prohibited from serving in any advisory capacity to PHS, including but not limited to service on any PHS advisory committee, board, and/or peer review committee, or as a consultant.

**FOR FURTHER INFORMATION CONTACT:** Acting Director, Division of Research Investigations, Office of Research Integrity, 5515 Security Lane, Suite 700, Rockville, MD 20852, (240) 453–8800.

**Chris B. Pascal,**

*Acting Director, Office of Research Integrity.*

[FR Doc. E5–7470 Filed 12–16–05; 8:45 am]

**BILLING CODE 4160–17–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers For Medicare & Medicaid Services

### Privacy Act of 1974; Report of a Modified or Altered System of Records

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

**ACTION:** Notice of a Modified or Altered System of Records (SOR).

**SUMMARY:** In accordance with the requirements of the Privacy Act of 1974, we are proposing to modify or alter an existing SOR, titled ''Non-Medicare Beneficiary Workers' Compensation (WC) Set-aside File (WCSAF),'' System No. 09–70–0537, last published at 67 FR 36892 (May 28, 2002). We propose to expand the scope of this system to include non-Medicare beneficiaries whose applications for a WC Arrangement have not been approved (denied) as submitted. The disclosure provisions contained in published routine use number 2 and 3 are deemed to be duplicative of each other and as such require corrective action. This modified routine use will now be number 2 and will authorize disclosure to ''another Federal and/or state agency, agency of a state government, an agency established by state law, or its fiscal agent.''

We are modifying the language in the remaining routine uses to provide clarity to CMS's intention to disclose individual-specific information contained in this system. The routine uses will then be prioritized and reordered according to their usage. We will also take the opportunity to update any sections of the system that were affected by the recent reorganization and to update language in the administrative sections to correspond with language used in other CMS SORs.

The primary purpose of the non-Medicare beneficiary WCSAF is to maintain a file of individuals who were injured while employed; are not currently Medicare beneficiaries; whose WC Settlement included a WC Medicare Set-aside Arrangement that is intended to pay for future medical expenses in place of future Medicare benefits; and was approved or not approved (denied) by CMS as submitted. The information retrieved from this system will be disclosed to: (1) Support regulatory, reimbursement, and policy functions performed within the agency or by a contractor or consultant; (2) another Federal and/or state agency, agency of a state government, an agency established by state law, or its fiscal agent to contribute to the accuracy of CMS' proper payment of Medicare benefits, enable such agency to administer a Federal health benefits program, or enable such agency to fulfill a requirement of a Federal statute or regulation that implements a health benefits program funded in whole or in part with Federal funds; (3) an individual or organization for research, evaluation or epidemiological projects related to the prevention of disease or disability, the restoration or maintenance of health, or for understanding and improving payment projects; (4) support constituent requests made to a Congressional representative; (5) support litigation involving the agency; and (6) combat fraud and abuse in health benefits programs funded in whole or in part by Federal funds. We have provided background information about the modified system in the **SUPPLEMENTARY INFORMATION** section, below. Although the Privacy Act requires only that the ''routine use'' portion of the system be published for comment, CMS invites comments on all portions of this notice. See **EFFECTIVE DATE** section for comment period.

**EFFECTIVE DATE:** CMS filed a modified or altered SOR report with the Chair of the House Committee on Government Reform and Oversight, the Chair of the Senate Committee on Governmental Affairs, and the Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB) on December 13, 2005. We will not disclose any information under a routine use until 30 days after publication. We may defer implementation of this system or one or more of the routine use statements listed below if we receive comments that persuade us to defer implementation.

**ADDRESSES:** The public should address comment to the CMS Privacy Officer, Mail Stop N2–04–27, 7500 Security Boulevard, Baltimore, Maryland 21244–1850. Comments received will be available for review at this location, by appointment, during regular business hours, Monday through Friday from 9 a.m.–3 p.m., eastern daylight time.

**FOR FURTHER INFORMATION CONTACT:** Donna Kettish, Division of Medicare Secondary Payer Policy Operations, Financial Services Group, Office of Financial Management, CMS, Mail stop C3–14–16, 7500 Security Boulevard, Baltimore, Maryland 21244–1850. She can be reached by telephone at (410) 786–5462, or via e-mail at *Donna.Kettish@cms.hhs.gov*.

**SUPPLEMENTARY INFORMATION:** Notice for this system, ''Non Medicare Beneficiary Workers' Compensation Set-aside File,'' System No. 09–70–0537, was most recently published in full at 67 **Federal Register** 36892 (May 28, 2002). CMS is responsible for safeguarding the fiscal integrity of the Medicare Program. The Health Insurance Portability and Accountability Act of 1996 established the ''Medicare Integrity Program,'' enabling CMS to competitively award contracts with entities to promote the integrity of the Medicare Program. The Coordination of Benefit Contractor (COBC) is one of those specialized contractors hired to increase efficiency and effectiveness by ensuring that the appropriate payer makes benefit payments by coordinating Medicare and other benefit payments.

The Electronic Correspondence Referral System (ECRS) is currently used to transfer data between CMS's

Medicare contractors and the COBC to establish Medicare Secondary Payer (MSP) periods of coverage on CMS's Common Working File (CWF) and to update CWF with the results of a CMS review of a WC Medicare Set-aside Arrangement Proposal. The CWF is a CMS system, containing Medicare beneficiary eligibility information that is used for verification and validation purposes to ensure Medicare claims are paid properly and by the appropriate payer. The WC Case Control System is used to control the receipt of WC Medicare Set-aside Arrangement Proposals and tracking of each proposal through the review process to establishment of the MSP period of coverage via ECRS. ECRS is also used to transmit WC Medicare Set-aside Arrangement data from CMS Regional Offices (RO) to the COBC for Medicare beneficiaries and non-Medicare beneficiaries who have an approved or denied WC Medicare Set-aside Arrangement to cover future medical costs resulting from an injury incurred while employed. If the injury results in disability payments from the Social Security Administration, there is a reasonable expectation that the injured individual will also be eligible for Medicare benefits some time after the WC settlement is made.

The ROs or a CMS contractor will transmit the WC Medicare Set-aside Arrangement information via ECRS, or the WC Case Control System, for non-Medicare beneficiaries once they approve or deny the arrangement. The COBC will maintain ECRS and WC Case Control System transmitted data in the WCSAF for future matching purposes. The COBC will ''match'' non-beneficiary WCSAF data against the file it receives each month of new Medicare eligibles to identify any non-beneficiaries with impending Medicare entitlement. Once a match occurs, the existence of a WC Medicare Set-aside Arrangement will be reflected on the new beneficiary's CWF record and a Lead Medicare Contractor will be assigned for monitoring expenditures from the WC Medicare Set-aside Arrangement.

CMS is drawn into a civil action resulting from a WC claim in a consulting position to ensure that a legal settlement involving an injured worker considers Medicare's interest with respect to future claims. CMS RO approval of a WC Medicare Set-aside Arrangement helps direct the treatment of future disorders or health claims by the injured worker, ensuring he/she is adequately covered for long-term care resulting from their WC injury, first by the WC Medicare Set-aside Arrangement and then by Medicare if necessary.

## I. Description of the Modified or Altered System of Records

### *A. Statutory and Regulatory Basis for SOR*

Section 1862 (b)(2) of the Social Security Act (the Act) requires that Medicare payment may not be made for any item or service to the extent that payment has been made under a WC law or plan. This section of the Act and Title 42 Code of Federal Regulations (CFR) 411.46 require CMS to exclude payments once the injured individual becomes a Medicare beneficiary when payment should be made from WC funds that are always primary to Medicare payment.

### *B. Collection and Maintenance of Data in the System*

The WCSAF includes standard data for identification including the name, address, date of birth, Social Security Number, date of the WC injury/incident, injury diagnosis code(s), effective date and amount of the WC Medicare Set-aside Arrangement. In addition, data will be included to enable CMS to manage the WC Medicare Set-aside Arrangement information when it becomes part of the beneficiary's record on the CWF. These data include the WC carrier, the administrator of the Set-aside Arrangement, and the attorney that prepared the arrangement.

## II. Agency Policies, Procedures, and Restrictions on the Routine Use

### *A. Agency Policies, Procedures, and Restrictions on the Routine Use*

The Privacy Act permits us to disclose information without an individual's consent if the information is to be used for a purpose that is compatible with the purpose(s) for which the information was collected. Any such disclosure of data is known as a ''routine use.'' The government will only release WCSAF information that can be associated with an individual as provided for under ''Section III. Proposed Routine Use Disclosures of Data in the System.'' Both identifiable and non-identifiable data may be disclosed under a routine use.

We will only collect the minimum personal data necessary to achieve the purpose of WCSAF. CMS has the following policies and procedures concerning disclosures of information that will be maintained in the system. Disclosure of information from this system will be approved only to the extent necessary to accomplish the purpose of the disclosure and only after CMS:

1. Determines that the use or disclosure is consistent with the reason that the data are being collected; *e.g.*, ensuring that benefit payments are made by the appropriate payer by coordinating Medicare and other benefit payments.

2. Determines that:

a. The purpose for which the disclosure is to be made can only be accomplished if the record is provided in individually identifiable form;

b. The purpose for which the disclosure is to be made is of sufficient importance to warrant the effect and/or risk on the privacy of the individual that additional exposure of the record might bring; and

c. There is a strong probability that the proposed use of the data would in fact accomplish the stated purpose(s).

3. Requires the information recipient to:

a. Establish administrative, technical, and physical safeguards to prevent unauthorized use of disclosure of the record;

b. Remove or destroy at the earliest time all patient-identifiable information; and

c. Agree to not use or disclose the information for any purpose other than the stated purpose under which the information was disclosed.

4. Determines that the data are valid and reliable.

## III. Proposed Routine Use Disclosures of Data in the System

A. The Privacy Act allows us to disclose information without an individual's consent if the information is to be used for a purpose that is compatible with the purpose(s) for which the information was collected. Any such compatible use of data is known as a ''routine use.'' The proposed routine uses in this system meet the compatibility requirement of the Privacy Act. We are proposing to establish the following routine use disclosures of information maintained in the system:

1. To agency contractors, or consultants that have been contracted by the agency to assist in the performance of a service related to this system and that need to have access to the records in order to perform the activity.

CMS contemplates disclosing information under this routine use only in situations in which CMS may enter into a contractual or similar agreement with a third party to assist in accomplishing agency business functions relating to purposes for this system.

CMS occasionally contracts out certain of its functions when doing so would contribute to effective and efficient operations. CMS must be able

to give a contractor whatever information is necessary for the contractor to fulfill its duties. In these situations, safeguards are provided in the contract prohibiting the contractor from using or disclosing the information for any purpose other than that described in the contract and requires the contractor to return or destroy all information at the completion of the contract.

2. To another Federal and/or state agency, agency of a state government, an agency established by state law, or its fiscal agent to:

a. Contribute to the accuracy of CMS's proper payment of Medicare benefits,

b. Enable such agency to administer a Federal health benefits program, or as necessary to enable such agency to fulfill a requirement of a Federal statute or regulation that implements a health benefits program funded in whole or in part with Federal funds.

Other Federal or state agencies in their administration of a Federal health program may require WCSAF information in order to support evaluations and monitoring of Medicare claims information of beneficiaries, including proper payment for services provided. Releases of information would be allowed if the proposed use(s) for the information proved compatible with the purpose for which CMS collects the information.

WCSAF data may be released to the State only on those injured individuals who are not currently Medicare beneficiaries but who have a WC Medicare Set-aside Arrangement that is intended to pay for future medical expenses in place of future Medicare benefits that has been approved, or denied, by CMS.

3. To an individual or organization for research, evaluation or epidemiological projects related to the prevention of disease or disability, the restoration or maintenance of health, or for understanding and improving payment projects.

The WCSAF data will provide the research and evaluations a broader, longitudinal, national perspective of the status of injured individuals that are not currently Medicare beneficiaries but have a WC Medicare Set-aside Arrangement that is intended to pay for future medical expenses in place of future Medicare benefits that has been approved, or denied, by CMS.

4. To a Member of Congress or to a Congressional staff member in response to an inquiry of the Congressional Office made at the written request of the constituent about whom the record is maintained.

Individuals sometimes request the help of a Member of Congress in resolving some issue relating to a matter before CMS. The Member of Congress then writes CMS, and CMS must be able to give sufficient information to be responsive to the inquiry.

5. To the Department of Justice (DOJ), court or adjudicatory body when:

a. The agency or any component thereof, or

b. Any employee of the agency in his or her official capacity; or

c. Any employee of the agency in his or her individual capacity where the DOJ has agreed to represent the employee, or

d. The United States Government is a party to litigation or has an interest in such litigation, and by careful review, CMS determines that the records are both relevant and necessary to the litigation.

Whenever CMS is involved in litigation, or occasionally when another party is involved in litigation and CMS's policies or operations could be affected by the outcome of the litigation, CMS would be able to disclose information to the DOJ, court or adjudicatory body involved. A determination would be made in each instance that, under the circumstances involved, the purposes served by the use of the information in the particular litigation is compatible with a purpose for which CMS collects the information.

6. To a CMS contractor (including, but not necessarily limited to intermediaries and carriers) that assists in the administration of a CMS-administered health benefits program, or to a grantee of a CMS-administered grant program, when disclosure is deemed reasonably necessary by CMS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud or abuse in such program.

CMS contemplates disclosing information under this routine use only in situations in which CMS may enter into a contractual or similar agreement with a third party to assist in accomplishing CMS functions relating to the purpose of combating fraud and abuse.

CMS occasionally contracts out certain of its functions when this would contribute to effective and efficient operations. CMS must be able to give a contractor whatever information is necessary for the contractor to fulfill its duties. In these situations, safeguards (like ensuring that the purpose for which the disclosure is to be made is of sufficient importance to warrant the effect and/or risk on the privacy of the individual that additional exposure of the record might bring and those stated in II.B, above), are provided in the contract prohibiting the contractor from using or disclosing the information for any purpose other than that described in the contract and to return or destroy all information.

7. To another Federal agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States (including any State or local governmental agency), that administers, or that has the authority to investigate potential fraud or abuse in, a health benefits program funded in whole or in part by Federal funds, when disclosure is deemed reasonably necessary by CMS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud or abuse in such programs.

Other State agencies in their administration of a Federal health program may require WCSAF information for the purpose of preventing, deterring, discovering, detecting, investigating, examining, prosecuting, suing with respect to, defending against, correcting, remedying, or otherwise combating such fraud and abuse in such programs. Releases of information would be allowed if the proposed use(s) for the information proved compatible with the purpose for which CMS collects the information.

*B. Additional Provisions Affecting Routine Use Disclosures*

To the extent this system contains Protected Health Information (PHI) as defined by HHS regulation ''Standards for Privacy of Individually Identifiable Health Information'' (45 CFR Parts 160 and 164, 65 FR 82462 (12–28–00), Subparts A and E. Disclosures of such PHI that are otherwise authorized by these routine uses may only be made if, and as, permitted or required by the ''Standards for Privacy of Individually Identifiable Health Information.''

In addition, our policy will be to prohibit release even of data not directly identifiable, except pursuant to one of the routine uses or if required by law, if we determine there is a possibility that an individual can be identified through implicit deduction based on small cell sizes (instances where the patient population is so small that individuals who are familiar with the enrollees could, because of the small size, use this information to deduce the identity of the beneficiary).

**IV. Safeguards**

CMS has safeguards in place for authorized users and monitors such

users to ensure against excessive or unauthorized use. Personnel having access to the system have been trained in the Privacy Act and information security requirements. Employees who maintain records in this system are instructed not to release data until the intended recipient agrees to implement appropriate management, operational and technical safeguards sufficient to protect the confidentiality, integrity and availability of the information and information systems and to prevent unauthorized access.

This system will conform to all applicable Federal laws and regulations and Federal, HHS, and CMS policies and standards as they relate to information security and data privacy. These laws and regulations may apply but are not limited to: the Privacy Act of 1974; the Federal Information Security Management Act of 2002; the Computer Fraud and Abuse Act of 1986; the Health Insurance Portability and Accountability Act of 1996; the E-Government Act of 2002, the Clinger-Cohen Act of 1996; the Medicare Modernization Act of 2003, and the corresponding implementing regulations. OMB Circular A–130, Management of Federal Resources, Appendix III, Security of Federal Automated Information Resources also applies. Federal, HHS, and CMS policies and standards include but are not limited to: all pertinent National Institute of Standards and Technology publications; the HHS Information Systems Program Handbook and the CMS Information Security Handbook.

## V. Effects of the Modified or Altered System of Records on Individual Rights

CMS proposes to modify this system in accordance with the principles and requirements of the Privacy Act and will collect, use, and disseminate information only as prescribed therein. Data in this system will be subject to the authorized releases in accordance with the routine uses identified in this system of records.

CMS will take precautionary measures (see item IV above) to minimize the risks of unauthorized access to the records and the potential harm to individual privacy or other personal or property rights of patients whose data are maintained in the system. CMS will collect only that information necessary to perform the system's functions. In addition, CMS will make disclosure from the proposed system only with consent of the subject individual, or his/her legal representative, or in accordance with an applicable exception provision of the Privacy Act. CMS, therefore, does not anticipate an unfavorable effect on individual privacy as a result of information relating to individuals.

Dated: December 12, 2005.

**Charlene Frizzera,**

*Acting Chief Operating Officer, Centers for Medicare & Medicaid Services.*

## SYSTEM NO. 09–70–0537

### SYSTEM NAME:

''Non-Medicare Beneficiary Workers' Compensation (WC) Set-aside File, (WCSAF).''

### SECURITY CLASSIFICATION:

Level 3 Privacy Act Sensitive.

### SYSTEM LOCATION:

Group Health Incorporated, 25 Broadway, New York, New York 10004.

### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The system of records will contain data on non-Medicare beneficiaries that receive an approval or a denial by the Centers for Medicare & Medicaid Services (CMS) of the adequacy of a WC Medicare Set-aside Arrangement, as part of a WC settlement that is intended to pay for future medical expenses in place of future Medicare benefits.

### CATEGORIES OF RECORDS IN THE SYSTEM:

This system of records will contain the individual-level identifying data including, but not limited to, name, address, date of birth, social security number (SSN), date of the WC injury/incident, injury diagnosis code(s), effective date and amount of the WC Medicare Set-aside Arrangement. In addition, data will be included to enable CMS to manage the WC Medicare Set-aside Arrangement information when it becomes part of a beneficiary's record on the Common Working File. These data include the WC carrier, the administrator of the WC Medicare Set-aside Arrangement, and the attorney that prepared the arrangement.

### AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Section 1862(b)(2) of the Social Security Act (the Act) requires that Medicare payment may not be made for any item or service to the extent that payment has been made under a WC law or plan. This section of the Act and Title 42 Code of Federal Regulation (CFR) 411.46 require CMS to exclude payments once the injured individual becomes a Medicare beneficiary when payment should be made from WC funds that are always primary to Medicare payment.

### PURPOSE(S) OF THE SYSTEM:

The primary purpose of the non-Medicare beneficiary WCSAF is to maintain a file of individuals who were injured while employed; are not currently Medicare beneficiaries; whose WC Settlement included a WC Medicare Set-aside Arrangement that is intended to pay for future medical expenses in place of future Medicare benefits; and was approved or not approved (denied) by CMS as submitted. The information retrieved from this system will be disclosed to: (1) Support regulatory, reimbursement, and policy functions performed within the agency or by a contractor or consultant; (2) another Federal and/or state agency, agency of a state government, an agency established by state law, or its fiscal agent to contribute to the accuracy of CMS' proper payment of Medicare benefits, enable such agency to administer a Federal health benefits program, or enable such agency to fulfill a requirement of a Federal statute or regulation that implements a health benefits program funded in whole or in part with Federal funds; (3) an individual or organization for research, evaluation or epidemiological projects related to the prevention of disease or disability, the restoration or maintenance of health, or for understanding and improving payment projects; (4) support constituent requests made to a Congressional representative; (5) support litigation involving the agency; and (6) combat fraud and abuse in health benefits programs funded in whole or in part by Federal funds.

### ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OR USERS AND THE PURPOSES OF SUCH USES:

A. The Privacy Act allows us to disclose information without an individual's consent if the information is to be used for a purpose that is compatible with the purpose(s) for which the information was collected. Any such compatible use of data is known as a ''routine use.'' The proposed routine uses in this system meet the compatibility requirement of the Privacy Act. We are proposing to establish the following routine use disclosures of information maintained in the system:

1. To agency contractors, or consultants that have been contracted by the agency to assist in the performance of a service related to this system and that need to have access to the records in order to perform the activity.

2. To another Federal and/or state agency, agency of a state government, an agency established by state law, or its fiscal agent to:

a. Contribute to the accuracy of CMS's proper payment of Medicare benefits,

b. Enable such agency to administer a Federal health benefits program, or as necessary to enable such agency to fulfill a requirement of a Federal statute or regulation that implements a health benefits program funded in whole or in part with Federal funds.

3. To an individual or organization for research, evaluation or epidemiological projects related to the prevention of disease or disability, the restoration or maintenance of health, or for understanding and improving payment projects.

4. To a Member of Congress or to a Congressional staff member in response to an inquiry of the Congressional Office made at the written request of the constituent about whom the record is maintained.

5. To the Department of Justice (DOJ), court or adjudicatory body when:

a. The agency or any component thereof, or

b. Any employee of the agency in his or her official capacity; or

c. Any employee of the agency in his or her individual capacity where the DOJ has agreed to represent the employee, or

d. The United States Government; is a party to litigation or has an interest in such litigation, and by careful review, CMS determines that the records are both relevant and necessary to the litigation.

6. To a CMS contractor (including, but not necessarily limited to intermediaries and carriers) that assists in the administration of a CMS-administered health benefits program, or to a grantee of a CMS-administered grant program, when disclosure is deemed reasonably necessary by CMS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud or abuse in such program.

7. To another Federal agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States (including any State or local governmental agency), that administers, or that has the authority to investigate potential fraud or abuse in, a health benefits program funded in whole or in part by Federal funds, when disclosure is deemed reasonably necessary by CMS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud or abuse in such programs.

B. Additional Provisions Affecting Routine Use Disclosures:

To the extent this system contains Protected Health Information (PHI) as defined by HHS regulation ''Standards for Privacy of Individually Identifiable Health Information'' (45 CFR Parts 160 and 164, 65 FR 82462 (12–28–00)), Subparts A and E. Disclosures of such PHI that are otherwise authorized by these routine uses may only be made if, and as, permitted or required by the ''Standards for Privacy of Individually Identifiable Health Information.''

In addition, our policy will be to prohibit release even of data not directly identifiable, except pursuant to one of the routine uses or if required by law, if we determine there is a possibility that an individual can be identified through implicit deduction based on small cell sizes (instances where the patient population is so small that individuals who are familiar with the enrollees could, because of the small size, use this information to deduce the identity of the beneficiary).

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

All records are stored on magnetic media.

**RETIEVABILITY:**

The records are retrieved alphabetically by the name and/or SSN of the subject of the records.

**SAFEGUARDS:**

CMS has safeguards in place for authorized users and monitors such users to ensure against excessive or unauthorized use. Personnel having access to the system have been trained in the Privacy Act and information security requirements. Employees who maintain records in this system are instructed not to release data until the intended recipient agrees to implement appropriate management, operational and technical safeguards sufficient to protect the confidentiality, integrity and availability of the information and information systems and to prevent unauthorized access.

This system will conform to all applicable Federal laws and regulations and Federal, HHS, and CMS policies and standards as they relate to information security and data privacy. These laws and regulations may apply but are not limited to: The Privacy Act of 1974; the Federal Information Security Management Act of 2002; the Computer Fraud and Abuse Act of 1986; the Health Insurance Portability and Accountability Act of 1996; the E-Government Act of 2002, the Clinger-Cohen Act of 1996; the Medicare Modernization Act of 2003, and the corresponding implementing regulations. OMB Circular A–130, Management of Federal Resources, Appendix III, Security of Federal Automated Information Resources also applies. Federal, HHS, and CMS policies and standards include but are not limited to: All pertinent National Institute of Standards and Technology publications; the HHS Information Systems Program Handbook and the CMS Information Security Handbook.

**RETENTION AND DISPOSAL:**

CMS will retain identifiable WCSAF data for a period of 6 years and 3 months unless the injured individual becomes a Medicare beneficiary prior to that period of time. When either of these criteria is met, the information stored on the injured individual will be deleted from the WCSAF. All claims-related records are encompassed by the document preservation order and will be retained until notification is received from DOJ.

**SYSTEM MANAGER AND ADDRESS:**

Director, Division of Medicare Secondary Payer Policy Operations, Financial Services Group, Office of Financial Management, CMS, Mail Stop C3–14–16, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

**NOTIFICATION PROCEDURE:**

For purpose of access, the subject individual should write to the system manager who will require the system name, and for verification purposes, the subject individual's name (woman's maiden name, if applicable), address, date of birth, date of WC injury/incident, diagnosis, effective date and amount of the WC Medicare Set-aside Arrangement. (Furnishing the SSN is voluntary, but it may make searching for a record easier and prevent delay).

**RECORD ACCESS PROCEDURE:**

For purpose of access, use the same procedures outlined in Notification Procedures above. Requestors should also reasonably specify the record contents being sought. (These procedures are in accordance with Department regulation 45 CFR 5b 5(a)(2)).

**CONTESTING RECORD PROCEDURES:**

The subject individual should contact the system manager named above, and reasonably identify the record and specify the information to be contested. State the corrective action sought and the reasons for the correction with supporting justification. (These procedures are in accordance with Department regulation 45 CFR 5b.7).

**RECORD SOURCE CATEGORIES:**

The Electronic Correspondence Referral System, Workers Comp Case

Control System, Medicare contractors and the Coordination of Benefit Contractor, Common Working File, CMS Regional Offices, an agency of a State government, Medicare beneficiaries and non-Medicare beneficiaries that have an approved or denied WC Medicare Set-aside arrangement to cover future medical costs resulting from an injury incurred while employed and the Social Security Administration.

**SYSTEMS EXEMPTED FROM CERTAIN PROVISION OF THE ACT:**

None.

[FR Doc. E5–7486 Filed 12–16–05; 8:45 am]

**BILLING CODE 4120–03–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Proposed Information Collection Activity; Comment Request

**Proposed Projects**

*Title:* Sanction Policies Task Order.

*OMB No.:* New Collection.

*Description:* This study is designed to determine how local welfare offices implement sanction policies in the Temporary Assistance for Needy Families program. This study will survey local welfare staff to gather in-depth qualitative information on how workers interpret the policies and apply them in specific instances. The results of this study should give the Administration for Children and Families (ACF) a better understanding of possible outcomes of various sanction policies, which in turn will help ACF design a research program to study the effect of sanctions.

*Respondents:* A maximum of 324 welfare staff in local welfare offices.

ANNUAL BURDEN ESTIMATES

| Instrument | Number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| In-person Survey and Telephone Interviews | 324 | 1 | .85 | 275 |

*Estimated Total Annual Burden Hours:* 275.

In compliance with the requirements of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments 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; (c) 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. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: December 12, 2005.

**Robert Sargis,**

*Reports Clearance Officer.*

[FR Doc. 05–24174 Filed 12–16–05; 8:45 am]

**BILLING CODE 4184–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. 1980N–0208]**

### Biological Products; Bacterial Vaccines and Toxoids; Implementation of Efficacy Review; Anthrax Vaccine Adsorbed; Final Order

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) proposed, among other things, to classify Anthrax Vaccine Adsorbed (AVA) on the basis of findings and recommendations of the Panel on Review of Bacterial Vaccines and Toxoids (the Panel) on December 13, 1985. The Panel reviewed the safety, efficacy, and labeling of bacterial vaccines and toxoids with standards of potency, bacterial antitoxins, and immune globulins. After the initial final rule and final order was vacated by the United States District Court for the District of Columbia on October 27, 2004, FDA published a new proposed rule and proposed order on December 29, 2004. The purpose of this final order is to categorize AVA according to the evidence of its safety and effectiveness, thereby determining if it may remain licensed and on the market; issue a final response to recommendations made in the Panel's report, and; respond to comments on the previously published proposed order. The final rule and final order concerning bacterial vaccines and toxoids other than AVA is published elsewhere in this issue of the **Federal Register**.

**DATES:** The final order on categorization of AVA is effective December 19, 2005.

**FOR FURTHER INFORMATION CONTACT:** Kathleen Swisher, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, Suite 200N, Rockville, MD 20852–1448, 301–827–6210.

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## I. Introduction

Biological products licensed before July 1972 are subject to a review procedure described in § 601.25 (21 CFR 601.25). AVA was licensed before July 1972. The purpose of this document is to: (1) Categorize AVA under § 601.25 according to the evidence of its safety and effectiveness, thereby determining if it may remain licensed and on the market, (2) issue a final response to recommendations made in the Panel's report, and (3) respond to comments on the proposed order (69 FR 78281, December 29, 2004).

## II. Background

### *A. General Description of the ''Efficacy Review'' for Biological Products Licensed Before July 1972*

In 1972, in an effort to assure that regulatory standards for drugs and biological products were harmonized, the National Institutes of Health (NIH) announced a review of all licensed biological products (37 FR 5404, March 15, 1972). However, on July 1, 1972, NIH's Division of Biologics Standards, which had been charged with administering and enforcing the licensing provisions of the Public Health Service Act, was transferred to FDA (37 FR 12865, June 29, 1972). FDA then assumed responsibility for reviewing the previously licensed biological products. In the **Federal Register** of February 13, 1973 (38 FR 4319), FDA issued procedures for the review of the safety, effectiveness, and labeling of biological products licensed before July 1, 1972. This process was eventually codified in § 601.25 (38 FR 32048 at 32052, November 20, 1973). Under the panel assignments published in the **Federal Register** of June 19, 1974 (39 FR 21176), FDA assigned each review of a biological product to one of the following groups: (1) Bacterial vaccines and bacterial antigens with ''no U.S. standard of potency,'' (2) bacterial vaccines and toxoids with standards of potency, (3) viral vaccines and rickettsial vaccines, (4) allergenic extracts, (5) skin test antigens, and (6) blood and blood derivatives.

Under § 601.25, FDA assigned the initial review of each of the six biological product categories to a separate independent advisory panel consisting of qualified experts. Each panel was charged with preparing for the Commissioner of Food and Drugs an advisory report which was to: (1) Evaluate the safety and effectiveness of the biological products for which a license had been issued, (2) review their labeling, and (3) identify the biological products that are safe, effective, and not misbranded. Each advisory panel report was also to include recommendations classifying the products reviewed into one of three categories.

- Category I, designating those biological products determined by the panel to be safe, effective, and not misbranded.
- Category II, designating those biological products determined by the panel to be unsafe, ineffective, or misbranded.
- Category III, designating those biological products determined by the panel not to fall within either Category I or Category II on the basis of the panel's conclusion that the available data were insufficient to classify such biological products, and for which further testing was therefore required. Category III products were assigned to one of two subcategories. Category IIIA products were those that would be permitted to remain on the market pending the completion of further studies. Category IIIB products were those for which the panel recommended license revocation on the basis of the panel's assessment of potential risks and benefits.

In its report, the panel could also include recommendations concerning any condition relating to active components, labeling, tests appropriate before release of products, product standards, or other conditions necessary or appropriate for a biological product's safety and effectiveness.

In accordance with § 601.25, after reviewing the conclusions and recommendations of the review panels, FDA would publish in the **Federal Register** a proposed order containing: (1) A statement designating the biological products reviewed into Categories I, II, IIIA, or IIIB, (2) a description of the testing necessary for Category IIIA biological products, and (3) the complete panel report. Under the proposed order, FDA would propose to revoke the licenses of those products designated into Category II and Category IIIB. After reviewing public comments, FDA would publish a final order on the matters covered in the proposed order.

### *B. The December 1985 Proposal*

The Panel was convened in a July 12, 1973, organizational meeting, which was followed by multiple working meetings until February 2, 1979. The Panel completed its final report in August 1979. In that report, the Panel found that AVA, manufactured by Michigan Department of Public Health (MDPH, now BioPort), License No. 99,[1] was safe and effective for its intended use and recommended that the vaccine be placed into Category I. The Panel based its evaluation of the safety and efficacy of AVA on two studies: The Brachman study, a well-controlled field study conducted in the 1950s (Ref. 1), and an open label safety study conducted by the National Center for Disease Control (CDC, now the Centers for Disease Control and Prevention) (50 FR 51002 at 51058, December 13, 1985). The Panel also considered surveillance data on the occurrence of anthrax disease in the United States in at-risk industrial settings as supportive of the effectiveness of the vaccine (50 FR 51002 at 51059, December 13, 1985).

In the **Federal Register** of December 13, 1985 (50 FR 51002), FDA issued a proposed rule that contained the full Panel report on bacterial vaccines and toxoids with standards of potency,

[1]On December 17, 1965, the company name was changed from the Division of Laboratories, Michigan Department of Health to the Bureau of Laboratories, Michigan Department of Public Health. On April 10, 1979, the name was changed to the Michigan Department of Public Health. On May 14, 1996, the name was changed to the Michigan Biologics Products Institute. On November 11, 1998, FDA accepted a name change to BioPort Corporation (BioPort) with an accompanying license number change to 1260.

including the anthrax vaccine,[2] and FDA's response to the recommendations of the Panel (the December 1985 proposal). In the December 1985 proposal, FDA proposed regulatory categories (Category I, Category II, or Category IIIB as defined previously in this document) for each bacterial vaccine and toxoid reviewed by the Panel, and responded to other recommendations made by the Panel. FDA agreed with the Panel's recommendation and proposed to place AVA into Category I.

The public was provided 90 days to submit comments in response to the December 1985 proposal. FDA received four letters of comments in response to the December 1985 proposal, but none of those comments pertained to AVA. We discuss them in a final rule and final order concerning bacterial vaccines and toxoids other than AVA published elsewhere in this issue of the **Federal Register**.

FDA addressed the review and reclassification of bacterial vaccines and toxoids classified into Category IIIA through a separate administrative procedure (see the **Federal Register** of May 15, 2000 (65 FR 31003), and May 29, 2001 (66 FR 29148)).

*C. Additional Proceedings Following the December 1985 Proposal*

On October 12, 2001, a group of individuals filed a citizen petition requesting that FDA find AVA, as currently manufactured by BioPort, ineffective for its intended use, classify the product as Category II, and revoke the license for the vaccine. The petitioners complained that the December 1985 proposal that placed AVA into Category I had not been finalized. FDA responded separately in a written response to the petitioners on August 28, 2002 (Docket No. 2001P–0471).

In March 2003, six plaintiffs, known as John and Jane Doe 1 through 6, filed suit in the U.S. District Court for the District of Columbia (the Court) asking the Court to enjoin the Anthrax Vaccine Immunization Program (AVIP) of the Department of Defense (DoD), and to declare AVA an investigational drug when used for protection against inhalation anthrax. On December 22, 2003, the Court issued a preliminary injunction enjoining inoculations under the AVIP in the absence of informed consent or a Presidential waiver of informed consent (see § 50.23 (21 CFR 50.23)). *Doe* v. *Rumsfeld*, 297 F.Supp. 2d 119 (D.D.C. 2003).

In the **Federal Register** of January 5, 2004 (69 FR 255), FDA published a final rule and final order amending the biologics regulations and categorizing certain biological products in response to the report and recommendations of the Panel. The final order placed AVA into Category I. Following FDA's issuance of the final rule and final order, on January 7, 2004, the Court lifted the preliminary injunction except as it applied to the six Doe plaintiffs. *Doe* v. *Rumsfeld*, 297 F.Supp. 2d 200 (D.D.C. 2004).

On October 27, 2004, the Court issued a memorandum opinion vacating and remanding the January 2004 final rule and final order to FDA for reconsideration, requiring an additional opportunity for comment. *Doe* v. *Rumsfeld*, 341 F.Supp. 2d 1 (D.D.C. 2004). On December 29, 2004 (69 FR 78280), FDA published a withdrawal of the January 5, 2004, final rule and final order. Concurrently with the withdrawal of the final rule and final order, FDA published again a proposed rule and proposed order (69 FR 78281) (the December 2004 proposal) to provide notice and to give interested persons an opportunity to comment on FDA's proposals relating to bacterial vaccines and toxoids classified into Category I, Category II, and Category IIIB, including AVA. In the December 2004 proposal, FDA reopened the comment period for 90 days on the entire Bacterial Vaccines and Toxoids efficacy review document.

Most of the comments received in response to the December 2004 proposal pertained to the anthrax vaccine (AVA). We provide a response to comments about AVA under section IV of this document. A discussion of comments to the December 2004 proposal concerning bacterial vaccines and toxoids other than AVA is provided in a final rule and final order published elsewhere in this issue of the **Federal Register**.

## III. Categorization of Anthrax Vaccine Adsorbed—Final Order

After review of the comments and finding no additional scientific evidence to alter the proposed categorization, FDA accepts the Panel's recommendation and adopts Category I as the final category for AVA and determines AVA to be safe and effective and not misbranded.

In this section of this document, we describe the data supporting our conclusion that AVA is safe and effective for its labeled indication to protect individuals at high risk for anthrax disease. Anthrax disease can be fatal despite appropriate antibiotic therapy. We also discuss points of disagreement with certain statements in the Panel's report.

In order to provide clarity to the reader, we use the following terms to refer to studies relevant to this final order. The versions of vaccine used in these studies reflect the optimization of anthrax vaccine during product and clinical development.

1. *Brachman study*—The Brachman study was an adequate and well-controlled clinical study conducted from 1954 to 1959 to evaluate the effectiveness of the anthrax vaccine. The vaccine used in the Brachman study (the DoD vaccine) was supplied by Dr. G. G. Wright and associates of the U.S. Army Chemical Corps., Fort Detrick, Frederick, MD.

2. *CDC open label safety study*—The CDC open label safety study was conducted from 1966 to 1971. Merck Sharp & Dohme (MSD) manufactured anthrax vaccine (DoD/MSD vaccine) under contract to DoD in 1960 and 1961. The Michigan Department of Public Health (MDPH) also manufactured anthrax vaccine (DoD/MDPH/AVA) under contract to DoD starting in the mid–1960s. CDC used one lot of DoD/MSD vaccine and one lot of DoD/MDPH/AVA vaccine in the first year of the CDC open label safety study, but only DoD/MDPH/AVA vaccine was used for the remainder of that study. The vaccine manufactured by MDPH was licensed by the NIH, Bureau of Biologics, in November 1970 as AVA. MDPH subsequently underwent a name change to Michigan Biologic Products Institute (MBPI) and later, BioPort Corporation (BioPort).

3. *DoD pilot study*—The DoD pilot study was conducted from 1996 to 1999. The purpose of the study was to make an initial assessment of the effects that alternative immunization schedules and/or an alternative route of administration may have on the safety and immunogenicity of AVA. The DoD pilot study used the licensed DoD/MDPH/AVA vaccine.

*A. Efficacy of Anthrax Vaccine Adsorbed*

The Brachman study was conducted in four textile mills where, prior to initiation of the study, the yearly average number of human anthrax cases was 1.2 cases per 100 mill employees. These textile mills were located in the northeastern United States and processed imported goat hair. The study included 1,249 workers from these

[2]In addition to publication in the **Federal Register** of December 13, 1985 (50 FR 51002), the full Panel report is available on FDA's Web site at *http://www.fda.gov/ohrms/dockets/default.htm* (Docket No. 1980N–0208). A copy of the Panel report is also available at the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

mills. Of these 1,249 workers, 379 received anthrax vaccine, 414 received placebo, 116 received incomplete inoculations of either anthrax vaccine or placebo, and 340 received no treatment but were monitored for the occurrence of anthrax disease as an observational group. The Brachman study used DoD vaccine administered subcutaneously at 0, 2, and 4 weeks and 6, 12, and 18 months. During the study, 26 cases of anthrax were reported across the four mills: 5 inhalation and 21 cutaneous anthrax cases. Of the five inhalation anthrax cases (four of which were fatal), two received placebo, three were in the observational group, and none received anthrax vaccine. Of the 21 cutaneous anthrax cases, 15 received placebo, 3 were in the observational group, and 3 received anthrax vaccine. Of the three cases in the vaccine group, one case occurred just prior to administration of the third dose, one case occurred 13 months after the individual received the third of the six doses (but no subsequent doses), and one case occurred prior to receiving the fourth dose of vaccine.

In its report, the Panel stated that the Brachman study results demonstrate ''a 93 percent (lower 95 percent confidence limit = 65 percent) protection against *cutaneous* anthrax'' (emphasis supplied) and that ''inhalation anthrax occurred too infrequently to assess the protective effect of vaccine against this form of the disease'' (50 FR 51002 at 51058, December 13, 1985). We do not agree with the Panel's statement that the protection was limited to cutaneous anthrax cases. The Brachman study's comparison between anthrax cases in the placebo and vaccine groups included both inhalation and cutaneous anthrax cases. Accordingly, the calculated effectiveness of the vaccine to prevent both types of anthrax disease combined was 92.5 percent (lower 95 percent confidence interval = 65 percent) as described in the Brachman, et al. report (Ref. 1). We agree that the cases of inhalation anthrax reported in the course of the Brachman study, if analyzed separately, are too few to support a meaningful statistical conclusion. However, the Brachman study's analysis of the effectiveness of the vaccine appropriately included all cases of anthrax disease that occurred in individuals who received at least three doses of vaccine or placebo and were on schedule for the remaining doses of the six-dose schedule regardless of the route of exposure or manifestation of disease, and was not limited to cutaneous cases. Thus, the study supports AVA's indication for active immunization against *Bacillus anthracis*, independent of the route of exposure.

As stated previously in this document, the Panel also considered epidemiological data—which we refer to as the CDC surveillance data—on the occurrence of anthrax disease in at-risk industrial settings collected by the CDC and summarized for the years 1962 to 1974, as supportive of the effectiveness of AVA. In that time period, individuals received either DoD/MDPH/AVA vaccine or an earlier version of anthrax vaccine. The Panel explained,

> Twenty-seven cases of anthrax disease were identified. Three cases were not mill employees but worked in or near mills; none of these cases had been vaccinated. Twenty-four cases were mill employees; three were partially immunized (one with 1 dose, two with 2 doses); the remainder (89 percent) were unvaccinated. Therefore, no cases have occurred in fully vaccinated subjects while the risk of infection has continued. These observations lend further support to the effectiveness of this product.
> (50 FR 51002 at 51058, December 13, 1985).

In 1998, the DoD initiated the Anthrax Vaccine Immunization Program, calling for mandatory vaccination of service members. Thereafter, questions about the vaccine caused the U.S. Congress to direct DoD to support an independent examination of AVA by the Institute of Medicine (IOM).[3] The IOM committee was charged with reviewing data regarding the efficacy and safety of the currently licensed anthrax vaccine—Anthrax Vaccine Adsorbed (AVA)—and assessing the efforts to resolve manufacturing issues and resume production and distribution of vaccine. The committee in its published report concluded that AVA, as licensed, is an effective vaccine to protect humans against anthrax, including inhalation anthrax (Ref. 2). FDA agrees with the report's finding that certain studies in humans and animal models support the conclusion that AVA is effective against *B. anthracis* strains that are dependent upon the anthrax toxin as a mechanism of virulence, regardless of the route of exposure.[4] However, our review of AVA, is independent of the IOM's review. We discuss later in this document comments that we received related to the IOM review.

[3]In October 2000, the Institute of Medicine (IOM) convened the Committee to Assess the Safety and Efficacy of the Anthrax Vaccine. In March 2002, the Committee issued its report: The Anthrax Vaccine: Is It Safe? Does It Work? (Ref. 2). The report concluded that the vaccine is acceptably safe and effective in protecting humans against anthrax.

[4]For example: The Brachman study (Ref. 1); the CDC surveillance data described in the December 1985 proposal; Fellows (2001) (Ref. 3); Ivins (1996) (Ref. 4); and Ivins (1998) (Ref. 5).

*B. Safety of Anthrax Vaccine Adsorbed*

CDC conducted the CDC open label safety study under an investigational new drug application (IND) between 1966 and 1971 in which approximately 7,000 persons, including textile employees, laboratory workers, and other at-risk individuals, were vaccinated with DoD/MDPH/AVA vaccine[5] and monitored for adverse reactions to vaccination. The vaccine was administered in 0.5–mL doses according to a 0-, 2-, and 4-week initial dose schedule followed by additional doses at 6, 12, and 18 months, with annual boosters thereafter. Several lots (approximately 15,000 doses) of DoD/MDPH/AVA vaccine were used in this study period. In its report, the Panel found that the CDC data ''suggests that this product is fairly well tolerated with the majority of reactions consisting of local erythema and edema. Severe local reactions and systemic reactions are relatively rare'' (50 FR 51002 at 51059).

Subsequent to the publication of the Panel's recommendations, from 1996 to 1999, DoD conducted the DoD pilot study, a small, randomized clinical study of AVA, administered by alternative route and schedules, compared to the vaccine administered according to the approved labeling. Safety data from the group that received the vaccine according to the labeling as well as post-licensure adverse event surveillance data available from the Vaccine Adverse Event Reporting System (VAERS), which FDA regularly reviews, further support the safety of AVA. These data provided the basis for labeling revisions approved by FDA in January 2002 (Ref. 6) to better describe the types and severities of adverse events associated with administration of AVA.

*C. The Panel's General Statement: Anthrax Vaccine, Adsorbed, Description of Product*

The Panel report states:

> Anthrax vaccine is an aluminum hydroxide adsorbed, protective, proteinaceous, antigenic fraction prepared from a nonproteolytic, nonencapsulated mutant of the Vollum strain of *Bacillus anthracis*. (50 FR 51002 at 51058).

The Panel's description of the anthrax vaccine has an inaccuracy. While the *B. anthracis* strain used in the manufacture of AVA is the nonproteolytic, nonencapsulated strain identified in the Panel report, it is not a mutant of the Vollum strain but was derived from a *B. anthracis* culture originally isolated from a case of bovine anthrax in Florida.

[5]In addition, one lot of the DoD/MSD vaccine was used during the CDC open label safety study.

*D. The Panel's Specific Product Review: Anthrax Vaccine Adsorbed: Efficacy*

The Panel report states:

3. *Analysis—a. Efficacy*—(2) *Human*. The vaccine manufactured by the Michigan Department of Public Health has not been employed in a controlled field trial. A similar vaccine prepared by Merck Sharp & Dohme for Fort Detrick was employed by Brachman * * * in a placebo-controlled field trial in mills processing imported goat hair * * *. The Michigan Department of Public Health vaccine is patterned after that of Merck Sharp & Dohme with various minor production changes.

(50 FR 51002 at 51059, December 13, 1985).

FDA found that contrary to the Panel's statement, the vaccine used in the Brachman study was not manufactured by MSD, but instead this vaccine was manufactured by DoD and provided to Dr. Brachman by Dr. G. G. Wright of Fort Detrick, U.S. Army, DoD (Ref. 1). The DoD vaccine used in the Brachman study was manufactured using an aerobic culture method (Ref. 7). Subsequent to the Brachman study, DoD modified the vaccine's manufacturing process to, among other things, optimize production of a stable and immunogenic formulation of vaccine antigen and increase the scale of manufacture. In the early 1960s (after the Brachman study), DoD entered into a contract with MSD to standardize the manufacturing process for large-scale production of the anthrax vaccine and to produce anthrax vaccine using an anaerobic method.

Thereafter, in the 1960s, DoD entered into a similar contract with MDPH to further standardize the manufacturing process and to scale up production for further clinical testing and immunization of persons at risk of exposure to anthrax. This DoD-MDPH contract resulted in the production of the anthrax vaccine that CDC used in the CDC open label safety study and that was licensed in 1970.

We have reviewed the historical development of AVA and conclude that DoD directed the development of the vaccine, including its formulation and manufacturing process, from the vaccine used in the Brachman study (DoD vaccine) to the vaccine that was ultimately licensed and manufactured by BioPort (DoD/MDPH/AVA vaccine). All three versions of anthrax vaccine, DoD vaccine, DoD/MSD vaccine, and DoD/MDPH/AVA vaccine, were tested in animals and demonstrated to protect test animals (e.g., guinea pigs, rabbits) against challenge with virulent *B. anthracis* spores. In addition, there are clinical data comparing the safety and immunogenicity of DoD/MDPH/AVA vaccine with DoD vaccine. These data, while limited in the number of vaccinees and samples evaluated, reveal that the serological responses to DoD/MDPH/AVA vaccine and DoD vaccine were similar with respect to peak antibody response and seropositivity.

Under FDA's long-standing approach to comparability, a manufacturer may make manufacturing changes in a product without performing additional clinical studies to demonstrate the safety and effectiveness of the similar product if data regarding the manufacturing changes support the conclusion that the versions are comparable. Put another way, after a manufacturing change, a manufacturer may use data gathered with a previous version of its product to support the effectiveness of a comparable version of the same product. These principles are further reflected in FDA's ''Guidance Concerning Demonstration of Comparability of Human Biological Products, Including Therapeutic Biotechnology-derived Products'' (1996) (Ref. 8). As discussed previously in this document, DoD vaccine and DoD/MDPH/AVA vaccine are comparable in their ability to protect test animals against challenge with virulent strains of *B. anthracis* and to elicit similar immune responses in humans.

*E. The Panel's Specific Product Review: Anthrax Vaccine Adsorbed: Labeling*

The Panel report states:

3. *Analysis—d. Labeling*: The labeling seems generally adequate. There is a conflict, however, with additional standards for anthrax vaccine. Section 620.24 (a) (21 CFR 620.24(a)) defines a total primary immunizing dose as 3 single doses of 0.5 mL. The labeling defines primary immunization as 6 doses (0, 2, and 4 weeks plus 6, 12, and 18 months).

(50 FR 51002 at 51059, December 13, 1985).

The Panel was concerned with whether the vaccination schedule conformed to a standard set out in former § 620.24(a), a rule that FDA revoked in 1996 with certain other biologics regulations because they were obsolete or no longer necessary (Ref. 9). The dosing schedule for AVA has always consisted of three doses of 0.5 mL administered in short succession at 0, 2, and 4 weeks, and three additional doses at 6, 12, and 18 months, with additional doses at 1-year intervals to maintain immunity. However, the use of certain terminology has varied as discussed in this section of this document. Pre-licensure labeling (submitted to the license application with a letter dated January 25, 1968) described the vaccination schedule as three initial doses, followed by three additional doses, and yearly subsequent doses. This schedule is consistent with the additional standards of AVA that were originally published on October 27, 1970 (35 FR 16631), immediately before the licensure of AVA. The 1979 labeling referred to ''primary immunization'' as consisting of six injections, with recommended yearly subsequent injections. The 1987 labeling of AVA, approved after the publication of the Panel's report, described the vaccination schedule as a ''primary immunization'' consisting of three doses followed by three additional doses (for a total of six doses), followed by annual injections. While the labeling has variously used the term ''primary'' to describe the AVA vaccination schedule, the licensed schedule itself has always consisted of three initial doses administered at 2-week intervals, followed by three additional doses at 6, 12, and 18 months, with additional annual doses to maintain immunity.

## IV. Comments on the December 2004 Anthrax Vaccine Adsorbed (AVA) Proposed Order and FDA's Responses

We received about 350 comments on the December 2004 proposal. Most comments related to AVA. To provide clarity to readers, we separated the AVA final order from the final rule and final order for other bacterial vaccines and toxoids. We are describing and responding to comments about AVA in this section of this document. Comments relating to other portions of the December 2004 proposal are discussed in a final rule and final order concerning bacterial vaccines and toxoids other than AVA published elsewhere in this issue of the **Federal Register**.

We carefully reviewed all comments submitted to the Docket, including those attaching copies of articles and other references. However, a number of comments submitted to the Docket simply referred to articles or other publications, or to Web site materials, without providing copies of the materials. FDA regulations governing submissions to the Docket expressly provide that ''information referred to or relied upon in a submission is to be included in full and may not be incorporated by reference unless previously submitted in the same proceeding.'' (§ 10.20(c) (21 CFR 10.20(c)). Without a copy to review, we were unable to review all references cited but not included in the comments. We obtained and reviewed readily available recognized medical or scientific textbooks (see § 10.20(c)(1)(iv)). The provision of Web site addresses, without substantive material, posed an additional problem. Since Web sites change continually, we were unable to review material at the Web site addresses provided with any

degree of certainty that the comment intended to incorporate the material we found. Also, many Web sites we checked contained irrelevant information. It was often difficult to determine a connection between the Web site and the comment's submission. FDA regulations require that only relevant information is to be submitted (§ 10.20(c)(3)) and failure to comply with these requirements results in exclusion from consideration of any portion of the comment that fails to comply (§ 10.20(c)(6)).

Many comments agreed with the Panel's recommendation that AVA is safe and effective and supported licensure of the vaccine; other comments advocated a need for a panel of experts to review in depth the data on AVA. Many of the comments did not support placing AVA into Category I as recommended by the Panel. Many comments described adverse events and suggested a relationship between the administration of AVA and the adverse events. Other comments recommended further testing of AVA through the conduct of clinical studies or other means. Numerous miscellaneous comments were received, some of which are not relevant to the proposed order. Many of the comments expressed an opinion about the conduct of vaccination administration programs, the need for compensation from public funds to individuals suffering injury from vaccinations, or other activities that are outside of FDA's jurisdiction, authority, and control.

To make it easier to identify comments and our responses, the word ''Comment,'' in parentheses, will appear before the description of comments, and the word ''Response,'' in parentheses, will appear before our response. We numbered the comments to help distinguish between different types of comments. The number assigned to a comment is purely for organizational purposes and does not signify the comment's value or importance or the order in which the comment was received.

*A. Comments Supporting Placing AVA into Category I*

(Comment 1) We received a number of comments expressing support for the safety and effectiveness of AVA, and for FDA's proposal to accept the Panel's recommendation to place AVA into Category I. Some of these comments were specific in their support of the Brachman study as evidence of effectiveness against anthrax regardless of route of exposure; others discussed or described results of animal studies that they regarded as providing additional supporting evidence that AVA is effective in preventing inhalation anthrax. Some were from vaccine recipients and medical personnel who expressed support for the DoD vaccination program in its effort to protect military personnel from anthrax used as a biological weapon. Others were supportive of the work conducted by DoD to document and evaluate adverse events experienced by military personnel enrolled in the vaccination program.

One comment was from a former director of the Division of Biological Standards (DBS) of the NIH and subsequently within the FDA, who stated his recollection that AVA had been subject to a careful review by DBS staff prior to approval in 1970. He stated that there have been three detailed, unbiased, and scientifically sound reviews, including the initial review by DBS, the expert Panel review in the 1970s (published in the December 1985 Proposal), and the IOM review more recently; and all three reviews concluded that the vaccine is safe and effective. Two comments were submitted by scientists who had been clinical investigators in the Brachman study. One stated that during the study he was blinded to group assignment when evaluating the reactions; i.e., he did not know whether the subject had received the placebo or the vaccine. He also stated that the pathophysiology of human anthrax, regardless of where the organism gains entrance to the body, is a result of the toxin released by the organism. Thus, it is appropriate to combine inhalation and cutaneous disease in the analysis. The other scientist stated that the vaccine has demonstrated effectiveness in animal and human studies, as described in published scientific literature articles.

We received comments from Army research scientists in support of placing AVA into Category I. One of these included tables of data from anthrax spore inhalation challenge studies in non-human primates and rabbits evaluating the effectiveness of AVA in prevention of death from disease. The comment noted that a high degree of protection was observed in these animals following only one or two doses of AVA, and that the IOM committee concluded that these animal models are representative of the human form of inhalation anthrax. Another research scientist also noted that, in addition to the Brachman study, inhalation anthrax challenge studies in non-human primates provide evidence of AVA's effectiveness in preventing disease caused by anthrax spores. Further, he noted that current knowledge of the pathogenesis of anthrax would indicate that, regardless of the route by which spores enter the body, toxins produced after those spores germinate into growing bacilli are essential for the anthrax organism to cause disease. Current scientific understanding of how the toxins work indicates that antibodies induced by AVA block the activities of anthrax toxins such that they would be effective in preventing any form of the disease regardless of the route of exposure to *B. anthracis* spores. Another researcher discussed further and in more detail how the pathology of cutaneous and inhalation anthrax at the cellular level is fundamentally the same, i.e., dependent upon the actions of anthrax toxin, such that cytotoxic activities are blocked by antibodies produced in response to AVA in the same manner despite the route of exposure.

Military personnel involved in the vaccine's administration under the DoD vaccination program also filed comments in support of classifying AVA into Category I, reasoning that the vaccine is important for soldiers entering potentially dangerous areas; however, one comment stated that long-term use of the vaccine should be studied further. Another comment was submitted by a physician who thought that there was evidence that AVA protects against inhalation anthrax and that the side effects of vaccination were comparable to other adult vaccines. Comments supportive of placing AVA into Category I were also submitted by a representative of the Armed Forces Epidemiological Board (AFEB), a civilian advisory body to the Assistant Secretary of Defense for Health Affairs and the military Surgeons General. This comment described the AFEB deliberations on the use of anthrax vaccine by the military and the recommendations made by the AFEB to the DoD supporting use of AVA as an appropriate force protection measure. A representative of the Partnership for Anthrax Vaccine Education, a coalition of public and private organizations, also submitted comments reflecting that organization's support for placing AVA into Category I.

(Response) We agree with those comments that provided support for placing AVA into Category I.

*B. Comments on the Evidence of Safety and Effectiveness of AVA*

(Comment 2) Some comments were concerned about the safety of AVA.

(Response) With regard to safety, FDA finds that AVA is safe for its indicated use as noted in the 2002 package insert:

BioThrax [the Tradename for AVA] is indicated for the active immunization against *Bacillus anthracis* of individuals between 18 and 65 years of age who come in contact with animal products such as hides, hair or bones that come from anthrax endemic areas, and that may be contaminated with *Bacillus anthracis* spores. BioThrax is also indicated for individuals at high risk of exposure to *Bacillus anthracis* spores such as veterinarians, laboratory workers and others whose occupation may involve handling potentially infected animals or other contaminated materials. (Ref. 6)

The adverse reactions observed after administration of AVA in clinical study settings are described in the product labeling approved in 2002. At that time, FDA conducted an extensive review of the clinical study data from the DoD pilot study, reports from DoD safety surveys conducted as part of their Anthrax Vaccine Immunization Program, and reports submitted to the Vaccine Adverse Event Reporting System (VAERS). Since approval of the revised labeling in 2002, FDA has conducted periodic evaluations of the reports in the VAERS database, and, as discussed elsewhere in this document, continues to find AVA to be safe for its intended use: To protect individuals at high risk for anthrax disease. Anthrax disease can be fatal despite appropriate antibiotic therapy.

1. Brachman Study

(Comment 3) Some comments expressed criticisms of the design and conduct of the Brachman study (Ref. 1).

(Response) The Brachman study was an adequate and well-controlled clinical study that involved workers in four textile mills that processed imported goat hair in the northeastern United States. This selected population was at risk because the mill workers routinely handled anthrax-infected animal materials. Prior to vaccination, the yearly average number of human anthrax infections among workers in these mills was 1.2 cases per every 100 employees.

The Brachman study design permitted a valid comparison of the vaccine group with the placebo control group to provide a quantitative assessment of effectiveness. For this study, employees with no known history of anthrax disease were assigned to one of two groups, treatment and placebo. The groups were balanced with regard to the individual's age, length of employment, department and job; both men and women were enrolled into the study. Voluntary cooperation was solicited and those who refused did not receive inoculations but were monitored for anthrax disease as part of the observational group. The subjects who chose to receive inoculations were not told whether they received anthrax vaccine or placebo. The published report of the Brachman study (Ref. 1) described all anthrax cases that occurred in the study, including ones in the vaccine, placebo, and observational groups. The Brachman study's efficacy analysis included only the cases that occurred in the treatment and placebo groups in completely vaccinated subjects (i.e., those receiving at least three inoculations and on schedule to receive the remaining three doses of the six-dose series), an approach that remains typical of vaccine analyses to date. We determine that the original statistical analysis presented in the report from the Brachman study was correct in its estimation of vaccine effectiveness. Some of the specific criticisms of the Brachman study included in the submitted comments claimed that the sample size was too small and that it was inappropriate to combine data from all four mills in the efficacy analysis.

Clinical studies are designed with a sample size sufficient to assure with high probability that, if there is a true effect of the intervention under study, that effect will be ''detected;'' that is, a comparison of outcomes in the treatment and control groups will show a ''statistically significant'' difference. To obtain the required sample size, investigators often have to implement the study at multiple sites (i.e., a multicenter study). The number of patients enrolled at any given site may be small, relative to the total number, and may not afford a high probability of achieving statistical significance at each individual site independently. Thus, when analyzing a multicenter clinical study, it is not reasonable to expect a statistically significant result at each site. Instead, consistent effects among individual study sites are the standard for multicenter studies (Ref. 10).

The Brachman study, a multicenter study, was based on an adequate sample size and appropriately combined the data from all mills in its analysis of vaccine efficacy. The site-specific data for the Brachman study are quite consistent in that at all sites, the vaccine group had fewer cases of anthrax than the placebo group. The strength of the overall finding of vaccine efficacy is such that, even with small numbers at each site, differences in outcome between the treatment and control groups are clearly statistically significant in one site and marginally significant in another. Thus, the site-specific data are fully supportive of the overall result, which showed a large reduction in risk of anthrax among those receiving vaccine.

(Comment 4) One comment noted that a 1960 publication by Brachman et al. stated ''The efficacy of the anthrax cell-free antigen as a vaccine was not fairly tested in this epidemic. Although none of the 9 cutaneous plus inhalation cases occurred in vaccinated individuals, only approximately one fourth of the employees had received the vaccine. There was an apparent difference in attack rates between workers who received placebo inoculations and those who received vaccine, but analysis of their job categories suggested that the vaccinated group was not at as high a risk as the placebo or uninoculated control groups.'' The comment makes several critical statements, based upon this 1960 publication, about FDA's reliance upon the Brachman study as evidence of vaccine effectiveness, claiming that the placebo group was at a greater risk of anthrax disease than the vaccine group.

(Response) Prior to publication of the complete study report in 1962, Brachman et al. published two papers (Refs. 11 and 12) describing the clinical features and epidemiology of an outbreak of inhalation and cutaneous anthrax cases that occurred in the Manchester, New Hampshire mill, one of the four mills included in the field study. The publication describing the epidemiology of that outbreak does include the statement quoted previously; however, the statement is specifically in reference to one study site and not to the field study as a whole, across the four woolen mills. The subsequent 1962 publication (Ref. 1) of the complete study across all four sites includes a table depicting participation of employees from all four mills included in the study. The table shows whether employees worked in high or low risk work areas and whether they received vaccine, placebo, or refused to participate in the study (Ref. 1 at Table 2). Of note, the totals for recipients of vaccine, placebo, incomplete inoculation and refusals in high risk work areas were 209, 226, 65 and 89, respectively. The same totals in low risk work areas were 170, 188, 51 and 251, respectively.

The distribution of vaccine recipients, placebo recipients, and incompletely inoculated subjects was similar for both the high and low risk work areas, which means that the vaccine and placebo groups were balanced with regard to the exposure risk factor. A larger number of persons who did not participate in the study (observation group) were in the low risk work areas than in the high risk areas, but the efficacy analysis did not

include cases that occurred in the observational group. The effectiveness calculation described in the 1962 publication included the anthrax cases that occurred in participants who received at least three doses of either vaccine or placebo and remained on schedule for the remainder of the six doses for all four mills, not just the Manchester, New Hampshire mill described in the 1960 publications. Thus, FDA's consideration of the Brachman study as evidence of effectiveness is based upon the complete analysis across all four study sites.

(Comment 5) One comment stated that it was inappropriate for the Brachman study to include both cutaneous and inhalation cases in the efficacy analysis.

(Response) The efficacy analysis presented in the Brachman study includes both cutaneous and inhalation anthrax cases that occurred in individuals who received at least three doses of vaccine or placebo and were on schedule for the remaining doses of the six-dose schedule. It did not include cases that occurred in the observation group. Based on this analysis, the calculated effectiveness level against all reported cases of anthrax combined in those subjects was 92.5 percent (lower 95 percent confidence interval = 65 percent). The efficacy analysis included the combined outcome of cutaneous and inhalation anthrax cases and thus included anthrax cases regardless of the route of exposure or manifestation of the disease.

The inclusion of both cutaneous and inhalation cases of anthrax in the analysis of the Brachman study was appropriate because it was not possible to predict the route of exposure (cutaneous versus inhalation) that would occur within the environmental setting of the woolen mills. With regard to the known pathophysiology of anthrax, the signs and symptoms of disease arise due to the production of toxins by anthrax bacteria growing within the infected individual. The toxins produced by anthrax bacteria do not vary based on the route of exposure. The antibodies produced in response to vaccination contribute to the protection of the vaccinated individual by neutralizing the activities of those toxins. Thus, AVA elicits an antibody response to disrupt the cytotoxic effects of toxins produced by anthrax bacteria, regardless of the route of infection.

(Comment 6) One comment stated that any decision by FDA to license AVA must provide a scientifically valid explanation of how FDA has assessed this vaccine's effectiveness against anthrax infection by inhalation in humans in the absence of an adequate and well-controlled clinical study specifically studying its effectiveness against anthrax infection by inhalation. The comment contends that in the absence of such data, or unless FDA uses the ''animal efficacy rule,'' FDA should not license AVA as a Category I biological product.

(Response) AVA has been licensed since 1970. The Panel, as reflected in its report published in the December 1985 proposal, and the FDA, as reflected in this final order, have determined that AVA is safe and effective for its labeled indication, decisions based in part on the Brachman study, which was an adequate and well-controlled study. Even if the referenced ''animal efficacy rule''[6] had been in effect at the time of AVA licensure, it would not have been applicable because there are sufficient data from adequate, well-controlled clinical studies to assess the safety and effectiveness of AVA as a vaccine against anthrax infection regardless of route of exposure. The ''animal efficacy rule'' does not apply to products that can be approved based on efficacy standards described in other regulations (§ 601.90 (21 CFR 601.90)).

(Comment 7) One comment pointed out that the route of exposure to an infectious agent can be a critical factor influencing vaccine effectiveness.

(Response) We agree that the route of exposure to an infectious agent may potentially have an impact on the effectiveness of a vaccine. The impact likely depends on the nature of the infectious agent in terms of its mechanism of virulence and the pathophysiology of infection and disease, and the mechanism of protection afforded by the vaccine. The Brachman study showed the anthrax vaccine to be effective in preventing anthrax disease regardless of route of exposure (Ref. 1). This finding is consistent with our current knowledge of the critical role played by anthrax toxins in the pathophysiology of cutaneous and inhalation anthrax and how antibodies generated in response to vaccination with AVA disrupt cytotoxic activities of those toxins. Furthermore, aerosolized anthrax spore challenge studies in both rabbits and nonhuman primates do demonstrate the ability of AVA to protect the test animals against inhalation anthrax (Refs. 3, 4, and 5).

(Comment 8) One comment proposed that a vaccine would have to be inhaled in order to protect against inhalation anthrax, noting that the lungs are susceptible to anthrax.

(Response) Vaccines generally do not need to be administered by the same route of exposure as the infectious agent uses to infect humans. In fact, there are numerous examples to the contrary. For example, vaccines against pertussis, pneumococcus, Hemophilus influenzae type b, meningococcus, measles, varicella, and influenza are administered by injection, although the infectious agents gain entry into humans by the respiratory route. The inactivated poliovirus vaccine is administered by injection, although the poliovirus infects humans by way of the intestinal tract. Although these vaccines are administered by a route that differs from the route of exposure, clinical trials have demonstrated their effectiveness against the targeted infectious disease. The same is true of anthrax vaccine. The vaccine is administered by injection, but has been shown to be effective against anthrax in a study that included both cutaneous and inhalation cases (Ref. 1). Furthermore, animal studies in which injected AVA protected animals from inhalation anthrax challenge are consistent with the finding of effectiveness in the clinical study. (Refs. 3, 4, and 5)

(Comment 9) One comment stated that FDA has deviated from the 1985 Panel recommendations (i.e., ''No meaningful assessment of its value against inhalation anthrax is possible due to its low incidence.'' 50 FR 51002 at 51059) and that FDA should not dispute its advisory committee's analysis of the safety and effectiveness data.

(Response) A critical component of the efficacy review process is FDA's consideration of the Panel's recommendations (§ 601.25(f)). Such consideration, by necessity, provides for the possibility that FDA might disagree with the Panel's recommendations. Indeed, in the preamble to § 601.25, FDA stated that ''the report of each panel is advisory to the Commissioner, who has the final authority either to accept or to reject the conclusions and recommendations of the panel.'' (38 FR 4319 at 4321, February 13, 1973). As noted in section III.A of this document, and as stated in the December 2004 proposal, we do not agree with the Panel's assessment that the vaccine is 93 percent efficacious against cutaneous anthrax only. In fact, the calculation of effectiveness presented in the published report of the Brachman study pertains to both cutaneous and inhalation anthrax. The Brachman study included in the effectiveness calculation both the

[6] New Drug and Biological Drug Products; Evidence Needed to Demonstrate Effectiveness of New Drugs When Human Efficacy Studies Are Not Ethical or Feasible; Final Rule (21 CFR 601.90 through 601.95) (67 FR 37988, May 31, 2002).

cutaneous and inhalation cases that occurred in vaccine and placebo recipients who received at least three doses and remained on schedule to receive the rest of the six-dose series.

2. CDC Surveillance Data

(Comment 10) One comment stated that the CDC surveillance data do not provide a reliable basis for an assessment of effectiveness because: (1) They represent the use of at least two earlier versions of anthrax vaccine, which are not the same vaccine currently produced by BioPort; (2) they are not statistically significant; and (3) these data may not be accurate and complete. Other comments asked why the CDC surveillance data for the years 1962 to 1974 are not regarded as supportive of safety of anthrax vaccine.

(Response) During the time these surveillance data were collected by CDC, both DoD/MSD vaccine and DoD/MDPH/AVA vaccine were available for use. The DoD/MDPH/AVA vaccine was licensed in 1970 and is the same vaccine currently manufactured and distributed by BioPort. An additional response to comments regarding different versions of the anthrax vaccine is addressed later in this document.

Although we do not consider the CDC surveillance data to be statistically significant, we regard the data as indicative that, during this time period, workers continued to be at risk of exposure, because anthrax cases were identified in unvaccinated and partially vaccinated individuals employed at woolen mills. The data are supportive of the effectiveness evidenced by the Brachman study, in that no anthrax cases were reported in fully vaccinated individuals during that time period. We do not regard the CDC surveillance data as contributing to an assessment of safety because the data do not describe adverse events occurring after vaccination.

The comment provides no support for the conclusion that the CDC surveillance data were unreliable. The comment described an anecdotal report of an additional anthrax case that occurred in an unspecified year and apparently was not included in the CDC surveillance data. We recognize that there is a potential for underreporting in disease surveillance systems. However, this one report does not provide a basis for concluding that the CDC surveillance data were unreliable for the purposes of supporting the effectiveness of the vaccine.

3. CDC Open Label Safety Study

(Comment 11) Some of the comments questioned the reliability of the CDC open label safety study, alleging that the open label safety study conducted by CDC ''made no attempt to identify, quantify or follow systemic adverse vaccine reactions'' and thus would be of no value in establishing vaccine safety, or that the study did not use consistent standards to identify and grade adverse events occurring at different study sites.

(Response) As described previously in this document, FDA believes that there are adequate data to demonstrate the safety and effectiveness of AVA. Moreover, the CDC open label safety study appropriately collected and analyzed adverse event reports. The IND protocol for the CDC open label safety study included specific criteria to be used to categorize mild, moderate and severe local reactions reported in the course of the study. In addition, the annual study reports submitted to the IND included information regarding systemic reactions reported during the respective reporting periods, and those data are described in the current product labeling for AVA: ''In the same open label safety study, four cases of systemic reactions were reported during a five-year reporting period (<0.06% of doses administered). These reactions, which were reported to have been transient, included fever, chills, nausea and general body aches.'' (Ref. 6)

(Comment 12) One comment claimed that one annual safety report for the CDC open label safety study might have underreported adverse reaction rates for that period, alleging that arithmetic miscalculations caused underreporting in one May 1967 reactogenicity table.

(Response) The commenter refers to the May 1967 table included in an appendix to one of the annual reports to the CDC trial; the appendix describes a protocol and the results of a small safety and immunogenicity study comparing DoD vaccine and DoD/MDPH/AVA vaccine. The safety data from this small study were reported separately from the CDC open label safety study due to differences in protocol design, such as the administration of one-half volume booster doses to some subjects instead of the full 0.5 mL human dose. Inclusion of safety data from the small ancillary safety study with a different protocol design does not support the inference that the annual safety report for the CDC open label safety study might have underreported adverse reaction rates for that period.

(Comment 13) One comment stated that in the course of the CDC open label safety study, Ft. Detrick and mill employees were required to be vaccinated as a condition of employment and therefore, they may have underreported adverse reactions to the vaccine from fear of losing their jobs. The comment also states that the employees did not provide free informed consent to participate in the study because they were compelled to be vaccinated, and no informed consent documents were signed by Ft. Detrick employees. Thus, the study did not comply with FDA requirements for informed consent.

(Response) The comment provides no support for the assumption that subjects in the CDC open label safety study may have underreported adverse reactions to the vaccine. With regard to the statements that mill workers in the CDC open label safety study were compelled to be vaccinated, and therefore did not provide informed consent, and that the Ft. Detrick subjects in the study did not sign informed consent documents, we note that the CDC open label safety study was conducted under IND 180 from 1966 through 1971. The NIH was responsible for reviewing IND 180 and the subsequent marketing application for AVA under the regulations then in effect. Significantly, the NIH did not reject the study, or place it on hold. Moreover, the comment does not identify a legal basis for requiring FDA to reject the study for this reason.

FDA is committed to assuring the protection of human subjects in clinical trials, as evidenced by the comprehensive regulations now in place (see FDA's current informed consent regulations, 21 CFR part 50, in effect since 1981, and IND regulations, 21 CFR part 312, in effect since 1987). Other data and studies, such as the DoD pilot study, conducted subsequent to the CDC open label safety study and under current informed consent regulations, provide additional safety evidence that corroborate the CDC open label safety study findings. We decline to reject the findings of the CDC open label safety study and we continue to view them as supportive of safety.

4. DoD Pilot Study and Safety Data

(Comment 14) One comment inquired whether the results of the DoD pilot study relating to the vaccine's safety required changes to AVA labeling in 2002, and whether additional data were considered in support of the new labeling. Other comments asked whether the DoD pilot study was also regarded as supportive of effectiveness.

(Response) BioPort voluntarily submitted to FDA proposed revised labeling for AVA for review and comment as part of an ongoing process of updating product and manufacturing information. In the course of FDA's review, revisions were made to the proposed labeling. Following our

review, in 2002 we approved revised product labeling that incorporated more recently acquired safety information from the DoD pilot study and FDA's ongoing review of reports to VAERS. The DoD pilot study was not intended to assess effectiveness; rather its purpose was to make an initial assessment of the effects that alternative immunization schedules and/or an alternative route of administration may have on the safety and immunogenicity of AVA.

(Comment 15) One comment claimed that the 1996 to 1999 DoD pilot study as reported is entirely inadequate to determine the safety of AVA, noting that the study was ''uncontrolled'' and that a quarantined lot was used in the study.

(Response) As discussed previously in this document, the CDC open label safety study, involving approximately 7,000 subjects who received DoD/MDPH/AVA vaccine,[7] demonstrated the safety of AVA. The DoD pilot study, which included 28 subjects randomized to receive the licensed vaccine according to the labeling, was conducted subsequent to licensure and provided additional data in support of the safety of AVA. The DoD pilot study was a controlled clinical study; the group receiving AVA according to the licensed schedule and route of administration served as the control group for the other groups receiving the vaccine under alternative vaccination schedules and/or route of administration. The purpose of the DoD pilot study was to make an initial assessment of the effects that alternative immunization schedules and/or an alternative route of administration may have on the safety and immunogenicity of AVA. The alternative schedules were alterations of the 0-2-4 week initial series of the licensed six-dose schedule (i.e., 0-4 weeks, 0-2 weeks). These alternative schedules were administered intramuscularly and subcutaneously. However, because one of the arms of the study included individuals vaccinated according to the labeling, we appropriately took such information into account as we continued to assess the safety of AVA. In this arm of the study, volunteers received subcutaneous doses of AVA according to the licensed schedule. Each volunteer was scheduled for follow-up evaluations at 1 to 3 days, 1 week, and 1 month after vaccination, and reactions were reported up to 30 days after each dose. For subjects who received the vaccine according to the licensed route and schedule, the latest follow-up occurred 30 days after the 18-month dose (Ref. 13).

In the December 2004 proposal, FDA discussed the safety data collected under this study for subjects receiving the vaccine according to the labeling. Similarly, descriptive information regarding adverse reactions reported in individuals receiving the vaccine according to the licensed schedule under this study was included in the 2002 labeling. Thus, the December 2004 proposal and the 2002 labeling reported this recently acquired safety information, which had been collected in a planned and prospective manner.

In addition, we believe no subjects in the study received quarantined doses of lot FAV 016, the lot mentioned in the comment. We understand that some subjects received lot FAV 032 while the voluntary quarantine of that lot was being implemented. However, this information does not provide an adequate basis for us to refuse to consider the data derived from the study. It is important to note that one of the chief uses of the study was as one of the bases for the expanded description of adverse events included in the 2002 labeling. Thus, the study results provided additional information for individuals administering and receiving AVA. We believe that this limited use of lot FAV 032 did not cause the results of the entire study to be unreliable, particularly in light of the purposes for which we use the data derived from this arm of the study. We will continue to monitor all available sources of information relating to the safety of AVA.

(Comment 16) One comment was critical of the fact that the results of the DoD pilot study were included in the 2002 labeling when the data were not peer reviewed or available to the public.

(Response) FDA performs its own review of data that are submitted in support of labeling changes. There is no requirement for peer review of data submitted to FDA in support of a labeling change. The DoD pilot study was intended to serve as a pilot study of alternative vaccination schedules and an alternative route of administration (intramuscular) to provide information for the design of a larger, more statistically robust study of promising alternative vaccination schedules and route of administration. The investigators published their report of this study in a peer-reviewed journal (Ref. 13).

5. Long-Term Safety Monitoring and Additional Studies

(Comment 17) A number of comments discussed the absence of a long-term safety study using AVA and the absence of studies of the potential effects of vaccination on vaccine recipients' children.

(Response) The pre-licensure safety evaluation of a new vaccine may include clinical studies that extend several months to several years after administration of the first dose. For example, the CDC open label safety study spanned from 1966 through 1971. Pre-licensure safety studies focus on those adverse reactions closely associated with the time of vaccine administration such as local injection site reactions and systemic reactions such as fever, malaise and allergic reactions. However, all serious adverse events that are reported during the conduct of the study are evaluated regardless of when they occur relative to vaccination. Longer-term controlled clinical trials (i.e., those extending more than several years after vaccination) are not generally conducted prior to approval of any medical product, including vaccine products.

The attribution to a vaccine or other drug product of adverse events or health conditions that develop long after administration is difficult to make with confidence because other factors such as environmental exposures, general health, genetic predisposition, etc., may also contribute to the development of health problems, symptoms or diseases. Elsewhere in this document, we provide a more detailed discussion of FDA's approach to post-licensure safety monitoring of AVA.

With regard to the potential effects of vaccination on offspring, the current approved labeling for AVA addresses administration of AVA to pregnant women. The labeling describes a preliminary assessment of the possibility that an increase in the rate of birth defects may be associated with AVA vaccination during pregnancy. Based upon the limited information available, the vaccine was assigned a Pregnancy Category D designation. The labeling states that ''Although these data are unconfirmed, pregnant women should not be vaccinated against anthrax unless the potential benefits of vaccination have been determined to outweigh the potential risk to the fetus.'' (Ref. 6)

DoD has undertaken to verify these preliminary results. We will review those results, when available, and we will continue to review adverse events.

(Comment 18) Many comments expressed concern about FDA's process of monitoring the safety of AVA.

(Response) For any drug or biological product, rare adverse events not observed during pre-licensure clinical studies may occur post-licensure. The

[7] In addition, one lot of the DoD/MSD vaccine was used during the CDC open label safety study.

need to understand the relationship between vaccination and adverse events that occur after licensure, and the limitations of clinical trials, have led to the use of other methods to detect and evaluate the link between vaccination and rare events. Post-marketing monitoring of vaccine safety involves the identification of possible adverse effects of vaccination, followed in some cases by evaluation of these ''signals'' for a possible causal link to the vaccine.

The most common method of signal generation is through the evaluation of spontaneous reports of cases of adverse events reported to manufacturers or government-sponsored systems such as the Vaccine Adverse Event Reporting System (VAERS). The identification of ''signals'' and their prioritization for evaluation involves qualitative and quantitative aspects, along with medical and epidemiological judgment. Evaluation of signals can involve literature review and clinical, laboratory, and epidemiological studies.

Surveillance for adverse events after vaccination is undertaken using VAERS, which is jointly managed by FDA and CDC. Uses of VAERS include detecting unrecognized adverse events, monitoring known reactions, identifying possible risk factors, and vaccine lot surveillance. Established in 1990, VAERS receives approximately 15,000 adverse event reports annually. Reports are submitted by vaccine manufacturers, vaccine providers, other health care givers, vaccine recipients and their relatives, attorneys, and other interested parties. While vaccine manufacturers are responsible for investigating and evaluating reports made to them, FDA and CDC also follow up reports from other parties of deaths and adverse events resulting in life-threatening illness, hospitalization, prolongation of hospitalization, persistent or significant disability, or congenital anomaly/birth defect, by telephone to obtain additional information about the event and the patient's prior medical history.

Passive surveillance systems such as VAERS are subject to limitations. Vaccine-associated adverse events will inevitably be underreported to an unknown extent. Moreover, adverse events reported in association with vaccination may or may not be caused by vaccination. For example, some adverse events might be expected to occur by coincidence after vaccination. Temporal associations often are reported with little data to evaluate whether any causal connection with the vaccine exists. Given these limitations, while safety signals may be detected, incidence rates cannot be determined from VAERS data. A particularly important limitation on the usefulness of VAERS reports as a means of investigating the possible causal relationship between an event and a vaccination generally is the lack of a direct, concurrent and unbiased comparison group from which to determine the incidence of the same type of adverse events among people who have not been vaccinated.

Another important limitation is the lack of standardization of diagnoses in VAERS reports. Reporting of unconfirmed diagnoses is common with VAERS reports. On follow-up, initially reported diagnoses are sometimes found to be inaccurate. Reports are coded by non-physicians, without the benefit of standardized case definitions, using the Coding Symbols for Thesaurus of Adverse Reaction Terms (COSTART) to describe the adverse event in a computerized database. Report coding depends on the reporter's use of certain words or phrases. This results in the use of the same COSTART term for reports with different degrees of diagnostic precision. For example, a report may simply say, ''I developed arthritis after I received the vaccine,'' without any other supporting medical information. Such a report would likely be coded as ''arthritis,'' as would a report that included a complete medical record in which a physician documents joint swelling and tenderness. As a result, coding terms must be interpreted very cautiously.

Because of the limitations of passive surveillance data, it is usually not possible to assess whether a vaccine caused the reported adverse event, except for conditions such as injection site reactions, some hypersensitivity conditions (e.g., anaphylaxis occurring shortly after vaccination), and illnesses consistent with the naturally occurring disease where vaccine components can be recovered from tissue specimens (e.g., recovery of live attenuated vaccine virus from vaccine-associated paralytic polio).

Analysis of VAERS data focuses on describing clinical and demographic characteristics of reports and looking for patterns to detect ''signals'' of adverse events plausibly linked to a vaccine. In FDA's guidance document on ''Good Pharmacovigilance Practices and Pharmacoepidemiologic Assessment'' (Ref. 14), we define a safety signal as a concern about an excess of adverse events compared to what would be expected to be associated with a product's use. This guidance document also details approaches for signal evaluation. Evidence of a signal in case reports and in case series of spontaneous reports includes unexpected patterns in clinical conditions by such factors as age, gender, time to onset, and dose. Three reports of an event can be used as the minimum number for case series analysis of rare conditions. Positive rechallenge is defined as the same event occurring after more than one dose of the same vaccine in the same subject and may also be considered evidence of a signal. Signals detected through analysis of VAERS data do not necessarily represent a causal relationship with the vaccine and almost always require confirmation through additional study.

In addition to the approach combining descriptive epidemiology with medical judgment, described above, several quantitative approaches, sometimes referred to as ''data mining'' methods, have been proposed. A common feature of data mining methods is that they identify patterns in the data that consist of a condition or group of conditions that are reported as a higher proportion of all adverse events after a particular vaccine or combination of vaccines than after other vaccines.

Calculations of reporting rates (number of adverse events reported/ number of doses of vaccine distributed) and reporting rate ratios (ratio of reporting rate in the vaccine of interest to the reporting rate in the comparison vaccine(s)) of adverse events have been used to generate signals. Comparison of reporting rates with background incidence rates for an adverse event is also sometimes advocated. Biases in reporting, inadequate denominator data, uncertainty of the risk interval (the interval after vaccination during which a person might be at risk for the adverse event under study) and lack of background incidence rates from an appropriate comparison population for some conditions limit the utility of the reporting rate approach.

Regardless of the method used, interpretation of vaccine-adverse event combinations that are identified as possible signals with any quantitative method must use medical knowledge about the disorders and take into account biases in reporting, misclassification of reports that occur with adverse event coding systems, and other limitations of passive surveillance systems previously discussed. Signals generated through such quantitative analysis need to be subject to the same clinical, descriptive epidemiological, and other analysis as for case reports and case series of spontaneous reports. Elevated reporting rate ratios or proportional reporting ratios or similar scores from data mining should not by themselves be interpreted as

establishing a causal relationship between an adverse event and a vaccine, but almost always require independent confirmation through additional study.

In spite of these limitations, use of VAERS data has provided initial reports that upon further evaluation have raised suspicions, later confirmed, about rare reactions to vaccines (e.g., intussusception after rotavirus vaccine). VAERS data also have suggested the need for further study of other adverse events (e.g., myopericarditis after smallpox vaccine).

Many possible signals[8] can be generated with these methods and prioritization for further evaluation is required. Because information submitted to VAERS is often incomplete, it is sometimes necessary to do enhanced follow-up of reports to systematically collect information as the first stage in the signal evaluation process. Objective factors such as seriousness and ''newness'' of the adverse event, size of the population potentially affected, ability to prevent the adverse event, and ability to study the question, influence priority for further evaluation.

VAERS reports are not the only source of information used to evaluate the safety of a vaccine. Evaluation of signals usually requires a literature review followed by epidemiological studies, sometimes combined with clinical and laboratory analysis. To evaluate specific hypotheses it is sometimes necessary to conduct cohort, population-based case series, case-control or other epidemiological studies using large administrative databases with medical record review.

If a clinical trial with sufficient statistical power to evaluate the adverse event of interest has not been conducted, assessing the potential causal link between a vaccine and an adverse event often requires integration of different types and quality of information (e.g., laboratory studies, case reports, epidemiological studies, and clinical studies). Causal inference criteria, patterned after those proposed by A. Bradford Hill in 1965 and adapted by others, and formal risk assessment have been applied to vaccine safety assessments. In a study of pertussis and rubella vaccines in the early 1990s, the IOM used the strength of association, the nature of the dose-response relation, the existence of a temporally correct association, consistency of association, specificity of the association, and the biological plausibility of the association for assessing whether evidence indicates a causal relationship between an adverse event and vaccine exposure (Ref. 15). These criteria were also used in other more recent vaccine safety reviews performed by the IOM in 2001 through 2004 (Ref. 16).

(Comment 19) Many comments questioned the role of VAERS.

(Response) Data from VAERS cannot generally be used to determine if a vaccine causes an adverse event, but VAERS data can be useful for hypothesis generation. As noted in the AVA labeling, a report of an adverse event is not proof that the vaccine caused the event.

From 1990 through March 31, 2005, approximately 1.3 million military personnel received 5.3 million doses of AVA. We evaluated the 4,370 VAERS reports of adverse events following administration of AVA submitted to VAERS from 1990 through August 15, 2005, (4,279 through March 31, 2005) using a combination of the techniques described previously in this section of this document (e.g., pattern assessment using frequency calculations, identification and descriptive analysis of case series, assessment of reporting rates for certain clinical conditions in the context of available information about background incidence rates and risk intervals, and data mining). Based on our review, we cannot conclude that there is a causal relationship between serious adverse events (other than some injection site reactions and some reports of allergic reactions) or deaths and AVA (Ref. 17). However, as with any medical product, FDA cannot rule out that some rare adverse events could be caused by AVA. As described in our response to Comment 21, VAERS data were used, along with other data, to develop a list of certain adverse events that were considered for further study by the Vaccine Analytic Unit. The Vaccine Analytic Unit has selected five topics for initial study to determine whether AVA has a causal role in certain serious adverse events. FDA continues to perform surveillance and periodic evaluations of adverse event reports, and will review post-marketing data from any studies that become available to FDA.

(Comment 20) Some comments on the December 2004 proposal seemed to interpret the spontaneously reported adverse events that are listed in the AVA labeling as being caused by the vaccine.

(Response) To make physicians and others aware of what is being reported, adverse events are sometimes included in the vaccine labeling even though it has not been shown that the vaccine actually caused the adverse event. Thus, for AVA, that section of the labeling is preceded by the statement, ''The following four paragraphs describe spontaneous reports of adverse events, without regard to causality'' to indicate that the relationship to the vaccine cannot be determined from the information provided in the reports for those events.

(Comment 21) One comment asked if FDA has required BioPort or DoD to conduct focused studies of any safety signals.

(Response) We encourage and support the expeditious conduct of well-designed studies evaluating the relationship between AVA and adverse events. The Vaccine Analytic Unit (VAU) was formed as a collaboration between DoD and CDC to conduct vaccine post-marketing surveillance investigations of AVA and other vaccines using data collected by the Defense Medical Surveillance System, which holds information on vaccinations, hospitalizations, outpatient visits, occupational variables, and demographics for all U.S. military personnel. FDA worked with the VAU to develop a list of adverse events for further study based on VAERS and other data sources. In 2004, VAU participants and a workgroup of the National Vaccine Advisory Committee (NVAC) agreed that the VAU's research agenda would include five topics for initial study: Systemic lupus erythematosus, optic neuritis, arthritis, erythema multiforme, and multiple, near-concurrent vaccinations.[9]

(Comment 22) Some comments suggested that new clinical studies be conducted using anthrax spores milled to a fine powder or using all 60 strains of anthrax. Others asked why it would

[8]Safety signals that may warrant further investigation may include, but are not limited to, the following: (1) new unlabeled adverse events, especially if serious; (2) an apparent increase in the severity of a labeled event; (3) occurrence of serious events thought to be extremely rare in the general population; (4) new product-product, product-device, product-food, or product-dietary supplement interactions; (5) identification of a previously unrecognized at-risk population (e.g., populations with specific racial or genetic predispositions or co-morbidities); (6) confusion about a product's name, labeling, packaging, or use; (7) concerns arising from the way a product is used (e.g., adverse events seen at higher than labeled doses or in populations not recommended for treatment); (8) concerns arising from potential inadequacies of a currently implemented risk minimization action plan (e.g., reports of serious adverse events that appear to reflect failure of a risk minimization action plan goal); and (9) other concerns identified by the sponsor or FDA. (''Guidance for Industry: Good Pharmacovigilance Practices and Pharmacoepidemiologic Assessment,'' March 2005.)

[9]Description of the VAU and the topic selection process are available at *http://www.cdc.gov/nip/webutil/about/annual-rpts/ar2005/2005annual-rpt.htm#online* (click on ''Leadership in Vaccine Safety'') and *http://cdc.confex.com/cdc/nic2004/techprogram/session_787.htm.*

be unethical to conduct additional human efficacy studies.

(Response) It is generally accepted that due to the significant health risks associated with exposure to anthrax spores, it would not be ethical to actively expose human study subjects to *B. anthracis* spores in order to assess the effectiveness of an anthrax vaccine in a controlled clinical trial. Furthermore, naturally occurring anthrax is now so rare that a field study of vaccine effectiveness is no longer feasible in the United States. For any future effectiveness studies, it is likely that the efficacy studies will need to be conducted in well-characterized animal models with an appropriate bridge to human immunogenicity data as described under the ''animal efficacy rule''[10] where human efficacy studies are not feasible or ethical (§§ 601.90 and 601.91(a)).

*C. Comments Describing Adverse Events*

1. Review of Adverse Event Reports Submitted to the Docket[11]

(Comment 23) Many comments to the docket described adverse events stated to have occurred following administration of AVA. For approximately 111 individuals, information was provided to the docket about specific adverse events experienced by the person filing the comment, a family member, or another person. Several comments indicated that a report about the adverse event had been submitted previously to VAERS. However, most of these comments did not mention whether a report to VAERS had been submitted.

(Response) The comments submitted to the docket for the December 2004 proposal described adverse events after administration of AVA in approximately 111 individuals. Multiple submissions were received for some individuals. To facilitate analysis of this information and to compare the comment reports with other VAERS reports, we entered into VAERS the adverse events reported in comments to the extent possible based on the information provided. Comments to the docket that reported only non-specific adverse events such as became ''ill'' or had a ''bad reaction'' were not entered into VAERS because of the lack of adequate specificity. Also, submissions that described groups of persons, adverse event statistics, or otherwise lacked key individual-level details used in VAERS, were not entered into VAERS, but were reviewed and considered.

More than one source (e.g., health care provider, patient, and manufacturer) might submit to VAERS information concerning a single individual's adverse events following a particular vaccination date, resulting in multiple reports. Routine report processing in VAERS includes steps aimed at identifying and linking such related reports. Using these processes, we found that 48 (43 percent) of the individuals described in adverse event reports submitted in comments to the docket were the subjects of reports previously entered into VAERS.

We categorized 106 of the 111 reports as serious, including 6 deaths. Most described one or more chronic symptoms or illnesses, though the duration was not always evident. VAERS reports had previously been received for two of the persons who died.

2. Summary of Adverse Event Reports Submitted to the Docket

The adverse event reports submitted to the docket did not provide substantially different information about possible new safety signals than the previous reports to VAERS. The previous reports to VAERS, together with the reports to the docket, do not establish a causal relationship between death or serious adverse events (other than some injection site reactions and some reports of allergic reactions) and AVA (Ref. 17). We entered into the VAERS database the conditions described in comments to the docket. These conditions will be considered along with all other adverse event reports received through continuing surveillance and incorporated into the periodic evaluations of these reports.

*D. Comments on the Vaccine Used in the Studies*

(Comment 24) Several comments raised issues about the versions of vaccine used in the Brachman study, the CDC open label safety study, and the vaccine made by MDPH at the time of licensure.

(Response) While the December 2004 proposal discussed the historical development of AVA, in light of the comments received, we believe that additional clarification of the historical development is warranted. In the 1950s, Brachman, et al., conducted a well-controlled field study in four woolen mills in the United States using DoD vaccine provided by Dr. G. G. Wright of Fort Detrick, U.S. Army (Ref. 1). This vaccine was produced from the growth of a nonencapsulated, nonproteolytic mutant (R1–NP) of the Vollum strain of *B. anthracis* using an aerobic culture method and evaluated for potency (i.e., ability to protect test animals against challenge with virulent *B. anthracis* spores) (Ref. 7).

In the early 1960s, subsequent to completion of the Brachman study, DoD modified the vaccine manufacturing process to, among other things, optimize production of a stable and immunogenic formulation of vaccine antigen and to increase the scale of production. These changes included a change in the mutant *B. anthracis* strain (V770–NP1–R) used to produce the vaccine and use of an anaerobic culture method (Refs. 18 and 19). These changes coincided with initiation of a contractual agreement between DoD and Merck Sharp & Dohme (MSD) to standardize the manufacturing process for large-scale production of anthrax vaccine and to produce anthrax vaccine using an anaerobic method. Vaccine lots manufactured by MSD under this contract were evaluated for potency (i.e., ability to protect test animals against challenge with virulent *B. anthracis* spores). One lot of vaccine manufactured by MSD (Merck–9) was also used during the first year of the CDC open label safety study.

In the mid–1960s, DoD entered into a similar contract with MDPH to further standardize the manufacturing process and to scale up production for further clinical testing and immunization of persons at risk of exposure to anthrax spores. This DoD/MDPH/AVA vaccine was made using the same strain of *B. anthracis* as that used under the DoD contract with MSD (DoD/MSD vaccine) and similar culture conditions. Vaccine lots manufactured by MDPH under this contract with DoD were evaluated for potency (i.e., ability to protect test animals against challenge with virulent *B. anthracis* spores). DoD/MDPH/AVA vaccine lots were used in the CDC open label safety study. Under the contract with DoD, MDPH pursued pre-market approval of the vaccine. The DoD-MDPH contract resulted in the production of AVA, which the NIH Bureau of Biologics licensed in 1970, FDA now regulates, and BioPort presently manufactures.

The safety and immunogenicity of the three generations of the anthrax vaccine were evaluated in three groups of vaccinees, one receiving DoD vaccine, another receiving DoD/MSD vaccine, and the third group receiving DoD/MDPH/AVA vaccine. Vaccine recipients were monitored for local and systemic adverse events. Antibody responses, expressed as Geometric Mean Titers and

[10] New Drug and Biological Drug Products; Evidence Needed to Demonstrate Effectiveness of New Drugs When Human Efficacy Studies Are Not Ethical or Feasible; Final Rule (21 CFR 601.90 through 601.95) (67 FR 37988, May 31, 2002).

[11] Docket Number 1980N–0208.

percent seropositives, were measured in blood samples collected at regular intervals following administration of the third vaccine dose utilizing an agar-gel precipitin-inhibition (AGPI) test. These data, while limited in the number of vaccinees and samples evaluated, reveal that the serological responses to DoD/MDPH/AVA vaccine and DoD vaccine were similar with respect to peak antibody response and percent seropositives and support our conclusion that data generated by administration of DoD and DoD/MSD generations of the vaccines support licensure of DoD/MDPH/AVA vaccine.

(Comment 25) Some comments mentioned that, in the 1985 report, the Panel noted that DoD/MDPH/AVA vaccine had not been employed in a controlled field study.

(Response) Although the Panel Report included the statement described in Comment 25, the Panel immediately followed with a statement that a ''similar'' vaccine was employed in a placebo-controlled field trial. The Panel then concluded that DoD/MDPH/AVA vaccine was ''patterned after'' the vaccine used in that trial (which the Panel mistakenly referred to as DoD/MSD vaccine, rather than DoD vaccine) ''with various minor production changes.'' (50 FR 51002 at 51059, December 13, 1985). Thus, the Panel concluded that the Brachman study, which used DoD vaccine, supported a finding of safety and effectiveness of DoD/MDPH/AVA vaccine. It is common practice for a product to undergo manufacturing changes as it moves from initial development to product approval. If an earlier generation is comparable, then studies using that earlier-produced product are relevant to the later product. As we discuss elsewhere in this section of this document, the controlled field study using DoD vaccine was relevant to DoD/MDPH/AVA vaccine, since the two vaccines were comparable in terms of their ability to protect test animals against challenge with *B. anthracis* and to elicit an immune response in humans.

(Comment 26) One comment stated that FDA is using potency data ''that it knows are unreliable to assert comparability of two different anthrax vaccines [DoD and DoD/MDPH/AVA vaccines]'' and if reliable ''would only establish comparable animal efficacy for the two vaccines, and fail to establish human efficacy, human safety and the comparability of the vaccines for humans.''

(Response) We note here that the comment did not provide evidence to support the statement that the potency data are ''unreliable.'' The potency data described in the response to Comment 24 demonstrated that the products are comparable. In addition, the clinical data described in response to Comment 30 demonstrated clinical comparability between the vaccines with regard to Geometric Mean Titer and seropositivity rates.

(Comment 27) One comment inquired about whether the differences in the versions of AVA resulted in differences in their safety.

(Response) There are ample clinical data and information from the CDC open label safety study, conducted under IND in the 1960s, which demonstrate that the DoD/MDPH/AVA vaccine is safe.

FDA's assessment of vaccine safety considered the data collected under the CDC open label safety study (1966 through 1971). During the first year of this study, CDC used one lot of DoD/MSD vaccine and one lot of DoD/MDPH/AVA vaccine, but only DoD/MDPH/AVA vaccine was used during the remainder of the safety study. Thus, the majority of the safety data accumulated in that study was from the use of vaccine manufactured by MDPH. Information pertaining to the incidence and severity of adverse reactions associated with administration of DoD/MDPH/AVA vaccine was collected for approximately 7,000 individuals participating in the CDC open label safety study. In addition, the safety of the vaccine is evaluated on an ongoing basis through review of new studies, such as the DoD pilot study, and periodic assessments of VAERS data.

(Comment 28) One comment stated that the differences in reported systemic reaction rates for the Brachman study and the later DoD pilot study indicate that DoD vaccine and DoD/MDPH/AVA vaccine are distinctly different such that the effectiveness associated with DoD vaccine cannot be regarded as evidence of effectiveness of DoD/MDPH/AVA vaccine.

(Response) We agree that the rates of reported systemic reactions associated with administration of anthrax vaccine in the Brachman study are lower than the rates reported in the DoD pilot study. However, we believe that the Brachman study provided evidence of effectiveness of the licensed vaccine. Differences between the Brachman study and the DoD pilot study in reported systemic reactions are attributable to a number of factors. The latter study was specifically designed to closely monitor and solicit subjects' information pertaining to adverse reactions associated with administration of the vaccine in accordance with the licensed schedule and route of administration so that comparisons of adverse reaction rates could be made between the licensed schedule and route and the alternative schedules and route also under investigation in that study. Differences in methodologies and design as well as a heightened awareness and sensitivity toward adverse reactions on the part of both study investigators and study subjects has resulted in a more comprehensive description of adverse reactions experienced in association with vaccination in the more recent DoD pilot study.

As discussed more fully previously in this document, DoD/MDPH/AVA vaccine was used in the CDC open label safety study; the production strain and culture methods were the same as those currently used by BioPort. To provide a more current picture of the types and severities of reactions associated with DoD/MDPH/AVA vaccine, the product labeling now includes descriptions of adverse events reported in association with administration of AVA in the DoD pilot study. Although the reporting rates for certain reactions are greater in the DoD pilot study, we continue to regard AVA to be safe for its intended use: To protect individuals at high risk for anthrax disease. Anthrax disease can be fatal despite appropriate antibiotic therapy.

(Comment 29) One comment stated that the anthrax vaccine produced in Michigan has undergone a series of manufacturing changes since it was licensed, resulting in a materially altered product that is much more concentrated than the original MDPH vaccine.

(Response) We note that the comment did not provide evidence to support the claim that DoD/MDPH/AVA vaccine is ''more concentrated'' now than when originally licensed. The DoD/MDPH/AVA vaccine currently manufactured by BioPort was licensed in 1970. Since then, the strain of *B. anthracis* used to produce the vaccine has not changed and the vaccine formulation has not changed. Changes in the manufacturing process (including equipment changes) have been reviewed and approved by FDA. Each lot of final vaccine product must pass certain criteria, including potency testing, as described subsequently in this document in the response to Comment 33.

(Comment 30) Some comments inquired about whether the change in vaccine during the 1962 to 1974 surveillance period altered the vaccine's effectiveness. One comment was critical of FDA's assessment that both the DoD generation and the DoD/MDPH/AVA

generation of the vaccine stimulated similar peak antibody responses and seropositivity rates since there was not an ELISA assay available at the time the antibody responses were measured. The comment argued that antibody levels cannot be used as a surrogate marker for effectiveness.

(Response) The antibody responses were measured by agar-gel precipitin-inhibition test, which was an acceptable assay. The immunogenicity data resulting from this testing showed that the DoD and the DoD/MDPH/AVA generations of the vaccine were both immunogenic. After the third dose, the peak Geometric Mean Titer for antibodies to anthrax was 1.30 (60 percent seropositivity of samples tested) for DoD/MDPH/AVA vaccine, and 1.4 (60 percent seropositivity of samples tested) for DoD vaccine. Thus, while limited in the number of vaccinees and the number of samples analyzed, the results do indicate comparable immune responses with regards to seropositivity rates and peak antibody titer levels (GMT). Rather than representing a surrogate for effectiveness, these results are a means of bridging the immunogenicity of these generations of the vaccine. In any event, the CDC surveillance data, which were gathered when the DoD/MDPH/AVA and DoD/MSD generations of the vaccine were in use, corroborate the efficacy data provided by the Brachman study.

(Comment 31) Some comments inquired whether the DoD pilot study or a larger ongoing CDC study are intended to provide data to reduce the vaccine dose level. Another comment asked how FDA has validated the current dose and inoculation schedule.

(Response) The DoD pilot study was followed by a larger, more statistically robust and significant CDC study in order to obtain safety and immunogenicity data to support a reduction in the total number of doses to be administered in a complete vaccination schedule. The new CDC study is a double-blind, randomized, placebo controlled trial conducted under IND to compare the licensed AVA schedule and route of administration (subcutaneous) to regimens with a different route of administration (intramuscular) and/or reduced number of doses. Safety and immunogenicity are assessed. The study started in May 2002 and is currently ongoing. The clinical studies referenced in the comment were not intended to seek a change in the amount of vaccine administered with each dose. The current dosage for AVA is 0.5 mL per inoculation and has been used for anthrax vaccine since before the Brachman study was conducted in the 1950s. The current 0.5 mL dosage and 6–dose regimen and schedule are based on the dosage, regimen, and schedule used in the Brachman study.

(Comment 32) One comment noted that there would have been no need to continue to develop newer and different anthrax vaccines had Brachman's vaccine produced acceptable safety and efficacy.

(Response) On the contrary, DoD (in particular, the Army, Dr. G. G. Wright and his colleagues) pursued improvements in the manufacturing process, formulation, and other aspects of anthrax vaccine precisely because it had been shown to be safe and effective in the Brachman study. The changes implemented with the transfer of production to MSD and then to MDPH were with the intent of increasing ease of production and yield to support further study and ultimately licensure of the vaccine. FDA encourages license holders to embrace continuous improvement.

*E. Comments about Allegedly Contaminated Vaccine and Inspectional Observations*

(Comment 33) Some comments asserted that AVA is contaminated or adulterated, citing FDA inspections of the Michigan Biologic Products Institute (MBPI, and then BioPort) facility. Some comments expressed concerns about particular lots of AVA received by soldiers in the U.S. military, stating that they were not made under current good manufacturing practice (cGMP) or were contaminated.

(Response) FDA has a lot release program to determine whether lots of the AVA licensed vaccine meet criteria for release, which include sterility, general safety, potency, and specified levels of benzethonium chloride, aluminum, and formaldehyde. All lots released from the manufacturer for administration to military personnel and other individuals met these criteria.

Additionally, FDA performs inspections of all biological product license holders biennially and at additional times when FDA deems that more regulatory oversight is warranted. On the basis of such inspections, FDA issued to AVA's manufacturer a Warning Letter in 1995, and a Notice of Intent to Revoke the license to manufacture all products, including AVA, in 1997. FDA did not initiate license revocation proceedings because BioPort committed to and implemented appropriate corrective and preventive actions to address the issues identified by FDA and demonstrated over time its commitment to comply with all applicable FDA requirements. BioPort did this by, among other things, renovating its AVA manufacturing facility, discontinuing the manufacture and distribution of all non-AVA products, closing its aseptic filling facility, and moving the AVA filling operations to a contract manufacturer. We believe that the manufacture of AVA is currently in compliance with regulatory requirements. We continue to evaluate the production of AVA to assure compliance with applicable federal standards and regulations.

(Comment 34) A number of comments alleged that squalene had been added to AVA and questioned how AVA could be approved when it contains squalene. Others claimed that health problems reported by some recipients of AVA were caused by squalene. Another comment noted the finding of small amounts of squalene in samples of AVA tested by FDA and advocated the testing of all lots of AVA for the presence of squalene. One comment claims that squalene ''overcharges'' the immune system when injected into the body even in tiny amounts.

(Response) Squalene is a naturally occurring biodegradable oil found in plants, animals, and humans. Squalene is an intermediate in the cholesterol biosynthetic pathway and is a natural constituent of dietary products including both vegetable and fish oils. Squalene is synthesized in the liver and circulates in the bloodstream and is present in human serum at 250 parts per billion (250 nanograms per milliliter) (Ref. 20). Antibodies to squalene occur naturally in humans, have an increased prevalence in females, are not correlated with vaccination with AVA, and appear to increase in prevalence with age (Ref. 21). Squalene is not used in the AVA manufacturing process and is not a component of the vaccine.

In 1999, FDA performed testing to determine whether squalene was added to AVA as an adjuvant. FDA believes that the testing was adequate for the intended purpose of determining whether squalene had been added to AVA as an adjuvant, and demonstrated that this was not the case. The values reported from FDA's testing of certain lots were minute (10 to 83 parts per billion, which is below the low levels normally detected in human serum (Ref. 20)) and at the low end of the analytical sensitivity of the test method. Given the extremely low level detected, more extensive testing and validation would be needed to ascertain whether any squalene was actually present.

At DoD's request, Stanford Research International (SRI) conducted testing designed to detect low levels of impurities (including squalene), in a

quantitative manner. SRI detected squalene at up to 9 parts per billion in 1 lot only of the 33 lots of AVA tested. This value can be contrasted with the amount of squalene added as a component of MF59 adjuvant included in FLUAD, an influenza vaccine which is marketed in many European countries and whose safety has been evaluated by European regulatory authorities. (The current version of this adjuvant is technically named MF59C.1.) According to the ''Summary of Product Characteristics,'' the amount of squalene contained in FLUAD is 9.75 mg per dose of 0.5 mL (about 2 parts per hundred or 20 million parts per billion), which is greater than 2 million times more than that detected by SRI in one lot of AVA.

We do not believe that additional testing of AVA is warranted because squalene is not used in the manufacturing process and is not a component of the vaccine. Moreover, at this time, we reviewed the evidence and conclude that such minuscule amounts of squalene, if even present in AVA, would not alter our view of the safety of AVA. The comment claiming that squalene overcharges the immune system did not provide any data in support of this assertion.

(Comment 35) Some comments noted that AVA contains formaldehyde.

(Response) The comments are correct in that formaldehyde, at a concentration of 100 microgram/mL, is included in AVA as a preservative. We note that formaldehyde has been used in the manufacture and formulation of AVA since MDPH started manufacturing AVA in the 1960s. Formaldehyde was present in the vaccine lots used in the CDC open label safety study and, in similarly small amounts, is a component of numerous other injectable products. The presence of formaldehyde in these small amounts does not alter our view of the safety of AVA.

(Comment 36) One comment was critical of the CDC open label safety study claiming that activities described in a program report for work conducted under contract with DoD indicated that some lots of anthrax vaccine used in the CDC open label safety study were adulterated with formaldehyde because additional formaldehyde was added.

(Response) The report referenced by this comment was written by Merck Sharp & Dohme (MSD). It noted that additional formaldehyde was added to DoD/MSD vaccine Lots 5 and 7, which were not used in the CDC open label safety study. One lot of DoD/MSD vaccine (Lot 9) was used in that study. It was used during the first year of the CDC open label safety study, along with one lot of DoD/MDPH/AVA vaccine; thereafter, only DoD/MDPH/AVA vaccine lots were used. Accordingly, the CDC open label safety study was unaffected by the lots that the comment cites.

*F. Comments on Labeling*

(Comment 37) Some comments noted the Panel statement regarding an apparent discrepancy between the labeling and a now rescinded section of the Code of Federal Regulations with regards to the number of doses to be administered.

(Response) We addressed this issue in section III.E of this document. The dosing schedule for AVA, from the time of the Brachman study to the present, has always consisted of six doses; a 0.5 mL dose at 0, 2, 4 weeks and then at 6, 12 and 18 months, followed by a subsequent 0.5 mL dose at 1-year intervals to maintain immunity. In any event, perceived variances to a rescinded regulation are not relevant to this final order under § 601.25, where we determine that AVA is appropriately placed into Category I, as a vaccine that is safe, effective, and not misbranded.

(Comment 38) One comment questioned the need for a six-dose immunization schedule referencing studies in animals where two doses of vaccine administered 2 weeks apart protected non-human primates from inhalation challenge with anthrax spores up to 104 weeks later.

(Response) The current immunization schedule described in the AVA labeling was demonstrated to be effective in the Brachman study. That schedule consists of a total of six doses of 0.5 mL administered subcutaneously at 0, 2, 4 weeks, 6, 12 and 18 months with annual boosters thereafter to maintain immunity. Changes to this vaccination schedule may be reviewed and considered for approval by FDA based upon the submission of scientific data to support changes to the product labeling.

*G. Additional Comments*

(Comment 39) Several comments were critical of FDA for ''relying'' upon the IOM report as the scientific basis for placing AVA into Category I and were critical of the IOM report with respect to its consideration of studies conducted by DoD as supportive of vaccine safety or its consideration of animal studies as evidence of effectiveness against inhalation anthrax. However, other comments stated that FDA was ''somewhat indirect'' regarding the IOM report and suggested that FDA ''accord the IOM report significant weight as expert scientific judgment.''

(Response) In the December 2004 proposal, we agreed with the IOM committee's general conclusion that AVA, as licensed, is an effective vaccine for protection of humans against anthrax infection, including inhalation anthrax and that certain studies in humans and animals support the conclusion that AVA is effective against *B. anthracis* strains that are dependent upon the anthrax toxin as a mechanism of virulence, regardless of the route of exposure. In response to the comments submitted regarding the IOM committee report, we wish to clarify that the general conclusions of the report are consistent with FDA's own independent assessment of the available data regarding the safety and effectiveness of AVA.

In response to public concerns expressed about the use of AVA in the DoD's Anthrax Vaccine Immunization Program, Congress called for DoD to support an independent examination of AVA by the IOM. The IOM committee was charged with reviewing data regarding the effectiveness and safety of the currently licensed anthrax vaccine and assessing the manufacturer's efforts to resolve manufacturing issues and resume production and distribution of vaccine.

While the IOM committee did invite FDA scientists to participate in their open meetings and comment on portions of the draft report, FDA was not a participant in their closed review sessions, nor did FDA participate in the writing or finalization of the IOM report. Similarly, FDA has conducted its review under § 601.25, culminating in this final order, independently of the activities of the IOM committee. FDA did not actively seek input or comment from the IOM committee during its review process.

(Comment 40) Some comments questioned the utility of animal data with one comment stating that animal testing is ''absolutely not at all relevant to the study of safety for humans.'' Another comment noted that AVA provided protection in guinea pigs against spores of some strains of *B. anthracis* but not others.

(Response) We wish to clarify that animal studies have not been relied upon for a determination of the safety of AVA for human use. The safety database is comprised of data from the CDC open label safety study in the late 1960s to early 1970s during which approximately 15,000 doses manufactured at MDPH were administered to approximately 7,000 subjects. In addition, safety data from the DoD pilot study (Ref. 13) and adverse reactions reported to VAERS as associated with administration of AVA were considered as part of FDA's continual process for assessing the

safety of AVA. In 2002, information from the DoD pilot study and VAERS were included in the sections of the labeling describing safety and adverse reactions. We continue to perform periodic evaluations of adverse events reported to VAERS.

With regard to data suggesting that the vaccine protected guinea pigs against spores from some strains of *B. anthracis* but not others, we note that different animal species may exhibit different levels of susceptibility to an infectious organism. The course of infection and disease may depend greatly upon the strain of the infectious organism for some species but not so much for other species (Refs. 3, 4, and 5). Thus, based on the strain used or other factors, studies in some animal species are likely to produce different results than studies in other species.

(Comment 41) One comment suggested that AVA had been administered to military personnel during Desert Storm/Desert Shield under an IND.

(Response) NIH's Division of Biologics Standards originally licensed AVA under the Public Health Service Act in 1970. Administration of AVA, an approved product, to military personnel by DoD during Desert Storm/Desert Shield was not under an IND.

(Comment 42) Many comments claimed that AVA was not properly licensed.

(Response) We disagree. AVA has been legally licensed since November 1970.

The purpose of the biologics efficacy review procedures is to determine whether biological products licensed before July 1, 1972, are safe and effective and not misbranded. In 1972, the Department of Health, Education, and Welfare redelegated from the NIH to FDA authority and responsibility to regulate biological products. FDA initiated a comprehensive review of the safety, effectiveness, and labeling of all licensed biologics, including AVA, shortly after the redelegation of authority. In keeping with § 601.25, independent advisory panels made up of scientific experts from outside the Federal Government, reviewed biological products licensed prior to July 1, 1972, in order to recommend to FDA how the agency should classify the products. One panel reviewed the safety, effectiveness, and labeling of AVA and recommended that FDA place the vaccine into Category I—safe, effective, and not misbranded. This recommendation was based on a review of the available data from the Brachman study and the CDC open label safety study, and the CDC surveillance data, as described elsewhere in this document. FDA followed the requirements of § 601.25(f), requiring publication of a proposed order for classification, and published a proposed rule in the **Federal Register** on December 13, 1985 (50 FR 51002). Since the publication of the December 1985 proposal, FDA has focused on removing Category II products–unsafe, ineffective, or misbranded, from the market and completing the final classification of the Category III products–products with insufficient information to allow classification and further testing is required. The purpose of this final order, and the final rule and final order published elsewhere in this issue of the **Federal Register**, is to complete FDA's categorization of bacterial vaccines and toxoids licensed prior to July 1, 1972. As stated in section III of this document, FDA concludes that AVA is safe, effective, and not misbranded.

(Comment 43) Some comments questioned why FDA did not reconvene an advisory review panel when it reopened the comment period in response to the Court order of October 27, 2004. The comments claim that FDA has attempted to avoid the normal approval process or circumvented its own rules by not convening an advisory review panel to review new data generated by DoD.

(Response) Neither the applicable FDA regulation, § 601.25, nor the Court's order of October 27, 2004, requires that an advisory review panel be convened at this time. FDA regulations at § 601.25 explicitly detail the procedures to be used to determine that biological products licensed prior to July 1, 1972, are safe, effective, and not misbranded. These regulations require FDA to submit a product to an advisory review panel at the initiation of the review. The panel then submits to the Commissioner of Food and Drugs a report containing the panel's conclusions and recommendations with respect to the biological product. The Commissioner, after reviewing the conclusions and recommendations, then publishes a proposed order categorizing the product as safe and effective (Category I), unsafe or ineffective (Category II), or determining that the available data are insufficient to classify such biological product (Category III). Thereafter, any interested person may within 90 days after publication of the proposed order, file written comments. After review of the comments, the Commissioner of Food and Drugs publishes a final order on the classification.

In *Doe* v. *Rumsfeld*, 341 F.Supp.2d 1 (D.D.C. 2004), the Court examined the step in the process involving the opportunity for public comment on the agency's proposed order. The court noted that FDA had published the Panel report in its entirety as a proposed order. However, the Court concluded that the proposed order did not provide public notice that FDA considered the vaccine to be indicated for use against inhalation anthrax, a conclusion that FDA made in its January 2004 final order. Accordingly, the Court remedied what it considered to be an Administrative Procedure Act violation, by vacating the January 2004 final order, and remanding it to FDA to reconsider following an additional opportunity for comment. The Court did not find fault with the Panel report. FDA believes that, with the requirements of § 601.25 satisfied with respect to the advisory review panel report, it is not necessary to consult another advisory panel on these issues. In drafting this final order, FDA has been able to review and consider extensive comments on the December 2004 proposed order.

(Comment 44) Some comments expressed concern that certain Panel members were also involved in developing AVA. They suggest that the members were biased, and their role in the review process self-serving. One comment specifically complained of the bias of Dr. Stanley Plotkin, who was a co-author on the Brachman study (Ref. 1).

(Response) As provided in § 601.25, the Commissioner appointed qualified experts to serve on the advisory review panel and the Panel included persons from lists submitted by organizations representing professional, consumer, and industry interests. A review of the Panel members appointed to review the data and information and to prepare a report on the safety, effectiveness, and labeling of bacterial vaccines, toxoids, related antitoxins, and immune globulins reveals that the list did not include the name of Dr. Stanley Plotkin or any other scientist who worked directly with the development of AVA. (50 FR 51002 at 51003 (December 13, 1985)).

(Comment 45) One comment alleged that FDA and DoD had a conflict of interest and that the agencies were working together to promote vaccinations.

(Response) FDA is charged with implementing the Federal Food, Drug, and Cosmetic Act, as well as certain provisions of the Public Health Service Act. Under these authorities and applicable regulations, including § 601.25, FDA is responsible for reviewing the safety and effectiveness of vaccines. In issuing this order, FDA is

fulfilling this responsibility, and is not working to promote, or discourage, vaccination for members of the armed forces. Rather, as described in this order, FDA has evaluated AVA and concluded that the product is safe, effective, and not misbranded.

(Comment 46) Other comments expressed concern that FDA had not considered alternatives to vaccination such as the use of detection devices and antibiotics to protect individuals from anthrax infection, or expressed the opinion that antibiotics are a better means of protection against anthrax.

(Response) Detection devices, if effective, would not prevent infections, but would simply detect the presence of anthrax spores in the environment. Moreover, a device would provide this information only for the particular location under observation by the device and only if the device was in use and functioning properly at the time.

Moreover, although antibiotic therapies are safe and effective in the treatment of anthrax disease and in the prevention of anthrax disease when administered as part of a post-exposure prophylaxis regimen, the safety and effectiveness of long term use of such therapies in individuals at high risk for anthrax disease, potentially for a period of years, has not been studied. Moreover, the early stages of inhalation anthrax present with flu-like symptoms, and diagnosis may be delayed. The initiation of antibiotic therapy only after a definitive diagnosis of inhalation anthrax has a diminished success rate. Anthrax disease can be fatal despite the use of antibiotics. The fatality rate for inhalation anthrax in the United States is estimated to be approximately 45 percent to 90 percent. From 1900 to October 2001, there were 18 identified cases of inhalation anthrax in the United States, the latest of which was reported in 1976, with an 89 percent (16/18) mortality rate. Most of these exposures occurred in industrial settings, i.e., textile mills. From October 4, 2001, to December 5, 2001, a total of 11 cases of inhalation anthrax linked to intentional dissemination of *B. anthracis* spores were identified in the United States. Five of these cases were fatal (Ref. 6). These fatalities occurred despite aggressive medical care, including antibiotic therapy (Refs. 22 and 23).

Thus, we have considered possible alternatives to AVA, and continue to conclude that AVA is safe, effective, and not misbranded.

*H. Comments on Matters Outside the Scope of this Proceeding*

(Comment 47) We received numerous comments on the December 2004 proposal that, although they relate to significant issues, are not relevant to the proposed order for placing AVA into Category I. These comments concerned: (1) The need for compensation programs for individuals injured by AVA, (2) statements that the vaccine should be optional for members of the armed forces, (3) statements that antidotes to anthrax should be developed, (4) concerns about DoD responsibilities and recordkeeping, and (5) requests for an investigation of BioPort stock ownership.

(Response) These comments are on matters outside the scope of this final order and FDA's jurisdiction, authority, and control. Accordingly, we do not respond to them.

## V. FDA's Responses to Additional Panel Recommendations

In the December 1985 proposal, FDA responded to the Panel's general recommendations regarding the products under review and to the procedures involved in their manufacture and regulation, and to the Panel's general research recommendations. Published elsewhere in this issue of the **Federal Register** in a final rule and final order concerning bacterial vaccines and toxoids other than AVA, FDA responds in final to the Panel's general recommendations.

## VI. References

The following references have been placed on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm.1061, Rockville, MD 20852, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday. (FDA has verified the Web site address, but we note subsequent changes to the Web site might have occurred after this document publishes in the **Federal Register**).

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Dated: December 12, 2005.

**Jeffrey Shuren,**

*Assistant Commissioner for Policy.*

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**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### Clinical Studies of Safety and Effectiveness of Orphan Products; Availability of Grants; Request for Applications

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

## I. Funding Opportunity Description

The Food and Drug Administration (FDA) is announcing changes to its Office of Orphan Products Development (OPD) grant program for fiscal year (FY) 2007 and FY 2008. This announcement supersedes the previous announcement of this program, which was published in the **Federal Register** of January 14, 2005 (70 FR 2642). Please note that there is only one receipt date for FY 2007 and one receipt date for FY 2008.

*1. Background*

OPD was created to identify and promote the development of orphan products. Orphan products are drugs, biologics, medical devices, and foods for medical purposes that are indicated for a rare disease or condition (that is, one with a prevalence, not incidence, of fewer than 200,000 people in the United States). Diagnostic tests and vaccines will qualify only if the U.S. population of intended use is fewer than 200,000 people per year.

*2. Program Research Goals*

The goal of FDA's OPD grant program is to support the clinical development of products for use in rare diseases or conditions where no current therapy exists or where the product will improve the existing therapy. FDA provides grants for clinical studies on safety and/or effectiveness that will either result in, or substantially contribute to, market approval of these products. Applicants must include, in the application's ''Background and Significance'' section, documentation to support the estimated prevalence of the orphan disease or condition and an explanation of how the proposed study will either help gain product approval or provide essential data needed for product development. All funded studies are subject to the requirements of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 301 *et seq.*) and regulations issued under it.

## II. Award Information

Except for applications for studies of medical foods that do not need premarket approval, FDA will only award grants to support premarket clinical studies to determine safety and effectiveness for approval under section 505 or 515 of the act (21 U.S.C. 355, or 360e) or safety, purity, and potency for licensing under section 351 of the Public Health Service Act (the PHS Act) (42 U.S.C. 262).

FDA will support the clinical studies covered by this notice under the authority of section 301 of the PHS Act (42 U.S.C. 241). FDA's research program is described in the Catalog of Federal Domestic Assistance, No. 93.103.

Applicants for Public Health Service (PHS) clinical research grants are encouraged to include minorities and women in study populations so research findings can be of benefit to all people at risk of the disease or condition under study. It is recommended that applicants place special emphasis on including minorities and women in studies of diseases, disorders, and conditions that disproportionately affect them. This policy applies to research subjects of all ages. If women or minorities are excluded or poorly represented in clinical research, the applicant should provide a clear and compelling rationale that shows inclusion is inappropriate.

PHS strongly encourages all grant recipients to provide a smoke-free workplace and to discourage the use of all tobacco products. This is consistent with PHS' mission to protect and advance the physical and mental health of the American people.

FDA is committed to achieving the health promotion and disease prevention objectives of ''Healthy People 2010,'' a national effort designed to reduce morbidity and mortality and to improve quality of life. Applicants may obtain a paper copy of the ''Healthy People 2010'' objectives, vols. I and II, for $70 ($87.50 foreign) S/N 017–000–00550–9, by writing to the Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250–7954. Telephone orders can be placed to 202–512–2250. The document is also available in CD–ROM format, S/N 017–001–00549–5 for $19 ($23.50 foreign) as well as on the Internet at *http://www.healthypeople.gov/*. Internet viewers should proceed to ''Publications'' (FDA has verified the Web site and its address, but we are not responsible for subsequent changes to the Web site or its address after this document publishes in the **Federal Register**).

*1. Award Instrument*

Support will be in the form of a grant. All awards will be subject to all policies and requirements that govern the research grant programs of PHS, including the provisions of 42 CFR part 52 and 45 CFR parts 74 and 92. The regulations issued under Executive Order 12372 do not apply to this program. The National Institutes of Health (NIH) modular grant program does not apply to this FDA grant program. All grant awards are subject to applicable requirements for clinical investigations imposed by sections 505, 512, and 515 of the act, section 351 of the PHS Act, and regulations issued under any of these sections.

*2. Award Amount*

Of the estimated FY 2007 funding ($14.2 million), approximately $10 million will fund noncompeting continuation awards, and approximately $4.2 million will fund 10 to 12 new awards subject to availability of funds. It is anticipated that funding for the number of noncompeting continuation awards and new awards in FY 2008 will

be similar to FY 2007. The earliest expected start date for the FY 2007 and FY 2008 awards will be November 1, 2006, and November 1, 2007, respectively. Grants will be awarded up to $200,000 or up to $350,000 in total (direct plus indirect) costs per year for up to 3 years. Please note that the dollar limitation will be total costs, not direct costs as in previous years.

Applications for the smaller grants ($200,000) may be for phase 1, 2, or 3 studies. Study proposals for the larger grants ($350,000) must be for studies continuing in phase 2 or 3 of investigation. Phase 1 studies include the initial introduction of an investigational new drug or device into humans, are usually conducted in healthy volunteer subjects, and are designed to determine the metabolic and pharmacological actions of the product in humans, the side effects including those associated with increasing drug doses and, if possible, to gain early evidence on effectiveness. Phase 2 studies include early controlled clinical studies conducted to evaluate the effectiveness of the product for a particular indication in patients with the disease or condition and to determine the common short-term side effects and risks associated with it. Phase 3 studies gather more information about effectiveness and safety that is necessary to evaluate the overall risk-benefit ratio of the product and to provide an acceptable basis for product labeling. Budgets for each year of requested support may not exceed the $200,000 or $350,000 total cost limit, whichever is applicable.

*3. Length of Support*

The length of support will depend on the nature of the study. For those studies with an expected duration of more than 1 year, a second or third year of noncompetitive continuation of support will depend on the following factors: (1) Performance during the preceding year, (2) compliance with regulatory requirements of the investigational new drug (IND)/ investigational device exemption (IDE), and (3) availability of Federal funds.

*4. Funding Plan*

In addition to the requirement for an active IND/IDE discussed in section V.1.B.(4) of this document, documentation of assurances with the Office of Human Research Protection (OHRP) (see section IV.5.A of this document) must be on file with FDA's Grants Management Office before an award is made. Any institution receiving Federal funds must have an institutional review board (IRB) of record even if that institution is overseeing research conducted at other performance sites. To avoid funding studies that may not receive, or may experience a delay in receiving, IRB approval, documentation of IRB approval and Federal Wide Assurance (FWA or assurance) for the IRB of record and all performance sites must be on file with FDA's Grants Management Office before an award to fund the study will be made. In addition, if a grant is awarded, grantees will be informed of any additional documentation that should be submitted to FDA's IRB. This grant program does not require the applicant to match or share in the project costs if an award is made.

*5. Dun and Bradstreet Number (DUNS)*

As of October 1, 2003, applicants are now required to have a DUNS number to apply for a grant or cooperative agreement from the Federal Government. The DUNS number is a 9-digit identification number that uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, call Dun and Bradstreet at 1–866–705–5711. Be certain that you identify yourself as a Federal grant applicant when you contact Dun and Bradstreet.

*6. Central Contractor Registration*

In anticipation of the grants.gov electronic application process, applicants are encouraged to register with the Central Contractor Registration (CCR) database. This database is a governmentwide repository of commercial and financial information for all organizations conducting business with the Federal Government. Registration with CCR will eventually become a requirement for grant applicants and is consistent with the governmentwide Management Reform to create a citizen-centered web presence and build e-gov infrastructures in and across agencies to establish a ''single face to industry.'' The preferred method for completing registration is on the Internet at *http://www.ccr.gov* (FDA has verified the Web site address, but we are not responsible for subsequent changes to the Web site or its address after this document publishes in the **Federal Register**). This Web site provides a CCR handbook with detailed information on data applicants will need prior to beginning the online registration, as well as steps to walk applicants through the registration process. Applicants must have a DUNS number to begin registration and should call Dun and Bradstreet, Inc., at the number listed in the previous paragraph if they do not have one.

In order to access grants.gov, applicants will be required to register with the Credential Provider. Information about this is available at *http://www.grants.gov/ CredentialProvider* (FDA has verified the Web site address, but we are not responsible for subsequent changes to the Web site or its address after this document publishes in the **Federal Register**).

*7. Clinical Trials Data Bank (CTDB)*

The Food and Drug Modernization Act of 1997 requires that certain information be entered into CTDB for federally and privately funded clinical trials conducted under an IND if a drug is being used to treat a serious or life-threatening disease or condition and if the trial is to test effectiveness (42 U.S.C. 282(j)(3)(A)). Information on noneffectiveness trials for drugs to treat conditions not considered serious or life-threatening may also be entered into this database, but such information is not required.

This databank provides patients, family members, healthcare providers, researchers, and members of the public easy access to information on clinical trials for a wide range of diseases and conditions. The U.S. National Library of Medicine has developed this site in collaboration with NIH and FDA. The databank is available to the public through the Internet at *http:// clinicaltrials.gov* (FDA has verified the Web site and its address, but we are not responsible for subsequent changes to the Web site or its address after this document publishes in the **Federal Register**).

CTDB contains the following information: (1) Information about clinical trials, both federally and privately funded, of experimental treatments for patients with serious or life-threatening diseases; (2) a description of the purpose of each experimental drug; (3) the patient eligibility criteria; (4) the location of clinical trial sites; and (5) the point of contact for those wanting to enroll in the trial. OPD program staff will provide more information to grantees about entering the required information in CTDB after awards are made.

## III. Eligibility Information

*1. Eligible Applicants*

The grants are available to any foreign or domestic, public or private, for-profit or nonprofit entity (including State and local units of government). Federal

agencies that are not part of the Department of Health and Human Services (HHS) may apply. Agencies that are part of HHS may not apply. For-profit entities must commit to excluding fees or profit in their request for support to receive grant awards. Organizations that engage in lobbying activities, as described in section 501(c)(4) of the Internal Revenue Code of 1968, are not eligible to receive grant awards. An application that has received two prior disapprovals is not eligible to apply.

*2. Cost Sharing or Matching*

Cost sharing is not required.

**IV. Application and Submission**

*1. Addresses to Request Application*

If submitted as a paper copy, application requests and completed applications should be submitted to Cynthia Polit, Grants Management Specialist, Division of Contracts and Grants Management (HFA–500), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–7180, e-mail: *cynthia.polit@fda.hhs.gov* or *cpolit@oc.fda.gov*. Applications that are hand-carried or commercially delivered should be addressed to 5630 Fishers Lane, rm. 2105, Rockville, MD 20852. Applications may also be obtained from OPD on the Internet at *http://www.fda.gov/orphan*. Do not send applications to the Center for Scientific Research (CSR), NIH.

*2. Content and Form of Application*

A. General Information

FDA is accepting new applications for this program electronically via *www.grants.gov*. Applicants are encouraged to apply electronically by visiting the Web site *www.grants.gov* and following instructions under ''Apply for Grants.'' The required application, SF 424RR (Research and Related Portable Document Formats) can be completed and submitted online. The package should be labeled ''Response to RFA–FDA–OPD–2007'' or ''Response to RFA–FDA–OPD–2008''. If you experience technical difficulties with your online submission you should contact either the grants.gov Customer Response Center or Cynthia Polit (see Addresses to Request Application in section IV.1 of this document).

To comply with the President's Management Agenda, HHS is participating as a partner in the new governmentwide grants.gov Web site. Users of grants.gov will be able to download a copy of the application package, complete it offline, and then upload and submit the application via the grants.gov Web site. We encourage your participation in the grants.gov project. When you enter the grants.gov Web site, you will find information about submitting an application electronically through the Web site.

In order to apply electronically, the applicant must have a DUNS number and register in the CCR database as described in sections II.5 and II.6 of this document.

If submitted other than electronically, please call Cynthia Polit for guidance (see Addresses to Request application in section IV.1 of this document) prior to submission. For hard copies, an original and two copies of the completed Grant Application Form PHS 398 (Rev. 5/01) with three copies of the appendices must be submitted to Cynthia Polit (see Addresses to Request Application in section IV.1 of this document). Other than evidence of final IRB approval, FWA or assurance, and certification of adequate supply of study product, no material will be accepted for inclusion in the grant application after the receipt date.

In unusual circumstances, additional information may be considered, on a case by case basis, for inclusion in the ad hoc expert panel review. However, FDA cannot assure inclusion of any information after the receipt date other than evidence of final IRB approval, FWA or assurance, and certification of adequate supply of study product.

The mailing package and the application face page must be labeled ''Response to RFA–FDA–OPD–2007'' for FY 2007 and ''Response to RFA–FDA–OPD–2008'' for FY 2008. If an application for the same study was submitted in response to a previous request for application (RFA) but has not yet been funded, an application in response to this notice will be considered a request to withdraw the previous application. The applicant for a resubmitted application should address the issues presented in the summary statement from the previous review and include a copy of the summary statement itself as part of the resubmitted application.

An application that has received two prior disapprovals is not eligible for resubmission.

B. Format for Application

For FY 2007, if submitted electronically, the application must be on SF424 Research and Related Portable Document Format. If submitted in paper copy, the application must be submitted on Grant Application Form PHS 398 (Rev. 5/01). All ''General Instructions'' and ''Specific Instructions'' in the application kit or on OPD's Web site (see Addresses to Request Application in section IV.1 of this document) must be followed except for the receipt dates and the mailing label address in the PHS 398 package. The face page of the application, either electronic or paper, should reflect RFA number RFA–FDA–OPD–2007. The title of the proposed study must include the name of the product and the disease/disorder to be studied and the IND/IDE number. The narrative portion of the application may not exceed 100 pages in length and must be single-spaced, printed on 1 side, in 12-point font, and unbound. The appendices should also not exceed 100 pages in length (separate from the narrative portion of the application).

For FY 2008, all applications must be submitted electronically through grants.gov. Exceptions may be made in unusual circumstances and on a case-by-case basis. If electronic submission is impossible, please contact the Grants Management Office (see Addresses to Request Application in section IV.1 of this document). The face page of the application should reflect RFA number RFA–FDA–OPD–2008. The title of the proposed study must include the name of the product and the disease/disorder to be studied and the IND/IDE number. The narrative portion of the application may not exceed 100 pages in length and must be single-spaced, printed on 1 side, in 12-point font. The appendices should also not exceed 100 pages in length (separate from the narrative portion of the application).

For all applications in FY 2007 and FY 2008, applicants have the option of omitting, from the application copies (but not from the original), specific salary rates or amounts for individuals specified in the application budget and Social Security numbers if otherwise required for individuals. The copies may include summary salary information.

Applicants should provide as an appendix to the application a summary of any meetings or discussions about the clinical study that have occurred with FDA review division staff.

Data and information included in the application generally will not be publicly available prior to the funding of the application. After funding has been granted, data and information included in the application will be given confidential treatment to the extent permitted by the Freedom of Information Act (5 U.S.C. 552(b)(4)) and FDA's implementing regulations (including 21 CFR 20.61, 20.105, and 20.106). By accepting funding, the applicant agrees to allow OPD to publish specific information about the grant.

Information collection requirements requested on Form PHS 398 (Rev. 5/01) have been sent by PHS to the Office of Management and Budget (OMB) and have been approved and assigned OMB control number 0925–0001. The requirements requested on Form SF424 Research and Related Portable Document Formats were approved and assigned OMB control number 4040–0001.

*3. Submission Dates and Times*

For FY 2007, the application receipt date is March 14, 2006, and for FY 2008, the application receipt date is February 7, 2007. Please note that there is only one receipt date for FY 2007 and one receipt date for FY 2008. Applications submitted electronically must be received by the close of business on the established receipt date.

The protocol in the grant application should be submitted to IND/IDE no later than February 13, 2006, for FY 2007 and no later than January 8, 2007, for FY 2008.

For FY 2007, if submitted as a paper copy, applications will be accepted from 8 a.m. to 4:30 p.m., Monday through Friday, until the established receipt date. Applications will be considered received on time if hand-carried to the address noted previously (see Addresses to Request Application in section IV.1 of this document) before the established receipt date, or sent or mailed by the receipt date as shown by a legible U.S. Postal Service dated postmark or a legible dated receipt from a commercial carrier (applicants should note that the U.S. Postal Service does not uniformly provide dated postmarks. Before relying on this method, applicants should check with their local post office). Private metered postmarks shall not be acceptable as proof of timely mailing. If submitted electronically, applications must be received by close of business on the published receipt date.

Applications not received on time will not be considered for review and will be returned to the applicant. Please do not send applications to CSR at NIH. Any application sent to NIH/CSR that is forwarded to FDA's Grants Management Office and not received in time for orderly processing will be judged nonresponsive and returned to the applicant. Applications must be submitted via U.S. mail or commercial carrier or hand-carried as stated previously, unless submitted electronically.

*4. Intergovernmental Review*

This program is not subject to review under the terms of Executive Order 12372.

*5. Funding Restrictions*

A. Protection of Human Research Subjects

All institutions engaged in human subject research financially supported by HHS must file an assurance of protection for human subjects with OHRP (45 CFR part 46). Applicants are advised to visit OHRP's Web site at *http://www.hhs.gov/ohrp* for guidance on human subjects issues (FDA has verified the Web site address, but we are not responsible for subsequent changes to the Web site or its address after this document publishes in the **Federal Register**).

The requirement to file an assurance applies to both ''awardee'' and collaborating ''performance site'' institutions. Awardee institutions are automatically considered to be ''engaged'' in human subject research whenever they receive a direct HHS award to support such research, even where all activities involving human subjects are carried out by a subcontractor or collaborator. In such cases, the awardee institution bears the responsibility for protecting human subjects under the award.

The awardee institution is also responsible for, among other things, ensuring that all collaborating performance site institutions engaged in the research hold an approved assurance prior to their initiation of the research. No awardee or performance site institution may spend funds on human subject research or enroll subjects without the approved and applicable assurance(s) on file with OHRP. An awardee institution must, therefore, have its own IRB of record and assurance. The IRB of record may be an IRB already being used by one of the ''performance sites,'' but it must specifically be registered as the IRB of record with OHRP.

For further information, applicants should review the section on human subjects in the application instructions entitled ''I. Preparing Your Application, Section C. Specific Instructions, Item 4, Human Subjects'' in the PHS 398 package or as posted on the grants.gov application Web site.

The clinical protocol should comply with ICHE6 ''Good Clinical Practice Consolidated Guidance'' which sets an international ethical and scientific quality standard for designing, conducting, recording, and reporting trials that involve the participation of human subjects. Applicants are encouraged to review the regulations, guidances, and information sheets on Good Clinical Practice cited on the Internet at *http://www.fda.gov/oc/gcp/*.

B. Key Personnel Human Subject Protection Education

The awardee institution is responsible for ensuring that all key personnel receive appropriate training in their human subject protection responsibilities. Key personnel include all principal investigators, coinvestigators, and performance site investigators responsible for the design and conduct of the study. HHS, FDA, and OPD do not prescribe or endorse any specific education programs. Many institutions have already developed educational programs on the protection of research subjects and have made participation in such programs a requirement for their investigators. Other sources of appropriate instruction might include the online tutorials offered by the Office of Human Subjects Research, NIH, at *http://ohsr.od.nih.gov* and by OHRP at *http://ohrp-ed.od.nih.gov/CBTs/Assurance/login.asp* (FDA has verified the Web site addresses, but we are not responsible for subsequent changes to the Web sites or their addresses after this document publishes in the **Federal Register**).

Within 30 days of the award, the principal investigator should provide a letter to FDA's Grants Management Office that includes the names of the key personnel, the title of the human subjects protection education program completed by each named personnel, and a one-sentence description of the program. This letter should be signed by the principal investigator and cosigned by an institution official and sent to FDA's Grants Management Office.

*6. Other Submission Requirements*

Informed Consent

Consent forms, assent forms, and any other information given to a subject are part of the grant application and must be provided, even if in a draft form. The applicant is referred to HHS regulations at 45 CFR 46.116 and 21 CFR 50.25 for details regarding the required elements of informed consent.

**V. Application Review Information**

*1. Criteria*

A. General Information

FDA grants management and program staff will review all applications sent in response to this notice. To be responsive, an application must be submitted in accordance with the

requirements of this notice and must bear the original signatures of both the principal investigator and the applicant institution's/organization's authorized official if submitted as a paper copy in FY 2007. The original signature requirement does not apply to applications submitted electronically.

Applications found to be nonresponsive will be returned to the applicant without further consideration. Applicants are strongly encouraged to contact FDA to resolve any questions about criteria before submitting applications. Please direct all questions of a technical or scientific nature to OPD program staff and all questions of an administrative or financial nature to the grants management staff (see Agency Contacts in section VII of this document).

B. Program Review Criteria

(1) Applications must propose clinical trials intended to provide safety and/or efficacy data.

(2) There must be an explanation in the ''Background and Significance'' section of how the proposed study will either contribute to product approval or provide essential data needed for product development.

(3) The ''Background and Significance'' section of the application must contain information documenting that the prevalence, not incidence, of the population to be served by the product is fewer than 200,000 individuals in the United States. The applicant should include a detailed explanation supplemented by authoritative references in support of the prevalence figure. Diagnostic tests and vaccines will qualify only if the population of intended use is fewer than 200,000 individuals in the United States per year.

(4) The study protocol proposed in the grant application must be under an active IND or IDE (not on clinical hold) to qualify the application for scientific and technical review. Additional IND/IDE information is described as follows:

The proposed clinical protocol should be submitted to FDA's IND/IDE review division a minimum of 30 days before the grant application deadline.

The number assigned to the IND/IDE that includes the proposed study should appear on the face page of the application with the title of the project. The date the subject protocol was submitted to FDA for the IND/IDE review should also be provided.

Protocols that would otherwise be eligible for an exemption from IND regulations must be conducted under an active IND to be eligible for funding under this FDA grant program.

If the sponsor of the IND/IDE is other than the principal investigator listed on the application, a letter from the sponsor permitting access to the IND/IDE must be submitted in both the IND/IDE and in the grant application. The principal investigator(s) named in the application and in the study protocol must be submitted to the IND/IDE.

Studies of already approved products, evaluating new orphan indications, are also subject to these IND/IDE requirements.

Only medical foods that do not need premarket approval and medical devices that are classified as nonsignificant risk (NSR) are exempt from these IND/IDE requirements. Applicants studying an NSR device should provide a letter in the application from FDA's Center for Devices and Radiologic Health indicating the device is an NSR device.

(5) The requested budget must be within the limits, either $200,000 in total costs per year for up to 3 years for any phase study, or $350,000 in total costs per year for up to 3 years for phase 2 or 3 studies. Any application received that requests support over the maximum amount allowable for that particular study will be considered nonresponsive.

(6) Evidence that the product to be studied is available to the applicant in the form and quantity needed for the clinical trial must be included in the application. A current letter from the supplier as an appendix will be acceptable. If negotiations with a sponsor to supply the study product are underway but have not been finalized at the time of application, please provide a letter indicating such in the application. Verification of an adequate supply of the study product will be necessary before an award is made.

(7) The protocol should be submitted in the application. The narrative portion of the application should be no more than 100 pages, single-spaced, printed on 1 side, with 1/2-inch margins, and in unreduced 12-point font. The appendices should also be no more than 100 pages (separate from the narrative portion of the application). The application should not be bound.

C. Scientific/Technical Review Criteria

The ad hoc expert panel will review the application based on the following scientific and technical merit criteria:

(1) The soundness of the rationale for the proposed study;

(2) The quality and appropriateness of the study design, including the design of the monitoring plans;

(3) The statistical justification for the number of patients chosen for the study, based on the proposed outcome measures and the appropriateness of the statistical procedures for analysis of the results;

(4) The adequacy of the evidence that the proposed number of eligible subjects can be recruited in the requested timeframe;

(5) The qualifications of the investigator and support staff, and the resources available to them;

(6) The adequacy of the justification for the request for financial support;

(7) The adequacy of plans for complying with regulations for protection of human subjects and monitoring; and

(8) The ability of the applicant to complete the proposed study within its budget and within time limits stated in this RFA.

*2. Review and Selection Process*

Responsive applications will be reviewed and evaluated for scientific and technical merit by an ad hoc panel of experts in the subject field of the specific application. Consultation with the proper FDA review division may also occur during this phase of the review to determine whether the proposed study will provide acceptable data that could contribute to product approval. Responsive applications will be subject to a second review by a National Advisory Council for concurrence with the recommendations made by the first-level reviewers, and funding decisions will be made by the Commissioner of Food and Drugs or his designee.

A score will be assigned based on the scientific/technical review criteria. The review panel may advise the program staff about the appropriateness of the proposal to the goals of OPD's grant program.

*3. Anticipated Announcement and Award*

Notification regarding the results of the review is anticipated by September 30, 2006, for FY 2007 and by September 30, 2007, for FY 2008. The earliest expected start date for the FY 2007 awards will be November 1, 2006, and for FY 2008 awards, the earliest expected start date will be November 1, 2007.

## VI. Award Administration Information

*1. Award Notices*

If receiving an award, applicants will be notified by FDA's Grants Management Office. Awards will either be issued on a Notice of Grant Award (PHS 5152) signed by FDA's Chief Grants Management Officer and be sent

to successful applicants by mail or will be transmitted electronically.

*2. Administrative Requirements*

Applicants must adhere to the requirements of this notice. Special terms and conditions regarding FDA regulatory requirements and adequate progress of the study may be part of the award notice.

*3. Reporting*

A. Reporting Requirements

The original and two copies of the annual Financial Status Report (FSR) (SF–269) must be sent to FDA's grants management officer within 90 days of the budget period end date of the grant. For continuing grants, an annual program progress report is also required. For such grants, the noncompeting continuation application (PHS 2590) will be considered the annual program progress report. Also, all new and continuing grants must comply with all regulatory requirements necessary to keep the status of their IND/IDE ''active'' and ''in effect,'' that is, not on ''clinical hold.'' Failure to meet regulatory requirements will be grounds for suspension or termination of the grant.

B. Monitoring Activities

The program project officer will monitor grantees periodically. The monitoring may be in the form of telephone conversations, e-mails, or written correspondence between the project officer/grants management officer and the principal investigator. Information including but not limited to study progress, enrollment, problems, adverse events, changes in protocol, and study monitoring activities will be requested. Periodic site visits with officials of the grantee organization also may occur. The results of these monitoring activities will be recorded in the official grant file and will be available to the grantee upon request consistent with applicable disclosure statutes and with FDA disclosure regulations. Also, the grantee organization must comply with all special terms and conditions of the grant, including those which state that future funding of the study will depend on recommendations from the OPD project officer. The scope of the recommendations will confirm that: (1) There has been acceptable progress toward enrollment, based on specific circumstances of the study, (2) there is an adequate supply of the product/device, and (3) there is continued compliance with all FDA regulatory requirements for the trial. The grantee must file a final program progress report, FSR, and invention statement within 90 days after the end date of the project period as noted on the notice of grant award.

## VII. Agency Contacts

*For issues regarding the administrative and financial management aspects of this notice*: Cynthia Polit (see Addresses to Request Application in section IV.1 of this document).

*For issues regarding the programmatic aspects of this notice*: Debra Y. Lewis, Director, Orphan Products Grants Program, Office of Orphan Products Development (HF–35), Food and Drug Administration, 5600 Fishers Lane, rm. 6A–55, Rockville, MD 20857, 301–827–3666, e-mail: *debra.lewis@fda.gov* or *dlewis@oc.fda.gov*.

## VIII. Other Information

Data included in the application may be entitled to confidential treatment as trade secret or confidential commercial information within the meaning of the Freedom of Information Act (5 U.S.C. 552(b)(4)) and FDA's implementing regulations (21 CFR 20.61).

Unless disclosure is required under the Freedom of Information Act as amended (5 U.S.C. 552) as determined by the freedom of information officials of HHS, by a court, or required by another Federal law, data contained in the portions of this application that have been specifically identified by page number, paragraph, etc., by the applicant as containing restricted information, shall not be used or disclosed except for evaluation purposes.

Dated: December 12, 2005.

**Jeffrey Shuren,**

*Assistant Commissioner for Policy.*

[FR Doc. 05–24164 Filed 12–16–05; 8:45 am]

BILLING CODE 4160–01–S

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Health Resources and Services Administration (HRSA) publishes abstracts of information collection requests under review by the Office of Management and Budget (OMB), in compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). To request a copy of the clearance requests submitted to OMB for review, call the HRSA Reports Clearance Office on (301)–443–1129.

The following request has been submitted to the Office of Management and Budget for review under the Paperwork Reduction Act of 1995:

**Proposed Project: The Sentinel Centers Network (SCN) Core Data Set (OMB No. 0915–0268)—Extension**

HRSA's Bureau of Primary Health Care (BPHC) established the Sentinel Centers Network (SCN) to assist in addressing critical quality, programmatic, and policy issues. Health centers identified as having adequate infrastructure and commitment through the competitive contract process have generated data for quality and program analyses and for projects on topics that have immediate programmatic impact. Health centers submit core data periodically extracted from existing information systems. These core data comprise patient, encounter, and practitioner level information including patient demographics, insurance status, clinical diagnoses and procedures, outcomes, and practitioner characteristics. Since all data obtained from the participant health centers are extracted/compiled from existing information systems and not through primary data collection, burden is minimized. In addition, each participant site receives technical assistance as needed to reduce burden and facilitate data submission.

The annual burden estimate for this activity is as follows:

| Type of respondent | Number of respondents | Responses per respondents | Total responses | Hours per response | Total burden hours |
|---|---|---|---|---|---|
| Sites | 43 | 2 | 86 | 8 | 688 |

Written comments and recommendations concerning the proposed information collection should be sent within 30 days of this notice to: John Kraemer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, D.C. 20503.

Dated: December 13, 2005.

**Tina M. Cheatham,**

*Director, Division of Policy Review and Coordination.*

[FR Doc. E5–7488 Filed 12–16–05; 8:45 am]

**BILLING CODE 4165–15–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Indian Health Service

### Loan Repayment Program for Repayment of Health Professions Educational Loans

*Announcement Type:* Initial.

*CFDA Number:* 93.164.

*Key Dates:* Beginnning of 2006 Award Period: January 20, 2006; Ending of 2006 Award Period: September 30, 2006.

**1. Funding Opportunity Description**

The Indian Health Service (IHS) estimated budget request for Fiscal Year (FY) 2006 includes $11,698,754 for the Indian Health Service (IHS) Loan Repayment Program (LRP) for health professional educational loans (undergraduate and graduate) in return for full-time clinical service in Indian health programs.

This program announcement is subject to the appropriation of funds. This notice is being published early to coincide with the recruitment activity of the IHS, which competes with other Government and private health management organizations to employ qualified health professionals.

This program is authorized by Section 108 of the Indian Health Care Improvement Act (IHCIA) as amended, 25 U.S.C. 1601 *et.seq.* The IHS invites potential applicants to request an application for participation in the LRP.

Funds appropriated for the LRP in FY 2006 will be distributed among the health professions as follows: Allopathic/osteopathic practitioners will receive 27 percent, registered nurses 20 percent, mental health professionals 10 percent, dentists 12 percent, pharmacists 10 percent, optometrists 5 percent, physician assistants/advanced practice nurses 6 percent, podiatrists 4 percent, physical therapists 2 percent, other professions 4 percent. This requirement does not apply if the number of applicants from these groups, respectively, is not sufficient to meet the requirement.

**H. Award Information**

It is anticipated that $11,698,754 will be availabe to support approximately 253 competing awards averaging $46,250 per award for a two year contract. One year contract continuations will receive priority consideration in any award cycle. Applicants selected for participation in the FY 2006 program cycle will be expected to begin their service period no later than September 30, 2006.

**III. Eligibility Information**

*1. Eligible Applicants*

Pursuant to Section 108(b), to be eligible to participate in the LRP, an individual must:

(1) (A) Be enrolled—

(i) In a course of study or program in an accredited institution, as determined by the Secretary, within any State and be scheduled to complete such course of study in the same year such individual applies to participate in such program; or

(ii) In an approved graduate training program in a health profession; or

(B) Have a degree in a health profession and a license to practice in a state; and

(2)(A) Be eligible for, or hold an appointment as a Commissioned Officer in the Regular or Reserve Corps of the Public Health Service (PHS); or

(B) Be eligible for selection for civilian service in the Regular or Reserve Corps of the (PHS); or

(C) Meet the professional standards for civil service employment in the IHS: or

(D) Be employed in an Indian health program without service obligation; and

(E) Submit to the Secretary an applicant for a contract to the Loan Repayment Program. The Secretary must approve the contract before the disbursement of loan repayments can be made to the participant. Participants will be required to fulfill their contract service agreements through full-time clinical practice at an Indian health program site determined by the Secretary. Loan repayment sites are characterized by physical, cultural, and professional isolation, and have histories of frequent staff turnover. All Indian health program sites are annually prioritized within the Agency by discipline, based on need or vacancy.

Section 108 of the IHCIA, as amended by Public Laws 100–713 and 102–573, authorizes the IHS LRP and provides in pertinent part as follows:

(a)(1) The Secretary, acting through the Service, shall establish a program to be known as the Indian Health Service Loan Repayment Program (hereinafter referred to as the ''Loan Repayment Program'') in order to assure an adequate supply of trained health professionals necessary to maintain accreditation of, and provide health care services to Indians through, Indian health programs.

Section 4(n) of the IHCIA, as amended by the Indian Health Care Improvement Technical Corrections Act of 1996, Public Law 104–313, provides that:

''Health Profession'' means *allopathic medicine,* family medicine, internal medicine, pediatrics, geriatric medicine, obstetrics and gynecology, pediatric medicine, nursing, public health nursing, dentistry, psychiatry, osteopathy, optometry, pharmacy, psychology, public health, social work, marriage and family therapy, chiropractic medicine, environmental health and engineering, and allied health profession, *or any other health profession.*

For the purposes of this program the term ''Indian health program'' is defined in Section 108(a)(2)(A), as follows:

(A) The term ''Indian health program'' means any health program or facility funded, in whole or in part, by the Service for the benefit of Indians and administered—

(i) Directly by the Service;

(ii) By any Indian tribe or tribal or Indian organization pursuant to a contract under—

(I) The Indian Self-Determination Act, or

(II) Section 23 of the Act of April 30, 1908, (25 U.S.C. 47), popularly known as the Buy Indian Act; or

(iii) By an urban Indian organization pursuant to title V of this act.

Section 108 of the IHCIA, as amended by Public Laws 100–713 and 102–573, authorizes the IHS to determine specific health professions for which Indian Health Loan Repayment contracts will be awarded. The list of priority health professions that follow are based upon the needs of the IHS as well as upon the needs of the American Indians and Alaska Natives.

(a) Medicine: Allopathic and Osteopathic
(b) Nurse: Associate and B.S. Degree
(c) Clinical Psychology: Ph.D. only
(d) Social Work: Masters level only (concentration in Mental Health)
(e) Chemical Dependency Counseling: Baccalaureate and Masters level
(f) Dentistry
(g) Dental Hygiene
(h) Pharmacy: B.S., Pharm.D.
(i) Optometry
(j) Physician Assistant
(k) Advanced Practice Nurses: Nurse Practitioner, Certified Nurse

Midwife, Registered Nurse Anesthetist (Priority consideration will be given to Registered Nurse Anesthetists.)
(l) Podiatry: D.P.M.
(m) Physical Therapy: M.S. and D.P.T.
(n) Diagnostic Radiology Technology: Certificate, Associate, and B.S.
(o) Medical Technology: B.S.
(p) Public Health Nutritionist/Registered Dietitian
(q) Engineering (Civil and Environmental): B.S. (Engineers must provide environmental engineering services to be eligible)
(r) Environmental Health (Sanitarian): B.S.
(s) Health Records: R.H.I.T. and R.H.I.A.
(t) Respiratory Therapy
(u) Ultrasonography

*2. Cost Sharing or Matching*

Not applicable.

*3. Other Requirements*

Interested individuals are reminded that the list of eligible health and allied health professions is effective for applicants for FY 2006. These priorities will remain in effect until superseded.

## IV. Application and Submission Information

*1. Address to Request Application Package*

Application materials may be obtained by calling or writing to the address below. In addition, completed applications should be returned to: IHS Loan Repayment Program, 801 Thompson Avenue, Suite 120, Rockville, Maryland 20852, PH: 301/443–3396 [between 8 a.m. and 5 p.m. (EST) Monday through Friday, except Federal holidays].

*2. Content and Form of Application Submission*

Applications must be submitted on the form entitled ''Application for the Indian Health Service Loan Repayment Program,'' identified with the Office of Management and Budget approval number of OMB #0917–0014 (expires 12/31/05).

*3. Submission Dates and Times*

Completed applications may be submitted to the IHS Loan Repayment Program, 801 Thompson Avenue, Suite 120, Rockville, Maryland 20852. Applications for the FY 2006 LRP will be accepted and evaluated monthly beginning January 20, 2006 and will continue to be accepted each month thereafter until all funds are exhausted for FY 2006. Subsequent monthly deadline dates are scheduled for Friday of the second full week of each month.

Applications shall be considered as meeting the deadline if they are either:

(a) Received on or before the deadline date; or

(b) Sent on or before the deadline date. (Applicants should request a legibly dated U.S. Postal Service postmark or obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered postmarks are *not* acceptable as proof of timely mailing.)

Applications received after the monthly closing date will be held for consideration in the next monthly funding cycle. Applicants who do not receive funding by September 30, 2006, will be notified in writing.

*4. Intergovernmental Review*

This program is not subject to review under Executive Order 12372.

*5. Funding Restrictions*

Not applicable.

*6. Other Submission Requirements*

All applicants must sign and submit to the Secretary, a written contract agreeing to accept repayment of educational loans and to serve for the applicable period of obligated service in a priority site as determined by the Secretary, and submit a signed affidavit attesting to the fact that they have been informed of the relative merits of the U.S. PHS Commissioned Corps and the Civil Service as employment options.

## V. Application Review Information

*1. Criteria*

The IHS has identified the positions in each Indian health program for which there is a need or vacancy and ranked those positions in order of priority by developing discipline-specific prioritized lists of sites. Ranking criteria for these sites include the following:

(a) Historically critical shortages caused by frequent staff turnover;

(b) Current unmatched vacancies in a Health Profession Discipline;

(c) Projected vacancies in a Health Profession Discipline;

(d) Ensuring that the staffing needs of Indian health programs administered by an Indian Tribe or Tribal or health organization receive consideration on an equal basis with programs that are administered directly by the Service;

(e) Giving priority to vacancies in Indian health programs that have a need for health professionals to provide health care services as a result of individuals having breached LRP contracts entered into under this section.

Consistent with this priority ranking, in determining applications to be approved and contracts to accept, the IHS will give priority to applications made by American Indians and Alaska Natives and to individuals recruited through the efforts of Indian Tribes or Tribal or Indian organizations.

*2. Review and Selection Process*

Loan Repayment Awards will be made only to those individuals serving at facilities which have a site score of 70 or above during the first and second quarters and the first month of the third quarter of FY 2006, if funding is available.

One or all of the following factors may be applicable to an applicant, and the applicant who has the most of these factors, all other criteria being equal, would be selected.

(a) An applicant's length of current employment in the IHS, Tribal, or urban program.

(b) Availability for service earlier than other applicants (first come, first served).

(c) Date the individual's application was received.

*3. Anticipated Announcement and Award Dates*

Not applicable.

## VI. Award Administration Information

*1. Award Notices*

Notice of awards will be mailed on the last working day of each month. Once the applicant is approved for participation in the LRP, the applicant will receive confirmation of his/her loan repayment award and the duty site at which he/she will serve his/her loan repayment obligation.

*2. Administrative and National Policy Requirements*

Applicants may sign contractual agreements with the Secretary for 2 years. The IHS will repay all, or a portion of the applicant's health profession educational loans (undergraduate and graduate) for tuition expenses and reasonable educational and living expenses in amounts up to $20,000 per year for each year of contracted service. Payments will be made annually to the participant for the purpose of repaying his/her outstanding health profession educational loans. Payment of health profession education loans will be made to the participant within 120 days, from the date the contract becomes effective.

In addition to the loan repayments, participants are provided tax assistance payments in an amount not less than 20 percent and not more than 39 percent of the participant's total amount of loan repayments made for the taxable year

involved. The loan repayments and the tax assistance payments are taxable income and will be reported to the Internal Revenue Service (IRS). The tax assistance payment will be paid to the IRS directly on the participant's behalf. LRP award recipients should be aware that the IRS may place them in a higher bracket than they would otherwise have been prior to their award.

*3. Reporting*

Any individual who enters this program and satisfactorily completes his or her obligated period of service may apply to extend his/her contract on a year-by-year basis, as determined by the IHS. Participants extending their contracts will receive up to the maximum amount of $20,000 per year plus an additional 20 percent for Federal Withholding. Participants who were awarded loan repayment contracts prior to FY 2000 will be awarded extensions up to the amount of $30,000 a year and 31 percent in tax subsidy if funds are available, and will not exceed the total of the individual's outstanding eligible health profession educational loans.

Any individual who owes an obligation for health professional service to the Federal Government, a State, or other entity is not eligible for the LRP unless the obligation will be completely satisfied before they begin service under this program.

**VII. Agency Contacts**

Please address inquiries to Ms. Jacqueline K. Santiago, Chief, IHS Loan Repayment Program, 801 Thompson Avenue, Suite 120, Rockville, Maryland 20852, PH: 301/443–3396 (between 8 a.m. and 5 p.m. (EST) Monday through Friday, except Federal holidays.)

**VIII. Other Information**

The IHS Area Offices and Service Units are authorized to provide additional funding to make awards to applicants in the LRP, but must be in compliance with any limits in the appropriation and Section 108 of the Indian Health Care Improvement Act not to exceed the amount authorized in the IHS appropriation (up to $27,000,000 for FY 2006).

Should an IHS Area Office contribute to the LRP, those funds will be used for only those sites located in that Area. Those sites will retain their relative ranking from the national site-ranking list. For example, the Albuquerque Area Office identifies supplemental monies for dentists. Only the dental positions within the Albuquerque Area will be funded with the supplemental monies consistent with the national ranking and site index within that Area.

Should an IHS Service Unit contribute to the LRP, those funds will be used for only those sites located in that Service Unit. Those sites will retain their relative ranking from the national site-ranking list. For example, Chinle Service Unit identifies supplemental monies for pharmacists. The Chinle Service Unit consists of two facilities, namely the Chinle Comprehensive Health Care Facility and the Tsaile PHS Indian Health Center. The national ranking will be used for the Chinle Comprehensive Health Care Facility (Score = 44) and the Tsaile PHS Indian Health Center (Score = 46). With a score of 46, the Tsaile PHS Indian Health Center would receive priority over the Chinle Comprehensive Health Care Facility.

Dated: December 12, 2005.

**Robert G. McSwain,**

*Deputy Director, Indian Health Service.*

[FR Doc. 05–24163 Filed 12–16–05; 8:45 am]

BILLING CODE 4165–16–M

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2005–0044]**

### Homeland Security Advisory Council

**AGENCY:** Office of the Secretary, Department of Homeland Security.

**ACTION:** Notice of Federal advisory committee meeting.

**SUMMARY:** The Homeland Security Advisory Council will hold a meeting to receive reports and briefings and to hold member deliberations. This meeting will be partially closed to the public as authorized under the Federal Advisory Committee Act.

**DATES:** *Meeting date:* Tuesday, January 10, 2006.

*Comments date:* If you desire to submit comments, they must be submitted by January 3, 2006.

**ADDRESSES:** The open portions of the meeting for the purpose of receiving Task Force reports and updates will be held at the Mandarin Oriental Hotel, 1330 Maryland Avenue Southwest, Washington, DC in Grand Ballroom A from 10 a.m. to 12 p.m. The closed portions of the meeting for the purpose of receiving detailed critical infrastructure briefings will be held in a separate venue closed to the public at the Mandarin Oriental Hotel, 1330 Maryland Avenue Southwest, Washington, DC from 8 a.m. to 9:50 a.m. and from 12:10 p.m. to 3 p.m.

You may submit comments, identified by DHS–2005–0044, by *one* of the following methods:

- *Federal eRulemaking portal: http://www.regulations.gov.*
- *E-mail: HSAC@dhs.gov.* Include docket number in the subject line of the message.
- *Fax:* (202) 772–9718.
- *Mail:* Mike Miron, Homeland Security Advisory Council, Department of Homeland Security, Washington, DC 20528.

*Instructions:* All submissions received must include the Department of Homeland Security and DHS–2005–0044, the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received by the DHS Data Privacy and Integrity Committee, go to *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Mike Miron, Homeland Security Advisory Council, Washington, DC 20528, (202) 692–4283, *HSAC@dhs.gov.*

**SUPPLEMENTARY INFORMATION:** At the upcoming meeting, the Homeland Security Advisory Council (HSAC) will receive reports from the Critical Infrastructure Task Force and the Prevention of the Entry of Weapons of Mass Effect on American Soil Task Force. It also will receive updates from the Private Sector Information Sharing and Fusion Center Task Forces. Additionally, the HSAC will receive detailed briefings covering specific critical infrastructure vulnerabilities, interdependencies, infrastructure resilience, and vulnerability mitigation. The HSAC will also hold roundtable deliberations and discussions among HSAC members, including discussions regarding administrative matters.

*Public Attendance:* A limited number of members of the public may register to attend the public session on a first-come, first-served basis. Security requires that any member of the public who wishes to attend the public session provide his or her name and date of birth, no later than 5 p.m. e.s.t., Tuesday, January 03, 2006, to Mike Miron or an Executive Staff Member of the HSAC via e-mail at *HSAC@dhs.gov* or via phone at (202) 692–4283. Persons with disabilities who require special assistance should so indicate in their admittance request and are encouraged to indicate their desires to attend and anticipated special needs as early as

possible. Photo identification will be required for entry into the public session, and everyone in attendance must be present and seated by 9:45 a.m.

*Basis for Closure:* In accordance with Section 10(d) of the Federal Advisory Committee Act (FACA), Public Law 92–463, as amended (5 U.S.C. App. 1 *et seq.*), I have determined that portions of this HSAC meeting (referenced above as ''closed'') will concern matters excluded from Open Meetings requirements. At portions of the meeting where the committee will be addressing specific critical infrastructure vulnerabilities, interdependencies, infrastructure resilience and vulnerability mitigation, discussions may include: trade secrets and commercial or financial information that is privileged or confidential; investigative techniques and procedures; and matters that for which disclosure would likely frustrate significantly the implementation of proposed agency actions. Accordingly, I have determined that these portions of the meeting must be kept closed as well, consistent with the provisions of 5 U.S.C. 552b(c)(4), (7)(E), and (9)(B).

Dated: December 12, 2005.

**Michael Chertoff,**

*Secretary.*

[FR Doc. 05–24190 Filed 12–16–05; 8:45 am]

BILLING CODE 4410–10–P

## DEPARTMENT OF HOMELAND SECURITY

**[DHS–2005–0051]**

## Science and Technology Directorate, Office of Systems Engineering and Development; SAFECOM Interoperability Baseline Survey

**AGENCY:** Office of Systems Engineering and Development, DHS.

**ACTION:** Notice and request for comment.

**SUMMARY:** The Department of Homeland Security (DHS) is soliciting public comment on the Office of Systems Engineering and Development SAFECOM Interoperability Baseline Survey.

**DATES:** Comments are encouraged and will be accepted until February 17, 2006. This process is conducted in accordance with 5 CFR 1320.10

**ADDRESSES:** You may submit comments, identified by docket number DHS–2005–0051, by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: thomas.cody@dhs.gov.* Include docket number DHS–2005–0051 in the subject line of the message.
- *Mail:* Science and Technology Directorate, Office of Systems Engineering and Development (SED), 1120 Vermont Avenue NW. #8–104, Washington, DC 20528.

**FOR FURTHER INFORMATION CONTACT:** Thomas Cody 202–254–6084 (this is not a toll free number).

**SUPPLEMENTARY INFORMATION:** DHS, as part of its continuing effort to reduce paperwork and respondents' burden, invites the general public to take this opportunity to comment on this proposed information collection as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). The collection is the ''SAFECOM Interoperability Baseline Survey.''

*Description:* SAFECOM was established as the overarching umbrella program within the Federal government that oversees all initiatives and projects pertaining to public safety communications and interoperability. The SAFECOM Interoperability Baseline Survey is an essential step in a mission to provide public safety communications interoperability nationwide.

In developing SAFECOM, DHS has worked extensively with the public safety community to create a descriptive and measurable definition of public safety interoperability that takes into account issues of governance, procedure, technology, training, and usage. The SAFECOM Interoperability Baseline Survey, which was developed from this definition, will allow DHS to measure the current state of public safety communications interoperability among state and local public safety practitioners. This will provide a baseline against which to track the future impact of Federal programs and provide a basis for identifying and executing specific projects to improve communications interoperability.

### Public Participation

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

*Instructions:* All submissions received must include the agency name and DHS–2005–0051 for this Information Collection Request. All comments received will be posted without change to *http://www. regulations.gov,* including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

### Analysis

*Agency:* Department of Homeland Security, Science and Technology Directorate, Office of Systems Engineering and Development.

*Title:* SAFECOM Interoperability Baseline Survey.

*OMB Control Number:* NEW.

*Frequency:* On Occasion.

*Affected Public:* State, Local or Tribal Government.

*Estimated Number of Respondents:* 18,375.

*Estimated Time per Response:* 20 minutes per response.

*Total Burden Hours:* 6,125.

*Total Cost Burden:* None.

Dated: December 12, 2005.

**Scott Charbo,**

*Chief Information Officer.*

[FR Doc. 05–24180 Filed 12–16–05; 8:45 am]

BILLING CODE 4410–10–P

## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

**[USCG–2005–23335]**

## Natural Working Group on Small Passenger Vessel Access

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of availability and request for comments.

**SUMMARY:** On November 14, 2005, the United States Coast Guard (USCG) and the Passenger Vessel Association (PVA) signed a charter establishing a Natural Working Group (NWG). The purpose of this NWG is to determine the acceptability and usefulness of a proposed risk matrix that was developed, by the Volpe Center, to assist small passenger vessel designers in meeting the requirements of the Americans with Disabilities Act (ADA) without compromising vessel safety. The USCG is seeking comments on this

initiative and the draft risk matrix to assist the NWG in meeting its objective.

**DATES:** Comments and related materials must reach the Docket Management Facility on or before March 20, 2006.

**ADDRESSES:** You may submit comments identified by Coast Guard docket number USCG–2005–23335 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) *Web site: http://dms.dot.gov;*

(2) *Mail:* Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001;

(3) *Fax:* 202–493–2251; or

(4) *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. The telephone number is 202–366–9329.

**FOR FURTHER INFORMATION CONTACT:** If you have questions about this Notice of Availability and Request for Comments, you may contact LT William A. Nabach at (202) 267–4004 or by e-mail at *wnabach@comdt.uscg.mil.*

**SUPPLEMENTARY INFORMATION:**

## Request for Comments

The USCG is seeking comments and related materials pertaining to this notice, the NWG charter and the draft risk matrix in the Volpe Phase 2 report. The NWG Charter and Volpe Center report (phase 1 and 2) may be found by running a ''simple search'' for docket number 23335 at *http://dms.dot.gov.* All comments will be posted, without change, to *http://dms.dot.gov* and will include any personal information that you have provided. Persons submitting comments should include their names, addresses and this notice reference number (USCG–2005–23335). We will consider all comments and materials received during the comment period.

## Background Information

The Americans with Disabilities Act was signed into law in July 1990 (Pub. L. 101–336). The U.S. Departments of Justice and Transportation, and the Architectural and Transportation Barriers Compliance Board (Access Board) issued regulations and guidelines in July and September 1991. Both the DOT's and Access Board's Rules noted that while ADA applied to vessels, further rulemaking would be deferred until a better understanding could be gained of the unique challenges faced by the marine industry.

It soon became apparent the one of the most difficult challenges to complying with ADA would be the barrier to access presented by the USCG mandated door sills. The Access Board requested that the Volpe Center conduct research on this issue and develop a strategy to enable small passenger vessel designers to satisfy both the ADA accessibility requirements and the USCG's door sill requirements. The Volpe Center's research culminated in a draft risk matrix (available in the Phase 2 report) that provides a methodology to assess the risk presented to the vessel by each individual exterior door and justify a reduction in the sill height requirement for doors of lower risk.

The USCG is interested in adopting this risk-based methodology as policy, but must first evaluate the validity of the approach against a broad cross-section of small passenger vessel designs. The NWG is tasked with completing this evaluation. Please refer to the NWG charter for further details.

The Volpe Center's report (Phase 1 and 2) are also available online through the Access Board's Web site: *http://www.access-board.gov/news/research-vessels.htm.*

Dated: December 13, 2005.

**Howard L. Hime,**

*Acting Director of Standards, Marine Safety, Security and Environmental Protection.*

[FR Doc. E5–7508 Filed 12–16–05; 8:45 am]

**BILLING CODE 4910–15–P**

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# DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

**[CGD08–05–053]**

## Implementation of Sector Houston-Galveston

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of organizational change.

**SUMMARY:** The Coast Guard announces the stand-up of Sector Houston-Galveston. Sector Houston-Galveston is an internal reorganization to combine Group Galveston, Base Galveston, Vessel Traffic Service Houston-Galveston, Marine Safety Office Houston-Galveston including Marine Safety Unit Galveston and Marine Safety Office Port Arthur including Marine Safety Unit Lake Charles into one command. The Coast Guard has established a continuity of operations order whereby all previous practices and procedures will remain in effect until superseded by an authorized Coast Guard official and/or document.

**DATES:** This organizational change is effective December 15, 2005.

**ADDRESSES:** Documents indicated in this preamble as being available in the docket are part of docket CGD08–05–053 and are available for inspection or copying at Commander (rpl), Eighth Coast Guard District, 500 Poydras Street, New Orleans, Louisiana 70130–3310 between 7:30 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Michael Roschel, Eighth District Planning Office at 504–589–6293.

**SUPPLEMENTARY INFORMATION:**

## Discussion of Notice

Sector Houston-Galveston is located at 9640 Clinton Dr., Houston, TX 77029 and contains a single Command Center. Sector Houston-Galveston is composed of a Response Department, Prevention Department, and Logistics Department. All existing missions and functions performed by Group Galveston, Base Galveston, Vessel Traffic Service Houston-Galveston, Marine Safety Office Houston-Galveston including Marine Safety Unit Galveston and Marine Safety Office Port Arthur including Marine Safety Unit Lake Charles will be performed by Sector Houston-Galveston. Effective December 15, 2005, Group Galveston, Base Galveston, Vessel Traffic Service Houston-Galveston, Marine Safety Office Houston-Galveston and Marine Safety Office Port Arthur will no longer exist as organizational entities. However, Marine Safety Office Port Arthur is renamed a Marine Safety Unit and will report directly to the Sector Houston-Galveston Commander as will Marine Safety Unit Galveston. Marine Safety Unit Lake Charles will report directly to MSU Port Arthur. There will also be a Sector Field Office retained at Galveston to provide remote support to Sector sub-units and will report directly to the logistics department. Sector Houston-Galveston contains one sub-zone, which is the Port Arthur Sub-Zone; however, Sector Houston-Galveston is responsible for all Coast Guard missions within this sub-zone.

Houston-Galveston Sector's primary zone starts at the intersection of the sea and 94°23′ W. longitude; thence proceeds north along 94°23′ W. longitude to 30°00′ N. latitude; thence west along 30°00′ N. latitude to the east bank of the Trinity River; thence northerly along the east bank of the Trinity River; thence northwesterly along the eastern shore of Lake Livingston; thence northwesterly along

the east bank of the Trinity River to the southern boundary of Dallas County, Texas; thence westerly along the southern boundary of Dallas County, Texas to 97°00′ W. longitude; thence north along 97°00′ W. longitude to the Texas-Oklahoma boundary; thence northwesterly along the Texas-Oklahoma boundary; thence north along the New Mexico-Oklahoma boundary; thence west along the New Mexico-Colorado boundary; thence south along the New Mexico-Arizona boundary; thence easterly along the southern boundary of New Mexico to the southeast corner of New Mexico at 32°00′ N. latitude; thence southeasterly to 29°18′ N. latitude, 96°07′ W. longitude on the east bank of the Colorado River; thence southerly along the east bank of the Colorado River to the sea; thence along a line bearing 140° to the outermost extent of the EEZ; thence easterly along the outermost extent of the EEZ to 93°25′ W. longitude; thence north to 27°49′ N. latitude, 93°25′ W. longitude; thence northwesterly to 29°30′ N. latitude, 93°48′ W. longitude; thence westward following a line 10.3 nautical miles from the coast to 29°24′ N. latitude, 94°20′ W. longitude; thence northwesterly to the coast at 94°23′ W. longitude.

The Port Arthur Sub-Zone Starts at the intersection of the sea and 92°23′ W. longitude; thence proceeds north along 92°23′ W. longitude to the northern boundary of Acadia Parish, thence westerly along the northern boundary of Acadia Parish; thence northwesterly along the northeastern boundaries of Allen, Vernon, Sabine, and De Soto Parishes; thence westerly along the northern boundary of De Soto Parish to the Louisiana-Texas boundary; thence northerly along the Louisiana-Texas boundary to the Texas-Arkansas-Louisiana boundaries; thence westerly along the Texas-Arkansas boundary and the Texas-Oklahoma boundary to 97°00′ W. longitude; thence south along 97°00′ W. longitude to the southern boundary of Dallas County, Texas; thence easterly along the southern boundary of Dallas County, Texas, to the east bank of the Trinity River; thence southeasterly along the east bank of the Trinity River; thence southeasterly along the east shore of Lake Livingston; thence southerly along the east bank of the Trinity River to 30°00′ N. latitude, 93°55′ W. longitude; thence east along 30°00′ N. latitude to 94°23′ W. longitude; thence south along 94°23′ W. longitude to the sea; thence seaward to 29°24′ N. latitude, 94°20′ W. longitude; thence easterly following a line 10.3 nautical miles from the coast to 29°30′ N. latitude, 93°48′ W. longitude; thence southeasterly to 27°49′ N. latitude, 93°25′ W. longitude; thence south along 93°25′ W. longitude to the outermost extent of the EEZ; thence east along the outermost extent of the EEZ to 92°23′ W. longitude; thence north along 92°23′ W. longitude to the point or origin.

The boundaries of Sector Houston-Galveston will be modified in the future upon the stand-up of adjoining sectors. Notice will be published in the **Federal Register**.

The Sector Houston-Galveston Commander is vested with all the rights, responsibilities, duties, and authority of a Group Commander and Commanding Officer Marine Safety Office, as provided for in Coast Guard regulations, with the exception of specific authorities that shall be retained by MSU Port Arthur. Sector Houston-Galveston Commander is the successor in command to the Commanding Officers of Group Galveston, Base Galveston, Vessel Traffic Service Houston-Galveston, Marine Safety Office Houston-Galveston including Marine Safety Unit Galveston and Marine Safety Office Port Arthur including Marine Safety Unit Lake Charles. The Sector Houston-Galveston Commander is designated for the entire Sector as: (a) Federal On Scene Coordinator (FOSC), consistent with the National Contingency Plan; and (b) Search and Rescue Mission Coordinator (SMC). Also, the Sector Houston-Galveston Commander is designated for the entire Sector as: (a) Captain of the Port (COTP); (b) Federal Maritime Security Coordinator (FMSC); and (d) Officer in Charge of Marine Inspection (OCMI). The Deputy Sector Commander is designated alternate COTP, FMSC, FOSC, SMC and Acting OCMI.

The Commanding Officer, Marine Safety Unit Port Arthur is designated for the entire MSU Port Arthur Sub-Zone as: (a) Captain of the Port (COTP); (b) Federal Maritime Security Coordinator (FMSC); (c) Federal On Scene Coordinator (FOSC) consistent with the National Contingency Plan; and (d) Officer in Charge of Marine Inspection (OCMI). The Executive Officer, Marine Safety Unit Port Arthur is designated alternate COTP, FMSC, FOSC, and Acting OCMI.

A continuity of operations order has been issued ensuring that all previous Group Galveston, Base Galveston, Vessel Traffic Service Houston-Galveston, Marine Safety Office Houston-Galveston including Marine Safety Unit Galveston and Marine Safety Office Port Arthur including Marine Safety Unit Lake Charles practices and procedures will remain in effect until superseded by Commander, Sector Houston-Galveston or in MSU Port Arthur Sub-Zone until superseded by Commanding Officer, Marine Safety Unit Port Arthur. This continuity of operations order addresses existing COTP regulations, orders, directives and policies.

The following information is a list of updated command titles, addresses and points of contact to facilitate requests from the public and assist with entry into security or safety zones:

*Name:* Sector Houston-Galveston

*Address:* Commander, U.S. Coast Guard Sector Houston-Galveston, 9640 Clinton Dr., Houston, TX 77029.

*Contact:* General Number, (713) 671–5100, Sector Commander: Captain Richard Kaser; Deputy Sector Commander: Captain Christine Balboni.

Chief, Prevention Department: (713) 671–5184, Chief, Response Department: (713) 671–5104, Chief, Logistics Department: (713) 671–5150.

MSU Port Arthur General Number, (409) 723–6500.

MSU Lake Charles General Number, (337) 491–7840.

MSU Galveston General Number, (409) 766–5400.

Dated: November 30, 2005.

**Kevin L. Marshall,**

*Captain, U.S. Coast Guard, Commander, 8th Coast Guard District, Acting.*

[FR Doc. E5–7509 Filed 12–16–05; 8:45 am]

BILLING CODE 4910–15–P

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–4975-N–39]**

## Notice of Proposed Information Collection: Comment Request; Deed-in-Lieu of Foreclosure (Corporate Mortgagors or Mortgagors Owning More than One Property)

**AGENCY:** Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

**ACTION:** Notice.

**SUMMARY:** The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

**DATES:** *Comments Due Date:* February 17, 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: Wayne Eddins, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, SW., L'Enfant Plaza Building, Room 8001, Washington, DC 20410 or *Wayne_Eddins@hud.gov.*

**FOR FURTHER INFORMATION CONTACT:** Joe McCloskey, Director, Office of Single Family Asset Management, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 708–1672 (this is not a toll free number) for copies of the proposed forms and other available information.

**SUPPLEMENTARY INFORMATION:** The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This Notice also lists the following information:

*Title of Proposal:* Deed-in-Lieu of Foreclosure (Corporate Mortgagors or Mortgagors Owning More than One Property).

*OMB Control Number, if applicable:* 2502–0301.

*Description of the need for the information and proposed use:* Mortgagees must obtain written consent from HUD's National Servicing Center to accept a deed-in-lieu of foreclosure when the mortgagor is a corporate mortgagor or a when mortgagor owns more than one property. Mortgagees must provide HUD with specific information. HUD uses this information collection to review specific requirements in assessing the validity of accepting a deed-in-lieu of foreclosure.

*Agency form numbers, if applicable:* None.

*Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:* The estimated total number of hours needed to prepare the information collection is 12.50, the number of respondents is 600 generating 25 annual responses, the frequency of response is on occasion, and the time to prepare per response is 30 minutes.

*Status of the proposed information collection:* This is an extension of a currently approved collection.

**Authority:** The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: December 12, 2005.

**Frank L. Davis,**

*General Deputy Assistant Secretary for Housing, Deputy Federal Housing Commissioner.*

[FR Doc. E5–7502 Filed 12–16–05; 8:45 am]

**BILLING CODE 4210–27–P**

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## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–4914-N–07]**

## Mortgagee Review Board; Administrative Actions

**AGENCY:** Office of the Assistant Secretary for Housing-Federal Housing Commissioner, Department of Housing and Urban Development (HUD).

**ACTION:** Notice.

**SUMMARY:** In compliance with section 202(c) of the National Housing Act, this notice advises of the cause and description of administrative actions taken by HUD's Mortgagee Review Board against HUD-approved mortgagees.

**FOR FURTHER INFORMATION CONTACT:** David E. Hintz, Secretary to the Mortgagee Review Board, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone: (202) 708–3856, extension 3594. A Telecommunications Device for Hearing- and Speech-Impaired Individuals (TTY) is available at (800) 877–8339 (Federal Information Relay Service).

**SUPPLEMENTARY INFORMATION:** Section 202(c)(5) of the National Housing Act (added by section 142 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. 101–235, approved December 15, 1989), requires that HUD ''publish a description of and the cause for administrative action against a HUD-approved mortgagee'' by the Department's Mortgagee Review Board (Board). In compliance with the requirements of section 202(c)(5), this notice advises of administrative actions that have been taken by the Board from August 25, 2004 to October 18, 2005.

### 1. Accent Mortgage Services, Inc., Alpharetta, GA [Docket No. 03–3219–MR]

*Action:* On September 12, 2005, the Board issued a letter to Accent Mortgage Services, Inc. (Accent), withdrawing its HUD/FHAapproval for five years. The Board also voted to impose a civil money penalty in the amount of $6,500.

*Cause:* The Board took this action because Accent failed to comply with the terms of a Settlement Agreement dated March 26, 2004 to pay civil money penalties to the Department in the amount of $75,000.

### 2. Alliance Mortgage Banking Corporation, Levittown, NY [Docket No. 04–4818–MR]

*Action:* Settlement Agreement signed September 16, 2005. Without admitting liability or fault, Alliance Mortgage Banking Corporation (Alliance) agreed to pay an administrative payment in the amount of $136,775, indemnify HUD on 16 HUD/FHA-insured loans and reimburse 27 HUD/FHA borrowers unallowable charges in the amount of $12,193. Additionally, Alliance agreed to retain an independent quality control firm to conduct a quality control review of twenty HUD/FHA loans, consisting of current and defaulted loans. Based upon the results of this review, Alliance would submit to HUD a corrective action plan that addresses the findings of the quality control review and the issues outlined in the Notice of Violation.

*Cause:* The Board took this action based on the following violations of HUD/FHA requirements in the origination of HUD/FHA-insured loans where Alliance: Permitted employees to be involved in the processing of loan applications on loans where they were the seller; used falsified documentation or conflicting information in originating loans and/or obtaining HUD/FHA-insured mortgages; failed to resolve discrepancies or fully obtain and analyze the terms and conditions of the real estate transaction and consider the acquisition cost of recently acquired properties in the underwriting of loans; failed to properly verify the source and/or adequacy of funds for the downpayment and/or closing costs; failed to properly verify income; failed to limit seller contributions to the maximum permitted by HUD; failed to ensure timely completion and/or establish an escrow account for incomplete property repairs; submitted delinquent loans for mortgage insurance endorsement; failed to remit Up-Front Mortgage Insurance Premiums within 15 days from the date of loan closing;

permitted a borrower to obtain a HUD/FHA loan within three years of a foreclosed loan; violated HUD/FHA third party origination restrictions; and failed to ensure borrowers, who had been charged a commitment fee, executed a Commitment Agreement guaranteeing discount points and/or interest rates, at least 15 days prior to the date the loan closed.

**3. American Union Mortgage, Inc., Ogden, UT [Docket No. 05–5049–MR]**

*Action:* On October 18, 2005, the Board issued a letter to American Union Mortgage, Inc. (American Union) withdrawing its HUD/FHA approval for five years. The Board also voted to impose a civil money penalty in the amount of $6,500.

*Cause:* The Board took this action because American Union failed to comply with the terms of a Settlement Agreement with the Department dated May 14, 2004 to pay civil money penalties to the Department in the amount of $150,000.

**4. Bancplus Home Mortgage Center, Inc., Ft. Lauderdale, FL [Docket No. 04–4450–MR]**

*Action:* Settlement Agreement signed May 24, 2005. Without admitting liability or fault, Bancplus Home Mortgage Center, Inc. agreed to pay an administrative payment in the amount of $24,000 and indemnify HUD on two loans.

*Cause:* The Board took this action based on the following violations of HUD/FHA requirements in the origination of HUD/FHA-insured loans where Bancplus: Failed to implement a Quality Control Plan in conformance with HUD/FHA requirements (repeat finding); and failed to properly document the source and/or adequacy of funds used for the downpayment and/or closing cost.

**5. Costal Capital Corp., Greenvale, NY [Docket No. 04–4384–MR]**

*Action:* Settlement Agreement signed June 7, 2005. Without admitting liability or fault, Costal Capital Corp. (Costal) agreed to pay a civil money penalty in the amount of $134,500, indemnify HUD on three loans and reimburse borrowers for impermissible expenses totaling $7,014.

*Cause:* The Board took this action based on the following violations of HUD/FHA requirements in the origination of HUD/FHA-insured loans where Costal: Violated third party origination restrictions; improperly allowed documents to pass through the hands of interested third parties; certifying falsely on form HUD–92900–A, Part II, Lender Certification; approved loans where the total origination fees charged to the borrowers were in excess of one percent; failed to properly verify the source and adequacy of funds used for the downpayment and/or closing costs; permitted borrowers to be charged fees that were not allowable under HUD/FHA requirements; failed to disclose all fees paid by the borrowers or on their behalf on the HUD–1 Settlement Statement; and failed to implement and maintain a Quality Control Plan in compliance with HUD/FHA requirements.

**6. De Oro, Inc., Ontario, CA [Docket No. 05–5073–MR]**

*Action:* On September 12, 2005, the Board issued a letter to De Oro, Inc. (De Oro) withdrawing its HUD/FHA approval for five years. The Board also voted to impose a civil money penalty in the amount of $26,000.

*Cause:* The Board took this action based on the following violations of HUD/FHA requirements where De Oro: Failed to comply with the terms of agreements requiring De Oro to indemnify the Department; failed to accrue or note a significant contingent liability in HUD's Lender Assessment Sub-System financial statement submission; misrepresented its net worth; and provided HUD a false certification.

**7. Global Financial Services, Inc., Bethesda, MD [Docket No. 04–4263–MR]**

*Action:* Settlement Agreement signed September 13, 2005. Global Financial Services, Inc. (Global) agreed to pay a civil money penalty in the amount of $62,500 and to immediate withdrawal of Global's HUD/FHA-approval for four years.

*Cause:* The Board took this action based on the following violations of HUD/FHA requirements in the origination of HUD/FHA-insured loans where Global: Employed an individual who has been debarred by the Department; and failed to implement and maintain a Quality Control Plan in compliance with HUD/FHA requirements.

**8. Home Loan Mortgage Corporation, Hesperia, CA [Docket No. 05–5002–MR]**

*Action:* On April 1, 2005, the Board issued a letter to Home Loan Mortgage Corporation (Home) withdrawing its HUD/FHA-approval for five years. The Board also voted to impose a civil money penalty in the amount of $6,500.

*Cause:* The Board took this action because Home failed to comply with the terms of the Settlement Agreement executed with the Department dated May 3, 2001.

**9. iMortgage Funding Corporation d/b/a Guaranty Mortgage, Houston, TX [04–4435–MR]**

*Action:* Settlement Agreement signed May 11, 2005. Without admitting liability or fault, iMortgage Funding Corporation d/b/a Guaranty Mortgage (iMortgage), agreed to pay a civil money penalty in the amount of $379,100 and indemnify HUD on 17 HUD/FHA-insured loans.

*Cause:* The Board took this action based on the following violations of HUD/FHA requirements in the origination of HUD/FHA-insured loans where iMortgage: Paid prohibited compensation to employees performing underwriting duties; failed to remit Upfront Mortgage Insurance Premiums to HUD/FHA within 15 days of loan closing; failed to adopt and implement a Quality Control Plan in compliance with HUD/FHA requirements; used documentation that was falsified and/or contained unresolved discrepancies; failed to properly verify the source and adequacy of funds used for the cash requirements and allowed funds for closing from unacceptable sources; failed to properly document and/or calculate income used for qualification or to justify loan approval with excessively high ratios of debt to income; omitted and understated liabilities, and failed to consider contingent liabilities in loan qualification; failed to obtain credit reports that met HUD/FHA requirements; approved mortgagors with unacceptable credit histories, without adequate justification; approved mortgage loans for ineligible mortgagors; and failed to document properly or analyze adequately the credit histories of mortgagors who did not use traditional credit or who did not have acceptable traditional credit histories.

**10. Karim Enterprises, Inc., St. Charles, MO [Docket No. 05–5017–MR]**

*Action:* Settlement Agreement signed July 8, 2005. Without admitting liability or fault, Karim Enterprises, Inc. (Karim) agreed to pay HUD a civil money penalty in the amount of $22,000.

*Cause:* The Board took this action based on the following violations of HUD/FHA requirements in the origination of HUD/FHA-insured loans where Karim: Loaned gift funds to a donor in HUD/FHA-insured mortgage transaction; submitted or caused the submission of false information to HUD in connection with a HUD/FHA-insured mortgage transaction; and failed to

implement a Quality Control Plan in conformance with HUD/FHA requirements.

**11. KB Home Mortgage Company, Los Angeles, CA [Docket No. 05–5020–MR]**

*Action:* Settlement Agreement signed June 27, 2005. Without admitting liability or fault, KB Home Mortgage Company (KB Home) agreed to pay HUD an administrative payment in the amount of $3,200,000. KB Home also agreed to prepare and submit a compliance plan acceptable to HUD that details the policies and procedures KB Home will implement to rectify the violations of HUD requirements identified in the Notice of Violation.

*Cause:* The Board took this action based on the following violations of HUD/FHA requirements in the origination of HUD/FHA-insured loans where KB Home: Approved loans with ratios exceeding guidelines without compensating factors or without adequate compensating factors; approved loans based on effective income that was overstated, improperly calculated or inadequately documented; failed to include or determine all of the mortgagor's liabilities and/or liabilities of the non-purchasing spouse in loan qualification; failed to properly verify the source and/or adequacy of funds required and/or there were insufficient funds verified to close; approved loans to borrowers who were not eligible because of unpaid court-ordered judgments and delinquent federal debt; approved loans to borrowers who were not eligible because of past credit performance; failed to address and resolve significant file discrepancies; failed to ensure property compliance with the Builder's Certification of Plans, Specifications and Site, HUD form 92541; failed to ensure the mortgagor met the minimum required investment because the loan exceeded the maximum allowable mortgage amount; failed to ensure the mortgagor was not charged excessive and/or unallowable fees and/or there was no documentation supporting the fee; failed to ensure that the HUD–1 Settlement Statement reflected the earnest money deposit that was shown on the sales contract and the loan application; failed to ensure the accuracy of the information contained in the HUD–1A, Addendum to the HUD–1 Settlement Statement; and failed to ensure gift letters met HUD requirements.

**12. Major Mortgage Corporation, Lathrup Village, MI [Docket No. 05–5071–MR]**

*Action:* On September 8, 2005, the Board issued a letter to Major Mortgage Corporation (Major Mortgage) withdrawing its HUD/FHA approval for five years. The Board also voted to impose a civil money penalty in the amount of $6,500.

*Cause:* The Board took this action because Major Mortgage failed to comply with the terms of a Settlement Agreement dated November 30, 1998 whereby Major Mortgage agreed to indemnify HUD on 15 loans.

**13. Megamerica Mortgage Group, Inc., San Antonio, TX [Docket No. 04–4262–MR]**

*Action:* Settlement Agreement signed April 6, 2005. Without admitting liability or fault, Megamerica Mortgage Group, Inc. (Megamerica) agreed to pay an administrative payment in the amount of $20,500.

*Cause:* The Board took this action based on the following violations of HUD/FHA requirements in the origination of HUD/FHA-insured loans where Megamerica: Operated branch offices under prohibited branch arrangements; failed to implement and maintain a Quality Control Plan in compliance with HUD/FHA requirements; failed to file annual reports regarding loan application activity required by Mortgagee Letter 95–3 and HUD Handbook 4155.1 REV–4 CHG 1; and charged mortgagors excessive or prohibited fees.

**14. Pike Creek Mortgage Services, Inc., Wilmington, DE [Docket No. 04–4629–MR]**

*Action:* Settlement Agreement signed September 14, 2005. Without admitting liability or fault, Pike Creek Mortgage Services, Inc. (Pike Creek) agreed to pay a civil money penalty in the amount of $19,000.

*Cause:* The Board took this action based on the following violations of HUD/FHA requirements in the origination of HUD/FHA-insured loans where Pike Creek: Failed to ensure that loans were originated by its employees; falsely certified on the HUD/VA Addendum to the Uniform Residential Loan Application, form HUD–92900–A, Part II Lender Certification; failed to retain a loan origination file; failed to file annual reports regarding loan application activity; and failed to implement and maintain a Quality Control Plan in compliance with HUD/FHA requirements.

**15. RTM Funding, Inc., Kingwood, TX [Docket No. 03–3169–MR]**

*Action:* Settlement Agreement signed April 14, 2005. Without admitting liability or fault, RTM Funding, Inc. (RTM) agreed to pay a civil money penalty in the amount of $11,000.

*Cause:* The Board took this action based on the following violations of HUD/FHA requirements in the origination of HUD/FHA-insured loans where RTM: Failed to maintain entire case file at least two years from date of insurance endorsement; failed to implement and maintain a Quality Control Plan in compliance with HUD/FHA requirements; and failed to file annual reports regarding loan activity as required by Mortgagee Letter 95–3 and HUD Handbook 4155.1 REV–4 CHG–1.

**16. Saxon Equity Mortgage Bankers, Ltd., Hauppauge, NY [Docket No. 05–5046–MR]**

*Action:* Settlement Agreement signed September 13, 2005. Without admitting liability or fault, Saxon Equity Mortgage Bankers, Ltd. (Saxon) agreed to pay the Department a civil money penalty in the amount of $13,000.

*Cause:* The Board took this action because Saxon failed to comply with the terms of two indemnification agreements signed with the Department dated June 13, 1994 and February 28, 2001. Saxon has now entered into an acceptable payment agreement for amounts due under the agreements.

**17. Susan Mittman Real Estate, Inc., Brooklyn, NY [Docket No. 04–4444–MR]**

*Action:* Settlement Agreement signed May 11, 2005. Without admitting liability or fault, Susan Mittman Real Estate, Inc. (Susan Mittman) agreed to pay an administrative payment in the amount of $30,000.

*Cause:* The Board took this action based on the following violations of HUD/FHA requirements in the origination of HUD/FHA-insured loans where Susan Mittman: Originated loans where the borrowers were charged fees in excess of the one percent allowable origination fee for services covered by the origination fee; and failed to implement and maintain a Quality Control Plan in compliance with HUD/FHA requirements.

**18. Terra Financial Group, Inc., Philadelphia, PA [Docket No. 04–4299–MR]**

*Action:* Settlement Agreement signed September 22, 2005. Without admitting liability or fault, Terra Financial Group, Inc. (Terra) agreed to pay an administrative payment in the amount of $7,000.

*Cause:* The Board took this action based on the following violations of HUD/FHA requirements in the origination of HUD/FHA-insured loans

where Terra: Failed to ensure that loans were originated by its employees; failed to maintain complete loan origination files; failed to provide evidence that original documents were reviewed; failed to file annual reports regarding loan application activity as required by Mortgagee Letter 95–3 and HUD Handbook 4155.1; and failed to implement and maintain an adequate Quality Control Plan in compliance with HUD/FHA requirements.

**19. Tucson Mortgage, LLC, Tucson, AZ [Docket No. 04–4934–MR]**

*Action:* Settlement Agreement signed September 22, 2005. Without admitting liability or fault, Tucson Mortgage, LLC (Tucson) agreed to pay an administrative payment in the amount of $45,000.

*Cause:* The Board took this action based on the following violations of HUD/FHA requirements in the origination of HUD/FHA-insured loans where Tucson: Allowed an unapproved branch to originate HUD/FHA-insured mortgages; provided false documents to originate a HUD/FHA-insured mortgage; failed to file loan application reports to HUD as required by the Mortgagee Letter 95–3 and HUD Handbook 4155.1 REV–4 CHG 1; failed to perform Quality Control reviews; and failed to provide complete loan origination files for review.

**20. United Lending Partners, LP, Irving, TX [Docket No. 05–5053–MR]**

*Action:* On September 8, 2005, the Board issued a letter to United Lending Partners, Ltd., (United Lending) withdrawing its HUD/FHA approval for five years. The Board also voted to impose a civil money penalty in the amount of $26,000.

*Cause:* The Board took this action because United Lending failed to comply with the terms of agreements dated June 3, 2003, November 13, 2003 and December 2, 2003 requiring United Lending to indemnify the Department on 15 loans.

Dated: December 12, 2005.

**Brian D. Montgomery,**

*Assistant Secretary for Housing—Federal Housing Commissioner.*

[FR Doc. E5–7503 Filed 12–16–05; 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 marine mammals.

**DATES:** Written data, comments or requests must be received by January 18, 2006.

**ADDRESSES:** Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 30 days of the date of publication of this notice to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203; fax 703/358–2281.

**FOR FURTHER INFORMATION CONTACT:** Division of Management Authority, telephone 703/358–2104.

**SUPPLEMENTARY INFORMATION:**

**Endangered Species**

The public is invited to comment on the following applications for a permit to conduct certain activities with endangered species. This notice is provided pursuant to section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). Written data, comments, or requests for copies of these complete applications should be submitted to the Director (address above).

**PRT–811776**

*Applicant:* Wildlife Conservation Society, Bronx, NY

The applicant requests re-issuance of a permit to import feathers dropped from wild and captive-hatched birds, which are obtained from various international institutions and through collections conducted during field studies, for the purpose of scientific research. This notification covers activities conducted by the applicant over a five year period.

**PRT–110072**

*Applicant:* White Oak Conservation Center, Yulee, FL

The applicant requests a permit to re-import a male greater Indian one-horn rhinoceros (*Rhinoceros unicornis*), captive bred in the United States, from Toronto Zoo, Canada, for the purpose of enhancement of the propagation and survival of the species.

**PRT–007870**

*Applicant:* National Zoological Park, Washington, DC

The applicant request reissuance of their permit for scientific research with captive-born giant pandas (*Ailuropoda melanoleuca*) currently held under loan agreement with the Government of China and under provisions of the USFWS Giant Panda Policy. The proposed research will cover all aspects of behavior, reproductive physiology, genetics, nutrition, and animal health and is a continuation of activities currently in progress. This notification covers activities conducted by the applicant over a period of five years.

**PRT–104625 and 104626**

*Applicant:* J & R Outfitters, Indiantown, FL

The applicant requests a permit to authorize interstate and foreign commerce, export and cull of excess male barasingha (*Cervus duvauceli*) from the captive herd maintained at their facility for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a five year period.

**PRT–115344**

*Applicant:* Forrest M. Simpson, Conroe, TX

The applicant requests a permit to authorize interstate and foreign commerce, export and cull of excess male barasingha (*Cervus duvauceli*) from the captive herd maintained at their facility for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a five year period.

**PRT–113771**

*Applicant:* Steve E. Payne West, Acampo, CA

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

**PRT–114470**

*Applicant:* Patricia K. Kehler, Woodbury, NJ

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa,

for the purpose of enhancement of the survival of the species.

**PRT–114761**

*Applicant:* James W. Wolf, Ellicott City, MD

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

**PRT–114550**

*Applicant:* Bradley S. Foster, Mishawaka, IN

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

**PRT–114513**

*Applicant:* William R. Norris, Caledonia, MI

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

**PRT–115665**

*Applicant:* Keith A. Platter, Hamilton, IN

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (Damaliscus pygargus pygargus) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

**PRT–116076**

*Applicant:* Robert E. Pitts, Toledo, OH

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

**PRT–114604**

*Applicant:* Richard P. Shoemaker, Coplay, PA

The applicant requests a permit to import the sport-hunted trophy of one female brown hyena (*Parahyaena brunnea*) taken from the wild in the Republic of South Africa, for the purpose of enhancement of the survival of the species.

**PRT–062075 and 064075**

*Applicant:* The Hawthorn Corporation, Richmond, IL

The applicant requests permits to re-export and re-import captive-born tigers (*Panthera tigris*) to worldwide locations for the purpose of enhancement of the species through conservation education. The permit numbers and animals are: PRT–062075, Azara and PRT–064075, Sheeba. This notification covers activities to be conducted by the applicant over a three-year period and the import of any potential progeny born while overseas.

**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.

**PRT–115000**

*Applicant:* Trent B. Latshaw, Broken Arrow, OK

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport hunted from the Norwegian Bay polar bear population in Canada for personal, noncommercial use.

Dated: December 2, 2005.

**Monica Farris,**

*Senior Permit Biologist, Branch of Permits, Division of Management Authority.*

[FR Doc. E5–7471 Filed 12–16–05; 8:45 am]

BILLING CODE 4310–55–P

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## 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 January 18, 2006.

**ADDRESSES:** Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 30 days of the date of publication of this notice to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203; fax 703/358–2281.

**FOR FURTHER INFORMATION CONTACT:** Division of Management Authority, telephone 703/358–2104.

**SUPPLEMENTARY INFORMATION:**

**Endangered Species**

The public is invited to comment on the following applications for a permit to conduct certain activities with endangered species. This notice is provided pursuant to section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). Written data, comments, or requests for copies of these complete applications should be submitted to the Director (address above).

*Applicant: Georgia State University, Atlanta, GA, PRT–113358*

The applicant requests a permit to import biological samples from lion-tailed macaques (*Macaca silenus*) collected worldwide, for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a five-year period.

*Applicant: Tommy B. Haas, Riverton, UT, PRT–111547*

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

*Applicant: Steven A. Grove, Atlanta, GA, PRT–112069*

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus*

*pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

*Applicant: Edward J. Beattie, Chappell, NE, PRT–113932*

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

*Applicant: Hollywood Animals, Los Angeles, CA, PRT–060470, 060471, 060472, 060473, and 060474*

The applicant requests permits to export and re-import five captive-born leopards (*Panthera pardus*) to worldwide locations for the purpose of enhancement of the species through conservation education. The permit numbers and animals are: 060470, Sheena; 060471, Flynn; 060472, Whoopi; 060473, Satchmo; and 060474, Athari. This notification covers activities to be conducted by the applicant over a three-year period and the import of any potential progeny born while overseas.

**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.

**PRT–112072**

Applicant: Rodney M. Brush, Byron Center, MI,

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.

**PRT –111562**

Applicant: Marshall G. Varner, Jr., Fountain Hills, AZ,

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport-hunted from the Northern Beaufort Sea polar bear population in Canada for personal, noncommercial use.

Dated: November 25, 2005.

**Michael S. Moore,**

*Senior Permit Biologist, Branch of Permits, Division of Management Authority.*

[FR Doc. E5–7472 Filed 12–16–05; 8:45 am]

BILLING CODE 4310–55–P

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### Notice of Availability for the Renewal of an Expired Section 10(a)(1)(B) Permit for Incidental Take of the Golden-Cheeked Warbler in Travis County, TX (Lake)

**SUMMARY:** On February 26, 1999, the U.S. Fish and Wildlife Service (Service) issued a section 10(a)(1)(B) permit, pursuant to Section 10(a) of the Endangered Species Act (Act), for incidental take of the golden-cheeked warbler (GCW) (*Dendroica chrysoparia*) to Mark and Brenda Hogan. This permit was subsequently transferred to Ralph Lake, Jr. on January 12, 2001. The permit (TE–005497) was for a period of five years and expired on February 26, 2004. The requested permit renewal by Ralph Lake will extend the permit expiration by five years from the date the permit is reissued.

**DATES:** To ensure consideration, written comments must be received on or before January 18, 2006.

**ADDRESSES:** Persons wishing to review the request for extension, former incidental take permit, or other related documents may obtain a copy by written or telephone request to Scott Rowin, U.S. Fish and Wildlife Service, 10711 Burnet Road, Suite 200, Austin, Texas 78758, (512/490–0057 ext. 224). Documents will be available for public inspection by written request, or by appointment only, during normal business hours (8 a.m. to 4:30 p.m.) at the Fish and Wildlife Service Austin Office. Comments concerning the request for renewal should be submitted in writing to the Field Supervisor at the above address. Please refer to permit number TE–005497–1 when submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Scott Rowin at the U.S. Fish and Wildlife Service Austin Office, 10711 Burnet Road, Suite 200, Austin, Texas 78758 (512/490–0057 ext. 224).

**SUPPLEMENTARY INFORMATION:** Section 9 of the Act prohibits the ''taking'' of endangered species such as the GCW. However, the Service, under limited circumstances, may issue permits to take endangered wildlife species incidental to, and not the purpose of, otherwise lawful activities. Regulations governing permits for endangered species are at 50 CFR 17.22. This notice is provided pursuant to Section 10(c) of the Act and National Environmental Policy Act regulations (40 CFR 1506.6).

*Applicant:* Ralph Lake Jr. plans to construct a single family residence (SFR) on his 10-acre lot located adjacent to City Park Road in Austin, Travis County, Texas. The construction of a SFR on approximately one acre of the 10-acre lot will eliminate less than one acre of GCW habitat and indirectly impact less than four additional acres of habitat. The original permit included, and the Applicant continues to propose to compensate for incidental take of the GCW by providing $1,500 to the Balcones Canyonlands Preserve, and placing a perpetual conservation easement on the remaining approximately nine acres to the Balcones Canyonlands Preserve. Since this property is located within the acquisition boundaries of the Balcones Canyonlands Preserve, it will add additional acreage to the preserve. The Applicant has agreed to follow all of the existing permit terms and conditions. If renewed, all of the permit terms and conditions will remain the same, and no additional take will be authorized.

**Larry G. Bell,**

*Acting Regional Director, Region 2, Albuquerque, New Mexico.*

[FR Doc. E5–7492 Filed 12–16–05; 8:45 am]

BILLING CODE 4510–55–P

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### Notice of Availability of an Environmental Assessment/Habitat Conservation Plan and Receipt of Application for Construction and Operation of a Residential and Commercial Development on the 307.85-acre Shadow Canyon Property, Williamson County, TX

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

**ACTION:** Notice of availability.

**SUMMARY:** San Gabriel Harvard Limited Partnership (Applicant) has applied to the U.S. Fish and Wildlife Service (Service) for an incidental take permit pursuant to section 10(a) of the

Endangered Species Act (Act). The requested permit, which is for a period of 30 years, would authorize incidental take of the endangered golden-cheeked warbler (*Dendroica chrysoparia*), Bone Cave harvestman (*Texella reyesi*), and Coffin Cave mold beetle (*Batrisodes texanus*). The proposed take would occur as a result of the construction and operation of a residential development on 307.85 acres (124.6 hectares) of the Shadow Canyon property, Williamson County, Texas.

**DATES:** To ensure consideration, written comments must be received on or before February 17, 2006.

**ADDRESSES:** Persons wishing to review the application may obtain a copy by writing to the Regional Director, U.S. Fish and Wildlife Service, P.O. Box 1306, Room 4102, Albuquerque, New Mexico 87103. Persons wishing to review the Environmental Assessment/Habitat Conservation Plan (EA/HCP) may obtain a copy by written or telephone request to Sybil Vosler, U.S. Fish and Wildlife Service, Ecological Services Office, 10711 Burnet Road, Suite 200, Austin, Texas 78758 (512/490–0057, ext. 225). Documents will be available for public inspection by written request or by appointment only during normal business hours (8 a.m. to 4:30 p.m.) at the U.S. Fish and Wildlife Service Office, Austin, Texas. Data or comments concerning the application and EA/HCP should be submitted in writing to the Field Supervisor, U.S. Fish and Wildlife Service, Ecological Services Office, 10711 Burnet Road, Suite 200, Austin, Texas 78758. Please refer to permit number TE–116313–0 when submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Sybil Vosler, U.S. Fish and Wildlife Service, Ecological Services Office, 10711 Burnet Road, Suite 200, Austin, Texas 78758 (512/490–0057, ext. 225).

**SUPPLEMENTARY INFORMATION:** Section 9 of the Act prohibits the ''taking'' of endangered species such as the golden-cheeked warbler. However, the Service, under limited circumstances, may issue permits to take endangered wildlife species incidental to, and not the purpose of, otherwise lawful activities. Regulations governing permits for endangered species are at 50 CFR 17.22. The Service has prepared an EA/HCP for the incidental take application. A determination of jeopardy or non-jeopardy to the species and a decision pursuant to the National Environmental Policy Act (NEPA) will not be made until at least 60 days from the date of publication of this notice. This notice is provided pursuant to Section 10(c) of the Act and NEPA regulations (40 CFR 1506.6).

*Applicant:* San Gabriel Harvard Limited Partnership plans to construct a residential and commercial development on 307.85 acres of the Shadow Canyon property, Williamson County, Texas. This action would adversely affect 43.35 acres (17.5 hectares) of oak-juniper woodland resulting in take of one to two pairs of golden-cheeked warblers. The Applicant proposes to compensate for this incidental take of the golden-cheeked warbler by purchasing 86 credits from a conservation bank approved by the Service to preserve 86 acres (35 hectares) of golden-cheeked warbler habitat in perpetuity within the acquisition area of the Balcones Canyonlands National Wildlife Refuge. The development also has the potential to take the Bone Cave harvestman and/or the Coffin Cave mold beetle should previously unknown but occupied voids be discovered during construction. To compensate for this event, the Applicant proposes to establish a 43.84-acre (17.7-hectare) preserve on-site to be managed in perpetuity for the benefit of the endangered karst invertebrates.

**Geoffrey L. Haskett,**

*Acting Regional Director, Region 2, Albuquerque, New Mexico.*

[FR Doc. E5–7489 Filed 12–16–05; 8:45 am]

**BILLING CODE 4510–55–P**

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### Draft Environmental Assessment/Habitat Conservation Plan and Receipt of Applications for Incidental Take Permits for the Douglas County Board of Commissioners, the Town of Castle Rock and the Town of Parker for the Douglas County Habitat Conservation Plan, in Douglas County, CO

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

**ACTION:** Notice of availability and receipt of applications.

**SUMMARY:** The Board of Commissioners of the County of Douglas, the Town of Castle Rock and the Town of Parker (Applicants) have each separately applied for an incidental take permit pursuant to section 10(a)(1)(B) of the Endangered Species Act (ESA) of 1973, as amended. The requested permits would authorize the incidental take of the federally threatened Preble's meadow jumping mouse, (Zapus hudsonius preblei) (Prebles), through the potential loss and modification of its habitat associated with the otherwise legal construction, use, maintenance, and repair of new and existing public facilities and with habitat improvements, along the mainstem and tributaries to the South Platte River, Plum Creek, and Cherry Creek, in Douglas County, Colorado. The duration of the permit would be 10 years from the date of issuance.

We also announce the availability of a document combining the Service's Environmental Assessment (EA) and the Douglas County Habitat Conservation Plan (DCHCP) for public review and comment. The Service requests comments from the public on the permit applications and the EA. The permit applications include the proposed DCHCP and associated draft Implementing Agreement. The DCHCP describes the proposed action and the measures that the Applicants will undertake to minimize and mitigate to the maximum extent practicable the take of Prebles. All comments on the EA and permit applications will become part of the administrative record and will be available to the public. We provide this notice pursuant to section 10(a) of the ESA and National Environmental Policy Act regulations (40 CFR 1506.6).

**DATES:** Written comments on the permit application and EA/DCHCP should be received on or before February 17, 2006.

**ADDRESSES:** Comments regarding the permit applications and EA/DCHCP should be addressed to Susan Linner, Field Supervisor, U.S. Fish and Wildlife Service, Colorado Field Office, 755 Parfet Street, Suite 361, Lakewood, Colorado 80215. Comments also may be submitted by facsimile to (303) 275–2371. Individuals wishing copies of the EA/DCHCP and associated documents for review or public inspection should immediately contact the above office during normal business hours. Documents also may be accessed through the following Web site *http://www.douglas.co.us*.

**FOR FURTHER INFORMATION CONTACT:** Adam Misztal, Fish and Wildlife Biologist, Colorado Field Office (see **ADDRESSES**), telephone (303) 275–2370.

**SUPPLEMENTARY INFORMATION:**

### Background

Section 9 of the ESA and Federal regulations prohibit the ''take'' of a species listed as endangered or threatened. Take is defined under the ESA, in part, as to kill, harm, or harass a federally listed species. However, the Service may issue permits to authorize ''incidental take'' of listed species under limited circumstances. Incidental take is

defined under the ESA as take of a listed species that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity under limited circumstances. Regulations governing permits for threatened species are promulgated in 50 CFR 17.32.

The Applicants' original draft regional county-wide HCP, initiated at the time of listing in May 1998, focused on providing coverage for activities conducted by the Applicants as well as private landowners and other entities, addressed multiple plant, wildlife and fish species, and proposed a permit duration of 50 years. The Applicants continued to pursue the regional HCP approach until February 2005 when the Service announced its 12-month finding on the two delisting petitions and its proposal to remove Prebles from the List of Endangered and Threatened Wildlife (70 FR 5404 [February 2, 2005]). In light of the proposed delisting of Prebles, the Applicants considered the following alternatives—(1) the no action alternative, resulting in the status quo requiring compliance with the ESA on a project by project basis; (2) the regional HCP alternative, affording broad incidental take permit coverage; or (3) the proposed action (DCHCP), entailing scaling back the regional HCP to address only Prebles, and covering only activities conducted by the Applicants for a reduced permit duration.

The Service's EA evaluates the environmental consequences of the three alternatives discussed above—the Proposed Action (the DCHCP); a Regional HCP; and No Action. The No Action alternative was rejected because it would likely have greater environmental impacts, would not provide as great a conservation benefit as the proposed action, and is more expensive and time consuming than the proposed action. While the Regional HCP alternative may provide greater conservation benefit to Prebles, it is not economically viable and no longer meets the Applicants' purpose and need, and thus was rejected. The draft EA analyzes the onsite, offsite, and cumulative impacts of the proposed action and associated development and construction activities and mitigation activities on the Prebles, and also on other threatened or endangered species, vegetation, wildlife, wetlands, geology/soils, land use, water resources, air and water quality, and cultural resources.

The DCHCP delineates riparian areas and adjacent upland habitat on non-Federal lands with a high likelihood of supporting Prebles within the three major watersheds in the County (Plum Creek, Cherry Creek, and South Platte River upstream of Chatfield Reservoir), referred to as the Riparian Conservation Zone (RCZ). The DCHCP seeks to provide incidental take coverage for construction, maintenance, use, and closure of roads, bridges, trails, and recreational facilities, maintenance and repair of existing structures and facilities, emergency activities, habitat improvements that benefit the RCZ, and other necessary public improvement projects (covered activities) identified by the Applicants that need to be completed during the next 10 years. The permanent impacts to the RCZ associated with the covered activities are distributed throughout the County and the RCZ and will permanently affect a maximum of approximately 308 acres (125 hectares) (about 1.6 percent of the RCZ) and temporarily disturb approximately 122 acres (49 hectares) over the life of the permit. The DCHCP establishes an impact cap (including permanent and temporary impacts) of approximately 30 acres (12 hectares) of the RCZ that will not be exceeded during the permit term absent amendment of the DCHCP and incidental take permits.

The DCHCP sets forth measures to minimize and mitigate impacts to Prebles and its potential habitat through impact avoidance, restoration of temporary impacts, implementation of activity conditions and best management practices, and habitat preservation. The minimization and mitigation efforts identified in the DCHCP will likely provide a benefit to Prebles and other wildlife by protecting approximately 1,133 acres (459 hectares), restoring portions of RCZ, and by providing a consistent riparian conservation strategy among the Applicants. The HCP addresses the proposed delisting of Prebles.

We will evaluate the application, associated documents, and comments submitted thereon to determine whether the application meets the requirement of National Environmental Policy Act regulations and section 10(a) of the ESA. If we determine that those requirements are met, we will issue a permit to the Applicants for the incidental take of Prebles. We will make our final permit decision no sooner than 60 days from the date of this notice.

Dated: December 2, 2005.

**Elliott Sutta,**

*Acting Deputy Regional Director, Region 6.*

[FR Doc. E5–7491 Filed 12–16–05; 8:45 am]

BILLING CODE 4310–55–P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### Service Regulations Committee Meeting

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

**ACTION:** Notice of meeting.

**SUMMARY:** The Fish and Wildlife Service (hereinafter Service) will conduct an open meeting on February 1, 2006, to identify and discuss preliminary issues concerning the 2006–07 migratory bird hunting regulations.

**DATES:** The meeting will be held February 1, 2006.

**ADDRESSES:** The Service Regulations Committee will meet at the Embassy Suites Hotel, Denver—International Airport, 7001 Yampa Street, Denver, Colorado, (303) 574–3000.

**FOR FURTHER INFORMATION CONTACT:** Brian Millsap, Chief, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, ms MBSP–4107–ARLSQ, 1849 C Street, NW., Washington, DC 20240, (703) 358–1714.

**SUPPLEMENTARY INFORMATION:** Under the authority of the Migratory Bird Treaty Act (16 U.S.C. 703–712), the U.S. Fish and Wildlife Service regulates the hunting of migratory game birds. We update the migratory game bird hunting regulations, located at 50 CFR part 20, annually. Through these regulations, we establish the frameworks, or outside limits, for season lengths, bag limits, and areas for migratory game bird hunting. To help us in this process, we have administratively divided the nation into four Flyways (Atlantic, Mississippi, Central, and Pacific), each of which has a Flyway Council. Representatives from the Service, the Service's Migratory Bird Regulations Committee, and Flyway Council Consultants will meet on February 1, 2006, at 8:30 a.m. to identify preliminary issues concerning the 2006–07 migratory bird hunting regulations for discussion and review by the Flyway Councils at their March meetings.

In accordance with Departmental policy regarding meetings of the Service Regulations Committee attended by any person outside the Department, these meetings are open to public observation.

Dated: December 6, 2005.

**Paul R. Schmidt,**

*Assistant Director, Migratory Birds, U.S. Fish and Wildlife Service.*

[FR Doc. E5–7473 Filed 12–16–05; 8:45 am]

BILLING CODE 4310–55–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[MT–039–1310–EJ]**

### Notice of Public Meeting, Dakotas Resource Advisory Council Meeting

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of public meeting.

**SUMMARY:** In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM), Dakotas Resource Advisory Council will meet as indicated below.

**DATES:** A meeting will be held February 9, 2006, at the Days Inn Grand Dakota Lodge at 532 15th Street West, Dickinson, ND 58601, beginning at 8 a.m. The public comment period will begin at 8 a.m.

**SUPPLEMENTARY INFORMATION:** The 15-member Council advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in North and South Dakota. All meetings are open to the public. The public may present written comments to the Council. Each formal Council meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation, or other reasonable accommodations, should contact the BLM as provided below. The Council will hear updates to Recreation Resource Advisory Committee roles, Off Highway Vehicle Planning, Sage Grouse Conservation Plan, and upcoming resource management planning efforts.

**FOR FURTHER INFORMATION CONTACT:** Marian Atkins, Field Manager, South Dakota Field Office, 310 Roundup St., Belle Fourche, South Dakota, 605.892.7000, or Lonny Bagley, Field Manager, North Dakota Field Office, 2933 3rd Ave., W. Dickinson, North Dakota, 701.227.7700.

Dated: December 12, 2005.

**Lonny R. Bagley,**

*Field Manager.*

[FR Doc. E5–7490 Filed 12–16–05; 8:45 am]

**BILLING CODE 4310–$$–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[MT–060–01–1020–PG]**

### Notice of Public Meeting; Central Montana 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 and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management (BLM) Central Montana Resource Advisory Council (RAC) will meet as indicated below.

**DATES:** The meeting will be held January 10 and 11, 2006, at the Bureau of Land Management's Lewistown Field Office in Lewistown, Montana (920 NE Main, in Lewistown, Montana).

The January 10, meeting will begin at 9 a.m. with a 60-minute public comment period. This meeting is scheduled to adjourn at 6 p.m.

The January 11, meeting will begin at 8 a.m. with a 60-minute public comment period. This meeting is scheduled to adjourn at 3 p.m.

**SUPPLEMENTARY INFORMATION:** This 15-member council advises the Secretary of the Interior on a variety of management issues associated with public land management in Montana. At this meeting the council will discuss/act upon:

The minutes of their proceeding meeting;
Orientation of new council members;
Field managers' updates;
An overview of the draft monument resource management plan; and
Administrative details.

All meetings are open to the public. The public may present written comments to the RAC. Each formal RAC meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited.

**FOR FURTHER INFORMATON CONTACT:** June Bailey, Lewistown Field Manager, Lewistown Field Office, P.O. Box 1160, Lewistown, Montana 59457, 406/538–1900.

Dated: December 13, 2005.

**June Bailey,**

*Lewistown Field Manager.*

[FR Doc. E5–7495 Filed 12–16–05; 8:45 am]

**BILLING CODE 4310–??–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[UT–921–1430–ET; UTU 042887]**

### Public Land Order No. 7650; Revocation of Public Land Order No. 852; Utah

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Public Land Order.

**SUMMARY:** This order revokes a Public Land Order in its entirety, which withdrew approximately 8,927 acres for automobile racing and testing grounds. The lands are located within another overlapping withdrawal, so Public Land Order No. 852 is no longer needed.

**EFFECTIVE DATE:** January 18, 2005.

**FOR FURTHER INFORMATION CONTACT:** Rhonda Flynn, BLM Utah State Office, 440 West 200 South, Suite 500, Salt Lake City, Utah 84101–1345, 801–539–4132.

**SUPPLEMENTARY INFORMATION:** The lands withdrawn by Public Land Order No. 852 are located within another overlapping withdrawal for the Bonneville Salt Flats. This is a record-clearing action only. A copy of the original withdrawal order, Public Land Order No. 852, is available from the BLM Utah State Office at the address stated above.

**Order**

By virtue of the authority vested in the Secretary of the Interior by section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (2000), it is ordered as follows:

Public Land Order No. 852 (17 FR 6100, July 8, 1952) which withdrew approximately 8,927 acres in Tooele County, Utah for automobile racing and testing grounds, is hereby revoked in its entirety.

Dated: November 16, 2005.

**Mark Limbaugh,**

*Assistant Secretary of the Interior.*

[FR Doc. E5–7485 Filed 12–16–05; 8:45 am]

**BILLING CODE 4310–DQ–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[CO–930–1430–ET; COC–69155]**

### Notice of Proposed Withdrawal and Transfer of Jurisdiction, Colorado; Correction

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Correction.

**SUMMARY:** This action corrects errors in the notice published as FR doc 05–21568 in the **Federal Register**, 70 FR 62138 (October 28, 2005).

On page 62138, second column, delete last paragraph of the notice and replace with the following paragraph: ''Notice is hereby given that an opportunity for a public meeting is afforded in connection with the proposed withdrawal and transfer of jurisdiction. All interested persons who desire a public meeting for the purpose of being heard on the proposed withdrawal and transfer of jurisdiction must submit a written request to the BLM Colorado State Director, within 90 days from the date of publication of this correction. If the authorized officer determines that a public meeting will be held, a notice of the time and place will be published in the **Federal Register** at least 30 days before the scheduled date of the meeting.''

Dated: December 1, 2005.

**John D. Beck,**

*Acting Chief, Branch of Lands and Minerals.*

[FR Doc. E5–7484 Filed 12–16–05; 8:45 am]

BILLING CODE 4310–JB–P

## JUDICIAL CONFERENCE OF THE UNITED STATES

### Hearings of the Judicial Conference Advisory Committees on Rules of Appellate, Bankruptcy, and Criminal Procedure

**AGENCY:** Judicial Conference of the United States; Advisory Committees on Rules of Appellate, Bankruptcy, and Criminal Procedure.

**ACTION:** Notice of Cancellation of Open Hearing.

**SUMMARY:** The public hearings on proposed amendments to the Federal Rules of Appellate, Bankruptcy, and Criminal Procedure, scheduled for January 9, 2006, in Phoenix, Arizona, have been canceled. [Original notice of hearing appeared in the **Federal Register** of September 13, 2005.]

**FOR FURTHER INFORMATION CONTACT:** John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, Washington, DC 20544, telephone (202) 502–1820.

Dated: December 12, 2005.

**John K. Rabiej,**

*Chief, Rules Committee Support Office.*

[FR Doc. 05–24187 Filed 12–16–05; 8:45 am]

BILLING CODE 2210–55–M

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on October 18, 2005, Norac, Inc., 405 S. Motor Avenue, P.O. Box 577, Azusa, California 91702, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of THC Tetrahydrocannabinols (7370), a basic class of controlled substance listed in Schedule I.

The company plans to manufacture the listed controlled substance in bulk for formulation into the pharmaceutical controlled substance Marinol®.

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 February 17, 2006.

Dated: December 8, 2005.

**Joseph T. Rannazzisi,**

*Acting Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. E5–7487 Filed 12–16–05; 8:45 am]

BILLING CODE 4410–09–P

## DEPARTMENT OF LABOR

### Office of the Secretary

### Submission for OMB Review: Comment Request

December 12, 2005.

The Department of Labor (DOL) has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13,44 U.S.C. Chapter 35). A copy of this ICR, with applicable supporting documentation, may be obtained by calling the Department of Labor. To obtain documentation contact Ira Mills on 202–693–4122 (this is not a toll-free number) or E-Mail: *Mills.Ira@dol.gov*.

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for ETA, Office of Management and Budget, Room 10235, Washington, DC 20503, 202–395–7316 (this is not a toll free number), within 30 days from the date of this publication in the **Federal Register**.

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

*Agency:* Employment and Training Administration (ETA).

*Type of Review:* Extension of a currently approved collection.

*Title:* Tax Performance System.

*OMB Number:* 1205–0332.

*Frequency:* Annual Report.

*Affected Public:* State, Local or Tribal Government.

*Type of Response:* Reporting.

*Number of Respondents:* 52.

*Annual Responses:* 52.

*Average Response time:* 1739 hours.

*Total Annual Burden Hours:* 90,428.

*Total Annualized Capital/Startup Costs:* 0.

*Total Annual Costs (operating/maintaining systems or purchasing services):* 0

*Description:* The Tax Performance System (TPS) gathers and disseminates information on the timeliness and accuracy of state unemployment insurance tax operations. This submission proposes to extend the TPS for three years.

**Ira L. Mills,**

*Departmental Clearance Officer.*

[FR Doc. E5–7477 Filed 12–16–05; 8:45 am]

BILLING CODE 4510–30–P

## DEPARTMENT OF LABOR

### Office of the Secretary

### Submission for OMB Review: Comment Request

December 12, 2005.

The Department of Labor (DOL) has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13,44 U.S.C. Chapter 35). A copy of this ICR, with applicable supporting documentation, may be obtained by contacting Darrin King on 202–693–4129 (this is not a toll-free number) or E-Mail: *king.darrin@dol.gov.*

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Employment and Training Administration (ETA), Office of Management and Budget, Room 10235, Washington, DC 20503, 202–395–7316 (this is not a toll free number), within 30 days from the date of this publication in the **Federal Register.**

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

*Agency:* Employment and Training Administration.

*Type of Review:* Revision of a Currently Approved Collection.

*Title:* Labor Exchange Reporting System (LERS).

*OMB Number:* 1205–0240.

*Form Numbers:* ETA–9002 A through E and VETS–200 A through C.

*Frequency:* On occasion for recordkeeping and Quarterly for reporting.

*Affected Public:* State, Local or Tribal Government.

*Type of Response:* Recordkeeping and Reporting.

*Number of Respondents:* 54.

| Form | Annual responses | Average response time (hours) | Burden hours |
|---|---|---|---|
| ETA 9002 A | 216 | 346 | 74,641 |
| ETA 9002 B | 216 | 346 | 74,641 |
| ETA 9002 C | 216 | 346 | 74,641 |
| ETA 9002 D | 216 | 346 | 74,641 |
| ETA 9002 E | 216 | 21 | 4,536 |
| VETS 200 A | 216 | 346 | 74,641 |
| VETS 200 B | 216 | 346 | 74,641 |
| VETS 200 C | 216 | 346 | 74,641 |
| Total | 1,728 | ..... | *527,020 |

* Except for the ETA 9002E, the average time per response for the ETA 9002 A, B, C, D, and VETS 200 A, B, and C forms is estimated at 345.56 hours. Any statistical differences related to the calculation of total annual burden hours for these forms are due to rounding at 346.

*Total Annualized Capital/Startup Costs:* $0.

*Total Annual Costs (operating/maintaining systems or purchasing services):* $0.

*Description:* Respondents are State governments. Selected standardized information pertaining to customers in Wagner-Peyser programs will be collected and reported for the purposes of general program oversight, evaluation and performance assessment.

**Ira L. Mills,**

*Departmental Clearance Officer.*

[FR Doc. E5–7478 Filed 12–16–05; 8:45 am]

**BILLING CODE 4510–30–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

### Proposed Information Collection Request Submitted for Public Comment and Recommendations; ATAA Activities Report

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

**DATES:** Written comments must be submitted to the office listed below on or before February 17, 2006.

**ADDRESSES:** Susan Worden, U.S. Department of Labor, Employment and Training Administration, Room C–5311, 200 Constitution Avenue, Phone: 202–693–3708, Fax: 202–693–3517, E-mail *worden.susan@dol.gov.*

**SUPPLEMENTARY INFORMATION:**

I. Section 246 of Title II, Chapter 2 of the Trade Act of 1974, as amended by the Trade Act of 2002, establishes ATAA as an alternative assistance program for older workers certified eligible to apply for Trade Adjustment Assistance. This program is effective for petitions filed on or after August 6, 2003. ATAA is designed to allow eligible older workers for whom retraining may not be appropriate to quickly find reemployment and receive

a wage subsidy to help bridge the salary gap between their old and new employment. To receive the ATAA benefits, workers must be TAA and ATAA certified.

Key workload data on ATAA is needed to measure program activities and to allocate program and administrative funds to the State Agencies administering the Trade programs for the Secretary. States will provide this information on the ATAA Activities Report (ATAAAR).

Regulations published at 617.61 give the Secretary authority to require the States to report the data described in this directive; therefore the respondents' obligation to fulfill these requirements is mandatory.

II. *Review Focus.* Currently, the Employment and Training Administration is soliciting comments concerning the proposed collection of the Alternative Trade Adjustment Assistance Activities Report (ATAAAR), and is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

III. *Current Actions. Type of Review:* New collection.

*Agency:* Employment and Training Administration.

*Title:* Alternative Trade Adjustment Assistance Activities Report (ATAAAR), ETA.

*OMB Number:* New.

*Record Keeping:* Respondent is expected to maintain records which support the requested data for three years.

*Affected Public:* State, Local or Tribal Government.

*Burden:* 50 Responses × 50 minutes = 41.5 hours.

*Total Respondents:* 50.

*Frequency:* Quarterly.

*Total Responses:* 200.

*Average Time per Response:* 50 minutes.

*Estimated Total Burden Hours:* 166.

*Total Burden Cost (capital/startup):* $120,250.

*Total Burden Cost (operating/maintaining):* $0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: December 7, 2005.

**Emily Stover Derocco,**

*Assistant Secretary for Employment and Training.*

[FR Doc. E5–7496 Filed 12–16–05; 8:45 am]

BILLING CODE 4510–30–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. Blue Mountain Energy, Inc.**

[Docket No. M–2005–076–C]

Blue Mountain Energy, Inc., 3607 County Road #65, Rangely, Colorado 81648 has filed a petition to modify the application of 30 CFR 75.312(c) (Main mine fan examinations and records) to its Deserado Mine (MSHA I.D. No. 05–03505) located in Rio Blanco County, Colorado. The petitioner requests a modification of the existing standard to permit testing of the automatic fan signal device at least every 31 days without shutting down the fan and without removing miners from the mine. The petition has listed in this petition specific procedures that will be followed when the proposed alternative method is implemented. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

**2. Alcoa, Inc.**

[Docket No. M–2005–077–C]

Alcoa, Inc., 3990 John D. Harper Road, Rockdale, Texas 76567 has filed a petition to modify the application of 30 CFR 77.803 (Fail safe ground check circuits on high-voltage resistance grounded systems) to its Three Oaks Mine (MSHA I.D. No. 41–04085) located in Lee and Bastrop Counties, Texas, and its Sandow Mine (MSHA I.D. No. 41–00356) located in Lee and Milam Counties, Texas. The petitioner requests a modification of the existing standard to permit disabling the ground fault and ground check circuits while lowering and raising a dragline boom or mast using the dragline on-board generators. The petitioner has listed specific procedures in this petition that will be followed when the proposed alternative method is implemented. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

**3. Advent Mining, LLC**

[Docket No. M–2005–078–C]

Advent Mining, LLC, 3603 State Route 370, Sebree, Kentucky 42455 has filed a petition to modify the application of 30 CFR 75.1101–1(b) (Deluge-type water spray systems) to its Onton #9 Mine (MSHA I.D. No. 15–18547) located in Webster County, Kentucky. The petitioner requests a modification of the existing standard to permit an alternative method compliance in lieu of using blow-off dust covers for the nozzles of a deluge-type water spray system. 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 January 18, 2006. Copies of these petitions are available for inspection at that address.

Dated at Arlington, Virginia this 13th day of December 2005.

**Rebecca J. Smith,**

*Acting Director, Office of Standards, Regulations, and Variances.*

[FR Doc. E5–7504 Filed 12–16–05; 8:45 am]

BILLING CODE 4510–43–P

## MILLENNIUM CHALLENGE CORPORATION

**[MCC FR 05–20]**

### Notice of Quarterly Report (July 1, 2005 through September 30, 2005)

**AGENCY:** Millennium Challenge Corporation.

**SUMMARY:** The Millennium Challenge Corporation (MCC) is reporting for the quarter July 1, 2005 through September 30, 2005, with respect to either assistance provided under Section 605 of the Millennium Challenge Act of 2003 (Pub. L. 108–199, Division D (the Act)), or transfers of funds to other federal agencies pursuant to Section 619 of that Act. The following report shall be made available to the public by means of publication in the **Federal Register** and on the Internet Web site of the MCC (*http://www.mcc.gov*) in accordance with Section 612(b) of the Act.

ASSISTANCE PROVIDED UNDER SECTION 605

| Projects | Obligated | Objectives | Disbursements | Measures |
|---|---|---|---|---|
| Country: Madagascar Year: 2005 Quarter 4 Total obligation: $109,773,000<br>Entity to which the assistance is provided: MCA Madagascar Total Quarterly Disbursement: $2.475 million | | | | |
| Land Tenure Project | $36 mil. | Increase Land Titling and Security. | | Legislative proposal ("loin de cadrage") reflecting the PNF submitted to Parliament and passed.<br>Percentage of land documents inventoried, restored, and/or digitized.<br>Average time and cost required to carry out property-related transactions at the local and/or national land services offices. Time/cost to respond to information request, issue titles and to modify titles after the first land right.<br>Number of land disputes reported and resolved in the target zones and sites of implementation.<br>Percentage of land in the zones that is demarcated and ready for titling.<br>Promote knowledge and awareness of land tenure reforms among inhabitants in the zones (surveys). |
| Finance Project | $37 mil. | Increase Competition in the Financial Sector. | | Submission to Parliament and passage of new laws recommended by outside experts and relevant commissions.<br>CPA Association (CSC) list of accountants registered.<br>Maximum check clearing delay.<br>Volume of funds in payment system and number of transactions.<br>Public awareness of new financial instruments (surveys).<br>Report of credit and payment information to a central database.<br>Number of holders of new denomination T-bill holdings, and T-bill issuance outside Antananarivo as measured by Central Bank report of redemption date.<br>Volume of production covered by warehouse receipts in the zones.<br>Volume of MFI lending in the zones.<br>MFI portfolio-at-risk delinquency rate.<br>Number of new bank accounts in the zones. |
| Agricultural Business Investment Project. | $4 mil. | Improve Agricultural Projection Technologies and Market Capacity in Rural Areas. | | Number of rural producers receiving or soliciting information from ABCs about the opportunities.<br>Zones identified and description of beneficiaries within each zone submitted.<br>Number of cost-effective investment strategies developed.<br>Number of plans prepared.<br>Number of farmers and business employing technical assistance received. |
| Program Administration and Control. | $15.464 mil. | | $2.475 mil. | n/a. |
| **Program Objective** | **Obligated** | **Program goal** | **Disbursements** | **Measures** |
| Country: Honduras Year: 2005 Quarter 4 Total Obligation: $215,000,000<br>Entity to which the assistance is provided: MCA Honduras Total Quarterly Disbursement: $00** | | | | |
| Rural Development Project. | $72 mil. | Increase the productivity and business skills of farmers who operate small and medium-size farms and their employees. | | Hours of technical assistance delivered to Program Farmers (thousands).<br>Funds lent by MCA–Honduras to financial institutions (cumulative).<br>Hours of technical assistance to financial institutions (cumulative). |

| Program Objective | Obligated | Program goal | Disbursements | Measures |
|---|---|---|---|---|
| Transportation Project ..... | $126 mil. ..... | Reduce transportation costs between targeted production centers and national, regional and global markets. | ..... | Lien Registry equipment installed.<br>Kilometers of farm-to-market road upgraded (cumulative).<br>Kilometers of highway upgraded.<br>Kilometers of secondary road upgraded.<br>Number of weight stations built. |
| Program Administration and Control. | $12.122 mil. .... | ..... | $0 | |

** The compact entered into force on September 30, the last day of the quarter, and therefore no disbursements were made in the quarter.

Transfers under 619b

| U.S. agency to which funds were transferred | Amount | Country | Description of program or project |
|---|---|---|---|
| U.S. Agency for International Development ..... | $60,000,000 | NA | Threshold Program. |

Dated: December 13, 2005.

**Frances C. McNaught,**

*Vice President, Congressional and Public Affairs, Millennium Challenge Corporation.*

[FR Doc. 05–24179 Filed 12–16–05; 8:45 am]

BILLING CODE 9210–01–P

## NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Office of the Federal Register

### Agreements in Force as of December 31, 2004 Between the American Institute in Taiwan and the Taipei Economic and Cultural Representative Office in the United States

**AGENCY:** Office of the Federal Register, NARA.

**ACTION:** Notice of availability of agreements.

**SUMMARY:** The American Institute in Taiwan has concluded a number of agreements with the Taipei Economic and Cultural Representative Office in the United States (formerly the Coordination Council for North American Affairs) in order to maintain cultural, commercial and other unofficial relations between the American people and the people of Taiwan. The Director of the Federal Register is publishing the list of these agreements on behalf of the American Institute in Taiwan in the public interest.

**SUPPLEMENTARY INFORMATION:** Cultural, commercial and other unofficial relations between the American people and the people of Taiwan are maintained on a non-governmental basis through the American Institute in Taiwan (AIT), a private nonprofit corporation created under the Taiwan Relations Act (Public Law 96–8; 93 Stat. 14). The Coordination Council for North American Affairs (CCNAA) was established as the nongovernmental Taiwan counterpart to AIT. On October 10, 1995 the CCNAA was renamed the Taipei Economic and Cultural Representative Office in the United States (TECRO).

Under section 12 of the Act, agreements concluded between AIT and TECRO (CCNAA) are transmitted to the Congress, and according to sections 6 and 10(a) of the Act, such agreements have full force and effect under the law of the United States.

The texts of the agreements are available from the American Institute in Taiwan, 1700 North Moore Street, Suite 1700, Arlington, Virginia 22209. For further information, please telephone (703) 525–8474, or fax (703) 841–1385.

Following is a list of agreements between AIT and TECRO (CCNAA) which were in force as of December 31, 2004.

Dated: November 22, 2005.

**Barbara J. Schrage,**

*Trustee and Managing Director ad interim, American Institute in Taiwan.*

Dated: December 14, 2005.

**Raymond A. Mosley,**

*Director of the Federal Register.*

### AIT–TECRO Agreements

*In Force as of December 31, 2004*

### Status of TECRO

The Exchange of Letters concerning the change in the name of the Coordination Council for North American Affairs (CCNAA) to the Taipei Economic and Cultural Representative Office in the United States (TECRO). Signed December 27, 1994 and January 3, 1995. Entered into force January 3, 1995.

### Agriculture

1. Guidelines for a cooperative program in the agriculture sciences. Signed January 15 and 28, 1986. Entered into force January 28, 1986.
2. Amendment amending the 1986 guidelines for a cooperative program in the agricultural sciences. Effected by exchange of letters September 1 and 11, 1989. Entered into force September 11, 1989.
3. Cooperative service agreement to facilitate fruit and vegetable inspection through their designated representatives, the United States Department of Agriculture Animal and Plant Health Inspection Service (APHIS) and the Taiwan Provincial Fruit Marketing Cooperative (TPFMC) supervised by the Taiwan Council of Agriculture (COA). Signed April 28, 1993. Entered into force April 28, 1993.
4. Memorandum of agreement concerning sanitary/phytosanitary and agricultural standards. Signed November 4, 1993. Entered into force November 4, 1993.
5. Agreement amending the guidelines for the cooperative program in agricultural sciences. Signed October 30, 2001. Entered into force October 30, 2001.

### Aviation

1. Memorandum of agreement concerning the arrangement for certain aeronautical equipment and services relating to civil aviation (NAT–I–845), with annexes. Signed September 24 and October 23, 1981. Entered into force October 23, 1981.
2. Amendment amending the memorandum of agreement concerning aeronautical equipment and services of September 24 and October 23, 1981. Signed September 18 and 23, 1985. Entered into force September 3, 1985.

3. Agreement amending the memorandum of agreement of September 24 and October 23, 1981, concerning aeronautical equipment and services. Signed September 23 and October 17, 1991. Entered into force October 17, 1991.

4. Air transport agreement, with annexes. Signed at Washington March 18, 1998. Entered into force March 18, 1998.

5. Agreement for promotion of aviation safety. Signed June 30, 2003. Entered into force June 30, 2003.

**Conservation**

1. Memorandum on cooperation in forestry and natural resources conservation. Signed May 23 and July 4, 1991. Entered into force July 4, 1991.

2. Memorandum on cooperation in soil and water conservation under the guidelines for a cooperative program in the agricultural sciences. Signed at Washington October 5, 1992. Entered into force October 5, 1992.

3. Agreement on technical cooperation in conservation of flora and fauna. Signed April 7, 1999. Entered into force April 7, 1999.

4. Memorandum of understanding concerning cooperation in fisheries and aquaculture. Signed July 30, 2002. Entered into force July 30, 2002.

5. Agreement on technical cooperation in forest management and nature conservation. Signed October 24, 2003 and February 27, 2004. Entered into force February 27, 2004.

**Consular**

1. Agreement regarding passport validity. Effected by exchange of letters of August 26 and November 13, 1998. Entered into force December 10, 1998.

**Consumer Product Safety**

1. Memorandum of Understanding for cooperation associated with consumer product safety matters. Signed April 29 and July 27, 2004. Entered into force July 27, 2004.

**Customs**

1. Agreement for technical assistance in customs operations and management, with attachment. Signed May 14 and June 4, 1991. Entered into force June 4, 1991.

2. Agreement on TECRO/AIT carnet for the temporary admission of goods. Signed June 25, 1996. Entered into force June 25, 1996.

3. Agreement regarding mutual assistance between their designated representatives, the United States Customs Administration and the Taiwan Customs Administration. Signed January 17, 2001. Entered into force January 17, 2001.

4. Declaration of Principles for governing cooperation, on the basis of reciprocity, including the posting of AIT Representatives at the Port of Kaohsiung, and the posting of TECRO Representatives at certain U.S. seaports. Signed August 18, 2004. Entered into force August 18, 2004.

**Education and Culture**

1. Agreement amending the agreement for financing certain educational and cultural exchange programs of April 23, 1964. Effected by exchange of letters at Taipei April 14 and June 4, 1979. Entered into force June 4, 1979.

2. Agreement concerning the Taipei American School, with annex. Signed at Taipei February 3, 1983. Entered into force February 3, 1983.

**Energy**

1. Agreement relating to the establishment of a joint standing committee on civil nuclear cooperation. Signed at Taipei October 3, 1984. Entered into force October 3, 1984.

2. Agreement amending and extending the agreement of October 3, 1984, relating to the establishment of a joint standing committee on civil nuclear cooperation. Signed October 19, 1989. Entered into force October 19, 1989.

3. Agreement abandoning in place in Taiwan the Argonaut Research Reactor loaned to National Tsing Hua University. Signed November 28, 1990.

4. Agreement Amending and Extending the Agreement of October 3, 1984, as amended and extended, relating to the establishment of a joint standing committee on civil nuclear cooperation. Signed October 3, 1994. Entered into force October 3, 1994.

5. Agreement concerning safeguards arrangements for nuclear materials transferred from France to Taiwan. Effected by exchange of letters February 12 and May 13, 1993. Entered into force May 13, 1993.

6. Agreement relating to participation in the USNRC program of severe accident research, with appendix. Signed February 18 and June 24, 1993. Entered into force June 24, 1993, effective January 1, 1993.

7. Agreement regarding participation in the Second USNRC International Piping Integrity Research Group Program, with addendum. Signed at Arlington and Washington February 7 and June 30, 1994. Entered into force June 30, 1994.

8. Memorandum of Agreement for release of an Energy and Power Evaluation Program (ENPEP) computer software package. Signed January 25 and February 27, 1995. Entered into force February 27, 1995.

9. Agreement relating to participation in the USNRC's program of thermal-hydraulic code applications and maintenance. Signed January 5 and June 26, 1998. Entered into force June 26, 1998.

10. Agreement regarding terms and conditions for the acceptance of foreign research reactor spent nuclear fuel at the Department of Energy's Savannah River site. Signed December 28, 1998 and February 25, 1999. Entered into force February 25, 1999.

11. Agreement in the area of probabilistic risk assessment research. Signed July 20 and December 27. Entered into force January 1, 1999.

12. Agreement relating to the participation in the United States Nuclear Regulatory Commission program of severe accident research. Signed May 15, 2003 and August 8, 2003. Entered into force August 8, 2003, effective January 1, 2003.

13. Agreement for technical cooperation in clean coal and advanced power systems technologies. Signed October 31, 2003 and January 20, 2004. Entered into force January 20, 2004.

**Environment**

1. Agreement for technical cooperation in the field of environmental protection, with implementing arrangement. Signed June 21, 1993. Entered into force June 21, 1993.

2. Agreement extending the agreement of June 21, 1993 for technical cooperation in the field of environmental protection. Effected by exchanges of letters June 30 and July 20 and 30, 1998. Entered into force July 30, 1998, effective June 21, 1998.

3. Agreement extending the agreement for technical cooperation in the field of environmental protection. Signed September 23, 2003. Entered into force September 23, 2003.

**Health**

1. Guidelines for a cooperative program in the biomedical sciences. Signed May 21, 1984. Entered into force May 21, 1984.

2. Guidelines for a cooperative program in food hygiene. Signed January 15 and 28, 1985. Entered into force January 28, 1985.

3. Agreement amending the 1984 guidelines for a cooperative program in the biomedical sciences, with attachment. Signed April 20, 1989. Entered into force April 20, 1989.

4. Agreement amending the 1984 guidelines for a cooperative program in the biomedical Sciences, as amended,

with attachment. Signed August 24, 1989. Entered into force August 24, 1989.

5. Guidelines for a cooperative program in public health and preventive medicine. Signed at Arlington and Washington June 30 and July 19, 1994. Entered into force July 19, 1994.

6. Agreement for technical cooperation in vaccine and immunization-related activities, with implementing arrangement. Signed at Washington October 6 and 7, 1994. Entered into force October 7, 1994.

7. Agreement regarding the mutual exchange of information on medical devices, including quality systems requirements inspectional information. Effected by exchange of letters January 9, 1998. Entered into force January 9, 1998.

**Intellectual Property**

1. Agreement concerning the protection and enforcement of rights in audiovisual works. Effected by exchange of letters at Arlington and Washington June 6 and 27, 1989. Entered into force June 27, 1989.

2. Understanding concerning the protection of intellectual property rights. Signed at Washington June 5, 1992. Entered into force June 5, 1992.

3. Agreement for the protection of copyrights, with appendix. Signed July 16, 1993. Entered into force July 16, 1993.

4. Memorandum of understanding regarding the extension of priority filing rights for patent and trademark applications. Signed April 10, 1996. Entered into force April 10, 1996.

**Judicial Assistance**

1. Memorandum of understanding on cooperation in the field of criminal investigations and prosecutions. Signed at Taipei October 5, 1992. Entered into force October 5, 1992.

2. Agreement on mutual legal assistance in criminal matters. Signed March 26, 2002. Entered into force March 26, 2002.

**Labor**

1. Guidelines for a cooperative program in labor affairs. Signed December 6, 1991. Entered into force December 6, 1991.

2. Guidelines for a cooperative program in labor mediation and alternative dispute resolution. Signed April 7, 1995. Entered into force April 7, 1995.

**Mapping**

1. Agreement concerning mapping, charting, and geodesy cooperation. Signed November 28, 1995. Entered into force November 28, 1995.

**Maritime**

1. Agreement concerning mutual implementation of the 1974 Convention for the safety of life at sea. Effected by exchange of letters at Arlington and Washington August 17 and September 7, 1982. Entered into force September 7, 1982.

2. Agreement concerning mutual implementation of the 1969 international convention on tonnage measurement. Effected by exchange of letters at Arlington and Washington May 13 and 26, 1983. Entered into force May 26, 1983.

3. Agreement concerning mutual implementation of the protocol of 1978 relating to the 1974 international convention for the safety of life at sea. Effected by exchange of letters at Arlington and Washington January 22 and 31, 1985. Entered into force January 31, 1985.

4. Agreement concerning mutual implementation of the protocol of 1978 relating to the international convention for the prevention of pollution from ships, 1973. Effected by exchange of letters at Arlington and Washington January 22 and 31, 1985. Entered into force January 31, 1985.

5. Agreement concerning mutual implementation of the 1966 international convention on load lines. Effected by exchange of letters at Arlington and Washington March 26 and April 10, 1985. Entered into force April 10, 1985.

6. Agreement concerning the operating environment for ocean carriers. Effected by exchange of letters at Washington and Arlington October 25 and 27, 1989. Entered into force October 27, 1989.

**Military**

1. Agreement for foreign military sales financing by the authorities on Taiwan. Signed January 4 and July 12, 1999. Entered into force July 12, 1999.

2. Letter of Agreement concerning exchange of research and development information. Signed August 4, 2004. Entered into force August 4, 2004.

**Postal**

1. Agreement concerning establishment of INTELPOST service. Effected by exchange of letters at Arlington and Washington April 19 and November 26, 1990. Entered into force November 26, 1990.

2. International business reply service agreement, with detailed regulations. Signed at Washington February 7, 1992. Entered into force February 7, 1992.

**Privileges and Immunities**

1. Agreement on privileges, exemptions and immunities, with addendum. Signed at Washington October 2. Entered into force October 2, 1980.

2. Agreement governing the use and disposal of vehicles imported by the American Institute in Taiwan and its personnel. Signed at Taipei April 21, 1986. Entered into force April 21, 1986.

**Scientific & Technical Cooperation**

1. Agreement on scientific cooperation. Effected by exchange of letters at Arlington and Washington on September 4, 1980. Entered into force September 4, 1980.

2. Agreement concerning renewal and extension of the 1980 agreement on scientific cooperation. Signed March 10, 1987. Entered into force March 10, 1987.

3. Guidelines for a cooperative program in atmospheric research. Signed May 4, 1987. Entered into force May 4, 1987.

4. Agreement for technical assistance in dam design and construction, with appendices. Signed August 24, 1987. Entered into force August 24, 1987.

5. Agreement for a cooperative program in the sale and exchange of technical, scientific, and engineering information. Signed November 17, 1987. Entered into force November 17, 1987.

6. Agreement for technical cooperation in meteorology and forecast systems development, with implementing arrangements. Signed June 5 and 28, 1990. Entered into force June 28, 1990.

7. Agreement extending the agreement of November 17, 1987, for a cooperative program in the sale and exchange of technical, scientific and engineering information. Signed August 8, 1990. Entered into force August 8, 1990.

8. Cooperative program on Hualien soil-structure interaction experiment. Signed September 28, 1990.

9. Agreement for technical cooperation in geodetic research and use of advanced geodetic technology, with implementing arrangement. Signed January 11 and February 21, 1991. Entered into force February 21, 1991.

10. Cooperative program in highway-related sciences. Signed October 30, 1990 and January 7, 1992. Entered into force January 7, 1992.

11. Agreement amending and extending the agreement of August 24, 1987, for technical assistance in dam design and construction. * Name changed to Agreement for Technical Assistance in Areas of Water Resource Development. Signed May 11 and June 9, 1992. Entered into force June 9, 1992.

12. Agreement for technical cooperation in seismology and earthquake monitoring systems development, with implementing arrangement. Signed July 22 and 24, 1992. Entered into force July 24, 1992.

13. Agreement amending the Agreement of August 24, 1987 for technical assistance in areas of water resource development. Signed August 30 and September 3, 1996. Entered into force September 3, 1996.

14. Agreement concerning joint studies on reservoir sedimentation and sluicing, including computer modeling. Signed February 14 and March 8, 1996. Entered into force March 8, 1996.

15. Guidelines for a cooperative program in physical sciences. Signed January 2 and 10, 1997. Entered into force January 10, 1997.

16. Agreement for scientific and technical cooperation in ocean climate research. Signed February 18, 1997. Entered into force February 18, 1997.

17. Agreement amending the agreement of August 24, 1987 for technical assistance in areas of water resource development. Signed October 14, 1997. Entered into force October 14, 1997.

18. Agreement for technical cooperation in scientific and weather technology systems support. Signed October 22 and November 5, 1997. Entered into force November 5, 1997.

19. Agreement for technical cooperation associated with establishment of advanced operational aviation weather systems. Signed February 10 and 13, 1998. Entered into force February 13, 1998.

20. Agreement for technical cooperation associated with development, launch and operation of a constellation observing system for meteorology, ionosphere and climate. Signed May 29 and June 30, 1999. Entered into force June 30, 1999.

21. Agreement on the International Research Institute for Climate Prediction, with attachments. Signed October 20, 2000 and October 26, 2000. Entered into force October 26, 2000.

22. Agreement for technical cooperation on neutron scattering research. Signed February 8, 2001. Entered into force February 8, 2001.

23. Agreement for technical cooperation in meteorology and forecast systems development. Signed June 12, 2001 and June 20, 2001. Entered into force June 20, 2001.

24. Agreement for cooperation on the tropical rainfall-measuring mission (TRMM). Signed February 6, 2002 and April 2, 2002. Entered into force April 2, 2002.

25. Agreement for joint research on earthquake and bridge engineering. Signed July 24, 2003 and July 8, 2004. Entered into force July 8, 2004.

26. Agreement in the area of probabilistic risk assessment research. Signed October 18 and December 29, 2004. Entered into force December 29, 2004, effective January 1, 2004.

27. Agreement relating to participation in the United States nuclear regulatory program. Signed December 13, 2004. Entered into force December 13, 2004.

**Security of Information**

1. Protection of information agreement. Signed September 15, 1981. Entered into force September 15, 1981.

**Taxation**

1. Agreement concerning the reciprocal exemption from income tax of income derived from the international operation of ships and aircraft. Effected by exchange of letters at Taipei May 31, 1988. Entered into force May 31, 1988.

2. Agreement for technical assistance in tax administration, with appendices. Signed August 1, 1989. Entered into force August 1, 1989.

**Trade**

1. Agreement concerning trade matters, with annexes. Effected by exchange of letters at Arlington and Washington October 24, 1979. Entered into force October 24, 1979; effective January 1, 1980.

2. Agreement concerning trade matters. Effected by exchange of letters at Arlington and Washington December 31, 1981. Entered into force December 31, 1981.

3. Agreement concerning measures that the CCNAA will undertake in connection with implementation of the GATT Customs Valuation Code. Effected by exchange of letters at Bethesda and Arlington August 22, 1986. Entered into force August 22, 1986.

4. Agreement concerning the export performance requirement affecting investment in the automotive sector. Effected by exchange of letters at Washington and Arlington October 9, 1986. Entered into force October 9, 1986.

5. Agreement concerning beer, wine and cigarettes. Signed at Washington December 12, 1986. Entered into force December 12, 1986, effective January 1, 1987.

6. Agreement implementing the agreement of December 12, 1986, concerning beer, wine and cigarettes. Effected by exchange of letters at Taipei April 29, 1987. Entered into force April 29, 1987, effective January 1, 1987.

7. Agreement concerning trade in whole turkeys, turkey parts, processed turkey products and whole ducks, with memorandum of understanding. Effected by exchange of letters at Arlington and Washington March 16, 1989. Entered into force March 16, 1989.

8. Agreement concerning the protection of trade in strategic commodities and technical data, with memorandum of understanding. Effected by exchange of letters at Arlington and Washington December 4, 1990 and April 8, 1991. Entered into force April 8, 1991.

9. Administrative arrangement concerning the textile visa system. Effected by exchange of letters at Arlington and Washington April 18 and May 1, 1991. Entered into force May 1, 1991.

10. Agreement regarding new requirements for health warning legends on cigarettes sold in the territory represented by CCNAA. Effected by exchange of letters at Washington and Arlington October 7 and 16, 1991. Entered into force October 16, 1991.

11. Memorandum of understanding concerning a new quota arrangement for cotton and man-made fiber trousers. Signed at Washington December 18, 1992. Entered into force December 18, 1992.

12. Memorandum of understanding on the exchange of information concerning commodity futures and options matters, with appendix. Signed January 11, 1993. Entered into force January 11, 1993.

13. Agreement concerning a framework of principles and procedures for consultations regarding trade and investment, with annex. Signed at Washington September 19, 1994. Entered into force September 19, 1994.

14. Visa arrangement concerning textiles and textile products. Effected by exchange of letters of April 30 and September 3 and 23, 1997. Entered into force September 23, 1997.

15. Agreement concerning trade in cotton, wool, man-made fiber, silk blend and other non-cotton vegetable fiber textile products, with attachment. Effected by exchange of letters December 10, 1997. Entered into force December 10, 1997, effective January 1, 1998.

16. Agreed minutes on government procurement issues. Signed December 17, 1997. Entered into force December 17, 1997.

17. Understanding concerning bilateral negotiations on the WTO accession of the separate customs territory of Taiwan, Penghu, Kinmen

and Matsu (Chinese Taipei) and the United States. Signed February 20, 1998. Entered into force February 20, 1998.

18. Agreement on mutual recognition for equipment subject to electromagnetic compatibility (EMC) regulations. Signed March 16, 1999. Entered into force March 16, 1999.

19. Agreement concerning the Asia Pacific Economic Cooperation mutual recognition arrangement for conformity assessment of telecommunications equipment (APEC Telecon MRA). Signed March 16, 1999. Entered into force March 16, 1999.

20. Memorandum of understanding on the extension of trade in textile and apparel products. Signed February 9, 2001. Entered into force February 9, 2001.

[FR Doc. E5–7435 Filed 12–16–05; 8:45 am]

BILLING CODE 4710–49–P

## NATIONAL CREDIT UNION ADMINISTRATION

### Agency Information Collection Activities: Submission to OMB for Revision to a Currently Approved Collection; Comment Request

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Request for comment.

**SUMMARY:** The NCUA is submitting the following information collection to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). This information collection is published to obtain comments from the public.

**DATES:** Comments will be accepted until January 18, 2006.

**ADDRESSES:** Interested parties are invited to submit written comments to the NCUA Clearance Officer listed below:

Clearance Officer: Mr. Neil McNamara, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428, Fax No. 703–518–6669, E-mail: *mcnamara@ncua.gov.*

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or a copy of the information collection request, should be directed to Tracy Sumpter at the National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428, or at (703) 518–6444.

**SUPPLEMENTARY INFORMATION:** Proposal for the following collection of information:

*Title:* Report of Officials.

*OMB Number:* 3133–0053.

*Form Number:* NCUA 4501.

*Type of Review:* Revision to a currently approved collection.

*Description:* 12 U.S.C. 1761—This statutory provision requires that a record of the names and addresses of the executive officers, members of the supervisory committee, credit committee, and loan officers shall be filed with the administration within 10 days of their election/appointment.

*Respondents:* Credit unions.

*Estimated No. of Respondents/Record keepers:* 8,871.

*Estimated Burden Hours Per Response:* 1 hour.

*Frequency of Response:* Annually.

*Estimated Total Annual Burden Hours:* 8,871 hours.

*Estimated Total Annual Cost:* 0.

By the National Credit Union Administration Board on December 9, 2005.

**Mary Rupp,**

*Secretary of the Board.*

[FR Doc. E5–7480 Filed 12–16–05; 8:45 am]

BILLING CODE 7535–01–P

## NATIONAL SCIENCE FOUNDATION

### Notice of Intent To Seek Approval To Extend and Revise a Current Information Collection

**AGENCY:** National Science Foundation.

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

**SUMMARY:** The National Science Foundation (NSF) is announcing plans to request renewal of this collection. In accordance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), we are providing opportunity for public comment on this action. After obtaining and considering public comment, NSF will prepare the submission requesting that OMB approve clearance of this collection for no longer than 3 years.

**DATES:** Written comments on this notice must be received by February 17, 2006 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

**FOR FURTHER INFORMATION CONTACT:** Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230; telephone (703) 292–7556; or send e-mail to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday. You also may obtain a copy of the data collection instrument and instructions from Ms. Plimpton.

*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 of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; 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.

**SUPPLEMENTARY INFORMATION:**

*Title of Collection:* Academic Research and Development Survey Expenditures at Universities and Colleges, FY 2006 through FY 2008; OMB Control Number 3145–0100.

*Expiration Date of Current Approval:* August 31, 2006.

*Proposed Renewal Project:* Separately budgeted current fund expenditures on research and development in the sciences and engineering performed by universities and colleges and federally funded research and development centers—A web survey, the Survey of Scientific and Engineering Expenditures at Universities and Colleges, originated in fiscal year (FY) 1954 and has been conducted annually since FY 1972. The survey is the academic expenditure component of the NSF statistical program that seeks to provide a ''central clearinghouse for the collection, interpretation, and analysis of data on the availability of, and the current and projected need for, scientific and technical resources in the United States, and to provide a source of information for policy formulation by other agencies of the Federal government,'' as mandated in the National Science Foundation Act of 1950.

*Use of the Information:* The proposed project will continue the current survey cycle for three years. The Academic R&D Survey will be a census of the full population of an expected 656 institutions (619 universities or colleges plus 37 federally funded research and development centers—FFRDCs) for academic years FY 2006 through FY 2008. These institutions account for over 95 percent of the Nation's

academic R&D funds. The survey has provided continuity of statistics on R&D expenditures by source of funds and by science & engineering (S&E) field, with separate data requested on current fund expenditures for research equipment by S&E field. Further breakdowns are collected on passed through funds to subrecipients and received as a subrecipient, and on R&D expenditures by field by science and engineering from specific Federal Government agency sources. Information on R&D for non-S&E fields is also requested. Data are published in NSF's annual publication series Academic Science and Engineering R&D Expenditures and are available electronically on the World Wide Web.

The survey is a fully automated web data collection effort and is handled primarily by the administrators at the Institutional Research Offices. To minimize burden, institutions are provided with an abundance of guidance and help menus on the Web, in addition to printing and responding via paper copy if necessary. Each record is pre-loaded with the institutions 2 previous year's data and a complete program for editing and trend checking. Response to this voluntary survey in FY 2004 was 94.0 percent. Burden estimates are as follows: [1]

| Total number of institutions | Doctorate-granting burden hours | Masters-granting burden hours | Bachelors degree burden hours | FFRDC's burden hours |
|---|---|---|---|---|
| FY 1999 480 | 20.8 | 13.0 | 7.5 | 9.4 |
| FY 2000 700 | 21.0 | 12.0 | 10.5 | 9.2 |
| FY 2001 625 | 30.2 | 11.9 | 9.0 | 12.1 |
| FY 2002 625 | 28.7 | 14.9 | 12.2 | 4.5 |

**Suzanne H. Plimpton,**

*Reports Clearance Officer, National Science Foundation.*

[FR Doc. 05–24192 Filed 12–16–05; 8:45 am]

**BILLING CODE 7555–01–M**

## NATIONAL SCIENCE FOUNDATION

### Notice of Intent to Extend an Information Collection

**AGENCY:** National Science Foundation.

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

**SUMMARY:** Under the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3501 et seq.), and as part of its continuing effort to reduce paperwork and respondent burden, the National Science Foundation (NSF) is inviting the general public or other Federal agencies to comment on this proposed continuing information collection. The National Science Foundation (NSF) will publish periodic summaries of proposed projects.

*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 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.

**DATES:** Written comments on this notice must be received by January 31, 2006 to be assured consideration. Comments received after that date will be considered to the extent practicable. Send comments to address below.

**FOR ADDITIONAL INFORMATION OR COMMENTS:** For further information or for a copy of the collection instruments and instructions, contact Ms. Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230; telephone (703) 292–7556; or send e-mail to *splimpto@nsf.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:**

*Title of Collection:* Survey of Earned Doctorates.

*OMB Approval Number:* 3145–0019.

*Expriation Date of Approval:* June 30, 2006.

*Type of Request:* Intent to seek approval to extend an information collection for three years.

1. *Abstract:* The National Science Foundation Act of 1950, as subsequently amended, includes a statutory charge to "* * * provide a central clearinghouse for the collection, interpretation, and analysis of data on scientific and engineering resources, and to provide a source of information for policy formulation by other agencies of the Federal Government." The Survey of Earned Doctorates is part of an integrated survey system that meets the human resources part of this mission.

The Survey of Earned Doctorates (SED) has been conducted continuously since 1958 and is jointly sponsored by six Federal agencies in order to avoid duplication. It is an accurate, timely source of information on our Nation's most precious resource—highly educated individuals. Data are obtained via paper questionnaire or Web option from each person earning a research doctorate at the time they receive the degree. Data are collected on their field of specialty, educational background, sources of support in graduate school, debt level, postgraduation plans for employment, and demographic characteristics. For the 2007 SED, minor changes to questions, based on focus group and cognitive testing will be incorporated into the questionnaire. Also for 2007, a field test of potential questions about salary after graduation will be conducted with less than 9 institutions. Based on the field test results, the intention is to add a salary question in 2008.

The Federal government, universities, researchers, and others use the information extensively. The National Science Foundation, as the lead agency, publishes statistics from the survey in many reports, but primarily in the annual publication series, "Science and Engineering Doctorates." The National Opinion Research Corporation at the University of Chicago dissemination a free interagency report entitled "Doctorate Recipients from U.S. Universities: Summary Report." These reports are available in print and electronically on the World Wide Web.

[1] Average burden hours for institutions responding to burden item.

The survey will be collected in conformance with the Privacy Act of 1974. Responses from individuals are voluntary. NSF will ensure that all information collected will be kept strictly confidential and will be used for research or statistical purposes, analyzing data, and preparing scientific reports and articles.

2. *Expected Respondents:* A total response rate of 90.8% of the total 42,155 persons who earned a research doctorate was obtained in the 2004 SED. This level of response rate has been consistent for several years. The respondents will be individuals and the estimated number of respondents annually is 38,275 (based on 2004 data).

3. *Estimate of Burden:* The Foundation estimates that, on average, 19 minutes per respondent will be required to complete the survey, for a total of 12,121 hours for all respondents (based on the 2004 SED numbers). Also, for the approximately 3,000 respondents in the field test on a salary question, there would be approximately another 50 hours of response time. The total respondent burden is therefore estimated at 12,171 hours for the 2007 SED. This is slightly higher than the last annual estimate approved by OMB due primarily to an increased number of respondents since the last clearance request.

Dated: December 14, 2005.

**Suzanne H. Plimpton,**

*Reports Clearance Officer, National Science Foundation.*

[FR Doc. 05–24213 Filed 12–16–05; 8:45 am]

**BILLING CODE 7555–01–M**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–52939; File No. SR–NASD–2005–137]**

## Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Pricing for NASD Members Using the Nasdaq Market Center and Nasdaq's Brut Facility

December 9, 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 22, 2005, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), 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 Nasdaq. Nasdaq has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the self-regulatory organization under Section 19(b)(3)(A)(ii)[3] of the Act and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

Nasdaq proposes to modify the pricing for NASD members using the Nasdaq Market Center and Nasdaq's Brut Facility (''Brut''). Nasdaq states that it will implement the proposed rule change for a pilot period running from December 1, 2005 through December 31, 2005.

The text of the proposed rule change is below. Proposed new language is in *italics;* proposed deletions are in [brackets].

* * * * *

**7010. System Services**

(a)–(h) No change.

(i) Nasdaq Market Center and Brut Facility Order Execution

(1)–(4) No Change.

(5) There shall be no charges or credits for order entry, execution, routing, or cancellation by members accessing the Nasdaq Market Center or Nasdaq's Brut Facility to buy or sell exchange-listed securities subject to the Consolidated Quotations Service and Consolidated Tape Association plans, other than:

(A) The charges in Rule 7010(i)(1) for Exchange-Traded Funds,

(B) Charges described in Rule 7010(d),

(C) A fee of $0.0004 per share executed for orders delivered by Nasdaq's Brut Facility to an exchange using the exchange's proprietary order delivery system if such orders do not attempt to execute in Nasdaq's Brut Facility or the Nasdaq Market Center prior to routing to the exchange, [and]

(D) a fee of $0.009 per share executed for any limit order delivered by Nasdaq's Brut Facility to the New York Stock Exchange (''NYSE'') using the NYSE's proprietary order delivery system if such an order is not an on-close order, is not executed in the opening, and remains at the NYSE for more than 5 minutes[.], *and*

*(E) for a pilot period beginning December 1, 2005 and ending December 31, 2005, a credit of $0.0005 per share executed to a member providing liquidity for a transaction in the following stocks: Advanced Micro Devices Inc. (AMD); Apache Corp. (APA); AT&T Corp. (T); Avaya, Inc. (AV); Baker Hughes, Inc. (BHI); BJ Services Co. (BJS); Bristol-Myers Squibb Co. (BMY); Burlington Resources, Inc. (BR); Calpine Corp. (CPN); Charles Schwab Corp. (SCH); Citigroup Inc. (C); ConocoPhillips (COP); Corning Inc. (GLW); Devon Energy Corp. (DVN); EMC Corp. (EMC); Exxon Mobil Corp. (XOM); Ford Motor Co. (F); Gateway, Inc. (GTW); General Electric Co. (GE); Halliburton Co. (HAL); Hewlett-Packard Co. (HPQ); Johnson & Johnson (JNJ); JPMorgan Chase & Co. (JPM); Kohl's Corp. (KSS); LSI Logic Corp. (LSI); Micron Technology, Inc. (MU); Motorola, Inc. (MOT); Noble Corp. (NE); Occidental Petroleum Corp. (OXY); Office Depot Inc. (ODP); Pfizer Inc. (PFE); Phelps Dodge Corp. (PD); Pulte Homes, Inc. (PHM); Qwest Communications International Inc. (Q); Schlumberger Ltd. (SLB); Solectron Corp. (SLR); Sovereign Bancorp, Inc. (SOV); Time Warner, Inc. (TWX); Valero Energy Corp. (VLO); and Verizon Communications, Inc. (VZ).*

(6) No change.

(j)–(v) No change.

* * * * *

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq 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. Nasdaq 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

Nasdaq is proposing to modify its fee schedule for transaction executions in certain stocks listed on markets other than Nasdaq by creating a pilot program under which liquidity providers (*i.e.*, market participants that put quotes or

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

orders that are accessed by incoming orders) would receive a credit of $0.0005 per share executed.[5] Nasdaq currently offers a liquidity provider credit with respect to securities whose primary listing is on Nasdaq, and its credit for transactions in exchange-traded funds (''ETFs'') listed on the American Stock Exchange (''Amex'') was recently extended to ETFs listed on other exchanges.[6] Nasdaq notes that, with the exception of ETFs, however, such a credit is not currently offered with respect to stocks whose primary listing is not on Nasdaq.

Nasdaq states that with the enhanced opportunities for electronic trading of non-Nasdaq listed stocks occasioned by market participant demand and upcoming regulatory changes, however, it expects that new competitive opportunities will develop for Nasdaq and other electronic venues. Nasdaq believes that the quality of executions that it can offer in such an environment will depend on the degree to which market participants in a position to provide liquidity opt to do so through Nasdaq. Because the market for executions of these stocks has not yet been subject to vigorous competition, and because the balance between the cost of providing credits and the revenue growth associated with increased liquidity provision has therefore not been tested in a fully competitive environment, Nasdaq believes that a pilot program, consisting of a modest $0.0005 per share credit paid with respect to a limited number of stocks, would allow an assessment of the costs and benefits of the credit to Nasdaq and its market participants. The Nasdaq represents that the forty stocks selected for inclusion in the pilot program[7] are all stocks whose propensity to trade on electronic venues, high daily trading volumes, and large market capitalizations may correlate with a relatively high degree of price elasticity with regard to liquidity provision.[8]

Nasdaq plans to run the pilot for a period of at least three months; however, because the authority for this proposal provided by the Nasdaq Board of Directors runs only through December 31, 2005, the pilot period covered by this filing is one month. Upon obtaining Board approval for a longer pilot, which Nasdaq expects to receive in December 2005, Nasdaq plans to file to extend the pilot through February 28, 2006.[9] Nasdaq states that, based on information received regarding the trading characteristics of the forty stocks included in the pilot, it would then determine whether to submit a proposed rule change to extend the pilot further, modify the level of the liquidity provider credit, and/or offer a credit with respect to additional stocks.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,[10] in general, and with Section 15A(b)(5) of the Act,[11] in particular, in that the proposed rule change provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the NASD operates or controls. Nasdaq believes that the proposed rule change will institute a liquidity provider credit available to all market participants that opt to provide liquidity through Nasdaq or Brut to support executions in any of forty stocks included in the pilot program.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

Nasdaq does not believe that the proposed rule change will result in 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*

Nasdaq states that written comments were neither solicited nor received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change is subject to Section 19(b)(3)(A)(ii) of the Act[12] and subparagraph (f)(2) of Rule 19b–4[13] thereunder because it establishes or changes a due, fee, or other charge imposed by the self-regulatory organization. Accordingly, the proposal is effective upon Commission receipt of the filing. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[14]

**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–NASD–2005–137 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–NASD–2005–137. 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

[5] Telephone conversation between John Yetter, Associate General Counsel, Exchange, and David Liu and Michou Nguyen, Attorneys, Division of Market Regulation, Commission, on December 6, 2005.

[6] *See* Securities Exchange Act Release Nos. 52757 (November 9, 2005), 70 FR 69791 (November 17, 2005) (SR–NASD–2005–125); and 52758 (November 9, 2005), 70 FR 69793 (November 17, 2005) (SR–NASD–2005–126).

[7] Advanced Micro Devices Inc. (AMD); Apache Corp. (APA); AT&T Corp. (T); Avaya, Inc. (AV); Baker Hughes, Inc. (BHI); BJ Services Co. (BJS); Bristol-Myers Squibb Co. (BMY); Burlington Resources, Inc. (BR); Calpine Corp. (CPN); Charles Schwab Corp. (SCH); Citigroup Inc. (C); ConocoPhillips (COP); Corning Inc. (GLW); Devon Energy Corp. (DVN); EMC Corp. (EMC); Exxon Mobil Corp. (XOM); Ford Motor Co. (F); Gateway, Inc. (GTW); General Electric Co. (GE); Halliburton Co. (HAL); Hewlett-Packard Co. (HPQ); Johnson & Johnson (JNJ); JPMorgan Chase & Co. (JPM); Kohl's Corp. (KSS); LSI Logic Corp. (LSI); Micron Technology, Inc. (MU); Motorola, Inc. (MOT); Noble Corp. (NE); Occidental Petroleum Corp. (OXY); Office Depot Inc. (ODP); Pfizer Inc. (PFE); Phelps Dodge Corp. (PD); Pulte Homes, Inc. (PHM); Qwest Communications International Inc. (Q); Schlumberger Ltd. (SLB); Solectron Corp. (SLR); Sovereign Bancorp, Inc. (SOV); Time Warner, Inc. (TWX); Valero Energy Corp. (VLO); and Verizon Communications, Inc. (VZ).

[8] The change proposed by this filing applies to NASD members that use the Nasdaq Market Center and Brut; in SR–NASD–2005–138, Nasdaq is proposing to make the same change applicable to non-members that use Brut.

[9] Telephone conversation between John Yetter, Associate General Counsel, Exchange, and Michou Nguyen, Attorney, Division of Market Regulation, Commission, on December 7, 2005.

[10] 15 U.S.C. 78*o*–3.

[11] 15 U.S.C. 78*o*–3(b)(5).

[12] 15 U.S.C. 78s(b)(3)(A)(ii).

[13] 17 CFR 240.19b–4(f)(2).

[14] 15 U.S.C. 78s(b)(3)(C).

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 NASD. 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–NASD–2005–137 and should be submitted on or before January 9, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

**Jonathan G. Katz,**

*Secretary.*

[FR Doc. E5–7481 Filed 12–16–05; 8:45 am]

**BILLING CODE 8010–01–P**

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–52938; File No. SR–NASD–2005–138]**

## Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Modify the Pricing for Non-Members Using Nasdaq's Brut Facility

December 9, 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 22, 2005, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), 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 Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and at the same time is granting accelerated approval of the proposed rule change.

[15] 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

Nasdaq proposes to modify the pricing for non-members using Nasdaq's Brut Facility (''Brut''). Nasdaq requests approval to implement the proposed rule change retroactively for a pilot period running from December 1, 2005 through December 31, 2005. The text of the proposed rule change is below. Proposed new language is in *italics.* Proposed deletions are in [brackets].

* * * * *

**7010. System Services**

(a)–(h) No change.

(i) Nasdaq Market Center and Brut Facility Order Execution

(1)–(5) No change.

(6) The fees applicable to non-members using Nasdaq's Brut Facility shall be the fees established for members under Rule 7010(i), as amended by SR–NASD–2005–019, SR–NASD–2005–035, SR–NASD–2005–048, and SR–NASD–2005–071, [and] SR–NASD–2005–125*, and SR–NASD–2005–137*, and as applied to non-members by SR–NASD–2005–020, SR–NASD–2005–038, SR–NASD–2005–049, SR–NASD–2005–072, [and] SR–NASD–2005–126*, and SR–NASD–2005–138.*

(j)–(v) No change.

* * * * *

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq 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. Nasdaq 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

In SR–NASD–2005–137, which applies to NASD members, Nasdaq modified its fee schedule for transaction executions in certain stocks listed on markets other than Nasdaq by creating a pilot program under which liquidity providers (*i.e.*, market participants that put quotes or orders that are accessed by incoming orders) may receive a credit of $0.0005 per share executed.[3] In this filing, Nasdaq is proposing to apply the same modification to non-NASD members that use Nasdaq's Brut Facility.

Nasdaq currently offers a liquidity provider credit with respect to securities whose primary listing is on Nasdaq, and its credit for transactions in exchange-traded funds (''ETFs'') listed on the American Stock Exchange (''Amex'') was recently extended to ETFs listed on other exchanges.[4] Nasdaq notes that, with the exception of ETFs, however, such a credit has not been offered with respect to stocks whose primary listing is not on Nasdaq.

Nasdaq states that with the enhanced opportunities for electronic trading of non-Nasdaq listed stocks occasioned by market participant demand and upcoming regulatory changes, however, it expects that new competitive opportunities will develop for Nasdaq and other electronic venues. Nasdaq believes that the quality of executions that it can offer in such an environment will depend on the degree to which market participants in a position to provide liquidity opt to do so through Nasdaq. Because the market for executions of these stocks has not yet been subject to vigorous competition, and because the balance between the cost of providing credits and the revenue growth associated with increased liquidity provision has therefore not been tested in a fully competitive environment, Nasdaq believes that a pilot program, consisting of a modest $0.0005 per share credit paid with respect to a limited number of stocks, would allow an assessment of the costs and benefits of the credit to Nasdaq and its market participants. Nasdaq represents that the forty stocks selected for inclusion in the pilot program[5] are all stocks whose

[3] Telephone conversation between John Yetter, Associate General Counsel, Exchange, and David Liu and Michou Nguyen, Attorneys, Division of Market Regulation, Commission, on December 6, 2005.

[4] *See* Securities Exchange Act Release Nos. 52757 (November 9, 2005), 70 FR 69791 (November 17, 2005) (SR–NASD–2005–125); and 52758 (November 9, 2005), 70 FR 69793 (November 17, 2005) (SR–NASD–2005–126).

[5] Advanced Micro Devices Inc. (AMD); Apache Corp. (APA); AT&T Corp. (T); Avaya, Inc. (AV); Baker Hughes, Inc. (BHI); BJ Services Co. (BJS); Bristol-Myers Squibb Co. (BMY); Burlington Resources, Inc. (BR); Calpine Corp. (CPN); Charles Schwab Corp. (SCH); Citigroup Inc. (C); ConocoPhillips (COP); Corning Inc. (GLW); Devon Energy Corp. (DVN); EMC Corp. (EMC); Exxon Mobil Corp. (XOM); Ford Motor Co. (F); Gateway, Inc. (GTW); General Electric Co. (GE); Halliburton Co. (HAL); Hewlett-Packard Co. (HPQ); Johnson & Johnson (JNJ); JPMorgan Chase & Co. (JPM); Kohl's Corp. (KSS); LSI Logic Corp. (LSI); Micron

Continued

propensity to trade on electronic venues, high daily trading volumes, and large market capitalizations may correlate with a relatively high degree of price elasticity with regard to liquidity provision.

Nasdaq plans to run the pilot for a period of at least three months; however, because the authority for this proposal provided by the Nasdaq Board of Directors runs only through December 31, 2005, the pilot period covered by this filing is one month. Upon obtaining Board approval for a longer pilot, which Nasdaq expects to receive in December 2005, Nasdaq plans to file to extend the pilot through February 28, 2006.[6] Nasdaq states that, based on information received regarding the trading characteristics of the forty stocks included in the pilot, it would then determine whether to submit a proposed rule change to extend the pilot further, modify the level of the liquidity provider credit, and/or offer a credit with respect to additional stocks.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,[7] in general, and with Section 15A(b)(5) of the Act,[8] in particular, in that the proposed rule change provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the NASD operates or controls. The proposed rule change applies to non-members that use Nasdaq's Brut Facility a fee change that is being implemented for NASD members that use the Nasdaq Market Center and/or Nasdaq's Brut Facility. Accordingly, Nasdaq believes that the proposed rule change promotes an equitable allocation of fees between members and non-members using Nasdaq's order execution facilities. Nasdaq believes that the proposed change will institute a liquidity provider credit available to all market participants that opt to provide liquidity through Nasdaq or Brut to support executions in any of forty stocks included in the pilot program.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

Nasdaq does not believe that the proposed rule change will result in 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*

Nasdaq states that written comments 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–NASD–2005–138 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–NASD–2005–138. 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 NASD. 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–NASD–2005–138 and should be submitted on or before January 9, 2006.

**IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change**

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 self-regulatory organization.[9] Specifically, the Commission believes that the proposed rule change is consistent with Section 15A(b)(5) of the Act,[10] which requires that the rules of the self-regulatory organization provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facilities or system which it operates or controls.

The Commission notes that this proposal would retroactively modify pricing for non-NASD members using the Nasdaq's Brut Facility to be implemented on a pilot basis running from December 1, 2005 to December 31, 2005. This proposal would permit the schedule for non-NASD members to mirror the schedule applicable to NASD members that became effective November 22, 2005, pursuant to SR–NASD–2005–137 and that Nasdaq stated it would implement on a pilot basis from December 1, 2005 to December 31, 2005.

The Commission finds good cause for approving the proposed rule change prior to the 30th day of the date of publication of the notice thereof in the **Federal Register**. The Commission notes that the proposed fees for non-NASD members are identical to those in SR–NASD–2005–137, which implemented those fees for NASD members and which became effective as of November 22, 2005. The Commission notes that this change will promote consistency in Nasdaq's fee schedule by applying the same pricing schedule with the same date of effectiveness for both NASD members and non-NASD members. Therefore, the Commission finds that there is good cause, consistent with Section 19(b)(2) of the Act,[11] to approve

Technology, Inc. (MU); Motorola, Inc. (MOT); Noble Corp. (NE); Occidental Petroleum Corp. (OXY); Office Depot Inc. (ODP); Pfizer Inc. (PFE); Phelps Dodge Corp. (PD); Pulte Homes, Inc. (PHM); Qwest Communications International Inc. (Q); Schlumberger Ltd. (SLB); Solectron Corp. (SLR); Sovereign Bancorp, Inc. (SOV); Time Warner, Inc. (TWX); Valero Energy Corp. (VLO); and Verizon Communications, Inc. (VZ).

[6] Telephone conversation between John Yetter, Associate General Counsel, Exchange, and Michou Nguyen, Attorney, Division of Market Regulation, Commission, on December 7, 2005.

[7] 15 U.S.C. 78*o*–3.

[8] 15 U.S.C. 78*o*–3(b)(5).

[9] The Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[10] 15 U.S.C. 78*o*–3(b)(5).

[11] 15 U.S.C. 78s(b)(2).

the proposed change on an accelerated basis.

## V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,[12] that the proposed rule change (File No. SR–NASD–2005–138), is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

**Jonathan G. Katz,**

*Secretary.*

[FR Doc. E5–7482 Filed 12–16–05; 8:45 am]

BILLING CODE 8010–01–P

[12] 15 U.S.C. 78s(b)(2).

[13] 17 CFR 200.30–3(a)(12).

## DEPARTMENT OF STATE

**[Public Notice 5249]**

### Determination and Waiver of Section 517(a) of the Foreign Operations, Export Financing, and Related Programs Appropriations Act (2006) (Pub. L. 109–102) Relating to Assistance for the Independent States of the Soviet Union

Pursuant to the authority vested in me as Deputy Secretary of State, including by Section 517(a) of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006 (Public Law 109–102), Executive Order 13118 of March 31, 1999, and State Department Delegation of Authority No. 245 of April 21, 2001, I hereby determine that it is in the national security interest of the United States to make available funds appropriated under the heading ''Assistance for the Independent States of the Former Soviet Union'' in Title II of that Act without regard to the restriction in that section.

This determination shall be reported to the Congress promptly and published in the **Federal Register**.

Dated: December 5, 2005.

**Robert B. Zoellick,**

*Deputy Secretary of State, Department of State.*

[FR Doc. 05–24276 Filed 12–16–05; 8:45 am]

BILLING CODE 4710–23–P

## DEPARTMENT OF STATE

**[Public Notice 5250]**

### Determination Pursuant to Section 1(b) of Executive Order 13224 Relating to the Designation of Sajid Mohammed Badat, Also Known as Saajid Badat, Also Known as Muhammed Badat, Also Known as Sajid Muhammad Badat, Also Known as Saajid Mohammad Badet, Also Known as Muhammed Badet, Also Known as Sajid Muhammad Badet, Also Known as Abu Issa al Pakistani, Also Known as Issa, Also Known as Issa Al Britaini, Also Known as Issa Al Pakistani; DOB: 28 March 1979; Alt. DOB: 8 March 1976; POB: Pakistan; Citizenship: British; Passport: 703114075 and 026725401

Acting under the authority of section 1(b) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13286 of July 2, 2002, and Executive Order 13284 of January 23, 2003, and Executive Order 13372 of February 16, 2005, in consultation with the Secretary of the Treasury, the Attorney General, and the Secretary of Homeland Security, I hereby determine that Sajid Mohammed Badat, aka Saajid Badat, aka Muhammed Badat, aka Sajid Muhammad Badat, aka Saajid Mohammad Badet, aka Muhammed Badet, aka Sajid Muhammad Badet, aka Abu Issa Al Pakistani, aka Issa, aka Issa Al Britaini, aka Issa Al Pakistani has committed and poses a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals and the national security, foreign policy, or economy of the United States.

Consistent with the determination in section 10 of Executive Order 13224 that ''prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectural the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously,'' I determine that no prior notice need be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

**Condoleezza Rice,**

*Secretary of State, Department of State.*

[FR Doc. 05–24262 Filed 12–16–05; 5:00 pm]

BILLING CODE 4710–10–U

## DEPARTMENT OF STATE

**[Public Notice 5248]**

### Notice of Receipt of Application for a Presidential Permit for Pipeline Facilities To Be Operated and Maintained on the Border of the United States

**AGENCY:** Department of State.

**ACTION:** Notice.

Notice is hereby given that the Department of State has received an application from PMC (Nova Scotia) Company (''PMC Nova Scotia'') for itself, and on behalf of Plains Marketing Canada L.P. (both Canadian companies), for a Presidential permit, pursuant to Executive Order 11423 of August 16, 1968, as amended by Executive Order 12847 of May 17, 1993 and Executive Order 13284 of January 23, 2003, to operate and maintain the Milk River Pipeline crossing the U.S.-Canada border. The Murphy Oil Corporation had a Presidential permit to construct, operate and maintain this oil pipeline, but the pipeline was acquired in May, 2001 by PMC Nova Scotia, for itself and on behalf of Plains Marketing Canada, L.P.

PMC Nova Scotia and Plains Marketing Canada are direct subsidiaries of Plains All American Pipeline, L.P., of Texas, U.S.A. The existing pipeline originates in Toole County, Montana, and runs to the international boundary between the U.S. and Canada, then connects to similar facilities in the Province of Alberta, Canada. PMC Nova Scotia has, in written correspondence to the Department of State, committed to abide by the relevant terms and conditions of the permit previously held by Murphy Oil. Further, PMC Nova Scotia indicated in that correspondence that the operation of the pipeline will remain essentially unchanged from that previously permitted. Therefore, in accordance with 22 CFR 161.7(b)(3) and the Department's Procedures for Issuance of a Presidential Permit Where There Has Been a Transfer of the Underlying Facility, Bridge or Border Crossing for Land Transportation (70 FR 30990, May 31, 2005), the Department of State does not intend to conduct an environmental review of the application unless information is brought to its attention that the transfer potentially would have a significant impact on the quality of the human environment.

As required by E.O. 13337, the Department of State is circulating this application to concerned federal agencies for comment.

**DATES:** Interested parties are invited to submit, in duplicate, comments relative to this proposal on or before January 18, 2006 to Charles Esser, Office of International Energy and Commodities Policy, Department of State, Washington, DC 20520. The application and related documents that are part of the record to be considered by the Department of State in connection with this application are available for inspection in the Office of International Energy and Commodities Policy during normal business hours.

**FOR FURTHER INFORMATION CONTACT:** Charles Esser, Office of International Energy and Commodity Policy (EB/ESC/IEC/EPC), Department of State, Washington, DC 20520; or by telephone at (202) 647–1291; or by fax at (202) 647–4037.

Dated: December 13, 2005.

**Stephan J. Gallogly,**

*Director, Office of International Energy and Commodity Policy, Department of State.*

[FR Doc. 05–24222 Filed 12–16–05; 8:45 am]

**BILLING CODE 4710–07–M**

## OFFICE OF THE TRADE REPRESENTATIVE

### 2005–2006 Allocations of the Tariff-Rate Quotas for Raw Cane Sugar

**AGENCY:** Office of the United States Trade Representative.

**ACTION:** Notice.

**SUMMARY:** The Office of the United States Trade Representative (USTR) is providing notice of additional country-by-country allocations of the in-quota quantity of the tariff-rate quota for imported raw cane sugar beginning on October 1, 2005 and ending on September 30, 2006.

**EFFECTIVE DATE:** December 19, 2005.

**ADDRESSES:** Inquiries may be mailed or delivered to Sharon Bomer Lauritsen, Deputy Assistant U.S. Trade Representative, Office of Agricultural Affairs, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20508.

**FOR FURTHER INFORMATION CONTACT:** Sharon Bomer Lauritsen, Office of Agricultural Affairs, 202–395–6127.

**SUPPLEMENTARY INFORMATION:** Pursuant to Additional U.S. Note 5 to chapter 17 of the Harmonized Tariff Schedule of the United States (HTS), the United States maintains a tariff-rate quota for imports of raw cane sugar.

Section 404(d)(3) of the Uruguay Round Agreements Act (19 U.S.C. 3601(d)(3)) authorizes the President to allocate the in-quota quantity of a tariff-rate quota for any agricultural product among supplying countries or customs areas. The President delegated this authority to the United States Trade Representative under Presidential Proclamation 6763 (60 FR 1007).

The in-quota quantity of the tariff-rate quota for raw cane sugar for the period October 1, 2005–September 30, 2006, was increased by the Secretary of Agriculture by 300,000 short tons, raw value (272,155 metric tons). This quantity is being allocated to the following countries:

| Country | FY 2006 Additional Allocation (metric tons) |
|---|---|
| Argentina | 11,797 |
| Australia | 22,771 |
| Barbados | 1,920 |
| Belize | 3,018 |
| Bolivia | 2,195 |
| Brazil | 39,781 |
| Colombia | 6,584 |
| Costa Rica | 4,115 |
| Dominican Republic | 48,286 |
| Ecuador | 3,018 |
| El Salvador | 7,133 |
| Fiji | 2,469 |
| Guatemala | 13,169 |
| Guyana | 3,292 |
| Honduras | 2,744 |
| India | 2,195 |
| Jamaica | 3,018 |
| Malawi | 2,744 |
| Mauritius | 3,292 |
| Mozambique | 3,567 |
| Nicaragua | 5,761 |
| Panama | 7,956 |
| Peru | 11,248 |
| Philippines | 37,037 |
| South Africa | 6,310 |
| Swaziland | 4,390 |
| Taiwan | 3,292 |
| Thailand | 3,841 |
| Trinidad-Tobago | 1,920 |
| Zimbabwe | 3,292 |

These allocations are based on the countries' historical shipments to the United States. The allocations of the raw cane sugar tariff-rate quota to countries that are net importers of sugar are conditioned on receipt of the appropriate verifications of origin.

Conversion factor: 1 metric ton = 1.10231125 short tons.

**Rob Portman,**

*United States Trade Representative.*

[FR Doc. E5–7479 Filed 12–16–05; 8:45 am]

**BILLING CODE 3190–W5–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Proposed Revisions to Advisory Circular 25–7A, Flight Test Guide for Certification of Transport Category Airplanes

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice of proposed advisory circular and request for comments.

**SUMMARY:** This notice requests comments regarding proposed revisions to Advisory Circular (AC) 25–7A, ''Flight Test Guide for Certification of Transport Category Airplanes.'' Advisory Circular 25–7A provides guidance on acceptable means, but not the only means, of demonstrating compliance with the airworthiness standards for transport category airplanes. The proposed revisions would remove the guidance material associated with certification for flight in icing conditions. This material is addressed in NPRM No. 05–10, ''Airplane Performance and Handling Qualities In Icing Conditions'' and the guidance material proposed in AC 25.21–1, ''Performance And Handling Characteristics In The Icing Conditions Specified In Part 25, Appendix C.'' This notice provides interested persons an opportunity to comment on the proposed revisions to AC 25–7A.

**DATES:** Your comments must be received on or before February 2, 2006.

**ADDRESSES:** You should send your comments to the Federal Aviation Administration, Attention: Don Stimson, Airplane & Flight Crew Interface Branch, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Ave., SW., Renton, WA 98055–4056. You may also fax your comments to 425–227–1149, or you may send your comments electronically to: *don.stimson@faa.gov.* You may review all comments received at the above address between 7:30 a.m. and 4 p.m. weekdays, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Don Stimson, Airplane & Flight Crew Interface Branch, ANM–111, at the above address, telephone 425–227–1129, facsimile 425–227–1149, or by e-mail at *don.stimson@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

#### Comments Invited

You are invited to comment on the proposed revisions to AC 25–7A by submitting written comments, data, or views. You must identify the AC title and submit your comments in duplicate

to the address specified above. We will consider all comments received on or before the closing date for comments before issuing the revision to AC 25–7A. You may obtain an electronic copy of the proposed AC at the following Internet address: *http://www.airweb.faa.gov/rgl.* If you do not have access to the Internet, you may request a copy by contacting Don Stimson at the address, phone number, or e-mail address listed above.

**Discussion**

Since AC 25–7A only provides one acceptable means of compliance with the regulatory standard, applicants will continue to have the option of proposing the use of another means of compliance.

**Proposed Revisions to AC 25–7A**

The revisions proposed in this notice address guidance material that is now covered in NPRM No. 05–10, ''Airplane Performance and Handling Qualities In Icing Conditions'' and proposed AC 25.21–1, ''Performance And Handling Characteristics In The Icing Conditions Specified In Part 25, Appendix C.'' The FAA proposes removing this material from AC 25–7A.

*1. Remove the following paragraphs:*

Paragraphs 20a(3), 20e, 29d(2)(viii), 31b(2)(ii), 231, and 232.

*2. Renumber the following paragraphs:*

Renumber existing paragraph 20a(4) as 20(a)(3).

Renumber existing paragraph 20f as 20e.

Renumber existing paragraph 29d(2)(ix) and (x) as 29d(2)(viii) and (ix), respectively.

Renumber existing paragraph 233 through 242 as 231 through 240, respectively.

*3. Revise the paragraphs referenced in renumbered paragraph 20e(2)(iii)(C) from 20f(2)(iii)(A) and (B) to 20e(2)(iii)(A) and (B), respectively, to read as follows:*

(C) In flight tests to satisfy paragraphs 20e(2)(iii)(A) and (B) the load factor should be increased until either: * * *

*4. Revise existing paragraph 31b(2)(i) and (ii) by moving the text of paragraph (i) into paragraph b(2), and removing paragraph (i) and (ii) to read as folllows:*

(2) *Section 25.251(b).* The airplane should be flown at $V_{DF}/M_{DF}$ at several altitudes from the highest practicable cruise altitude to the lowest practicable altitude. The test should be flown starting from trimmed flight at $V_{MO}/M_{MO}$ at a thrust setting not exceeding maximum continuous power. The airplane gross weight should be as high as practicable for the cruise condition, with the c.g., at or near the forward limit. High drag devices should also be deployed at $V_{DF}/M_{DF}$ (spoilers and speed brakes); thrust reversers, if designed for inflight deployment, should be deployed at their limit speed conditions.

*5. Revise paragraph 15a by removing the last two sentences of paragraph 15a to read as follows:*

15. CLIMB: GENERAL—§ 25.117

a. *Explanation.* This section states the climb requirements of §§ 25.119 and 25.121 must be complied with at each weight, altitude, and ambient temperature within the operational limits established for the airplane and with the most unfavorable center of gravity for each configuration.

6. Revise the Table of Contents to reflect the paragraph and page number changes above.

Issued in Renton, Washington, on December 9, 2005.

**Ali Bahrami,**

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

[FR Doc. 05–24156 Filed 12–16–05; 8:45 am]

BILLING CODE 4910–13–M

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Proposed Advisory Circular 25.21–1X, Performance and Handling Characteristics in the Icing Conditions Specified in Part 25, Appendix C

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice of availability of proposed Advisory Circular (AC) 25.21–1X and request for comments; extension of comment period.

**SUMMARY:** This notice announces the extension of the comment period for Notice of availability of proposed Advisory Circular (AC) 25.21–1X, and request for comments, which was published in the **Federal Register** on November 4, 2005 (70 FR 67303), and closes on January 3, 2006. In that notice, the FAA invited public comment on a proposed AC which provides guidance on a means, but not the only means, of compliance with the proposed certification requirements for performance and handling characteristics of transport category airplanes affected by flight in the icing conditions defined in appendix C of Title 14, Code of Federal Regulations (CFR) part 25. This extension of the comment period is necessary to give all interested persons an opportunity to present their views on the proposed AC.

**DATES:** Comments must be received on or before February 2, 2006.

**ADDRESSES:** Send all comments on the proposed AC to: Federal Aviation Administration, Attention: Don Stimson, Airplane and Flight Crew Interface Branch, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, WA 98055–4056. Comments may be inspected at the above address between 7:30 a.m. and 4 p.m. weekdays, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Don Stimson at the above address, telephone (206) 227–2143; facsimile (425) 227–1320; or e-mail at: *don.stimson@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

Interested persons are invited to comment on the proposed AC by submitting such written data, views, or arguments, as they may desire. Commenters should identify AC 25.21–1X, and submit comments, in duplicate, to the address specified above. The Transport Standards Staff will consider all communications received on or before the closing date for comments before issuing the final AC. The AC can be found and downloaded from the Internet at: *http://www.airweb.faa.gov/rgl* under ''Draft Advisory Circulars.'' A paper copy of the proposed AC may be obtained by contacting the person named above under the caption **FOR FURTHER INFORMATION CONTACT**.

**Background**

This proposed AC sets forth acceptable methods of compliance with the provisions of 14 CFR 25.21 and related regulations dealing with the certification requirements for performance and handling characteristics of transport category airplanes affected by flight in icing conditions defined in appendix C.

It is one means, but not the only means, of complying with the revisions proposed in Notice No. 05–10 entitled ''Airplane Performance and Handling Qualities in Icing Conditions,'' published in the **Federal Register** on November 4, 2005 (70 FR 67278). Issuance of AC 25–21–1 is contingent on final adoption of the proposed revisions to part 25. Other methods of compliance with the requirements may be acceptable.

In addition, a separate Notice of availability of proposed revisions to AC 25–7A, ''Flight Test Guide for Certification of Transport Category Airplanes,'' will be published in the **Federal Register** when issued. In that proposed AC, the FAA proposes

removing the icing-related guidance from AC 25–7A because that material is addressed by the NPRM Notice No. 05–10, ''Airplane Performance and Handling Qualities In Icing Conditions'' and proposed AC 25.21–1X, ''Performance And Handling Characteristics In The Icing Conditions Specified In part 25, Appendix C.''

Since publication of that notice, the FAA has received a request that the comment period for the notice be extended past its original closing date of January 3, 2006, to allow more time in which to study the proposal and to prepare comments on this very important issue.

**Extension of Comment Period**

The FAA has reviewed the request for consideration of an additional amount of time to comment on proposed AC 25.21–1X, and has determined that extending the comment period would be in the public interest and that good cause exists for taking this action. Accordingly, the comment period of Notice of availability of proposed AC 25.21–1X, and request for comments, is extended until February 2, 2006.

Issued in Renton, Washington, on December 9, 2005.

**Ali Bahrami,**

*Manager, Transport Airplane Directorate Aircraft Certification Service.*

[FR Doc. 05–24157 Filed 12–16–05; 8:45 am]

**BILLING CODE 4910–13–M**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

### Environmental Impact Statement: Alameda and Contra Costa Counties, CA

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of withdrawal.

**SUMMARY:** The FHWA is issuing this notice to advise the public that the Notice of Intent to prepare an Environmental Impact Statement (EIS) for the proposed project to construct a fourth bore to the Caldecott Tunnel between State Route 24/Broadway interchange in the City of Oakland in Alameda County and the State Route 24/Camino Pablo interchange in the City of Orinda in Contra Costa County, California is being withdrawn; and an Environmental Assessment (EA) in lieu of an EIS is being prepared for this proposed highway project.

**FOR FURTHER INFORMATION CONTACT:** Mr. Leland W. Dong, Project Development Engineer, Federal Highway Administration, California Division, 650 Capitol Mall, Suite 4–100, Sacramento, California 95814, Telephone: (916) 498–5860 or to Ms. Cristina Ferraz, Regional Project Manager, California Department of Transportation, 111 Grand Avenue, Oakland CA 94623–0660, Telephone: (510) 286–3890.

**SUPPLEMENTARY INFORMATION:** The FHWA, in cooperation with the California Department of Transportation (Caltrans), conducted studies of the potential environmental impacts associated with the proposed highway project to construct a fourth bore to the Caldecott Tunnel between Alameda and Contra Costa Counties, California. A NOI was published in the Federal Register/Volume 67/No. 225/November 21, 2002. Subsequently, during the course of conducting studies and coordinating with regulatory and resource agencies for this proposed project, it was determined that the potential environmental issues that led to issuing the Notice of Intent were not significant. In addition, it was determined that changes to avoid or minimize potential impacts identified in early scoping can be incorporated into the proposed project. Changes to minimizing impacts were achieved by eliminating alternative alignments that had higher impacts, by reducing the number of lanes to either two or three lanes in lieu of four lanes thereby reducing the tunnel footprint, and by evaluating alignments that will not require the acquisition of additional right-of-way or acquisition of recreational or historic properties protected by section 4(f) of the Department of Transportation Act of 1966.

The FHWA has determined that the proposed project is not anticipated to result in significant impacts to the environment; that an EA would be an appropriate environmental document for the project; and that the Notice of Intent for this project is being withdrawn.

The EA will be available for public inspection prior to the public meeting for the proposed project. Comments or questions concerning this proposed project and the determination that an EA is the appropriate environmental document should be directed to the FHWA or Caltrans at the addresses provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on federal programs and activities apply to this program.)

Issued on: December 13, 2005.

**Leland W. Dong,**

*Project Development Engineer, Federal Highway Administration, Sacramento, California.*

[FR Doc. 05–24193 Filed 12–16–05; 8:45am]

**BILLING CODE 4910–22–M**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

**[Docket No. FMCSA–2005–22905]**

### Qualification of Drivers; Exemption Applications; Diabetes

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of applications for exemption from the diabetes standard; request for comments.

**SUMMARY:** FMCSA announces receipt of applications from six individuals for exemptions from the prohibition against persons with insulin-treated diabetes mellitus (ITDM) operating commercial motor vehicles (CMVs) in interstate commerce. If granted, the exemptions would enable these individuals with ITDM to operate as drivers of commercial motor vehicles in interstate commerce.

**DATES:** Comments must be received on or before January 18, 2006.

**ADDRESSES:** You may submit comments by any of the following methods. Please label your comments with DOT DMS Docket Number FMCSA–2005–22905.

- *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 20590–0001.
- *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

All submissions must include the agency name and docket number for this notice. Note that all comments received will be posted without change to *http://dms.dot.gov,* including any personal information provided. Please see the Privacy Act heading under Regulatory Notices. To read background documents

or comments received, go to *http://dms.dot.gov* 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:** Dr. Mary D. Gunnels, Chief, Physical Qualifications Division, (202) 366–4001, FMCSA, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Office hours are from 8 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

*Public Comments:* The DMS is generally available 24 hours each day, except when announced system maintenance requires a brief interruption in service. You can get electronic submission and retrieval help guidelines under the ''help'' section of the DMS Web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard. An acknowledgement page appears after submitting comments on-line and can be printed to document submission of comments.

*Privacy Act:* Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's complete Privacy Act statement in the **Federal Register**published April 11, 2000 (65 FR 19477–78) or you may visit *http://dms.dot.gov.*

## Background

Under 49 U.S.C. 31315 and 31136(e), the FMCSA may grant an exemption for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' The statute also allows the agency to renew exemptions at the end of the 2-year period. The six individuals listed in this notice have recently requested an exemption from the diabetes prohibition in 49 CFR 391.41(b)(3), which applies to drivers of CMVs in interstate commerce. Accordingly, the agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by the statute.

## Qualifications of Applicants

*Daryle W. Belcher*

Mr. Belcher, 63, has had ITDM since 2000. He has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years. His endocrinologist examined him in 2005 and stated, ''He has been extremely willing to properly monitor and manage his diabetes.'' Mr. Belcher meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2005 and certified that he does not have diabetic retinopathy. He holds a Class B Commercial Driver's License (CDL) from Texas.

*William H. Gardner*

Mr. Gardner, 34, has had ITDM since 1981. He has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years. His endocrinologist examined him in 2005 and stated, ''He is stable on the current insulin regimen, understands diabetes management and monitoring, and is able to drive a commercial motor vehicle safely.'' He holds a Class A CDL from California.

*Roy G. Hill*

Mr. Hill, 43, has had ITDM since 1975. He has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years. His endocrinologist examined him in 2005 and stated, ''Mr. Hill has demonstrated the ability to monitor and manage his diabetes.'' Mr. Hill meets the requirements of the vision standard at 49 CFR 391.41 (b)(10). His ophthalmologist examined him in 2005 and certified that there is no evidence of diabetic retinopathy He holds a Class A CDL from Kentucky.

*Anthony D. Izzi*

Mr. Izzi, 45, has had ITDM since 2000. He has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years. His endocrinologist examined him in 2005 and stated, ''He demonstrates willingness to properly monitor and manage his diabetes without difficulty and with success.'' Mr. Izzi meets the requirements of the vision standard at 49 CFR 391.41 (b)(10). His ophthalmologist examined him in 2005 and certified that he does not have diabetic retinopathy He holds an operator's license from Rhode Island.

*Ronald D. Paul*

Mr. Paul, 58, has had ITDM since 1980. He has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years. His endocrinologist examined him in 2005 and stated, ''Mr. Paul has demonstrated willingness to properly monitor and manage his diabetes.'' Mr. Paul meets the requirements of the vision standard at 49 CFR 391.41 (b)(10). His ophthalmologist examined him in 2005 and certified that he does have stable mild background diabetic retinopathy. He holds a Class B CDL from New Hampshire.

*Kenneth L. Pogue*

Mr. Pogue, 46, has had ITDM since 1997. He has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years. His endocrinologist examined him in 2005 and stated, ''Mr. Pogue is well educated regarding his diabetes and its management. Mr. Pogue has demonstrated willingness to properly monitor and manage his diabetes.'' Mr. Pogue meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2005 and stated, ''There was no evidence of diabetic retinopathy present.'' He holds a Class A CDL from Missouri.

## Request for Comments

In accordance with 49 U.S.C. 31315 and 31136(e), the FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated earlier in the notice.

FMCSA notes that Section 4129 of the Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) requires the Secretary to begin within 90 days of enactment to revise the September 3, 2003 (68 FR 52441), notice of final disposition, to allow drivers who use insulin to treat diabetes to

operate CMVs in interstate commerce.[1] The revision must provide for individual assessment of drivers with diabetes mellitus, and be consistent with the criteria described in section 4018 of TEA–21.

Section 4129 requires two substantive changes to be made in the current exemption process set out in the September 3, 2003 Notice. As required by section 4129(b) and (c), the changes are: (1) Elimination of the requirement for three years of experience operating CMVs while being treated with insulin; and (2) establishment of a specified minimum period of insulin dose to demonstrate stable control of diabetes before being allowed to operate a CMV.

In order to accomplish these changes within the 90-day time frame established by section 4129, FMCSA made immediate revisions to the diabetes exemption program established by the September 3, 2003 Notice. These revisions were those necessary to respond to the specific changes mandated by section 4129 while continuing to ensure that operation of CMVs by drivers with ITDM will achieve the necessary level of safety as also required by section 4129(a).

Section 4129(d) also directed FMCSA to ensure that drivers of CMVs with ITDM are not held to a higher standard than other drivers, with the exception of limited operating, monitoring and medical requirements that are deemed medically necessary. FMCSA concluded that all of the operating, monitoring and medical requirements set out in the September 3, 2003 Notice, except as modified, were in compliance with section 4129(d). All of the requirements set out in the September 3, 2003 Notice, except as modified in the Notice in the **Federal Register** on November 8, 2005 (70 FR 67777), remain in effect.

Issued on: December 13, 2005.

**Annette M. Sandberg,**

*Administrator.*

[FR Doc. E5–7494 Filed 12–16–05; 8:45 am]

**BILLING CODE 4910–EX–P**

[1] Section 4129(a) refers to the 2003 Notice as a ''final rule.'' However, the 2003 Notice did not issue a ''final rule,'' but did establish the procedures and standards for issuing exemptions for drivers with ITDM.

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[STB Finance Docket No. 34790]**

### Dakota, Minnesota & Eastern Railroad Corporation and Iowa, Chicago & Eastern Railroad Corporation—Temporary Trackage Rights Exemption—BNSF Railway Company

BNSF Railway Company (BNSF) has agreed to grant temporary trackage rights to the Dakota, Minnesota & Eastern Railroad Corporation (DM&E) and the Iowa, Chicago & Eastern Railroad Corporation (IC&E) (DM&E and IC&E are referred to collectively as ''User'') between milepost (MP) 146.0 on BNSF's Corson Subdivision at Sioux Falls, SD, and MP 705.5 on BNSF's Aberdeen Subdivision at Wolsey, SD, a distance of 149.8 miles, solely for the overhead movement of User's business cars (and engines and end-of-train devices required to operate those business cars). The trackage rights run: between Sioux Falls, SD, and Canton, SD; between Canton, SD, and Mitchell, SD; and between Mitchell, SD, and Wolsey, SD. These trackage rights were scheduled to be effective on or after December 6, 2005, and the authorization for these trackage rights will expire one year after the effective date. However, although the term of the temporary trackage rights agreement is for no more than one year, BNSF has also agreed that, for a period of 10 years from the effective date of that agreement, BNSF shall agree to DM&E's requests to establish new annual temporary trackage rights arrangements on the same terms, provided that the temporary trackage rights agreement shall not have terminated early as a result of material default of DM&E, and further provided that DM&E shall not otherwise be in material default of the terms of the agreement.

As a condition to this exemption, any employees affected by the acquisition of the temporary trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN,* 354 I.C.C. 605, 610–15 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate,* 360 I.C.C. 653, 664 (1980), and any employees affected by the discontinuance of those trackage rights will be protected by the conditions set out in *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91, 98–103 (1979).

This notice is filed under 49 CFR 1180.2(d)(8). If it contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34790, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on User's representative: Michael J. Barron, Jr., Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 920, Chicago, IL 60606–2875.

Board decisions and notices are available on its Web site at *http://www.stb.dot.gov.*

Decided: December 9, 2005.

By the Board, David M. Konschnik, Director, Office of Proceedings.

**Vernon A. Williams,**

*Secretary.*

[FR Doc. 05–24141 Filed 12–16–05; 8:45 am]

**BILLING CODE 4915–01–P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[STB Finance Docket No. 34125 (Sub–No. 1)]**

### South Dakota Railroad Authority—Acquisition and Operation Modification Exemption—BNSF Railway Company

BNSF Railway Company (BNSF) has agreed to amend existing operating rights of the South Dakota Department of Transportation, successor in interest to the South Dakota Railroad Authority (User), at Aberdeen, SD, pursuant to an amendment (Amendment) to an existing agreement. Pursuant to the Amendment, BNSF has agreed to grant User and its designee the right to interchange traffic on and/or via BNSF-owned trackage at Aberdeen in connection with the movement of the traffic to, from, or via User's tracks between Kidder, SD, and Aberdeen, SD (the ''Rail Line'') pursuant to the terms outlined below.

(1) Subject to all other applicable terms and conditions set forth in the Amendment, BNSF shall permit the Dakota, Minnesota & Eastern Railroad Corporation (DM&E) and User or its designee to interchange with one another at Aberdeen Yard via the Interchange Access Line (as that is defined in an agreement between the parties) without restrictions for traffic which either originates or terminates on the Rail Line.

(2) Subject to all other applicable terms and conditions set forth in the Amendment, BNSF shall permit DM&E and User or its designee to interchange

with one another at Aberdeen Yard or on the State-owned trackage north of Aberdeen via the Interchange Access Line for traffic originating or terminating on DM&E in South Dakota, moving to or from points served by Canadian Pacific Railway's (CP's) network as it existed as of April 25, 2005, in (a) North Dakota (not including the Dakota, Missouri Valley & Western Railroad or CP-affiliated shortlines) other than to or from industries which are (as of April 25, 2005) jointly served by CP and BNSF (*e.g.*, industries at Valley City and Minot), and (b) Canada (including, but not limited to, Canadian export ports and CP-affiliated shortlines); provided such rights shall extend only to movements of agricultural commodities (STCCs 01 and 20), fertilizers, ethanol, bentonite, and forest products, and provided further that such rights shall be subject to certain unit train restrictions for North Dakota points as set forth in the Amendment.

(3)(a) Subject to all other applicable terms and conditions set forth in the Amendment and other agreements between BNSF and User, BNSF shall permit User or its designee to interchange with lessees and operators of State-owned rail lines (as hereinafter defined) all traffic (excluding coal and intermodal traffic) originating or terminating on said State-owned rail lines.

(3)(b) In the event that traffic from the State-owned rail lines is being moved to/from Aberdeen by BNSF in haulage service for said operators/lessees pursuant to terms of a haulage agreement, the interchange with BNSF or the Rail Line operator shall occur at Aberdeen Yard (or other location in the Aberdeen vicinity at BNSF's discretion) on trackage designated by BNSF. In the event that the traffic is being moved to the Rail Line by the operators/lessees pursuant to exercise of trackage rights over BNSF trackage, such interchange shall be performed on the Rail Line or, if the operators/lessees request to interchange at Aberdeen Yard and BNSF local operating personnel consent thereto, at such tracks in Aberdeen Yard as may be designated by BNSF.

(3)(c) ''State-owned rail lines'' as referenced herein refer to the Mitchell, SD-Kadoka, SD Line and the Napa, SD-Platte, SD Line as those lines existed as of April 25, 2005, and do not include extensions which, in the future, may be connected to or from these lines; provided, however, ''extensions'' means additions to the lines by way of acquisition or construction of lines of railroad, but does not include, or otherwise prohibit interchange to/from the Rail Line of, rail traffic moving to/from new industries located on the State-owned rail lines subsequent to April 25, 2005.

(4) Except as expressly provided above, User or its designee shall not move, or cause or allow to be moved, on, over, or via the Rail Line or the Interchange Access Line, traffic that neither originates nor terminates on the Rail Line.

The trackage rights granted by BNSF were scheduled to become effective on or after December 6, 2005. The purpose of the trackage rights is to allow User to have expanded interchange rights at Aberdeen.

As a condition to the exemption invoked by User, any employees affected by the trackage rights granted to User in STB Finance Docket No. 34125 (Sub–No. 1) will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights*—BN, 354 I.C.C. 605, 610–15 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653, 664 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If it contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34125 (Sub–No. 1), must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on User's representative: Michael J. Barron, Jr., Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 920, Chicago, IL 60606–2875.

Board decisions and notices are available on its Web site at *http://www.stb.dot.gov.*

Decided: December 9, 2005.

By the Board, David M. Konschnik, Director, Office of Proceedings.

**Vernon A. Williams,**

*Secretary.*

[FR Doc. 05–24143 Filed 12–16–05; 8:45 am]

**BILLING CODE 4915–01–P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[STB Finance Docket No. 34788]**

### Mitchell-Rapid City Regional Railroad Authority and Dakota Southern Railway Company—Trackage Rights Exemption—BNSF Railway Company

BNSF Railway Company (BNSF) has agreed to grant overhead trackage rights to the Mitchell-Rapid City Regional Railroad Authority (MRC, a political subdivision of the State of South Dakota) and the Dakota Southern Railway Company (DSRC, a sublessee/contract operator for MRC) (MRC and DSRC are referred to collectively as ''User'') at Mitchell, SD: (1) Between BNSF's connection with DSRC, at milepost (MP) 650.65, and DSRC-leased tracks in BNSF's Mitchell yard, at MP 650.16; and (2) between BNSF's Mitchell yard, at MP 650.16, and the Grain Shuttle Facility at Mitchell, at MP 652.9. In addition to User's right to utilize the Mitchell yard pursuant to other agreements, User shall also have the right to ingress and egress the Mitchell yard for the purpose of ''running around'' its train at Mitchell, if operationally necessary to originate traffic from or terminate traffic at the Grain Shuttle Facility. The new rights granted by BNSF apply only to traffic that originates or terminates on the rail line between Mitchell, SD, and Kadoka, SD (as that line existed as of April 25, 2005), and that originates or terminates at the Grain Shuttle Facility. Under the agreement entered into by BNSF and MRC/DSRC: MRC would be able to utilize the new rights granted by BNSF with another sublessee/contract operator (other than a Class I or Class II railroad or the Dakota, Minnesota & Eastern Railroad Corporation); and, if MRC ceases to be the lessee of the State of South Dakota for the corridor between Mitchell and Rapid City, SD, the new rights granted by BNSF will be automatically assigned to the State of South Dakota.

The trackage rights granted by BNSF were scheduled to become effective on or after December 6, 2005. The purpose of the trackage rights is to allow MRC/DSRC to move traffic between points on the Mitchell-Kadoka Line and the Grain Shuttle Facility at Mitchell.

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN,* 354 I.C.C. 605, 610–15 (1978), as modified in *Mendocino Coast Ry., Inc.—*

*Lease and Operate,* 360 I.C.C. 653, 664 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If it contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34788, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on User's representative: Michael J. Barron, Jr., Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 920, Chicago, IL 60606–2875.

Board decisions and notices are available on its Web site at *http://www.stb.dot.gov.*

Decided: December 9, 2005.

By the Board, David M. Konschnik, Director, Office of Proceedings.

**Vernon A. Williams,**

*Secretary.*

[FR Doc. 05–24144 Filed 12–16–05; 8:45 am]

**BILLING CODE 4915–01–P**

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## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[STB Finance Docket No. 34789]**

### Dakota, Minnesota & Eastern Railroad Corporation—Trackage Rights Exemption—BNSF Railway Company

BNSF Railway Company (BNSF) has agreed to supplement existing trackage rights of the Dakota, Minnesota & Eastern Railroad Corporation (DM&E) at Aberdeen, SD, as explained herein. DM&E has existing trackage rights on BNSF's track at Aberdeen pursuant to a 1975 agreement between the Chicago, Milwaukee, St. Paul & Pacific (predecessor-in-interest of BNSF) and the Chicago and North Western Transportation Company (predecessor-in-interest of DM&E), which agreement was amended in 1986 (the 1975 agreement and the 1986 amendment are collectively referred to herein as the Agreement). The State of South Dakota, acting through the State Department of Transportation, as successor-in-interest to the South Dakota Railroad Authority (herein referred to as the State), owns the tracks between Aberdeen and Kidder, SD (herein referred to as the Rail Line). In addition to the trackage and interchange rights granted under the Agreement, BNSF will permit DM&E and the State (or the State's designee, i.e., the State's contract operator acting as agent for the State) to interchange DM&E's traffic at Aberdeen in connection with the movement of traffic moving to, from, or via the Rail Line pursuant to the provisions outlined below.

(1) BNSF will permit DM&E and the State (or the State's designee) to interchange with one another in BNSF's Aberdeen Yard via the Interchange Access Line (the tracks on BNSF's Geneseo Subdivision between mileposts 118.60 and 115.08) without restrictions for traffic which either originates or terminates on the Rail Line.

(2) BNSF will permit DM&E and the State (or the State's designee) to interchange with one another at Aberdeen Yard via the Interchange Access Line for traffic originating or terminating on DM&E in South Dakota, moving to or from points served by Canadian Pacific Railway's (CP's) network as it existed as of April 25, 2005 in: (a) North Dakota (not including the Dakota, Missouri Valley & Western Railroad or CP-affiliated shortlines) other than to or from industries which are (as of April 25, 2005) jointly served by CP and BNSF (e.g., industries at Valley City and Minot); and (b) Canada (including, but not limited to, Canadian export ports and CP-affiliated shortlines), provided such interchange rights extend only to movements of agricultural commodities (STCC's 01 and 20), fertilizers, ethanol, bentonite clay, and forest products, and further subject to certain unit train restrictions pertaining to North Dakota points.

(3) BNSF will permit DM&E to use the Interchange Access Line in conjunction with DM&E's existing trackage rights in order to facilitate interchange of cars between DM&E and the State, by and through the State's designee, on the State-owned trackage north of Aberdeen, subject to certain restrictions.

The trackage rights granted by BNSF were scheduled to become effective on or after December 6, 2005. The purpose of the trackage rights is to allow DM&E to enjoy, at Aberdeen, expanded interchange access for traffic moving to, from, or via the Aberdeen-Kidder Line.

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN,* 354 I.C.C. 605, 610–15 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate,* 360 I.C.C. 653, 664 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If it contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34789, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on DM&E's representative: Michael J. Barron, Jr., Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 920, Chicago, IL 60606–2875.

Board decisions and notices are available on its Web site at *http://www.stb.dot.gov.*

Decided: December 9, 2005.

By the Board, David M. Konschnik, Director, Office of Proceedings.

**Vernon A. Williams,**

*Secretary.*

[FR Doc. 05–24145 Filed 12–16–05; 8:45 am]

**BILLING CODE 4915–01–P**

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## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[STB Finance Docket No. 34787]**

### D&I Railroad Company—Trackage Rights Exemption—BNSF Railway Company

BNSF Railway Company (BNSF) has agreed to grant 159.2 miles of limited overhead trackage rights to D&I Railroad Company (D&I) between Sioux Falls, SD, at milepost (MP) 74.1 (MP 74.1 is just north of West Junction, SD), and Wolsey, SD, at MP 707.0 (MP 707.0 is north of the diamond crossing of the Dakota, Minnesota & Eastern Corporation (DM&E) at Wolsey). The trackage rights run: between Sioux Falls, SD, and Canton, SD; between Canton, SD, and Mitchell, SD; and between Mitchell, SD, and Wolsey, SD. The trackage rights apply only to the movement of aggregates (STCC series 14219, 14412, 14413, and 14919) moving in cars in D&I's account, originating at Dell Rapids, SD, interchanged to DM&E at Wolsey, SD, and terminating at DM&E-served destinations in South Dakota (provided, however, that DM&E may transport such aggregates beyond South Dakota where necessary for DM&E's operations).

The trackage rights granted by BNSF were scheduled to become effective on or after December 6, 2005. The purpose of the trackage rights is to allow D&I to move certain shipments of aggregates from Dell Rapids to Wolsey.

As a condition to this exemption, any employees affected by the trackage

rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN,* 354 I.C.C. 605, 610–15 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate,* 360 I.C.C. 653, 664 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If it contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34787, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on D&I's representative: Edward J. Krug, Krug Law Firm, PLC, 401 First Street, SE., P.O. Box 186, Cedar Rapids, IA 52406.

Board decisions and notices are available on its Web site at *http://www.stb.dot.gov.*

Decided: December 9, 2005.

By the Board, David M. Konschnik, Director, Office of Proceedings.

**Vernon A. Williams,**

*Secretary.*

[FR Doc. 05–24146 Filed 12–16–05; 8:45 am]

**BILLING CODE 4915–01–P**

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## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[STB Finance Docket No. 34786]**

### Sioux Valley Regional Railroad Authority and D&I Railroad Company—Trackage Rights Exemption—BNSF Railway Company

BNSF Railway Company (BNSF) has agreed to grant 136.70 miles of limited overhead trackage rights to Sioux Valley Regional Railroad Authority (SVRRA) and D&I Railroad Company (D&I): (1) On the Canton subdivision in Canton, SD, between milepost (MP) 49.40 and MP 50.01; (2) on the Mitchell subdivision between Canton, SD, at MP 294.80, and Mitchell, SD, at MP 373.58; and (3) on the Aberdeen subdivision between Mitchell, SD, at MP 649.69, and Wolsey, SD, at MP 707.00 (MP 707.00 is located north of the diamond crossing of the Dakota, Minnesota & Eastern Railroad Corporation (DM&E) at Wolsey). These trackage rights apply only to the movement of aggregates (STCC series 14219, 14412, 14413, and 14919) moving in cars in SVRRA's or D&I's account, originating at Hawarden, IA, interchanged to DM&E at Wolsey, SD, and terminating at DM&E-served destinations in South Dakota (provided, however, that DM&E may transport such aggregates beyond South Dakota where necessary for DM&E's operations). The agreement entered into by BNSF, on the one hand, and, on the other hand, SVRRA (a political subdivision of the State of South Dakota) and D&I (a sublessee/contract operator for SVRRA) provides that SVRRA can utilize the trackage rights with another sublessee/contract operator, subject to certain restrictions. The agreement further provides that, subject to certain restrictions, the trackage rights may be assigned to any lessee of the State of South Dakota for the line known as the Canton-Elk Point Corridor or to a party that acquires the Canton-Elk Point Corridor.

The trackage rights granted by BNSF were scheduled to become effective on or after December 6, 2005. The purpose of the trackage rights is to allow SVRRA/D&I to move certain commodities pursuant to the trackage rights.

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN,* 354 I.C.C. 605, 610–15 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate,* 360 I.C.C. 653, 664 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If it contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34786, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on SVRRA's and D&I's representative: Edward J. Krug, Krug Law Firm, PLC, 401 First Street, SE., P.O. Box 186, Cedar Rapids, IA 52406.

Board decisions and notices are available on its Web site at *http://www.stb.dot.gov.*

Decided: December 9, 2005.

By the Board, David M. Konschnik, Director, Office of Proceedings.

**Vernon A. Williams,**

*Secretary.*

[FR Doc. 05–24147 Filed 12–16–05; 8:45 am]

**BILLING CODE 4915–01–P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[STB Finance Docket No. 34685 (Sub–No. 1)]**

### D&I Railroad Company—Trackage Rights Exemption—BNSF Railway Company

Pursuant to an earlier trackage rights agreement between BNSF Railway Company (BNSF) and D&I Railroad Company (D&I), D&I presently has overhead trackage rights over BNSF tracks: (a) In Sioux Falls, SD, between milepost (MP) 71.5 (East Junction) and MP 74.1 (just north of West Junction), between MPs 0.0 and 1.09 on the Madison Subdivision, and between MPs 145.45 and 145.91 on the Corson subdivision; (b) between Sioux Falls, SD (MP 69.9), and Canton, SD (MP 49.9), on the Canton Subdivision; and (c) between South Wye Switch, SD (MP 533.4, just south of Elk Point, SD) (formerly known as East Wye Switch and also referenced as Elk Point), and Sioux City, IA (MP 512.6), on the Aberdeen subdivision.

BNSF has agreed to grant the following additional overhead trackage rights to D&I: (1) At Canton, D&I's Sioux Falls-Canton trackage rights will be extended from MP 49.9 to MP 49.4 (Engineering Survey Number 6651.08=97+08.5 E.C.), where centerline of track leaves BNSF property and enters Sioux Valley Regional Railroad Authority (SVRRA) property; (2) D&I's South Wye Switch-Sioux City trackage rights will be extended from MP 512.6 to just east of Steuben Street, MP 512.36; (3) D&I will also receive additional operating rights on BNSF's ''Blood Line'' in Sioux City, solely for the purpose of effecting interchange with Union Pacific Railroad Company (UP) and Canadian National Railway Company (CN) at Sioux City, until such time as a direct connection to UP and CN is built, as contemplated in a letter agreement between BNSF and the State of South Dakota (the State), dated November 22, 2005.

Under the agreement with BNSF, the rights granted to D&I pertaining to movement of traffic between Canton and South Wye Switch, including Beresford, SD, to Hawarden, IA (as those lines existed as of April 25, 2005) (the ''Existing Hawarden Line''), shall automatically be assigned to any State lessee of the Existing Hawarden Line who succeeds SVRRA as lessee, other than the Dakota, Minnesota & Eastern Railroad Corporation (DM&E) or a successor thereto, or a Class I or Class II railroad, and may be assigned by SVRRA and its successor to another

operator of all or a part of the Existing Hawarden Line acting as agent for SVRRA or otherwise assigned in whole to an entity acquiring ownership of or a leasehold interest in the Existing Hawarden Line, provided such operator is not DM&E or a successor thereto, or a Class I or Class II Railroad.

The trackage rights granted by BNSF were scheduled to become effective on or after December 6, 2005. The purpose of the trackage rights is to facilitate D&I access to additional markets.

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN,* 354 I.C.C. 605, 610–15 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate,* 360 I.C.C. 653, 664 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If it contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34685 (Sub-No. 1), must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on D&I's representative: Edward J. Krug, Krug Law Firm, PLC, 401 First Street, SE., P.O. Box 186, Cedar Rapids, IA 52406.

Board decisions and notices are available on its Web site at *http://www.stb.dot.gov.*

Decided: December 9, 2005.

By the Board, David M. Konschnik, Director, Office of Proceedings.

**Vernon A. Williams,**

*Secretary.*

[FR Doc. 05–24148 Filed 12–16–05; 8:45 am]

**BILLING CODE 4915–01–P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[STB Finance Docket No. 34794]**

### BNSF Railway Company—Acquisition and Operation Exemption—State of South Dakota

BNSF Railway Company (BNSF), a Class I rail carrier, has filed a verified notice of exemption under 49 CFR 1150.31 to acquire and operate approximately 368 route miles of railroad lines, referred to as the ''Core Lines,'' that are owned by the State of South Dakota (the State). These lines, which are described in a July 10, 1986 Operating Agreement between a BNSF predecessor (Burlington Northern Railroad Company) and the State, extend principally: between milepost (MP) 777.0 near Aberdeen, SD, and MP 650.6 near Mitchell, SD; between MP 518.9 near Sioux City, IA, and MP 649.7 near Mitchell, SD; between MP 293.1 near Canton, SD, and MP 650.6 near Mitchell, SD; between MPs 74.1 and 68.8 in Sioux Falls, SD; between MP 68.8 near Sioux Falls, SD, and MP 49.4 near Canton, SD; and between MPs 511.9 and 518.9 in Sioux City, IA.

The Core Lines were once part of the rail system operated by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (the Milwaukee Road). The Milwaukee Road entered bankruptcy in 1977, and, in 1980, it received, both from the Interstate Commerce Commission (ICC) and from the bankruptcy court, approval to abandon the Core Lines. In 1981, the abandoned Core Lines were acquired by the State, and, since on or about July 6, 1981, BNSF has provided common carrier rail service over the Core Lines pursuant to various agreements (the most recent of which is the 1986 Operating Agreement) with the State, and pursuant to a Modified Certificate of Public Convenience and Necessity (the modified certificate) issued by the ICC. *See* 49 CFR Part 1150, Subpart C (§ 1150.21 *et seq.*) (these are the ''modified certificate'' regulations that apply to operations over abandoned rail lines that have been acquired, through purchase or lease, by a State).

Because the Core Lines were abandoned by the Milwaukee Road, BNSF has invoked the notice of exemption procedures at 49 CFR Part 1150, Subpart D (§ 1150.31 *et seq.*) (these are the regulations that apply to acquisitions and operations under § 10901). *See The Burlington Northern and Santa Fe Railway Company—Acquisition and Operation Exemption—Lac Qui Parle Regional Railroad Authority,* STB Finance Docket No. 33364 (STB served Apr. 15, 1997); —Burlington Northern Railroad Company—Acquisition and Operation Exemption—South Dakota Railroad Authority, Finance Docket No. 32017 (ICC served Apr. 2, 1992).

BNSF has stated that the ''acquisition'' authority encompassed by its exemption notice was expected to be effective on December 6, 2005, and that ''operations'' under its exemption notice were expected to begin on or after that date.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke does not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34794, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on BNSF's representative: Adrian L. Steel, Jr., Mayer, Brown, Rowe & Maw LLP, 1909 K Street, NW., Washington, DC 20006–1101.

Board decisions and notices are available on its Web site at *http://www.stb.dot.gov.*

Decided: December 9, 2005.

By the Board, David M. Konschnik, Director, Office of Proceedings.

**Vernon A. Williams,**

*Secretary.*

[FR Doc. 05–24140 Filed 12–16–05; 8:45 am]

**BILLING CODE 4915–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Form 8569

**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, Pub. L. 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8569, Geographic Availability Statement.

**DATES:** Written comments should be received on or before February 17, 2006 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Glenn Kirkland Internal Revenue Service, room 6512, 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 Larnice Mack at Internal Revenue Service, room 6512, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3179, or through the internet at (*Larnice.Mack@irs.gov*).

**SUPPLEMENTARY INFORMATION:**

*Title:* Geographic Availability Statement.

*OMB Number:* 1545–0973.

*Form Number:* 8569.

*Abstract:* This form is used to collect information from applicants for the Senior Executive Service Candidate Development Program and other executive positions. The form states an applicant's minimum area of availability and is used for future job replacement consideration.

*Current Actions:* There are no changes being made to Form 8569 at this time.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Individuals and the Federal Government.

*Estimated Number of Respondents:* 500.

*Estimated Number of Respondents:* 10 minutes.

*Estimated Total Annual Burden Hours:* 84.

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: December 12, 2005.

**Glenn Kirkland,**

*IRS Reports Clearance Office.*

[FR Doc. 05–24170 Filed 12–16–05; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

**[REG–209709–94]**

### 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, REG–209709–94 (TD 8865), Amortization of Intangible Property (§ 1.197–2).

**DATES:** Written comments should be received on or before February 17, 2006 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Glenn Kirkland, Internal Revenue Service, room 6512, 1111 Constitution Avenue NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the regulations should be directed to Larnice Mack at Internal Revenue Service, room 6512, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3179, or through the Internet at (*Larnice.Mack@irs.gov*).

**SUPPLEMENTARY INFORMATION:**

*Title:* Amortization of Intangible Property.

*OMB Number:* 1545–1671.

*Regulation Project Number:* REG–209709–94.

*Abstract:* Section 1.197–2(h)(9) requires the party making the election statement to timely filed Federal income tax return for the taxable year that the election under section 197(f)(9)(B) is effective, and to provide written notification of the election to the party acquiring the section 197 intangible.

*Current Actions:* There is no change to this existing regulation.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* 500.

*Estimated Time Per Respondent:* 3 hours.

*Estimated Total Annual Burden Hours:* 1,500.

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: December 12, 2005.

**Glenn Kirkland,**

*IRS Reports Clearance Officer.*

[FR Doc. 05–24171 Filed 12–16–05; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Form 4419

**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 4419, Application for Filing Information Returns Magnetically/Electronically.

**DATES:** Written comments should be received on or before February 17, 2006 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Glenn Kirkland Internal Revenue Service, room 6512, 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 Larnice Mack at Internal Revenue Service, room 6512, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3179, or through the Internet at (*Larnice.Mack@irs.gov*).

**SUPPLEMENTARY INFORMATION:**

*Title:* Application for Filing Information Returns Magnetically/Electronically.

*OMB Number:* 1545–0387.

*Form Number:* 4419.

*Abstract:* Under section 6011(e)(2)(a) of the Internal Revenue Code, any person, including corporations, partnerships, individuals, estates and trusts, who is required to file 250 or more information returns must file such returns magnetically or electronically. Payers required to file on magnetic media or electronically must complete Form 4419 to receive authorization to file.

*Current Actions:* There are no changes being made to the form at this time.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations, non-profit institutions, and Federal, State, local or tribal governments.

*Estimated Number of Respondents:* 15,000.

*Estimated Number of Respondents:* 26 minutes.

*Estimated Total Annual Burden Hours:* 6,500.

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: December 12, 2005.

**Glenn Kirkland,**

*IRS Reports Clearance Officer.*

[FR Doc. 05–24172 Filed 12–16–05; 8:45 am]

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Federal Register

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December 19, 2005

# Part II

# Department of Labor

## Veterans' Employment and Training Service

## 20 CFR Part 1002

## Uniformed Services Employment and Reemployment Rights Act of 1994; Final Rules

**DEPARTMENT OF LABOR**

**Veterans' Employment and Training Service**

**20 CFR Part 1002**

**[Docket No. VETS–U–04]**

**RIN 1293–AA09**

## Uniformed Services Employment and Reemployment Rights Act of 1994, As Amended

**AGENCY:** Veterans' Employment and Training Service, Department of Labor.

**ACTION:** Final rules.

**SUMMARY:** The Veterans' Employment and Training Service (''VETS'' or ''the Agency'') issued proposed rules implementing the Uniformed Services Employment and Reemployment Rights Act of 1994, as amended (USERRA). This document sets forth the Agency's review of and response to comments on the proposal and any changes made in response to those comments.

Congress enacted USERRA to protect the rights of persons who voluntarily or involuntarily leave employment positions to undertake military service. USERRA authorizes the Secretary of Labor (in consultation with the Secretary of Defense) to prescribe rules implementing the law as it applies to States, local governments, and private employers. VETS proposed rules under that authority in order to provide guidance to employers and employees concerning their rights and obligations under USERRA. The Agency invited written comments on these proposed rules, and any specific issues related to the proposal, from members of the public.

**DATES:** *Effective Date:* This rule will be effective on January 18, 2006.

**FOR FURTHER INFORMATION CONTACT:** Robert Wilson, Chief, Investigations and Compliance Division, Veterans' Employment and Training Service, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–1312, Washington, DC 20210, *Wilson.Robert@dol.gov,* (202) 693–4719 (this is not a toll-free number).

For press inquiries, contact Michael Biddle, Office of Public Affairs, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–1032, Washington, DC 20210, *Biddle.Michael@dol.gov,* (202) 693–5051 (this is not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

### I. Background

On September 20, 2004, the Department of Labor (''the Department'') issued proposed regulations to implement the Uniformed Services Employment and Reemployment Rights Act of 1994, as amended (USERRA), 38 U.S.C. 4301–4334. The Department invited written comments on the proposed regulations from interested parties. The Department also invited public comment on specific issues. The written comment period closed on November 19, 2004, and the Department has considered all timely comments received in response to the proposed regulations.

The Department received 80 timely comments from a wide variety of sources. Commenters included: a member of Congress; service members and veterans; organizations representing human resource professionals and employee benefits providers; law firms; individual employers and employer associations; individual employees and employee representatives; and members of the interested public. The comments were composed of well over 300 individual queries or concerns addressed to approximately 200 specific topics set out in the Department's notice of proposed rulemaking. While a few of the comments were generalized plaudits or individualized complaints, the great majority of comments specifically addressed issues contained in the Department's proposed rule. The Department recognizes and appreciates the value of comments, ideas, and suggestions from members of the uniformed services, employers, industry associations, labor organizations and other parties who have an interest in uniformed service members' and veterans' employment and reemployment rights and benefits.

Following the publication of the NPRM, the Department issued an interim final rule, Notice of Rights and Duties Under the Uniformed Services Employment and Reemployment Act, 70 FR 12106 (March 10, 2005), to comply with an amendment made to USERRA by the Veterans Benefits Improvement Act of 2004 (VBIA), Public Law 108–454 (Dec. 10, 2004). In part, the VBIA imposed a new requirement that ''Each employer shall provide to persons entitled to rights and benefits under [USERRA] a notice of the rights, benefits, and obligations of such persons and such employers under [USERRA].'' 38 U.S.C. 4334(a). The VBIA required the Secretary of Labor to make available to employers the text of the required notice, 38 U.S.C. 4334(b), and the Department's publication of the interim final rule set forth such text as an appendix to these USERRA regulations.

### II. Statutory Authority

Section 4331 of USERRA authorizes the Secretary of Labor (in consultation with the Secretary of Defense) to prescribe regulations implementing the law as it applies to States, local governments, and private employers. 38 U.S.C. 4331(a). The Department has consulted with the Department of Defense, and issues these regulations under that authority in order to provide guidance to employers and employees concerning the rights and obligations of both under USERRA.

### III. Prior Laws and Interpretation

USERRA was enacted in part to clarify prior laws relating to the reemployment rights of service members, rights that were first contained in the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U.S.C. 301, *et seq.* USERRA's immediate predecessor was the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021–2027 (later recodified at 38 U.S.C. 4301–4307 and commonly referred to as the Veterans' Reemployment Rights Act ''VRRA''), which was amended and recodified as USERRA.

In construing USERRA and these prior laws, courts have followed the Supreme Court's admonition that:

> This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. * * * And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act.

See *Fishgold* v. *Sullivan Drydock and Repair Corp.,* 328 U.S. 275, 285 (1946), cited in *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 584–85 (1977); *King* v. *St. Vincent's Hosp.,* 502 U.S. 215, 221 n.9 (1991). The Department intends that this interpretive maxim apply with full force and effect in construing USERRA and these regulations.

This preamble also selectively refers to many other cases decided under USERRA and its predecessor statutes, to explain and illustrate the rights and benefits established under the Act. The failure to cite or refer to a particular court decision in this preamble is not intended to indicate the Department's approval or disapproval of the reasoning or holding of that case.

### IV. Plain Language

The Department wrote the proposed rule in the more personal style advocated by the Presidential Memorandum on Plain Language. ''Plain language'' encourages the use of:

- Personal pronouns (we and you);
- Sentences in the active voice; and,
- A greater use of headings, lists, and questions.

The Department received three comments regarding its use of ''you,'' ''I,'' and ''my'' to refer to employees, whom the Department viewed as the primary beneficiaries of USERRA rights and benefits. These commenters appreciated the use of plain language and the use of question and answer format, but expressed a preference for the use of third person pronouns so that both employers and employees are included as the audience of the rule. In response, the Department has revised the pronoun usage in the final rule, and has employed third person pronouns to refer to the rights and obligations of both employers and employees.

In addition, one of these commenters recommended the Department use a more formal style when addressing complex topics such as health and pension plan rights and obligations. In response, the Department has adopted the use of more technical guidance on these matters without unduly sacrificing clarity.

## V. Section-by-Section Summary of the Final Rule and Discussion of Comments

This preamble sets out the Department's interpretation of USERRA, section by section. The preamble generally follows the outline of the rule, which in turn follows the outline of USERRA. Within each section of the preamble, the Department has noted and responded to those comments that are addressed to that particular section of the rule. Before setting out the section-by-section analysis, however, the Department will first acknowledge and respond to comments that did not easily fit into this organizational scheme.

### *A. General Comments*

The Department received a number of general comments from members of the public expressing gratitude to the Department for the long-awaited USERRA regulations. In particular, Rep. John Boehner, Chairman of the U.S. House of Representatives Committee on Education and the Workforce, commended the Department for ''undertaking this most important endeavor.''

Conversely, the Department received a few comments from individuals complaining about their specific USERRA claims. The Department also received several comments offering assistance with grammar and punctuation. In all cases—the plaudits, the complaints, and the offers of assistance— the Department acknowledges and appreciates the thorough and thoughtful comments.

The Department also received several comments requesting that particular text cross-reference other text or make reference to related text elsewhere in the rule. As a general matter of style, the Department views such cross-references as cumbersome and ultimately detrimental to the clarity of the text and, with few exceptions, has declined to make such revisions.

Finally, the Department received several comments asking about the application of these regulations to the Federal Government when it is acting as an employer. The Federal Office of Personnel Management has issued a separate body of regulations that govern the USERRA rights of Federal employees. See 5 CFR part 353.

### *B. Compliance With USERRA and Compliance With the Internal Revenue Code*

The Department received a number of comments from individuals and employers seeking guidance on compliance with USERRA in those cases in which the commenters perceived a conflict between USERRA's mandates and the mandates of the Internal Revenue Code (IRC). These comments arose primarily with regard to the health and pension plan provisions of the rule, and suggested that in some cases compliance with USERRA may cause the plan to be out of compliance with the IRC. See Subparts D and E. The Department can provide guidance only with regard to the requirements of USERRA. However, the Internal Revenue Service (IRS) and the Department of the Treasury have indicated that a health or pension plan will be deemed not to be in conflict with the applicable IRC requirements merely because of compliance with USERRA or its regulations.

### *C. Comments Addressing the National Disaster Medical System*

The Department received several comments from an attorney employed by the Federal Emergency Management Agency (FEMA) regarding the rule's treatment of the National Disaster Medical System (NDMS). The NDMS is a section within the U.S. Department of Homeland Security, and supports Federal agencies in the management and coordination of the Federal medical response to major emergencies and Federally declared disasters. The NDMS is composed primarily of teams of professional and para-professional volunteers, who may be activated for training or in response to public health emergencies. NDMS volunteers who are activated are considered to be serving in the uniformed services for the purposes of USERRA. 42 U.S.C. 300hh–11(e)(3).

The FEMA commenter suggests several instances in which the Department should clarify the coverage of members of the NDMS under USERRA. The Department agrees with a number of these suggestions, and rejects others, as follows:

1. The commenter recommends that section 1002.2, which provides background and historical information on USERRA, include the statutory reference, 42 U.S.C. 300hh–11(e)(3), that provides USERRA coverage to members of the NDMS. The Department declines this suggestion, because this section of the rule is intended as a general discussion, and contains no mention of any statutory provisions that have directly or indirectly amended USERRA. However, the Department will take the opportunity to highlight the NDMS coverage issues elsewhere in this final rule.

2. The commenter recommends that the Department include a description of the NDMS in section 1002.5, which contains a number of definitions that are considered helpful in understanding USERRA. The Department has adopted this proposal. See 1002.5(f).

3. The commenter recommends a style change in NPRM section 1002.5(k), which has been incorporated. See 1002.5(l).

4. The commenter suggests that the Department include in NPRM section 1002.5 that NDMS appointees are considered members of the uniformed services when Federally activated or attending authorized training. The Department has revised section 1002.5(o) to reflect that, pursuant to the statute creating the NDMS, service in the NDMS is considered to be service in the uniformed services for the purposes of USERRA, although the appointee is not considered to be a member of the uniformed services. See 42 U.S.C. 300hh–11(e)(3).

5. The commenter suggests that the Department clarify in section 1002.6 that service in the NDMS is a type of service covered by USERRA. The Department agrees. See 1002.6.

6. The commenter requests that the Department modify 1002.41 to include a reference to the intermittent nature of the service of the NDMS. The Department rejects this suggestion because the section in question refers to the brief or intermittent nature of civilian employment, not the service in the uniformed services.

7. The commenter suggests that the Department clarify that, with regard to section 1002.56, not all NDMS service is

protected by USERRA, and that the Department remove the phrase ''even if you are not a member of the uniformed services'' from this section. While the Department did not adopt these suggestions, the Department reexamined the question set out in section 1002.56 and concluded it needed revision to accurately reflect the scope of the coverage of NDMS service.

8. The commenter properly suggests that the Department modify section 1002.86 to indicate that the Secretary of Homeland Security may, in consultation with the Secretary of Defense, make a determination that giving of notice by intermittent disaster-response appointees of the National Disaster Medical System is precluded by ''military necessity.'' The revision has been made. See 1002.86.

9. The commenter requests that the Department correct a reference in section 1002.103(a)(5) and (a)(7), which addresses the types of service that do not count toward the general five-year limit on service after which a person is not entitled to reemployment rights. The correction has been made to follow precisely the corresponding sections of the statute. See 38 U.S.C. 4312(c)(4)(B) and 4312(c)(4)(D).

10. The commenter requests that the Department include within section 1002.123 an additional type of document that establishes an employee's eligibility for reemployment following covered NDMS service. The Department agrees. See section 1002.123(a)(7).

11. The commenter suggests that the Department modify section 1002.35, which specifies the types of discharge following service that will cause a person to lose reemployment rights under USERRA. The commenter sought inclusion on this list the termination of an intermittent NDMS appointee for misconduct or cause. Because no statutory or regulatory guidance was provided as a basis for this suggestion, and the Department is aware of none, the suggestion is not adopted.

**Subpart A—Introduction to the Regulations Under the Uniformed Services Employment and Reemployment Rights Act of 1994**

*General Provisions*

Sections 1002.1 through 1002.7 describe the regulation's purpose, scope, and background, as well as the sense of the Congress in enacting USERRA. Section 1002.1 sets out the purpose of these regulations. See 38 U.S.C. 4301. Sections 1002.2 through 1002.4 provide additional background on USERRA, its effective date, and its purposes. Section 1002.5 defines the important terms used in the regulation. See 38 U.S.C. 4303. Sections 1002.6 and 1002.7 describe the general coverage of the rule, its applicability and its relationship to other laws, contracts, agreements, and workplace policies and practices. See 38 U.S.C. 4302.

The Department received one comment from the Equal Employment Advisory Council regarding the breadth of USERRA's definition of ''employer.'' The proposed rule adopted, in Section 1002.5(d), USERRA's definition of ''employer,'' which includes ''any person, institution, organization or other entity that pays salary of wages for work performed or that has control over employment opportunities, including * * * a person, institution, organization, or entity to whom the employer has delegated the performance of employment-related responsibilities.'' 38 U.S.C. 4303(4). The EEAC proposed that the regulatory definition of employer explicitly exclude from liability for statutory violations individuals, such as managers or supervisors, who are not directly responsible for paying wages to employees. In support of this proposal, the EEAC cited case law under various civil rights statutes holding that individuals cannot be held personally liable for statutory violations if the individual does not independently meet the statute's definition of a covered ''employer.'' See, e.g., *EEOC* v. *AIC Security Investigations,* LTD, 55 F.3d 1276, 1281 (7th Cir. 1995), and cases cited therein. Under the statutory definitions of ''employer'' in the Americans with Disabilities Act (ADA), 42 U.S.C 12111(5), the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 630(b), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(b), which are essentially the same, the weight of authority is that Congress intended the doctrine of respondeat superior to apply, and to impose liability upon employers for acts of their agents. Id.

The Department has considered this comment and disagrees with the conclusion reached by the commenter. In comparison to the ADA, the ADEA, and Title VII of the Civil Rights Act, USERRA's definition of ''employer'' is quite different and much broader. USERRA imposes liability for violations upon ''any person * * * [who] * * * has control over employment opportunities'' including ''a person * * * to whom the employer has delegated the performance of employment-related responsibilities.'' 38 U.S.C. 4303(4)(A)(i). At least two courts have held that, based on this definition, individual supervisors may be liable under the Act. See *Brandasse* v. *City of Suffolk,* 72 F.Supp.2d 608, 617–18 (E.D.Va. 1999) (both a city, as a police officer's direct employer, and its director of personnel, who had authority over hiring and firing for the city, were subject to liability as ''employers'' under USERRA); *Jones* v. *Wolf Camera, Inc.,* 1997 WL 22678 (N.D.Tex. 1997) (at Fed.R.Civ.P. 12(b)(6) stage, individual supervisors may be liable under USERRA as ''persons'' with control over hiring and firing and to whom the employer has delegated the performance of employment-related responsibilities). But see *Satterfield* v. *Borough of Schuykill Haven,* 12 F.Supp.2d 423 (E.D.Pa. 1998) (plaintiff could not bring an action under USERRA against individual members of a borough council, alleging that the council terminated him because of his military status, because such members did not have any individual power over the plaintiff and the plaintiff was not required to report to them individually); *Brooks* v. *Fiore,* 2001 WL 1218448 (D. Del. 2001) (supervisor was not covered by USERRA because he did not have the power to hire and fire the plaintiff).

Thus, courts have construed USERRA's definition of ''employer'' as including supervisors and managers in appropriate cases. Those courts that have found no individual liability have done so not because the language of the statute precludes it, but rather because the facts and circumstances of the case do not warrant the imposition of individual liability. Based on these considerations, the Department declines to adopt the position that individual supervisors and managers should be excluded from the regulatory definition of ''employer'' under USERRA.

The Department received two additional comments, one from an association of third-party employee benefit administrators and one from a trade association of firms providing health insurance products to employers, regarding the statute's broad definition of ''employer'' and its implications in the employee benefits area. Each commenter was concerned that USERRA's definition of ''employer'' was so broad as to impute liability to third parties to whom employers had delegated only ministerial responsibilities for employee benefits plans.

Congress intended that the definition of employer be broad enough to ''apply to insurance companies that administer employers' life, long-term disability, or health plans, so that such entities cannot refuse to modify their policies in order for employers to comply with

requirements under [USERRA].'' S. Rep. No. 158, 103d Cong., 2d Sess. 42 (1993). However, the Department agrees with the commenters that entities to whom employers or plan sponsors have delegated purely ministerial functions regarding the administration of employee benefits plans are not intended to be covered by USERRA's definition of ''employer.'' For instance, firms whose activities are strictly limited to the preparation and maintenance of plan benefit forms, without engaging in substantive decisions regarding plan benefits, would not be considered employers for the purposes of USERRA.

The Department received comments on the rule's definitions regarding an employer's obligation to make reasonable efforts, without imposing an undue hardship on the employer, to qualify an employee returning from military service for reemployment. One commenter suggested that the definition of ''reasonable efforts'' in section 1002.5(i) should explicitly include an employer's obligation to provide evaluative testing, assistance with obtaining licensing, and other similar employer efforts. The Department views the definition of ''reasonable efforts,'' which requires actions by employers ''including training * * * that do not place undue hardship on the employer,'' as sufficiently broad so as to include other actions not specified in the definition. The same commenter requested that the Department delete from the definition of ''undue hardship'' in section 1002.5(n) any consideration based on ''the nature and cost of the action needed.'' The ''nature and the cost of the action'' is one of the factors expressly included in USERRA's definition of ''undue hardship,'' and the Department views consideration of all factors essential to evaluation of what constitutes ''undue hardship.'' 38 U.S.C. 4303(15)(A)–(D).

Additionally, another commenter requested that the Department exclude ''former employees'' from the definition of ''employee'' in section 1002.5(c). Congress intended ''that the term 'employee' would include former employees of an employer.'' H.R. Rep. No. 65, 103d Cong., 2d Sess. 21 (1993); S. Rep. No. 103–158, at 41 (1993). Therefore, the Department will retain ''former employees'' within this definition.

One comment suggests a revision to section 1002.6, which describes the various types of service that are covered under USERRA. USERRA's predecessor, the VRRA, provided reemployment protections that varied (in many instances) based on the type of service performed. One of the ways in which USERRA modified the old law was to base many of the reemployment rights on the length of the service performed rather than its type. The commenter requests the deletion of the sentence from section 1002.6 that erroneously indicates that the statute's reemployment provisions vary only according to the length of service. The Department agrees, and has made the deletion. See 1002.6.

Finally, the Department received one comment regarding USERRA's relationship to the Internal Revenue Code. The commenter has requested the Department clarify how ''differential pay'' should be reported for tax purposes. The term ''differential pay'' refers to payments by employers to their employees absent to perform military service, and this pay is neither required by nor addressed in USERRA. In some cases, employers provide employees their full civilian pay, but more often they provide payments that represent the difference between the employee's military pay and civilian pay. Differential pay is a generous show of support by employers for their employees who are in service to the nation.

The commenter correctly points out that USERRA requires that a person absent from a position of employment on account of service in the uniformed services is to be considered on a furlough or leave of absence, a provision that has been incorporated in the reemployment rights statute since its first enactment in 1940. 38 U.S.C. 4316(b)(1)(A). On the other hand, the commenter notes that the Internal Revenue Service (IRS) has issued guidance that such person is considered to be ''terminated'' for certain tax purposes.

The Department reiterates that for the purposes of determining the rights and obligations set out in USERRA, an employee absent to perform service in the uniformed services is to be considered as on furlough or leave of absence. 38 U.S.C. 4316(b). Therefore, for the purposes of compliance with USERRA, an employee should be treated as on furlough or leave of absence, and for the purposes of compliance with the Internal Revenue Code (IRC), the IRS guidance should be followed. See IRS Revenue Ruling 69–136 (1969).

**Subpart B—Anti-Discrimination and Anti-Retaliation**

*Protection From Employer Discrimination and Retaliation*

USERRA prohibits an employer from engaging in acts of discrimination against past and present members of the uniformed services, as well as applicants to the uniformed services. 38 U.S.C. 4311(a). The anti-discrimination prohibition applies to both employers and potential employers. No employer may deny a person initial employment, reemployment, retention in employment, promotion, or any benefit of employment based on the person's membership, application for membership, performance of service, application to perform service, or obligation for service in the uniformed services. USERRA also protects any person who participates in an action to protect past, present or future members of the uniformed services in the exercise of their rights under the Act. The Act prohibits any employer from discriminating or taking reprisals against any person who acts to enforce rights under the Act; testifies in any proceeding or assists a statutory investigation; or exercises any right under the statute pertaining to any person. 38 U.S.C. 4311(b). A person is protected against discrimination and reprisal regardless whether he or she has served in the military.

Proposed sections 1002.18, 1002.19 and 1002.20 implement the protections of section 4311(a) and (b). Proposed section 1002.21 makes clear that the prohibition on discrimination applies to any employment position, regardless of its duration, including a position of employment that is for a brief, non-recurrent period, and for which there is no reasonable expectation that the employment position will continue indefinitely or for a significant period.

The Department received two comments on proposed section 1002.21. The first commenter suggests that the application of USERRA's anti-discrimination and anti-retaliation provisions to brief, non-recurrent positions is ''unduly burdensome for employers and contains unnecessary verbiage.'' Because the statute explicitly requires the application of the anti-discrimination and anti-retaliation provisions to such employment positions, see 38 U.S.C. 4311(d), the Department will retain the provision unchanged. A second commenter requests that 1002.21 include a cross-reference to section 1002.41 to reflect that persons employed in brief, non-recurrent employment positions enjoy the protections of USERRA's anti-

discrimination and anti-retaliation provisions, while persons employed in temporary and seasonal employment positions are not protected by USERRA's reemployment provisions. The commenter mistakenly equates the terms ''brief, non-recurrent'' with ''temporary'' and ''seasonal'' when referring to employment positions. Some employment positions, such as a life guard at a swimming pool or a football coach, are temporary, seasonal positions, and such positions enjoy both the anti-discrimination/anti-retaliation and the reemployment protections afforded under USERRA. See 38 U.S.C. 4311(d) and 4312(d)(1)(C); S. Rep. No. 103–158, at 46 (1993). By contrast, some, but not all, temporary, seasonal employment positions are brief and non-recurrent, and provide the employee no reasonable expectation of continued employment, such as an employment contract that covers a one-time-only, three-month-long position. Such brief, non-recurrent positions enjoy the protections afforded by USERRA's anti-discrimination/anti-retaliation provisions, but are not protected by the statute's reemployment provisions. See 38 U.S.C. 4312(d)(1)(C); S. Rep. No. 103–158, at 46 (1993).

Proposed section 1002.22 explains who has the burden of proving that a certain action violates the statute. Proposed section 1002.23 sets out the evidentiary elements of a claimant's and an employer's case under USERRA. The Department received several comments regarding these two provisions. Two commenters, including the National Employment Lawyers Association (NELA), criticized the provisions for failing to state explicitly in the text of the rule that once an employee has met his or her burden to prove that the employee's USERRA-protected status or activity was a reason for an employer's adverse action against the employee, that the employer's rebuttal case is an affirmative defense, which places the burden of proof on the employer to show by a preponderance of evidence that it would have taken the adverse action in the absence of the protected status or activity. In addition, two commenters, including NELA, criticized the provisions for erroneously stating that the burden of proof shifts back to the employee if the employer successfully prevails on its affirmative defense.

The Department agrees that the structures of proof set forth in proposed sections 1002.22 and 1002.23 are susceptible to confusion and should be clarified. Congress intended that the evidentiary scheme set forth by the United States Supreme Court in *NLRB* v. *Transportation Management Corp.,* 462 U.S. 393, 401 (1983), apply to the analysis of violations under USERRA. See S. Rep. No. 103–158, at 45 (1993), and H.R. Rep. No. 103–65, Pt. I, at 18, 24 (1993). See also *Gummo* v. *Village of Depew,* NY, 75 F.3d 98, 106 (2d Cir. 1996) (citing USERRA's legislative history); *Sheehan* v. *Dept. of the Navy,* 240 F.3d 1009, 1013–1014 (Fed. Cir. 2001) (same).

Under this structure, in order to establish a case of employer discrimination, the person's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services must be a ''motivating factor'' in the employer's actions or conduct. 38 U.S.C. 4311(c)(1). The initial burden of proving discrimination or retaliation rests with the person alleging discrimination (the claimant). A person alleging discrimination under USERRA must first establish that his or her protected activities or status as a past, present or future service member was a motivating factor in the adverse employment action. See *Robinson* v. *Morris Moore Chevrolet-Buick, Inc.,* 974 F.Supp. 571 (E.D. Tex. 1997). The claimant alleging discrimination must prove the elements of a violation—i.e., membership in a protected class (such as past, present or future affiliation with the uniformed services); an adverse employment action by the employer or prospective employer; and a causal relationship between the claimant's protected status and the adverse employment action (the ''motivating factor''). To meet this burden, a claimant need not show that his or her protected activities or status was the sole cause of the employment action; the person's activities or status need be only one of the factors that ''a truthful employer would list if asked for the reasons for its decision.'' *Kelley* v. *Maine Eye Care Associates, P.A*, 37 F. Supp.2d 47, 54 (D. Me. 1999); see *Robinson,* 974 F. Supp. at 575 (citing *Price Waterhouse* v. *Hopkins,* 490 U.S. 228, 250 (1989) (addressing Title VII gender discrimination claim and related defense)). ''Military status is a motivating factor if the defendant relied on, took into account, considered, or conditioned its decision on that consideration.'' *Fink* v. *City of New York,* 129 F.Supp.2d 511, 520 (E.D.N.Y. 2001), citing *Robinson,* 974 F.Supp. at 576. The employee is not required to provide direct proof of employer animus at this stage of the proceeding; intent to discriminate or retaliate may be established through circumstantial evidence. See *Desert Palace, Inc.* v. *Costa,* 539 U.S. 90 (2003); *United States Postal Service Bd. of Governors* v. *Aikens,* 460 U.S. 711, 714 (1983); *Sheehan,* 240 F.3d at 1014.

After the employee establishes the elements of an alleged violation, the employer may avoid liability by proving by a preponderance of the evidence that the claimant's military activities or status was not a motivating factor in the adverse employment action. See *Gummo,* 75 F.3d at 106. At this stage, the employer carries the burden to prove as an affirmative defense that it would have taken the action anyway, without regard to the employee's protected status or activity. *Sheehan,* 240 F.3d at 1014. Because the employer's defenses are affirmative under USERRA, if the employer fails to counter the employee's evidence, the claimant's proof establishes that the adverse employment action was more likely than not motivated by unlawful reasons. This framework is set forth in sections 1002.22 and 1002.23, which have been revised in response to the comments noted above and to accurately reflect the nature of the evidentiary structure intended by Congress.

Section 4311(c)(2) provides the same evidentiary framework for adjudicating allegations of reprisal against any person (including individuals unaffiliated with the military) for engaging in activities to enforce a protected right; providing testimony or statements in a USERRA proceeding; assisting or participating in a USERRA investigation; or exercising a right provided by the statute. 38 U.S.C. 4311(c)(2). Section 1002.19 addresses the elements of a case of retaliation. One commenter highlighted an ambiguity in the question posed in section 1002.19, and the Department has narrowed the question to clarify that the section applies only to employer retaliation.

The Department received responses to its request for comment on the application of the anti-discrimination provisions of the Act to potential employers. Because this issue is also addressed in section 1002.40, which explains in some detail the obligations of potential employers, the Department will respond to those comments in its summary of Subpart C, below.

The Department received one comment requesting clarification in the text of the final rule that USERRA protects not just a service member's activities, but also protects a service member's status in the uniformed services. For example, an employer may not discriminate against a person because of his or her status as a military veteran or member of a uniformed

service, regardless of whether that status results in the performance of military activities. The Department agrees with the comment, and has revised sections 1002.18, 1002.22 and 1002.23 to reflect that USERRA protects both military status and activities.

The Department received numerous additional comments regarding this part of the rule. One comment criticized the rule for failing to state that the evidentiary scheme set forth in sections 1002.22 and 1002.23 applies only to court proceedings and does not apply to the earlier administrative stage during which VETS investigates an employee's USERRA claim. While the evidentiary structure in the rule certainly pertains to the litigation of USERRA claims in court, the Department regards the analysis as one that should be taken into account during the investigative stage, so that adequate assessments can be made regarding the claims of any party to a USERRA dispute. An additional comment criticized the proposed rule for failing to explicitly state that an employee need only show that his or her protected status or activity was one of the factors motivating the adverse employment action. Section 1002.22 states that the employee's burden is to prove that the protected activity or status was ''one of the factors for the employer's adverse action,'' and therefore no revision is necessary. Another commenter faulted the proposed rule for failing to state that the employee's initial burden of proof includes showing by a preponderance of evidence that the protected activity or status was a ''substantial and motivating'' factor. The Department has concluded that under *Transportation Management,* an employee must show that the protected status or activity was a ''substantial or motivating'' factor. 462 U.S. at 401. One commenter suggested the addition of the phrase ''or more'' to the first sentence of Section 1002.23(b) so that it states, ''If you prove that the employer's action against you was based on one or more of the prohibited motives listed in paragraph (a) of this Section * * *.'' The Department regards this suggestion as unnecessary to clarify the meaning of the provision. Finally, the Department received one comment suggesting that in a reinstatement case in which the employer has failed to reemploy a service member in a position of like pay, status and seniority, the burden of proof should be on the employer to show that its failure was not a result of protected activity or service, and that the burden should be on the employee only after reinstatement. Because the comment is ambiguous and does not offer clarification of any provision of the regulation, no revision has been made to respond to the comment.

## Subpart C—Eligibility for Reemployment

*General Eligibility Requirements for Reemployment*

USERRA requires that the service member meet five general criteria in order to establish eligibility for reemployment:

(1) That the service member be absent from a position of civilian employment by reason of service in the uniformed services;

(2) That the service member's employer be given advance notice of the service;

(3) That the service member have five years or less of cumulative service in the uniformed services with respect to a position of employment with a particular employer;

(4) That the service member return to work or apply for reemployment in a timely manner after conclusion of service; and

(5) That the service member not have been separated from service with a disqualifying discharge or under other than honorable conditions.

Section 1002.32 sets out these general eligibility requirements. Sections 1002.34–.74 explain the ''absent from a position of civilian service'' requirement, sections 1002.85–.88 explain the ''advance notice'' requirement, sections 1002.99–.104 explain the ''five years or less of cumulative service'' requirement, sections 1002.115–.123 explain the ''return to work or apply for reemployment'' requirement, and sections 1002.134–.138 explain the ''no disqualifying discharge'' requirement.

A person who meets these eligibility criteria, which are contained in 38 U.S.C. 4312(a)–(c) and 4304, is entitled to be reemployed in the position described in 38 U.S.C. 4313, unless the employer can establish one of the three affirmative defenses contained in 38 U.S.C. 4312(d).

The Department received two comments on the general eligibility criteria set out in proposed section 1002.32. The first commenter recommended that the phrase ''in the uniformed services'' be inserted after the word ''service'' in section 1002.32(a)(2) so that the sentence more accurately states, ''You have five years or less of cumulative service in the uniformed services with respect to your position of employment.'' The Department agrees that this amendment improves the clarity of the text, and has made the revision. See 1002.32(a)(2). The second commenter also requested a clarification to the same sentence. In order to reflect that the five-year service limit applies to an employee's entire employment relationship with a particular employer, including any changes in employment position with that particular employer, the Department has revised this sentence accordingly. See 1002.32(a)(2).

There has been some disagreement in the courts over the appropriate burden of proof in cases brought under 38 U.S.C. 4312, the provision in USERRA establishing the reemployment rights of persons who serve in the uniformed services. One court has interpreted that provision to be ''a subsection of section 4311 [the anti-discrimination and anti-retaliation provision].'' *Curby* v. *Archon,* 216 F.3d 549, 556 (6th Cir. 2000). Other courts have interpreted section 4312 to establish a statutory protection distinct from section 4311, creating an entitlement to re-employment for qualifying service members rather than a protection against discrimination. *Wrigglesworth* v. *Brumbaugh,* 121 F. Supp.2d 1126, 1134 (W.D. Mich. 2000) (stating that requirements of section 4311 do not apply to section 4312). *Brumbaugh* relies in part on legislative history and the Department's interpretation of USERRA. Id. at 1137. Another district court supports the *Brumbaugh* decision and characterizes the contrary view in *Curby* as dicta. *Jordan* v. *Air Products and Chem.,* 225 F. Supp.2d 1206, 1209 (C.D. Ca. 2002).

In the proposed rule, the Department agreed with the district court decisions in *Brumbaugh* and *Jordan* that sections 4311 and 4312 of USERRA are separate and distinct. Accordingly, proposed section 1002.33 provided that a person seeking relief under section 4312 need not meet the additional burden of proof requirements for discrimination cases brought under section 4311. The Department disagreed with the decision in *Curby* v. *Archon* discussed above, insofar as it interprets USERRA to the contrary, and the Department invited comment regarding the proper interpretation of the statute regarding the burden of proof for relief under section 4312.

The Department received four comments regarding this issue, and all four agreed with the Department's interpretation that a person alleging a violation of section 4312 of USERRA need not prove the elements of an alleged violation of section 4311. In the absence of any negative comment to consider, the Department will incorporate this provision of the

proposed rule in the final rule. In addition, one of the four commenters on this topic requested that section 1002.33 contain much more detail about VETS' administrative procedures that follow the filing of a complaint stating a claim under section 4312. The Department declines this request, as it suggests the insertion of material that is covered below in Subpart F of this rule, Compliance Assistance, Enforcement and Remedies.

*Coverage of Employers and Positions*

Sections 1002.34 through 1002.44 of the final rule list the employers and employment positions that are covered by USERRA. Section 1002.34 provides that the Act's coverage extends to virtually all employers in the United States; the statute contains no threshold or minimum size to limit its reach. The Department received two comments regarding this coverage provision. First, the Department was asked whether USERRA applies to Native American tribes when they act as employers. Section 1002.34(a) reiterates USERRA's broad applicability to all employers, explicitly including the Federal government and the States. 38 U.S.C. 4303(4). While the face of the statute does not explicitly cover Native American tribal employers, USERRA's legislative history reflects the Act was intended to apply to ''Native American tribes and their business enterprises.'' S. Rep. No. 103–158, at 42 (1993). Thus, although the Department concludes that USERRA likely applies to Native American tribal employers, the Department recognizes that there is a difference between the right to demand compliance with the law and the means to enforce it. *Kiowa Tribe of Oklahoma* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998). Native American tribes, like the States, possess sovereign immunity from suit except where ''Congress has authorized the suit or the tribe has waived its immunity.'' *Kiowa Tribe of Oklahoma*, 523 U.S. at 754. As a result, judicial enforcement of the Act against an Indian tribe depends on whether the tribe has waived its immunity, and such a waiver ''cannot be implied but must be unequivocally expressed.'' *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978). Accordingly, the Department recognizes that the application of USERRA's provisions to Native American tribal employers is a complicated and heavily fact-dependent issue that, if raised in a USERRA proceeding, will ultimately be resolved by the courts on a case-by-case basis. See, e.g., *C & L Enterprises, Inc.* v. *Citizen Band Potawatomi Tribe of Oklahoma*, 532 U.S. 411 (2001) (arbitration provisions in contract amounted to clear waiver of tribal immunity).

An additional commenter suggests the elimination of section 1002.34(c), which states that USERRA applies to American firms operating in a foreign country, because it ''attempts to create an extraterritorial application that is not established under the statute.'' To the contrary, the text set out in section 1002.34(c) is based on an unambiguous statutory provision establishing such applicability. See 38 U.S.C. 4319. Accordingly, the Department has retained this provision in the final rule. See 1002.34.

Other provisions in this section address various aspects of the employment relationship subject to the Act. Section 1002.35 defines the term ''successor in interest,'' and section 1002.36 further addresses the issue. Section 1002.37 addresses the situation in which more than one employer may be responsible for one employee. The Department received two comments on this provision regarding multiple employers. The first commenter suggested that, as with regulations promulgated under the Family and Medical Leave Act, see, e.g. 29 CFR 825.106, the provision should allocate statutory responsibilities and liability between ''primary'' and ''secondary'' employers. Similarly, an additional commenter submitted that the statute's reemployment provisions should apply only to the ''primary'' employer and not the ''secondary'' employer.

In response to these two comments, the Department again notes USERRA's broad definition of ''employer'' as an entity ''that has control over employment opportunities.'' 38 U.S.C. 4303(4). In addition, USERRA's legislative history instructs that the term ''employer'' is intended to be broadly construed to cover situations where more than one entity exercises control over different aspects of the employment relationship. S. Rep. No. 103–158, at 41 (1993); H.R. Rep. 103–65, Pt. I, at 21(1993), citing, e.g., *Magnuson* v. *Peak Technical Services, Inc.,* 808 F.Supp. 500, 507–511 (E.D. Va. 1992) (the legal issue is whether one or more of the entities exercise requisite control over significant aspects of employment relationship so as to be deemed an ''employer'' under the statute). Thus, in cases in which more than one entity employs an individual, the entity's status, responsibility and liability as an employer under USERRA is assessed by determining whether the entity controls the employee's employment opportunities, not by reference to shorthand labels such as ''primary employer'' and ''secondary employer.'' Indeed, under this analytical framework, employers may share or co-determine certain aspects of the employment relationship, and in those cases there will not be a ''primary'' and ''secondary'' employer. Accordingly, the Department will retain the provision unmodified. See 1002.37.

The Department received a comment from the Building and Construction Trades Department of the AFL–CIO (''BCTD'') regarding the Department of Labor's treatment of hiring halls in proposed section 1002.38, which provides that a hiring hall is an ''employer'' if ''the hiring and job assignment functions have been delegated by an employer to the hiring hall.'' The BCTD recommends that this provision be eliminated, arguing that hiring halls in the unionized construction industry represent an ''arrangement'' between the union and local employers to facilitate referral of available union members for work. According to the BCTD, hiring halls do not perform any hiring or assignment functions beyond referring the number and types of workers requested by the employer. The BCTD suggests that the multi-employer group using the hiring hall to obtain workers should be the ''employer'' rather than the hiring hall. In order to effectuate this suggestion, the BCTD proposes, in addition to eliminating section 1002.38, that the Department modify the regulatory definition of ''employer'' (section 1002.5(d)) to state, ''In industries in which exclusive hiring halls are utilized, all employers who are required to obtain applicants through a given hiring hall arrangement, may constitute a single employer under the Act.''

The Department's response to the BCTD's proposal lies again in the breadth of the statutory definition of ''employer,'' and in Congress's unambiguous intent that this definition be read broadly to include entities, such as hiring halls, to whom job referral responsibilities have been delegated. See S. Rep. No. 103–158, at 42 (1993); H.R. Rep. 103–65, Pt. I, at 21(1993). In addition, the BCTD's proposed amendment to the definition of employer in section 1002.5, which seeks the permanent application of a ''single employer'' framework to multiple hiring hall employers, is misplaced. The term ''single employer'' applies to firms that operate as an integrated enterprise and ''exert [ ] significant control over'' the employees in question. *G. Heileman Brewing Co.* v. *NLRB,* 879 F.2d 1526, 1530 (7th Cir. 1989). To determine whether firms are sufficiently integrated to constitute a single employer, courts

look to (1) common management; (2) centralized control of labor relations; (3) interrelation of operations; and (4) common ownership or financial control. See *Radio and Television Broadcast Technicians Local Union 1264* v. *Broadcast Service of Mobile, Inc.,* 380 U.S. 255, 256, 85 S. Ct. 876, 13 L. Ed. 2d 789 (1965); see also *Naperville Ready Mix, Inc.* v. *NLRB,* 242 F.3d 744, 752 (7th Cir. 2001), cert. denied, 534 U.S. 1040 (2001). While one or more employers utilizing the same hiring hall may or may not operate as an integrated enterprise so that they meet the criteria of the ''single employer'' test, such criteria are not essential to determine whether the entity is an employer for the purposes of USERRA. Accordingly, the Department rejects the BCTD's suggestions, and will retain the provision regarding hiring halls in unchanged form. See 1002.38.

Proposed section 1002.39 covers States and other political subdivisions of the United States as employers, and the Department received one comment regarding this provision. The commenter noted USERRA's specific treatment for reemployment of employees of the Federal legislative and judicial branches and, seeing no similar provision for employees of State legislative and judicial branches, asked whether USERRA's protections applied to the latter group. In response, the Department again notes USERRA's broad applicability to all employers, explicitly including the States, 38 U.S.C. 4303(4), without regard to whether the State employer is the State's judicial or legislative branch.

The Department received three favorable comments in response to proposed section 1002.40, which confirms that USERRA makes it unlawful for any employer to deny employment to a prospective employee on the basis of his or her membership, application for membership, performance of service, application to perform service, or obligation for service in the uniformed services, or on the basis of his or her exercise of any right guaranteed under the Act. In addition to these favorable comments, the Department received two comments regarding the application of this principle in specific circumstances. The first commenter submits a hypothetical in which a person is on extended active duty and cannot interview for a job or be present for the job's start date because of service in the uniformed services. In the scenario presented, the job advertisement states clearly that the ''most qualified'' applicants must be interviewed and the selectee is desired to start work immediately upon selection. The person on active duty can do neither, but does apply for the job by mail and is among the most qualified based on the application. The employer eliminates all applicants who cannot for whatever reason appear for an interview or start work immediately upon selection. The commenter requests that the Department determine that such conduct on the part of an employer would not constitute a violation of USERRA. The second commenter suggests a scenario in which a prospective employer withdraws an offer of employment because of a person's military service or obligations, and urges the Department to state in the final rule that while such a withdrawal may constitute discrimination under USERRA, the prospective employee is not entitled to reemployment rights under section 4312 of the statute.

The Department declines to include either of these hypothetical scenarios or their suggested outcomes in the final rule. Each individual case involving an issue under USERRA must be decided based on the specific facts of that case, with all the attendant and potentially influential details, together with the appropriate and applicable legal standards.

In addition, the Department received three comments regarding whether employer inquiries about military service or obligations during the hiring process are permissible under USERRA. The Department concludes that it is not unlawful in itself for a prospective employer to ask an applicant about military service or obligations. Indeed, in many instances a prospective employee's military experience may enhance his or her potential value to the employer. However, if information elicited in response to such questions forms the basis of the employer's decision not to hire the applicant, or to take other adverse action against the person once hired, the inquiries may constitute evidence of unlawful discrimination.

As stated earlier, temporary, part-time, probationary, and seasonal employment positions are also covered by USERRA. The Department received one comment on proposed section 1002.41, which establishes that an employer does not have reemployment obligations under USERRA if the temporary or seasonal position is for a brief, non-recurrent period and the employee has no reasonable expectation of continued employment indefinitely or for a significant period. The commenter submits that the Department should state in the final rule that in such cases, an employer need not provide employment benefits during the absence from employment due to military service.

Section 4312(d)(1)(C) of USERRA clearly provides that an employer does not possess any reemployment obligations if an employee departing for military service is in a brief, non-recurrent position and has no reasonable expectation that such employment will continue indefinitely or for a significant period. However, an employee in a brief, non-recurrent position may be entitled to non-seniority benefits under certain situations. Because section 4316(b)(1)(B) requiring employers to provide non-seniority benefits to employees is not limited by an exception regarding employees occupying brief, nonrecurrent employment positions, the Department interprets the mandate of section 4316(b)(1)(B) to apply to all employees, including those in brief, nonrecurrent positions of employment. However, as discussed below in Subpart D and in section 1002.150 of this rule, the employer is obligated to provide non-seniority benefits to employees on military leave only to the extent that the employer provides such benefits to similarly situated employees on comparable non-military furlough or leave of absence. As a result, if an employer provides non-seniority benefits to similarly situated employees in brief, nonrecurrent employment positions on comparable, non-military leave, those benefits must also be provided to employees in brief, nonrecurrent employment positions on military leave.

Section 1002.42 explains that USERRA covers employees on strike, layoff, or leave of absence, and section 1002.43 makes clear that persons occupying professional, executive and managerial positions also are entitled to USERRA rights and benefits. The Department received two comments on proposed section 1002.44, which addresses the distinction between an independent contractor and an employee under USERRA. This section provides that USERRA does not apply to individuals who act as independent contractors rather than as employees of an employer, and outlines six factors that must be considered in deciding whether a person is an independent contractor. One commenter suggested the Department eliminate as too limiting the word ''managerial'' from one of the six factors that addresses a ''person's opportunity for profit or loss that depends on his or her managerial skill.''

The second commenter disputed the six-factor test entirely, and stated the appropriate legal standard for determining whether a person is an

employee or an independent contractor is found in *Nationwide Mutual Insurance Co.* v. *Darden,* 503 U.S. 318 (1992), a case decided under the Employee Retirement Income Security Act (ERISA). In *Darden,* the Supreme Court set forth a common-law-based ''degree of control'' test that focuses primarily on ''the hiring party's right to control the manner and means by which the product is accomplished.'' Id. The commenter sought the elimination of three of the six factors set out in 1002.44 as inconsistent with the common law test and because ''they do not help to inform the decision.''

The independent contractor provision in this rule is based on Congress's intent that USERRA's definition of ''employee'' be interpreted in the same expansive manner as the term is defined under the Fair Labor Standards Act (FLSA). H.R. Rep. No. 103–65, Pt. I, at 29 (1993) (citing *Brock* v. *Mr. W. Fireworks, Inc.,* 814 F.2d 1042 (5th Cir.), cert. denied, 484 U.S. 924 (1987)); S. Rep. No. 103–58, at 40 (1993). In determining whether a person is a statutory employee or an independent contractor under the FLSA, the ''economic reality'' test is employed. See, e.g., *Mr. W. Fireworks,* 814 F.2d at 1043; see also *Debra T. Landis,* Determination of ''Independent Contractor'' and ''Employee'' Status for Purposes of the FLSA, 51 A.L.R. Fed. 702 (2005). The focal point of the test is whether the individual is economically dependent on the business to which he or she renders service or is, as a matter of economic fact, in business for him- or herself. *Bartels* v. *Birmingham,* 332 U.S. 126, 130 (1947). In applying the test, courts generally examine five or six factors. *Landis,* supra, section 2. No one of the factors is determinative. *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722 (1947). Moreover, the factors are ''simply analytical tools,'' thus, ''their weight, number and composition are variable.'' *Dole* v. *Snell,* 875 F.2d 802, 805 n. 2 (10th Cir. 1989). In *Mr. W. Fireworks,* the court examined five factors to use in determining independent contractor status: ''(1) The degree of control exercised by the alleged employer; (2) the extent of the relative investments of the putative employee and employer; (3) the degree to which the 'employee's' opportunity for profit and loss is determined by the employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship.'' Id. (citing *United States* v. *Silk,* 331 U.S. 704 (1947)). Many courts also examine a sixth factor: Whether the service rendered is an integral part of the employer's business. See, e.g., *Henderson* v. *Interchem Coal Co.,* 41 F.3d 567, 570 (10th Cir. 1994); *Real* v. *Driscoll Strawberry Associates, Inc.,* 603 F.2d 748 (9th Cir. 1979).

Consistent with USERRA's legislative history, the proposed section essentially restates the test used under the FLSA to determine independent contractor status. In addition, in FLSA cases, ''the courts have generally indicated that the common law degree of control test is not controlling.'' See *Landis*, supra, section 2. Indeed, even in *Darden*, the Supreme Court indicated that the common law test is inappropriate in FLSA cases. 503 U.S. at 326 (''While the FLSA, like ERISA, defines an 'employee' to include 'any individual employed by an employer,' it defines the verb 'employ' expansively to mean 'suffer or permit to work.' This latter definition [* * *] stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles.'' (internal citations omitted)). USERRA's legislative history shows that Congress made a clear choice between the test employed under the FLSA and the degree-of-control test, and explicitly chose the former. In addition, with respect to the proposal to delete the word managerial from the second factor of the test set out in section 1002.44(b), the Department notes that most courts use that term when applying the test. See, e.g., *Imars* v. *Contractors Manufacturing Services, Inc.,* 165 F.3d 27 (6th Cir. 1998). As a result, the Department will retain the test for independent contractor as set forth in section 1002.44.

*Coverage of Service in the Uniformed Service*

Sections 1002.54 through 1002.62 explain the term ''service in the uniformed services,'' list the various types of uniformed services, and clarify that both voluntary and involuntary duty are covered under USERRA. Section 1002.54 provides that ''service in the uniformed services'' includes a period for which a person is absent from a position of employment for the purpose of an examination to determine his or her fitness to perform duty in the uniformed services. Sections 1002.55 and 1002.56 provide that service under certain authorities for funeral honors duty or as a disaster-response appointee also constitute service in the uniformed services. Section 1002.57 clarifies when service in the National Guard is covered by USERRA, and section 1002.58 addresses service in the commissioned corps of the Public Health Service, a division of the Department of Health and Human Services. Section 1002.59 recognizes coverage for persons designated by the President in time of war or national emergency.

Sections 1002.60, 1002.61, and 1002.62 address the coverage of a cadet or midshipman attending a service academy, and members of the Reserve Officers Training Corps, Commissioned Corps of the National Oceanic and Atmospheric Administration, Civil Air Patrol, and Coast Guard Auxiliary. The Department received one comment regarding the provision in section 1002.61, which states that training performed by members of ROTC is not considered ''service in the uniformed services'' under USERRA's definition of that term, except in very limited circumstances. In particular, section 1002.61 explains that, on occasion, Reserve and National Guard units will enroll enlisted unit members in a local college's ROTC program in order to train them to become officers. In such cases, the ROTC member may perform ROTC training while in a duty status with the National Guard or Reserve unit, either active duty training or inactive duty training. Under these circumstances, the ROTC duty would be considered ''service in the uniformed services'' for USERRA purposes, and the ROTC member would be entitled to reemployment rights following such service. 38 U.S.C. 4303(13).

The commenter has requested that the Department modify section 1002.61 to establish broader USERRA protection for ROTC members. Specifically, the commenter points out that where an ROTC member has a contractual obligation to complete the ROTC course of training, he or she should have USERRA protection against discrimination. An ROTC member generally signs an agreement that specifies he or she will complete the ROTC program and accept a commission upon graduation, or serve as an enlisted member of the service if he or she fails to successfully complete ROTC training. The Department agrees with the commenter and, following consultation with the Department of Defense, has made the necessary revision by adding subsection (b) to 1002.61. The Department's consultation with the Department of Defense also resulted in technical modifications to section 1002.61(a). See section 1002.61.

*Absence From a Position of Employment Necessitated by Reason of Service in the Uniformed Services*

The Department received four comments regarding proposed section 1002.73, which addresses the issue of

the employee's reason for leaving employment as it bears on his or her reemployment rights. Section 4312(a) of the Act states that ''any person whose absence from a position of employment is necessitated by reason of service in the uniformed services'' is entitled to the reemployment rights and benefits of USERRA, assuming the Act's eligibility requirements are met. Military service need not be the only reason the employee leaves, provided such service is at least one of the reasons. See H.R. Rep. No. 103–65, Pt. I, at 25 (1993).

All four commenters expressed unease about the apparent latitude given employees in this section. The first commenter, concerned about an employee's opportunity to seek other employment during absence for military leave, suggested that the Department permit employers to evaluate whether it was reasonable that an employee's absence included a particular purpose other than the actual time engaged in service itself. Similarly, a second commenter suggested that the Department indicate in this provision that a neutral observer must be able to conclude that the absence is related to performing military service. Although the commenters did not say so explicitly, the presumed result of imposing such requirements on an employee's non-military activities would be to permit employers to deny reemployment if the employer concludes that the employee's absence included a purpose that was unreasonable or inappropriate. The effect of these suggestions would be to impose an additional requirement for reemployment eligibility based on an employee's conduct during absence from employment for military service beyond the requirements contained in the statute. Consequently, the Department will not include the proposed addition.

The third commenter requests that the Department state in section 1002.73 that an employee cannot extend the USERRA-protected period of absence for non-military purposes. Because section 1002.73 clearly provides that the period of absence from employment must be necessitated by military service, there is no need for modification on this point. The final commenter on this provision requests that the Department require an employee to return to work within a prescribed period of time if the employee's mobilization orders are cancelled. The Department will not prescribe a set period of time within which an employee must report back to work following the cancellation of mobilization orders, because the facts and circumstances of each case will differ. However, in the event that a mobilization is cancelled, an employee on military leave of absence should report back to his or her employer as soon as practicable.

USERRA does not impose a limit on the amount of time that may elapse between the date the employee leaves his or her position and the date he or she actually enters the service. Proposed section 1002.74 recognized that no such limit is warranted. A person entering military service generally needs a period of time to organize his or her personal affairs, travel safely to the site where the service is to be performed, and arrive fit to perform service. The amount of time needed for these preparations will vary from case to case. Moreover, the actual commencement of the period of service may be delayed for reasons beyond the employee's control. If an unusual delay occurs between the time the person leaves civilian employment and the commencement of the uniformed service, the circumstances causing the delay may be relevant to establish that the person's absence from civilian employment was ''necessitated by reason of service in the uniformed services.'' See *Lapine* v. *Town of Wellesley,* 304 F.3d 90, 100 (1st Cir. 2002).

The Department received two comments suggesting this provision could be subject to abuse. One commenter suggested that the Department should restrict the time off to prepare for military service solely to travel or to a prescribed time period. The second commenter requested that the Department state that USERRA permits time off from employment to put one's affairs in order only immediately and seamlessly before the military service itself and not on an intermittent or periodic basis during the weeks prior to military service. The final commenter was more concerned that employees facing an extended period of military service are ensured an adequate period of time to prepare for service, so requested that the rule provide that an employee is entitled to a minimum of one week off from employment prior to service.

The Department is averse to placing in this provision the limitations or specific time frames suggested by these commenters. The amount of time that an employee may need to prepare for military service will vary, and will depend on the facts of each case. In addition, employees may need intermittent time off from work prior to military service for brief but repeated periods to put their affairs in order, and such periods may be necessary to, for example, interview child care providers, go to meetings with bank officers regarding financial matters, or seek assistance for elderly parents. Although the Department is disinclined to include the commenter's limitations in section 1002.74, the Department has revised the text of the provision to reflect that the duration of the military service, the amount of notice supplied to an employee called to military service, and the location of the service are all factors that influence the amount of time an employee may need in order to rest and/or put his or her affairs in order.

*Requirement of Advance Notice*

Section 1002.85 explains one of the basic obligations imposed on the service member by USERRA as a prerequisite to reemployment rights: the requirement to notify the employer in advance about impending military service. 38 U.S.C. 4312(a)(1). Section 4312(a)(1) of USERRA contains three general components of adequate notice: (i) The sender of the notice; (ii) the type of notice; and (iii) the timing of notice. First, the employee must notify his or her employer that the employee will be absent from the employment position due to service in the uniformed services. An ''appropriate officer'' from the employee's service branch, rather than the employee, may also provide the notice to the employer on behalf of the employee. Second, the notice may be either verbal or in writing. See 38 U.S.C. 4303(8) (defining ''notice'' to include both written and verbal notification) and 38 U.S.C. 4312(a)(1). Although written notice by the employee provides evidence that can help establish the fact that notice was given, the sufficiency of verbal notice recognizes the ''informality and current practice of many employment relationships[.]'' S. Rep. No. 103–158, at 47 (1993). The act of notification is therefore more important than its particular form. Third, the notice should be given in advance of the employee's departure. USERRA does not establish any bright-line rule for the timeliness of advance notice, i.e., a minimum amount of time before departure by which the employee must inform the employer of his or her forthcoming service. Instead, timeliness of notice must be determined by the facts in any particular case, although the employee should make every effort to give notice of impending military service as far in advance as is reasonable under the circumstances. See H.R. Rep. No. 103–65, Pt. 1, at 26 (1993).

The Department received several comments concerning the general requirement of notice. One commenter suggested the regulations address situations in which an employee is

employed by more than one employer, for instance, in cases in which an employee is referred by a hiring hall to various employers in a common industry, or cases in which an employment agency assigns an employee to a particular job site. The commenter suggests that the rule provide that where an employee is employed by one or more employers, the employee must provide the required notice to each employer. The Department agrees with the submission, and has modified section 1002.85 accordingly. See section 1002.85(a).

Four commenters requested the regulations adopt a general requirement that notice be given 30 days in advance of impending service. Another commenter requested the Department employ stronger language with respect to an employee's obligation to give timely notice, suggesting the final rule state the employee should ''make every effort'' to give advance notice ''as promptly as possible.'' The Department does not intend that these regulations impose any new requirements, either explicit or implied, upon the exercise of the rights granted to protected persons by the statute. Therefore, the Department did not adopt these suggestions concerning the timeliness of notice. However, the Department has revised Section 1002.85 to note that the Department of Defense, in their USERRA regulations, ''strongly recommends that advance notice to civilian employers be provided at least 30 days prior to departure for uniformed service when it is feasible to do so.'' See 32 CFR 104.6(a)(2)(i)(B). While this provision does not establish an inflexible 30-day requirement for the provision of advance notice, it does serve to demonstrate that the Department of Defense expects that service members exercise care when providing notice to their employers of impending service in the uniformed services.

The Department received seven comments related to the provision in section 1002.85 that advance notice may be either written or verbal. One commenter requested the final rule contain a ''recommendation'' that notice be in writing. Another commenter requested the regulation provide that an employee use the employer's established procedure for requesting other types of leave (*i.e.*, written), except in cases where written notice is precluded pursuant to USERRA. Five commenters requested the final rule require the employee to provide, either before or shortly after the commencement of the uniformed service, some form of documentation, either a written notice or a copy of military orders or similar documentation of the service. As noted above, both the statutory language and the legislative history make clear Congress's intent that advance notice may be either verbal or written. However, the Department again notes that the Department of Defense regulations under USERRA provide guidance to service members that ''strongly recommends'' that advance notice be given in writing, while acknowledging that verbal notice is sufficient. See 32 CFR 104.6(a)(2)(i)(B). The Department of Defense regulations also make clear that the military services must consider and, where military requirements permit, accommodate legitimate concerns of civilian employers concerning the military service or obligations of their employees. See 32 CFR 104.4(c) and (d); 104.5(b)(6); and 104.6(n), (o).

Section 1002.86 implements the statutory exceptions to the requirement of advance notice of entry into the uniformed services. The statute recognizes that in rare cases it may be very difficult or impossible for an employee to give advance notice to his or her employer. To accommodate these cases, the advance notice requirement may be excused by reason of ''military necessity'' or circumstances that make notice to the employer ''otherwise impossible or unreasonable.'' 38 U.S.C. 4312(b). Section 4312(b) also provides that the uniformed services make the determination whether military necessity excuses an individual from notifying his or her employer about forthcoming military service. Any such determination is to be made according to regulations issued by the Secretary of Defense. See 32 CFR part 104. Finally, section 4312(b) states that the ''military necessity'' determination is not subject to judicial review. The same finality and exemption from review, however, do not apply if the employee fails to provide notice to his or her employer because the particular circumstances allegedly make notification ''impossible or unreasonable.'' Whether the circumstances of the case support the employee's failure to provide advance notice of service are questions to be decided by the appropriate fact-finder. See S. Rep. No. 103–158, at 47 (1993).

One commenter requested the Department note in section 1002.86 that situations in which the provision of advance notice is precluded because it is ''impossible or unreasonable'' will be rare, especially in light of the access to telephones, e-mail and other readily available sources by which contact with an employer may be made. The commenter also requested the section provide that in such rare cases, the employee must give the employer notice at the employee's earliest opportunity. The Department views the current language in subsection 1002.86(b) as sufficient to address the notice requirement in ''impossible or unreasonable'' circumstances, and therefore has not adopted the commenter's suggested revision.

Proposed section 1002.87 makes explicit that the employee is not required to obtain the employer's permission before departing for uniformed service in order to protect his or her reemployment rights. Imposing a prior consent requirement would improperly grant the employer veto authority over the employee's ability to perform service in the uniformed services by forcing the employee to choose between service and potential loss of his or her employment position, if consent were withheld.

Section 1002.88 implements the long-standing legal principle that an employee departing for service is not required to decide at that time whether he or she intends to return to the pre-service employer upon completion of the tour of duty. Rather, the employee may defer the decision until after he or she concludes the period of service, and the employer may not press the employee for any assurances about his or her plans. See H.R. Rep. No. 103–65, Pt. I, at 26 (1993) (''One of the basic purposes of the reemployment statute is to maintain the service member's civilian job as an 'unburned' bridge.'') and S. Rep. No. 103–158, at 47 (1993), both of which cite *Fishgold* v. *Sullivan Drydock and Repair Corp.,* 328 U.S. 275, 284 (1946).

Section 1002.88 also provides that an employee cannot waive the right to reemployment by informing the employer that he or she does not intend to seek reemployment following the service. This general principle that an employee cannot waive USERRA's right to reemployment until it has matured, *i.e.*, until the period of service is completed, is reiterated in the discussion of USERRA's ''Furlough and Leave of Absence'' provisions. See section 1002.152.

The Department received three comments regarding section 1002.88, all of which contested the Department's conclusion that a person cannot waive the right to reemployment by notifying the employer prior to or during the period of military service that he or she does not intend to seek reemployment upon completion of the service. Commenters included the Equal Employment Advisory Council, the U.S.

Chamber of Commerce, and a law firm. The Department's conclusion is based on both the USERRA's broad prohibition against waivers of statutory rights, and the statute's legislative history on this point. Section 4302(b) of USERRA states that the statute supersedes ''any * * * contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by [the Act].'' 38 U.S.C. 4302(b). This provision against waivers has been interpreted expansively; for instance, it includes a prohibition against the waiver in an arbitration agreement of an employee's right to bring a USERRA suit in Federal court. See, e.g., *Garrett* v. *Circuit City Stores, Inc.,* 338 F.Supp.2d 717, 721–22 (N.D.Tex. 2004). USERRA's legislative history underscores that this provision is intended to prohibit ''employer practices and agreements, which provide fewer rights or otherwise limit rights provided under amended chapter 43 or put additional conditions on those rights * * *.'' *H. Rep. No. 103–65,* Pt. I, at 20 (1993). This provision, coupled with the mandate to courts to liberally construe USERRA to the benefit of the service member, supports the Department's determination regarding waivers of reemployment rights made before or during service. However, in light of the comments received on this point, the Department has revised section 1002.88 to clarify that a person cannot waive his or her reemployment rights prior to or during a period of service in the uniformed services. See section 1002.88.

*Period of Service*

USERRA provides that an individual may serve up to five years in the uniformed services, in a single period of service or in cumulative periods totaling five years, and retain the right to reemployment by his or her pre-service employer. 38 U.S.C. 4312(c). Sections 1002.99 through 1002.104 implement this statutory provision. The Department received one comment on Section 1002.99, which implements the basic five-year period established by the statute, requesting that the five-year period be reduced to two years. Because the time period is established by statute, the Department has rejected the suggestion. See section 1002.99.

Section 1002.100 provides that the five-year period includes only actual uniformed service time. Periods of time preceding or following actual service are not included even if those periods may involve absences from the employment position for reasons that are service-related, for example, travel time to and from the duty station, time to prepare personal affairs before entering the service, delays in activation, etc. The Department received one comment regarding this provision, indicating that employers may have difficulty in ascertaining which part of the absence from employment is attributable to actual time in the uniformed service, and which part of the absence was service-related. As a result, the commenter suggests that employers either be allowed to assess an employee's entire absence from employment for the purposes of the five-year limit or, alternatively, be permitted to request documentation from an employee that will demonstrate the precise length of the actual military service. Because the text of the provision comports with the statute and its legislative history, the Department declines the suggestion to amend the text of the rule. However, in response to the stated concerns, the Department advises employers that the Secretaries of the Military Departments and the Commandant of the Coast Guard are expected to provide assistance to civilian employers of employees covered by USERRA, 32 CFR 104.5(b)(6). Such assistance may include support to employers to ascertain which part of the absence from employment constituted service in the uniformed services.

Section 1002.101 clarifies that the five-year period pertains only to the cumulative period of uniformed service by the employee with respect to one particular employer, and does not include periods of service during which the individual was employed by a different employer. Therefore, the employee is entitled to be absent from employment with a particular employer because of service in the uniformed services for up to five years and still retain reemployment rights with respect to that employer; this period starts anew with each new employer. The regulation derives from section 4312(c)'s language tying the five-year period ''to the employer relationship for which a person seeks reemployment[.]'' 38 U.S.C. 4312(c).

One commenter requested guidance on applying the five-year limit to cases in which an employee is employed by more than one employer. The Department has revised section 1002.101 to reflect that if an employee is employed by more than one employer, a separate five-year period runs as to each employer independently, even if those employers share or co-determine the employee's terms and conditions of employment. See section 1002.101.

Section 1002.102 addresses periods of service undertaken prior to the enactment of USERRA, when the Veterans' Reemployment Rights Act (VRRA) was in effect. If an individual's service time counted towards the VRRA's four or five-year periods for reemployment rights, then that service also counts towards USERRA's five-year period. The regulation implements section (a)(3) of the rules governing the transition from the VRRA to USERRA, which appear in a note following 38 U.S.C. 4301.

The Department invited comments as to whether its interpretation in proposed section 1002.102 best effectuates the purpose of the Act, and received one comment in response. The commenter indicated that in reply to the question posed in section 1002.102 regarding whether the five-year service limit includes periods of service that the employee performed before USERRA was enacted, the Department should not provide an unqualified ''yes,'' but instead should indicate that ''it depends'' on whether the individual's service time counted towards the VRRA's four or five-year periods for reemployment rights. The Department agrees, and has made the change to the text of this provision. See 1002.102.

Section 4312(c) enumerates eight specific exceptions to the five-year limit on uniformed service that allow an individual to serve longer than five years while working for a single employer and retain reemployment rights under USERRA. 38 U.S.C. 4312(c)(1)–(4)(A)–(E). The exceptions involve unusual service requirements, circumstances beyond the individual's control, or service (voluntary or involuntary) under orders issued pursuant to specific statutory authority or the authority of the President, Congress or a Service Secretary. Section 1002.103 implements this provision by describing each exception set out in the statute.

The regulation also recognizes a ninth exception based on equitable considerations. A service member is expected to mitigate economic damages suffered as a consequence of an employer's violation of the Act. See *Graham* v. *Hall-McMillen Co., Inc.,* 925 F. Supp. 437, 446 (N.D. Miss. 1996). If an individual remains in (or returns to) the service in order to mitigate economic losses caused by an employer's unlawful refusal to reemploy that person, the additional service is not counted against the five-year limit. The Department sought comment on whether an exception to the five-year limit based on the service member's mitigation of economic loss furthers the

purposes of the statute, and received four comments in support of the provision.

Section 1002.104 implements section 4312(h), which prohibits the denial of reemployment rights based on the ''timing, frequency, and duration'' of the individual's training or service, as well as the nature of that service or training. 38 U.S.C. 4312(h). A service member's reemployment rights must be recognized as long as the individual has complied with the eligibility requirements specified in the Act. *Id.* The legislative history of section 4312(h) makes clear the Congress' intent to codify the holding of the United States Supreme Court in *King* v. *St. Vincent's Hospital,* 502 U.S. 215 (1991). See H.R. Rep. No. 103–65, Pt. I, at 30 (1993); S. Rep. No. 103–158, at 52 (1993). In King, the court held that no service limit based on a standard of reasonableness could be implied from the predecessor version of USERRA. Section 4312(h). Section 1002.104 therefore prohibits applying a ''reasonableness'' standard in determining whether the timing, frequency, or duration of the employee's service should prejudice his or her reemployment rights.

Consistent with views expressed in the House report, Section 1002.104 counsels an employer to contact the appropriate military authority to discuss its concerns over the timing, frequency, and duration of an employee's military service. The Department received two comments regarding this provision. One commenter suggests that section 1002.104 state that employer contacts with a military authority to discuss concerns regarding timing, frequency, and duration of an employee's military service should not be considered as evidence of discrimination in violation of section 4311 of USERRA. The Department declines the opportunity to make such a categorical statement in the final rule that would apply in all circumstances. However, the Department notes that good faith contacts with the military to express legitimate concerns about timing, frequency, and duration of an employee's military service do not evidence a discriminatory motive. The second comment regarding section 1002.104 involves the provision stating that ''military authorities are required to consider requests from employers of National Guard and Reserve members to adjust scheduled absences from civilian employment to perform service.'' The commenter asks whether this statement subjects the military authority to suit under the Administrative Procedures Act (APA) in cases in which it may be alleged that the military authority's response to such requests is arbitrary and capricious. The Department views this inquiry as raising an issue beyond the scope of these regulations. However, the Department notes that this requirement is established by Department of Defense regulations. See 32 CFR 104.6(o).

*Application for Reemployment*

In order to protect reemployment rights under USERRA, the returning service member must make a timely return to, or application for reinstatement in, his or her employment position after completing the tour of duty. 38 U.S.C. 4312(a)(3). Sections 4312(e) and (f) establish the required steps of the reinstatement process. 38 U.S.C. 4312(e), (f). Section 4312(e) of USERRA establishes varying time periods for requesting reinstatement, and section 1002.115 explains that the three statutory time periods for making a request for reinstatement are dependent on the length of the period of military service, except in the case of an employee's absence for an examination to determine fitness to perform service.

The Department received three general comments with regard to the time periods set out in section 1002.115. Two commenters suggest that the Department indicate that employees and employers may lawfully agree to extend the time periods for making a request for reinstatement. Section 4302(a) of USERRA states that ''[n]othing in this chapter shall supersede, nullify or diminish any * * * contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided'' under USERRA. The Department concludes that this statutory provision permits the types of agreements to which the commenters refer, and finds it unnecessary to add such a provision to the final rule. A final general comment suggests that the Department indicate that an employee's separate but proximate periods of service be accumulated into one period for the purposes of determining the time period within which to apply for reemployment. The Department disagrees with the approach offered by the commenter. Under USERRA, an employee may not add together service days from separate but proximate periods of military service to create a longer period within which to apply for reemployment with the employer. Similarly, if an additional period of military service intervenes in the statutory period within which to apply for reemployment with the employer, an employee may not bank any remaining days from that period and add them on to the subsequent period within which to report back to or apply for reemployment with the employer.

Section 1002.115 also specifies the actions that must be taken by the employee. Section 4312(e)(1)(A)(i) of USERRA provides that the employee reporting back to the employer following a period of service of less than 31 days must report:

> (i) Not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence * * *

38 U.S.C. 4312(e)(1)(A)(i).

The Department interprets this provision as requiring the employee to report at the beginning of the first full shift on the first full day following the completion of service, provided the employee has a period of eight hours to rest following safe transportation to the person's residence. See H.R. Rep. No. 103–65, Pt. I, at 29 (1993). If it is impossible or unreasonable for the employee to report within this time period, he or she must report to the employer as soon as possible after the expiration of the eight-hour period.

The Department invited comment as to whether the interpretations in section 1002.115(a) best effectuate the statute, and received four comments in response. Two commenters asserted that the statute requires that an employee report back to the employer ''by the beginning of the first full shift on the first calendar day that falls after the eight hour rest period ends.'' One commenter requested that this provision be re-drafted to improve its clarity, and one commenter requested that the Department extend the 8-hour period of rest because it is too brief.

After reviewing these comments, and the arguments in support of a modification to this provision, the Department views section 1002.115(a), which requires an employee to report back to the employer no later than the beginning of the first full regularly-scheduled work period on the first full calendar day following the completion of the period of service, provided the employee has an 8-hour rest period, as a proper and accurate interpretation of section 4312(e)(1)(A)(i). Neither the statute nor the legislative history suggests that an employee must report back on the first full shift on the day following the day that includes the period of rest. Nor can the Department

extend that period of rest beyond eight hours, as is called for in the statute.

An additional commenter sought guidance on the application of section 1002.115(a) to a case in which an employee is subject to rotating shifts. This rule is not intended as an opportunity to resolve issues arising under individual facts and circumstances. However, the Department views the text of section 1002.115(a), which requires an employee to report back ''at the beginning of the first full regularly-scheduled work period on the first full calendar day following the completion of the period of service,'' as capable of resolving the inquiry. Under this provision, an employee need not report back until the beginning of the first full regularly scheduled work period, whether the shift is conventional or rotating.

Two final commenters on this provision asked the Department to clarify the application of USERRA's rules covering reporting back to work following periods of service for less than 31 days in light of a recent case from a Federal appeals court, *Gordon* v. *WAWA, Inc.,* 388 F.3d 78 (3rd Cir. 2004). In Gordon, an employee returning from weekend duty with the Army Reserve stopped by his workplace to collect his paycheck and was allegedly ordered by the employer to return to work before he had an opportunity to return home and rest. The employer allegedly threatened Gordon with termination if he did not work the upcoming shift. The employee apparently did not insist on his rest period, and worked the upcoming (midnight) shift. He was not denied reemployment. After working his shift, the employee suffered a fatal automobile accident while driving home.

The court reviewed USERRA's legislative history, which demonstrates Congressional intent that service members reporting back to their civilian employment ''be allowed sufficient time to return to their residence and be rested before they are to perform their work.'' 388 F.3d at 83, citing S. Rep. No. 103–158, at 50 (1993). However, the court held that the time periods provided by USERRA in which a returning service member must notify the pre-service employer of his or her intent to return to work are obligations the service member must meet to reclaim the pre-service job, not rights that can be enforced under USERRA in cases where, as here, the person was in fact reemployed. As a result, the court held that the statute's reporting-back requirement, 38 U.S.C. 4312(e)(1), ''does not confer a right to rest'' to a returning service member.

Although Gordon did not interpret USERRA to provide relief to an employee allegedly injured by the employer's denial of the eight-hour rest period, the Department's view is that the case does not interfere with the eight-hour, 14-day, and 90-day rest/notification periods allowed under USERRA. The facts in Gordon were unusual; the employer reportedly threatened the employee with termination if he did not work the upcoming shift, but the employee apparently did not insist on his rest period, and was not denied reemployment. Consequently, the employee was not denied his USERRA right to be reemployed.

Gordon also does not change the procedure that a service member must follow to be entitled to reemployment rights. An employee must report to the employer or apply for reemployment within the specified time periods to be eligible for reemployment. If the employee is required by the employer to report to work, or apply for reemployment, earlier than is provided by USERRA, the employee should seek assistance from VETS or seek relief in the courts to prevent the employer from enforcing such a policy. A service member may not be required by an employer to forego any portion of the applicable eight-hour, 14-day, or 90-day rest/notification period as a condition of reemployment.

Section 1002.115(b) and (c) set out the other time periods in which an employee must report back to an employer. If the individual served between 31 and 180 days, he or she must make an oral or written request for reemployment no more than 14 days after completing service. If it is impossible or unreasonable for the employee to apply within 14 days through no fault of the employee, he or she must submit the application not later than the ''next full calendar day after it becomes possible to do so.'' The Department indicated in the proposed rule that it understands the term ''next'' in the clause ''next first full calendar day'' in section 4312(e)(1)(C) to be superfluous, and received one comment agreeing with the position. Finally, if the individual served more than 180 days, he or she must make an oral or written request for reemployment no more than 90 days after completing service.

Section 1002.116 addresses the situation in which a service member is unable to meet the foregoing timeframes due to the individual's hospitalization for or convalescence from a service-related illness or injury. Such a person must comply with the notification procedures determined by the length of service, after the time period required for the person's recovery. The recovery period may not exceed two years unless circumstances beyond the individual's control make notification within the required two-year period impossible or unreasonable.

The Department received two requests for guidance on section 1002.116 from one commenter. The commenter would like to know whether the two-year period begins on the date of military discharge, on the date the recovery period ends, or on the date the employee returns to work, and how to apply the rule in a situation in which the returning service member has already reported to the employer and a service-related medical condition arises requiring absence from work. As to the first issue, section 4312(e)(2)(A) of the statute states that a ''person who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services shall, at the end of the period that is necessary for the person to recover from such illness or injury, report to the person's employer * * * or submit an application for reemployment with such employer * * * [and] such period of recovery may not exceed two years.'' The Department concludes, based on this provision of USERRA, that the two-year recuperation period begins on the date of completion of the service.

This represents a change from USERRA's predecessor law, under which an employee with a service-related injury or illness could seek reemployment within 90 days of the conclusion of a period of hospitalization of not more than one year (a maximum of one year plus 90 days). USERRA's enactment extended the period for recuperation and recovery from one year to two years, but did not allow any additional time for application or reporting back after the end of the recuperation period. USERRA's legislative history supports this reading by indicating that if time were needed for recuperation and recovery, the time for application or reporting back would be extended ''by up to two years.'' See, e.g., S. Rep. No. 103–158, at 51 (1993) (USERRA ''provides for extending reemployment reporting or application dates for up to two years.''); H.R. Rep. No. 103–65, Pt. I, at 29 (1993) (USERRA extends the reporting deadlines ''by up to two years.'').

As a result, unless extended to accommodate circumstances beyond the control of the employee that make

reporting within such period impossible or unreasonable, the entire period between the date of completion of service and the date of reporting to work or applying for reemployment can be no greater than two years, and there is no longer an additional extension of 14 or 90 days for applying for reemployment at the end of the recuperation period. However, because the recuperation period is coextensive with the 14- or 90-day application period under USERRA, the service member is entitled to whichever period is longer, but not both.

The second request for guidance on section 1002.116 asks whether the provision of section 1002.116 applies in a situation in which the returning service member has already reported to the employer and a service-related medical condition arises, necessitating absence from work. The Department concludes that the extension of time for recuperation and recovery applies only to the period in which the employee has to report back or apply for reemployment, and does not apply after the person is reemployed. Although this conclusion does not provide for cases in which service-related injuries or illnesses, such as post-traumatic stress disorder or exposure to battlefield toxins, become apparent only following reemployment, it is nevertheless consistent with the unambiguous statutory language on this issue. The Department has revised section 1002.116 to reflect this position.

Section 1002.117 covers the situation where the employee fails to report or to submit a timely application for reemployment. Such failure does not automatically divest the individual of his or her statutory reemployment rights. See 38 U.S.C. 4312(e)(3). However, the employer may subject the employee to the workplace rules, policies and practices that ordinarily apply to an employee's unexcused absence from work.

Sections 1002.118 through 1002.123 establish procedures for notifying the employer that the service member intends to return to work. These sections also address the requirement that the returning service member provide documentation to the employer in certain instances. The documentation provides evidence that the service member meets three of the basic requirements for reemployment: Timely application for reinstatement, permissible duration of service, and appropriate type of service discharge. USERRA expressly provides that the Secretary may prescribe, by regulation, the documentation necessary to demonstrate that a service member applying for employment or reemployment meets these requirements.

The Department received two comments on section 1002.119 of the proposed rule, which indicates to whom an employee must submit an application for reemployment. The first commenter suggests that the Department incorporate in this provision a statement that an employee is ''encouraged, but not required, to notify [the employee's] human resources officer and * * * supervisors as soon as practicable.'' The second commenter suggests that the provision include a statement that if a pre-service employer ''has an established channel for receiving employment or reemployment applications, [an employee] should follow that channel.'' The Department views both suggestions as ones that can be construed as imposing on service members obligations not set forth in the statute and, as a result, declines the proposals.

The Department received two comments on proposed section 1002.120, which, as originally drafted, provided unconditionally that the service member does not forfeit reemployment rights with one employer by working for another employer after completing his or her military service, as long as the service member complies with USERRA's reinstatement procedures. The commenters suggested either deletion of the provision entirely, or the placement of some limitations on the right to seek alternative employment during the application period. One commenter suggests that such limitations are required in cases in which such alternative employment may violate the pre-service employer's workplace policies, such as employment with a competitor of the pre-service employer that violates an employer's policy against non-competition, or employment that presents a conflict of interest for the employee. The Department agrees with the comments, and has modified this provision accordingly. Section 1002.120 now reflects that a service member's alternative employment during the application period must not violate the pre-service employer's employment policy to such a degree that it constitutes just cause for discipline or termination by the pre-service employer. The Department views this new language as striking an appropriate balance between protecting the proprietary interests of pre-service employers and providing flexibility for employees to explore other post-service employment opportunities. In addition, the modification comports with USERRA's provision protecting reemployed service members from discharge for a certain period following reemployment, except for ''cause.'' 38 U.S.C. 4316(c).

Section 4312(f) of USERRA describes the documentary evidence that the service member must submit to the employer in order to establish that the service member meets the statutory requirements for reinstatement, and the rule implements these documentation requirements at 1002.121 to .123. Section 1002.121 establishes that an individual applying for reemployment who served more than 30 days in military service must provide certain documentation upon the employer's request. The documentation must establish that the individual's application is timely; he or she has not exceeded the five-year service limitation; and the type of separation from service does not disqualify the individual from reemployment. Section 1002.122 provides that an employer is required to reemploy a service member even if documentation establishing the service member's reemployment eligibility does not exist or is not readily available.

The Department received five comments on sections 1002.121 and 1002.122, each of which addresses a different aspect of the provisions. One comment urged the Department to include language in section 1002.122 imposing an affirmative obligation on the employee to make a ''reasonable effort'' to secure the documentation, and assist the employer in obtaining such documentation. Section 4312(f)(1) of USERRA states that an employee applying for reinstatement ''*shall provide* to the person's employer'' the requested documentation (emphasis supplied). Section 1002.121 follows the directive of the statute and similarly states that the employee ''must'' provide the documentation. The Department concludes that adding the ''reasonable effort'' language to the rule is redundant, and arguably diminishes the mandatory directive of the statute. Furthermore, Department of Defense regulations under USERRA obligate the military services to provide documentation upon request by the service member ''that may be used to satisfy the Service member's entitlement to statutory reemployment rights and benefits.'' 32 CFR 104.6(l). The service branch is therefore ultimately obligated to provide the documentation that the employee requires in order to satisfy his or her own obligation to the employer. The Department concludes that a service member seeking reemployment will realistically make every effort to

obtain the documentation or assist the employer in doing so. However, in difficult cases, the military services can assist employers.

Two comments regarding these provisions were very similar in their suggested solutions to the situation in which documentation is unavailable in a timely fashion. One comment suggested specific time frames for the employee to provide the documentation, and both suggested sanctions for failing to do so in a timely manner. The suggestions included a three-step proposal that should apply to an employee who is unable to produce documentation at the time he or she applies for reemployment: First, the employer may require the employee to execute an affidavit confirming the dates of service, and the employer may terminate the employee if the information is later proven incorrect; second, if the employee does not provide requested documentation within a specific period (28 business days is suggested), the employer may place him or her on unpaid leave; and third, if the employee does not provide the documentation after a specific period of unpaid leave (28 days is again suggested), the employer may terminate him or her.

The Department concludes that the proposed change is inconsistent with the statute and USERRA's general policy of eliminating obstacles to prompt reemployment. Both section 1002.122 and the legislative history of USERRA's section 4312(f) clearly establish that the employer may not deny or delay reemployment if the requested documentation is nonexistent or not ''readily available.'' H.R. Rep. No. 103–65, Pt. I, at 29–30 (1993); S. Rep. No. 103–158, at 51 (1993). Requiring an affidavit in lieu of documentation at the time of reemployment places an additional condition on reemployment beyond the general obligation to obtain the documentation. Furthermore, both sections 4312(f)(3)(A) and 1002.122 permit an employer to terminate an employee only if the documentation ultimately proves the employee was not eligible for reemployment. Terminating the employee for failure to provide the documentation after a prescribed period is inconsistent with the statute.

The fourth comment suggests that 1002.122 be modified to state that an employer may terminate an employee following reemployment if documentation received after reemployment indicates that the employee was not entitled to reemployment, ''unless the employer's policy, plan, or practice provides otherwise under the circumstances.'' The Department views the provision permitting an employer to terminate an employee if documentation fails to support the employee's entitlement to reemployment as permissive and not a mandatory directive. The proposed addition neither enhances nor circumscribes the employer's discretion on this subject, and is therefore unnecessary.

The final comment with respect to these provisions urged the Department to require the employee to provide the documentation within a reasonable time. The Department concludes that adoption of this option imposes an additional obligation on the employee not contemplated by the statute, particularly in those cases in which delays in obtaining documentation following return from service may be caused by the military unit and not by the employee. After considering all the comments on these provisions, the Department has concluded that it will retain them in unchanged form. See sections 1002.121 and 1002.122.

*Character of Service*

USERRA makes entitlement to reemployment benefits dependent on the characterization of an individual's separation from the uniformed service, or ''character of service.'' 38 U.S.C. 4304. The general requirement is that the individual's service separation be under other than dishonorable conditions. Section 1002.135 lists four grounds for terminating the individual's reemployment rights based on character of service: (i) Dishonorable or bad conduct discharge; (ii) ''other than honorable'' discharge as characterized by the regulations of the appropriate service Secretary; (iii) dismissal of a commissioned officer by general court-martial or Presidential order during a war (10 U.S.C. 1161(a)); and, (iv) removal of a commissioned officer from the rolls because of unauthorized absence from duty or imprisonment by a civil authority (10 U.S.C. 1161(b)). 38 U.S.C. 4304(1)–(4). The uniformed services determine the individual's character of service, which is referenced on Defense Department Form 214. See section 1002.136. For USERRA purposes, Reservists who do not receive character of service certificates are considered honorably separated; many short-term tours of duty do not result in an official separation or the issuance of a Form 214.

Sections 1002.137 and 1002.138 address the consequences of a subsequent upgrading of an individual's disqualifying discharge. Upgrades may be either retroactive or prospective in effect. An upgrade with retroactive effect may reinstate the individual's reemployment rights provided he or she otherwise meets the Act's eligibility criteria, including having made timely application for reinstatement. However, a retroactive upgrade does not restore entitlement to the back pay and benefits attributable to the time period between the individual's discharge and the upgrade.

The Department received two comments regarding the character-of-service provisions. The meaning of the first comment was difficult to discern, but appeared to be related to an obligation an employer might have to pay back-wages to an employee who receives a retroactive upgrade in the characterization of his or her service. Section 1002.137 expressly provides that in such a case an employer is not required to pay back-wages for the period from the date of completion of service to the date of the retroactive upgrade. The final commenter requests that in the event a service member otherwise eligible for reemployment receives an upgrade to the characterization of his or her service months or even years later, the employer should enjoy some flexibility in its obligation to reemploy. Because a person who receives a retroactive upgrade and meets all other eligibility requirements is eligible for reemployment, there is no basis for providing flexibility regarding an employer's obligation to reemploy. However, such employers may rely on the undue hardship or changed circumstances defenses, if applicable. After considering all the comments on the character-of-service provisions, the Department will retain them as originally proposed. See sections 1002.137 and 1002.138.

*Employer Statutory Defenses*

USERRA provides three statutory defenses that an employer may assert against a claim for USERRA benefits. The employer bears the burden of proving any of these defenses. 38 U.S.C. 4312(d)(2)(A)–(C).

An employer is not required to reemploy a returning service member if the employer's circumstances have so changed as to make such reemployment impossible or unreasonable. 38 U.S.C. 4312(d)(1)(A). In view of USERRA's remedial purposes, this exception must be narrowly construed. The employer bears the burden of proving that changed circumstances make it impossible or unreasonable to reemploy the returning veteran. 38 U.S.C. 4312(d)(2)(A); proposed section 1002.139. The change must be in the pre-service employer's circumstances,

as distinguished from the circumstances of its employees. For example, the defense of changed circumstances is available where reemployment would require the creation of a ''useless job or mandate reinstatement where there has been a reduction in the workforce that reasonably would have included the veteran.'' H.R. Rep. No. 103–65, Pt. I, at 25 (1993), citing *Watkins Motor Lines* v. *De Galliford*, 167 F.2d 274, 275 (5th Cir. 1948); *Davis* v. *Halifax County School System*, 508 F. Supp. 966, 969 (E.D. N.C. 1981). However, an employer cannot establish that it is unreasonable or impossible to reinstate the returning service member solely by showing that no opening exists at the time of the reemployment application or that another person was hired to fill the position vacated by the veteran, even if reemploying the service member would require terminating the employment of the replacement employee. See Davis at 968; see also *Cole* v. *Swint*, 961 F.2d 58, 60 (5th Cir. 1992); *Fitz* v. *Bd. of Education of Port Huron Area Schools*, 662 F. Supp. 1011, 1015 (E.D. Mich. 1985), aff'd, 802 F.2d 457 (6th Cir. 1986); *Anthony* v. *Basic American Foods, Inc.*, 600 F. Supp. 352, 357 (N.D. Cal. 1984); *Goggin* v. *Lincoln St. Louis*, 702 F.2d 698, 704 (8th Cir. 1983). Id.

An employer is also not required to reemploy a returning service member if such reemployment would impose an undue hardship on the employer. 38 U.S.C. 4312(d)(1)(B). As explained in USERRA's legislative history, this defense only applies where a person is not qualified for a position due to disability or other bona fide reason, after reasonable efforts have been made by the employer to help the person become qualified. H.R. Rep. No. 103–65, Pt. I, at 25 (1993). USERRA defines ''undue hardship'' as actions taken by the employer requiring significant difficulty or expense when considered in light of the factors set out in 38 U.S.C. 4303(15). USERRA defines ''reasonable efforts'' as ''actions, including training provided by an employer, that do not place an undue hardship on the employer.'' 38 U.S.C. 4303(10). USERRA defines ''qualified'' in this context to mean having the ability to perform the essential tasks of the position. 38 U.S.C. 4303(9). These definitions are set forth in sections 1002.5(n) (''undue hardship''), 1002.5(i) (''reasonable efforts''), and 1002.5(h) (''qualified'').

The third statutory defense against reemployment requires the employer to establish that ''the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.'' 38 U.S.C. 4312(d)(1)(C), (2)(C). USERRA does not define ''significant period.'' Under both USERRA and its predecessor, the VRRA, a person holding a seasonal job may have reemployment rights if there was a reasonable expectation that the job would be available at the next season. See, e.g., *Stevens* v. *Tennessee Valley Authority*, 687 F.2d 158, 161–62 (6th Cir. 1982), and cases cited therein; S. Rep. No. 103–158, at 46–47 (1993).

The Department received three comments on section 1002.139, which sets forth the employer's statutory defenses. Two of the comments request the deletion of one or more of the statutory defenses from the rule. Because these defenses are expressly provided in the statute, the Department will retain them in the rule. The final comment requested that this provision of the rule should express that the statutory defenses are affirmative ones and that the employer carries the burden to prove them by a preponderance of the evidence. Section 4312(d)(2) expressly provides that the employer has the burden to prove its statutory defenses, and it is appropriate for the rule to include this statutory provision. Therefore, the rule has been modified accordingly. See section 1002.139.

## Subpart D—Rights, Benefits, and Obligations of Persons Absent From Employment Due to Service in the Uniformed Services

### *Furlough or Leave of Absence*

Sections 1002.149 and 1002.150 implement section 4316(b) of the Act, which establishes the employee's general non-seniority based rights and benefits while he or she is absent from the employment position due to military service. 38 U.S.C. 4316(b). The employer is required to treat the employee as if he or she is on furlough or leave of absence. 38 U.S.C. 4316(b)(1)(A). The employee is entitled to non-seniority employment rights and benefits that are available to any other employee ''having similar seniority, status, and pay who [is] on furlough or leave of absence. * * *'' 38 U.S.C. 4316(b)(1)(B). These non-seniority rights and benefits may be provided ''under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.'' Id. For example, if the employer offers continued life insurance coverage, holiday pay, bonuses, or other non-seniority benefits to its employees on furlough or leave of absence, the employer must also offer the service member similar benefits during the time he or she is absent from work due to military service. If the employer has more than one kind of non-military leave and varies the level and type of benefits provided according to the type of leave used, the comparison should be made with the employer's most generous form of comparable leave. See *Waltermyer* v. *Aluminum Company of America*, 804 F.2d 821 (3d Cir. 1986); H.R. Rep. No. 103–65, Pt. I, at 33–34 (1993); *Schmauch* v. *Honda of America Manufacturing, Inc.*, 295 F. Supp. 2d 823 at 836–839 (S.D. Ohio 2003) (employer improperly treated jury duty more favorably than military leave). The employee is entitled not only to the non-seniority rights and benefits of workplace agreements, policies, and practices in effect at the time he or she began the period of military service, but also to those that came into effect during the period of service.

The Department also interprets section 4316(b) of the Act to mean that an employee who is absent from a position of employment by reason of service is not entitled to greater benefits than would be generally provided to a similarly situated employee on non-military furlough or leave of absence. See Sen. Rep. No. 103–158, at 58 (1993).

The Department invited comments as to whether its interpretation in sections 1002.149 and 1002.150 best effectuates the purpose of section 4316(b). In response, the Department received six comments generally addressing the provisions, and fifteen comments addressing specific issues contained in the provisions. Of the general comments, three expressed general support for the Department's interpretation in this provision. A fourth general comment suggested that employers that are contractors with the Federal government be required to provide to employees on military leave any non-seniority rights and benefits provided to Federal employees. The same commenter suggested that an employer be required to provide to employees on military leave any non-seniority rights and benefits provided to other employees under a collective bargaining agreement. In response to each scenario, the Department underscores that the statute requires that an employer provide to employees on military leave those non-seniority employment rights and benefits that are available to any other employee ''having similar seniority, status, and pay who [is] on furlough or leave of absence. * * *'' 38 U.S.C. 4316(b)(1)(B). The statement in the preamble to the proposed rule that the ''Department also

does not interpret the second use of the term 'seniority' in section 4316(b)(1)(B) as a limiting factor'' is inaccurate: for the purposes of section 4316(b)(1)(B), the comparator must be employees of the employer with similar seniority, status, and pay. Although a determination of whether an employee is ''similarly situated'' under section 1002.150 includes consideration of seniority as well as status and pay, it is not necessary for the seniority to be determined by a collective bargaining agreement, nor does consideration of seniority in determining whether an employee is ''similarly situated'' make the benefit a seniority benefit for purposes of USERRA. The final general comment suggested that the rule state that an employer does not violate USERRA if it characterizes an employee on military leave as ''terminated'' for the purposes of its administrative systems. The Department agrees that an employer's characterization, or mis-characterization, of a service member's absence from employment is unimportant so long as the employer is in full compliance with USERRA's substantive requirements on this issue, but because the rule is sufficiently clear on this point, the suggested modification is unnecessary.

Of the specific comments received regarding these provisions, two comments expressed agreement with the terms in section 1002.150 and the remaining comments primarily addressed the mechanics of implementing the provisions of section 1002.150. Four commenters requested that the Department indicate whether vacation accrual is a seniority-or non-seniority-based benefit. Three of the four comments take the position that vacation accrual is not a seniority-based benefit; the fourth simply seeks clarification of the issue. The regulations provide that a particular right or benefit is seniority-based if it accrues with or is determined by seniority, and depends primarily on whether the benefit is a reward for length of service. See section 1002.212. Under this construct, the Supreme Court has held that vacation accrual, rather than being a perquisite of seniority, is a form of short-term compensation for work performed. *Foster* v. *Dravo*, 420 U.S. 92 (1975). Accordingly, the Department has long viewed the accrual of vacation leave as a non-seniority based benefit and, because a significant number of comments were received on this subject, has amended the text of the rule to reflect this determination. See section 1002.150(c).

USERRA requires, and section 1002.150 reiterates, that an employee on military leave must be accorded the non-seniority rights and benefits generally provided by the employer to other employees with similar seniority, pay, and status that are on furlough or leave of absence based on ''employment contract, agreement, policy, practice, or plan'' in effect at the workplace. 38 U.S.C. 4316(b)(1)(B); section 1002.150. The Department received one question asking whether non-seniority benefits that are required by law, rather than by ''employment contract, agreement, policy, practice, or plan,'' to be provided to employees on other types of leaves of absence must be provided to employees on military leave. For instance, regulations promulgated by the Department pursuant to the Family and Medical Leave Act, 29 U.S.C. 2601 et seq. (FMLA), require that covered employers extend to employees who have taken leave under the FMLA bonuses that do not require performance by the employee but rather contemplate the ''absence of occurrences'' of some particular event. See 29 CFR 825.215(c)(2). For instance, under this provision, bonuses for perfect attendance and for safety do not require performance by the employee but rather contemplate the absence of occurrences, and an employee absent from employment due to FMLA leave may not be disqualified from the award of such bonuses because of taking FMLA leave. 29 CFR 825.215(c)(2). The commenter argues that if such bonuses are contemplated by section 4316(b)(1)(B) of the statute, they may become the ''most favorable treatment'' to which employees on military leave are entitled.

USERRA's legislative history gives no unambiguous indication whether Congress intended that non-seniority benefits required to be provided by law to employees on other types of leaves of absence must also be provided to employees on military leave. S. Rep. 103–158, at 58 (1993) (reemployed service member entitled to the ''agreements and practices in force'' at the time of departure and the ''agreements and practices which became effective'' during military service); H.R. Rep. 103–65, Pt. I, at 33 (1993) (service member entitled to ''whatever non-seniority related benefits are accorded other employees on non-military leaves of absence''). As a result, the Department is averse to responding to the inquiry in a manner that establishes a rigid rule regarding the application of non-seniority benefits established by law. Rather, the Department views the issue as one that must be decided on a case-by-case basis, and depends on the nature of the leave to which the benefits apply, whether that leave is comparable, the nature of the benefit mandated by other law, and the nature of the ''employment contract, agreement, policy, practice, or plan'' that implements the non-seniority benefit provisions of the other law.

The Department received seven comments regarding section 1002.150(b), which states that if non-seniority benefits to which employees on other types of furlough or leave of absence vary according to the type of leave, the employee on military leave must be given the most favorable treatment accorded to employees on any comparable leave. One commenter was in complete agreement with the provision, and a second commenter requests that the Department designate what factors to consider when assessing whether two types of leave are comparable. The third commenter submitted that employees on military leave should be afforded only those non-seniority-based benefits that are provided to other employees on unpaid, long-term leaves of absence. Similarly, the fourth commenter queried whether the voluntary provision of salary to an employee during military leave altered the treatment of non-seniority benefits, so that the employer must provide an employee on military leave those non-seniority benefits provided to employees on other types of paid leave. Three final commenters stated that section the requirement in 1002.150(b) that employers provide to employees on military leave the ''most favorable treatment'' accorded to employees on comparable leave is confusing, exceeds the scope of the statutory mandate, or both.

The plain language of the statute mandates that an employee on military leave be granted non-seniority benefits afforded to ''employees having similar seniority, status, and pay who are on furlough or leave of absence. * * *'' The requirement that an employee on military leave must be given the ''most favorable treatment'' accorded to other employees on leave is based on legislative history requiring that ''to the extent that employer policy or practice varies among various types of non-military leaves of absence, the most favorable treatment accorded any particular leave would also be accorded the military leave. * * *'' H.R. Rep. 103–65, Pt. I, at 33 (1993), citing *Waltermyer,* 804 F.2d at 825, in which the court held that the service member's leave for Reserve training was comparable to other forms of leave to which benefits attached under the collective bargaining agreement and,

therefore, the service member could not be afforded less favorable treatment.

The *Waltermyer* court held that in providing non-seniority benefits to employees on military leave, an employer cannot treat those employees less favorably than other employees on comparable forms of leave. In comparing types of employee leave, the court first assessed the purpose of the collective bargaining agreement's provision rewarding holiday pay to those employees that either worked during the week of the holiday or were away from work for specified, non-military reasons. The court found that the purpose of the benefit was to protect against excessive absenteeism during the holiday week, and that the collective bargaining agreement's exemption from the policy of certain types of absence from work served to protect those employees who were absent involuntarily. Therefore, the court found that because military leave was similarly involuntary, it was comparable to other types of involuntary absences from work and should be afforded the holiday pay. *Waltermyer,* 804 F.2d at 825.

The Department recognizes that under the proposed rule, employers may have had some difficulty in assessing whether one or more types of leave are comparable for the purposes of this provision, and has accordingly amended section 1002.150(b) to provide further guidance. The additional text indicates that in determining whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be comparable to an extended military leave. The new language also states that in addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered. See section 1002.150(b). Finally, USERRA's legislative history indicates that Congress intended that for the purposes of implementing this provision, it is irrelevant whether the non-military leave is paid or unpaid. See H.R. Rep. 103–65, Pt. I, at 33–34 (1993). Therefore, contrary to the request of one commenter, the Department has declined to include as a factor in determining the comparability of leave whether the non-military leave is paid or unpaid.

The final comment regarding these provisions sought further guidance on the provision of bonuses, for example, attendance bonuses or performance bonuses, to employees on military leave. The provision of employment benefits during military leave depends first on whether the benefit is a seniority-based or non-seniority based benefit. As noted above, a particular right or benefit is seniority-based if it accrues with or is determined by seniority, and depends primarily on whether the benefit is a reward for length of service. If a bonus is based on seniority, it must be included in the escalator position and provided upon reemployment. See sections 1002.191–1002.193. If a bonus is non-seniority-based and is provided to similarly situated employees on comparable non-military leave, it must be provided to employees on military leave. Therefore, after considering all the comments applicable to sections 1002.149 and 1002.150, the Department has made revisions only with regard to the issues of leave comparability factors and accrual of vacation leave. See section 1002.149 and 150.

Section 1002.152 addresses the circumstances under which an employee waives entitlement to non-seniority based rights and benefits. Section 4316(b)(2) of the Act provides that an employee who ''knowingly'' states in writing that he or she will not return to the employment position after a tour of duty will lose certain rights and benefits that are not determined by seniority. 38 U.S.C. 4316(b)(2). The Department intends for principles of Federal common law pertaining to a waiver of interest to apply in determining whether such notice is effective in any given case. See *Melton* v. *Melton,* 324 F.3d 941, 945 (7th Cir. 2003); *Smith* v. *Amedisys, Inc.,* 298 F.3d 434, 443 (5th Cir. 2002). By contrast, a notice given under 38 U.S.C. 4316(b)(2) does not waive the employee's reemployment rights or seniority-based rights and benefits upon reemployment.

The Department invited comments as to whether this interpretation best effectuates the purpose of this provision, and received four comments in response. Of these, three commenters requested that the Department clarify what USERRA rights may be waived by an employee and what USERRA rights are not susceptible to waiver. The final commenter requested that the Department include in the text of the rule the legal elements that must be met in order for a waiver to be effective.

Pursuant to section 4316(b)(2)(A) of USERRA, if an employee provides to his or her employer a written notice that he or she intends not to return to employment with the pre-service employer, the employee has effectively waived any non-seniority based benefits to which he or she is entitled under section 4316(b)(1) of the statute. Such waiver is effective only with regard to the employee's non-seniority-based rights, and will not pertain to the employee's right to reemployment. For example, if prior to departure for military service, or during military service, an employee sends his or her employer a letter that states that the employee will not be returning to his or her pre-service employment after military service, the employee may have waived his or her entitlement to non-seniority based benefits, depending on whether the elements of waiver have been met. However, if the same employee changes his or her mind after sending the letter, and decides that he or she will seek reemployment, the employee may do so, despite having sent the letter. The right to reemployment, with all its attendant rights, cannot be waived prior to or during military service. See section 1002.88.

The fourth commenter addressing section 1002.152 requested the Department include in the text of the rule the legal elements of waiver of statutory rights. As noted above, whether an employee has effectively waived a right protected by USERRA is to be determined by application of Federal common law. The common law test is fact intensive, and seeks to determine whether the employee's waiver is explicit, knowing, voluntary, and uncoerced. *Melton,* 324 F.3d at 945; *Smith,* 298 F.3d at 443. The statute provides the additional element that the waiver must be in writing. 38 U.S.C. 4316(b)(2)(A)(ii). Because the test is based in common law and is intended to provide a flexible approach to the analysis of a wide variety of circumstances, the Department is reluctant to establish the legal elements within the text of the regulation. After considering all the comments applicable to section 1002.152, the Department has retained the provision in unchanged form. See section 1002.152.

Section 1002.153 clarifies that an employer may not require the employee to use his or her accrued vacation, annual or similar leave to cover any part of the period during which the employee is absent due to military service. 38 U.S.C. 4316(d). The employee must be permitted upon request to use any accrued vacation, annual or similar leave with pay during the period of service. The employer may require the employee to request permission to use such accrued leave. The proposed rule stated that because sick leave is not comparable to vacation, annual or similar types of leave, and its entitlement is generally conditioned on the employee (or a family member) suffering an illness or receiving medical

care, an employee is not entitled to use accrued sick leave solely to continue his or her civilian pay during a period of service. The Department received one comment that disagreed with the restriction on use of accrued sick leave, arguing that the restriction is overly-broad, particularly in cases in which an employer may permit the use of sick leave for non-illness-related or non-injury-related absences. The Department agrees with the comment, and has revised the provision accordingly. See section 1002.153.

The Department received three additional comments on section 1002.153, one of which was generally supportive of the provision. An additional comment regarding this provision asked that the Department specify that an employer cannot require an employee to use accrued annual leave while absent on military leave ''unless the employer's policy requires use of leave as part of a pay differential program, and the value of the forfeited leave is less than the value of the pay provided by the employer.'' The Department must decline to include this suggestion in the final rule because it does not comport with the statutory language in section 4316(d), which states without condition that ''[n]o employer may require any [employee on military leave] to use vacation, annual, or similar leave during such period of service.'' 38 U.S.C. 4316(d).

The final commenter regarding section 1002.153 seeks guidance on a situation in which an employer switches an employee's days off so that they coincide with the employee's obligation to participate in a regular, monthly two-day military drill or similar military obligation. This may be a hardship to the employee because he or she will lose leisure time as a result of having to perform service obligations during the scheduled time off. Because this comment does not concern the use of accrued leave, it does not require modification of section 1002.153. However, the Department notes that such a scenario may constitute a violation of USERRA's anti-discrimination provisions if the employee successfully establishes the elements of a discrimination case set forth in sections 1002.22 and 1002.23. USERRA prohibits the denial of any ''benefit of employment'' on the basis of military service obligations, see section 1002.18, and it bears emphasis in response to this inquiry that USERRA includes an employee's ''opportunity to select work hours'' as a ''benefit of employment,'' see 38 U.S.C. 4303(2); section 1002.5(b)).

*Health Plan Coverage*

Section 4317 of USERRA provides that service members who leave work to perform military service have the right to elect to continue their existing employer-based health plan coverage for a period of time while in the military. ''Health plan'' is defined to include an insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or other arrangement under which health services for individuals are provided, or the expenses of such services are paid. 38 U.S.C. 4303(7); 1002.5(e). USERRA's health plan provisions are similar but not identical to the continuation of health coverage provisions added to Federal law by the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). As with COBRA, the Act permits the continuation of employment-based coverage. Unlike COBRA, USERRA's continuation coverage is available without regard to either the size of the employer's workforce or to whether the employer is a government entity. As with every other right and benefit guaranteed by USERRA, the employer is free to provide continuation health plan coverage that exceeds that which is required by USERRA.

Section 4317 also requires that the employee and eligible dependents must, upon the service member's reemployment, be reinstated in the employer's health plan without a waiting period or exclusion that would not have been imposed had coverage not been suspended or terminated due to service in the uniformed services. The employee need not elect to continue health plan coverage during a period of uniformed service in order to be entitled to reinstatement in the plan upon reemployment. Section 4317 of USERRA is the exclusive source in USERRA of service members' rights with respect to the health plan coverage they receive in connection with their employment. Section 4317 therefore controls the entitlement of a person to coverage under a health plan, and supersedes more general provisions of USERRA dealing with rights and benefits of service members who are absent from employment. See 38 U.S.C. 4316(b)(5). Sections 1002.163 through 1002.171 of this rule implement USERRA's health plan provisions.

As an initial matter, the Department received several comments questioning the interaction of USERRA's health plan provisions with other Federal laws governing health plans. One commenter in particular requested that the Department provide a general statement in the final rule that an employee's rights under USERRA are protected and preserved, and USERRA will not be violated, where a health plan follows existing plan procedures concerning elections and re-enrollment that are in compliance with the Internal Revenue Code (IRC), the Employee Retirement Income Security Act (ERISA, 29 U.S.C. 1001, et. seq.) and the Health Insurance Portability and Accountability Act (HIPAA, Pub. L. 104–191 (1996)). USERRA contains requirements that may be different from requirements established under other statutes, and compliance with those laws does not necessarily indicate full compliance with USERRA. In addition, providing guidance related directly to the provisions of the IRC, ERISA and HIPAA is beyond the scope of these regulations. However, as stated earlier, the Internal Revenue Service (IRS) and the Department of the Treasury have indicated that a health or pension plan will be deemed not to be in conflict with the applicable IRC requirements merely because of compliance with USERRA or its regulations.

Similarly, the Department received three comments seeking clarification of the relationship between USERRA and so-called ''cafeteria'' plans established pursuant to section 125 of the IRC. 26 U.S.C. 125. Generally, ''cafeteria'' plans allow employees to pay for certain benefits, including health benefits, using pre-tax dollars. With respect to health benefits, an employee may be allowed to pay for health plan premiums on a pre-tax basis or to pay for health care expenses not covered by insurance, such as deductibles or co-payments, through a health flexible spending arrangement (health FSA) using pre-tax dollars. Such plans qualify as health plans under USERRA because, as noted in the definition discussed above, they are an ''arrangement under which * * * expenses of [health] services are paid.'' See 38 U.S.C. 4303(7); section 1002.5(e). Accordingly, these plans must comply with the statute's continuation and reinstatement provisions. See 38 U.S.C. 4317. In cases in which cafeteria plans provide for health FSAs, it may be advantageous for an employee who is absent from employment due to military service to elect continuation coverage until amounts allocated to the health FSA are used. The IRS and the Department of the Treasury have indicated that an amount will not be treated as violating the cafeteria plan rules because a plan provides for a new election either upon leaving employment for military service or subsequent reemployment.

In a final inquiry about USERRA's relationship to other Federal laws governing health plans, one comment requested clarification of whether an employee who elected continuation coverage under USERRA but did not return to the pre-service employer would then be eligible for COBRA coverage. Because this involves the interpretation of COBRA, not USERRA, it is beyond the scope of these regulations.

Under USERRA, the term ''employer'' is defined broadly to cover entities, such as insurance companies or third party plan administrators, to which employer responsibilities such as administering employee benefit plans or deciding benefit claims have been delegated. 38 U.S.C. 4303(4); section 1002.5(d). The Department received two comments concerning the definition of ''employer'' and potential liability of third-party health plan administrators under USERRA. Of these, one commenter requested the final rule specify that plan administrators that perform employment-related functions on behalf of the employer be excluded from the definition of ''employer.'' The other commenter requested the final rule clarify that a plan administrator or a plan is liable under USERRA only when the delegation of employment-related responsibilities is made through a written agreement with the employer. The Department declines to adopt either of these recommendations. As noted in above in Subpart A, Introduction to the Regulations Under USERRA, the statute is clear that an entity to which an employer has delegated employment-related responsibilities is to be considered an ''employer'' for USERRA purposes and does not condition this application upon the existence of a written agreement. See 38 U.S.C. 4303(4)(A)(i). However, the Department has amended the definition of employer in section 1002.5 to clarify that those third-party entities that perform purely ministerial functions at the request of an employer will not be considered ''employers'' for the purpose of determining USERRA liability. An example of a purely ministerial function would be maintaining an employer's personnel files. The examples provided in the revised section are not intended to be an exclusive list but rather are offered only as illustrations. See section 1002.5(d)(1)(i).

Because USERRA's continuation coverage and reinstatement provisions only apply to health plan coverage that is provided in connection with a position of employment, coverage obtained by an individual through a professional association, club or other organization would not be governed by USERRA, nor would health plan coverage obtained under another family member's policy or separately obtained by an individual. The Department received two comments concerning the application of USERRA's continuing coverage and health plan reinstatement provisions to cases in which the dependent of a person receiving employer-based health plan coverage leaves to perform service in the uniformed services and both commenters sought the application of USERRA's right to continuing coverage for those dependents. In a similar vein, a third comment contended that retirees covered by their former employer's health plan who leave to perform military service should not be entitled to USERRA continuing coverage. USERRA's continuing coverage and reinstatement provisions are employment-based, and apply only in cases in which the service member has coverage under a health plan in connection with the service member's position of employment. 38 U.S.C. 4317(a)(1). As a result, where the service member is a dependent of the covered employee or the service member is a retiree, USERRA's continuing coverage and reinstatement provisions would not apply because the coverage is not in connection with his or her position of employment. The regulation implements this statutory mandate and, as a result, no change is mandated in response to the comments. The Department notes, however, that while dependents and retirees who are service members are not covered by USERRA's continuing coverage provisions, such persons may be entitled to reinstatement of health plan coverage following periods of certain types of military service under the provisions of the Servicemembers Civil Relief Act (SCRA). See 50 U.S.C. App. 594. The Department does not interpret the SCRA, but notes that, in general, attorneys or other experts in the military services may provide technical assistance on its provisions.

The Department also received comments about the application of USERRA's health plan election provisions to dependents of service members receiving employment-based health coverage. Two commenters sought the establishment in the final rule of a separate right for dependents to elect or waive continuation coverage, arguing that this is necessary to avoid any sudden termination of civilian health plan coverage for dependents if the service member declines or fails to elect continuing coverage. Furthermore, the commenters state, such termination may be in conflict with a custody or child support agreement or court order. USERRA provides that individuals who are absent from employment to perform military service have the right to elect to continue employer-provided health plan coverage for themselves and their dependents. 38 U.S.C. 4317(a)(1). There is no provision in USERRA for a separate election for dependents. As a result, the Department concludes that such a modification is not compelled by the statute. However, as discussed below, Section 1002.165 of the rule provides plan administrators with the flexibility necessary to establish a comprehensive schedule of notice, election and waiver procedures, if they choose to do so.

Section 1002.164 of the rule, which addresses the length of time the service member is entitled to continuing health plan coverage, reflects a recent amendment to USERRA. Congress amended the statute in December, 2004, with passage of the Veterans Benefits Improvement Act (VBIA, Pub. L. 108–454). As a result, 38 U.S.C. 4317(a)(1)(A), and section 1002.164 now provide that the maximum period of continued coverage is the lesser of 24 months or the period of military service (beginning on the date the absence begins and ending on the day after the service member fails to apply for reemployment).

As noted above, section 1002.165 provides that plan administrators and fiduciaries may develop reasonable requirements and operating procedures for the election of continuing coverage, consistent with USERRA and the terms of the plan. Such procedures must take into consideration the requirement in USERRA section 4312(b) that where military necessity prevents the service member from giving the employer notice that he or she is leaving for military duty, or where giving such notice would be impossible or unreasonable, plan requirements may not be imposed to deny the service member continuation coverage. The Department invited comments as to whether this approach—allowing health plan administrators latitude to develop reasonable requirements for employees to elect continuation coverage—best effectuates the purpose of the statute. As an alternative to this flexibility, the Department requested comments on whether these regulations should establish a date certain by which time continuing health plan coverage must be elected.

The provision in section 1002.165 that health plan administrators may establish reasonable rules that govern an

employee's election of continuation coverage, and the alternative question of whether the final rule should establish specific deadlines within which such elections must be made, received more comments than any other health plan issue. Six commenters, including America's Health Insurance Plans, ORC Worldwide, Equal Employment Advisory Council, Society for Human Resources, and U.S. Chamber of Commerce, generally favored the flexibility provided in the proposed rule, while nine commenters, including the Society of Professional Benefit Advisors, National Association of Employment Lawyers, WorldatWork, Illinois Credit Union League, TOC Management Services, National School Boards Association, and three law firms, requested more regulatory specificity. Most of the nine comments suggested that the final USERRA rule contain provisions identical to or substantially the same as those provided in COBRA, which establishes specific timeframes within which the employer must notify the employee of his or her COBRA rights, followed by a specific time within which the person must make an election to accept or decline continuation coverage. *See* 26 U.S.C. 4980B(f). One commenter in particular captured the essence of those comments seeking the imposition of COBRA rules, arguing that the Department's uniform adoption of COBRA rules and timeframes would avoid disputes over what constitutes a ''reasonable'' rule. Several additional commenters suggested that the adoption of COBRA rules and timeframes would ease a plan's administration of USERRA's requirements.

In response to those comments requesting the imposition of COBRA-like timeframes for notice and election, the Department notes that it is generally averse to imposing on employers covered by USERRA relatively inflexible rules such as those established under COBRA. Such rules may unduly burden many smaller employers that are covered by USERRA but are not covered by COBRA. The Department views each individual plan as best qualified to determine what election rules are reasonable based on its own unique set of characteristics, and therefore declines to amend section 1002.165 in this manner. However, under the USERRA rule, plans themselves are permitted to adopt reasonable rules, and, depending on a particular plan's circumstances, these may include COBRA timeframes.

However, the Department has decided to amend the election provisions in response to comments seeking a revision to those provisions for other reasons. Several commenters suggested that the Department should adopt specific rules and timeframes for election of continuing coverage because establishing a time certain by which an election must be made would help employers avoid paying premiums for employees who do not want continuation coverage but have failed to advise their employer of this fact. In addition, the Department received five comments regarding the provision in section 1002.165 stating that service members must be provided continuing coverage if their untimely election was excused because it was impossible or unreasonable, or precluded by military necessity. These commenters shared the concern that employers may be required to pay premiums for employees who do not want continuation coverage but have failed to advise their employer of this fact.

After considering these comments, the Department has added a new section 1002.167, and sequentially renumbered the succeeding health plan provisions,[1] to permit an employer to cancel the employee's health insurance if the employee departs work for military service without electing continuing coverage, with a requirement for retroactive reinstatement under certain circumstances. See 1002.167. For instance, new section 1002.167(a) provides that in cases in which an employee's failure to give advance notice of service was excused under the statute because it was impossible, unreasonable, or precluded by military necessity, the employer will be required to retroactively provide continuing coverage during the period of service if the employee elects and pays all unpaid amounts due for the coverage, and the employee must not incur administrative reinstatement costs. Id. This is consistent with the statute's provision regarding excusal for failure to provide notice to the employer of service, which states that an employee is excused from giving advance notice of impending military service in cases where the giving of notice is precluded by military necessity or is otherwise impossible or unreasonable under the circumstances. See 38 U.S.C. 4312(b)(1); section 1002.86.

New section 1002.167(b) addresses those cases in which an employee leaves employment for uniformed service in excess of 30 days and provides advance notice of the military service but does not elect continuing coverage. In such cases, a plan administrator that has developed reasonable rules regarding the election of continuing coverage may cancel the employee's health plan coverage but must reinstate it upon the employee's election and full payment within the time periods established by the plan, without the imposition of administrative reinstatement costs. Alternatively, a plan administrator that has not developed rules regarding the election of continuing coverage may cancel the employee's health plan coverage but must reinstate it upon the employee's election and full payment within the time periods established under section 1002.164(a), also without the imposition of administrative reinstatement costs. See section 1002.167(b).

Section 1002.166 implements USERRA section 4317(a)(2), which provides that a service member who elects to continue employer-provided health plan coverage may be required to pay no more than 102 percent of the full premium (the employee's share plus the employer's share) for such coverage, except that service members who perform service for fewer than 31 days may not be required to pay more than the employee share, if any, for such coverage. The legislative history of USERRA indicates that the purpose of these provisions, and in particular the requirement that service members pay only the employee share for coverage during service lasting fewer than 31 days, is to ensure that there is no gap in health insurance coverage for the service member's family during a short period of service. Dependents of Reserve Component members are entitled to participate in the military health care system, called TRICARE, only if the period of service exceeds 30 days. See H.R. Rep. No. 103–65, Pt. 1, at 34 (1993). USERRA does not provide specific guidance concerning the timing of payments for continuation coverage and the termination of coverage for failure to make payments, and section 1002.166(c) of the proposed rule provided that plan administrators may develop reasonable procedures for payment, consistent with the plan's terms.

The Department received four comments concerning section 1002.166. One commenter queried whether the payment obligation began at the

[1] The insertion of new section 1002.167 requires the sequential renumbering of proposed sections 1002.167, 1002.168, and 1002.169, resulting in the contents of proposed section 1002.167 being found in final rule section 1002.168, and so on. In discussing these sections below, the Department will use the new section numbers to refer to the sections as proposed. As an aid, the initial reference to provisions 1002.168, 1002.169, and 1002.170 will include a single reminder that the discussion involves the content of the provision as it was proposed.

beginning of the period of coverage or 31 days after the beginning of the continuation coverage. The statute states that an employee who elects continuation coverage may be required to pay no more than the employee share if the coverage pertains to service of less than 31 days, and may be required to pay no more than 102% of the full premium under the plan if the coverage pertains to service of 31 days or more. In either case, the payment obligation begins on the first day of the continuation coverage.

The three additional comments regarding section 1002.166 sought more guidance concerning payment for continuation coverage and the plan's entitlement to cancel coverage for non-election or non-payment. Of these, one recommended that the final rule adopt COBRA guidelines for payment and termination for non-payment. Another commenter suggested that the rule include a provision that the use of COBRA-compliant forms and procedures is reasonable under USERRA. In addition, as noted in the discussion of section 1002.165 above, absent any affirmative provisions in the rule regarding the ability of employers to cancel employee coverage during military leave, employers and plan administrators noted that they would have to bear the entire cost of continuing coverage when the employee leaves employment without electing continuing coverage.

After considering these comments, the Department has added a provision to new section 1002.167 that establishes that plans may develop reasonable rules to permit termination of coverage if an employee elects but does not pay for continuation coverage. In addition, new section 1002.167(c) provides that in cases where plans are covered by COBRA, it may be reasonable to adopt COBRA rules concerning election and payments so long as the plan complies with all related provisions of USERRA and these regulations. See section 1002.167(c).

Section 1002.168 (proposed section 1002.167) explains the right of a reemployed service member to reinstatement of coverage in a health plan if coverage has been terminated as a result of his or her failure to elect continuation coverage, or length of service. At the time of reemployment, no exclusion or waiting period may be imposed where one would not have been imposed if the coverage of the service member had not terminated as a result of service in the uniformed services. This provision also applies to the coverage of any other person who is covered under the service member's policy, such as a dependent. Injuries or illnesses determined by the Secretary of Veterans' Affairs to have been incurred in or aggravated during the performance of service in the uniformed services are excluded from the ban on exclusions and waiting periods; however, the service member and any dependents must be reinstated as to all other medical conditions covered by the plan.

The Department received eight comments related to section 1002.168. Of these, three comments concerned issues addressed in relation to other provisions, and are covered elsewhere in this section of the preamble. One commenter requested the Department include in the rule a definition of ''prompt reinstatement'' in connection with this provision. Section 1002.168 provides for prompt reinstatement upon reemployment generally without the imposition of any waiting periods or exclusions, thus making further clarification unnecessary. The same commenter requested the rule state that the failure to promptly reinstate the health coverage as required by this section is evidence of discrimination in violation of section 4311 of USERRA. While the Department is disinclined to include such a far-reaching generalization in this context, the Department reiterates that the denial of any benefit of employment that is motivated by an employee's status or activity protected by USERRA is a violation of the statute's anti-discrimination provisions. See 38 U.S.C. 4311(c); sections 1002.18–1002.23.

Two commenters expressed concern that if an insurance carrier imposes an exclusion or waiting period upon a returning employee in violation of section 4317(b) of USERRA, implemented by section 1002.168(a), the employer could be liable for funding health claims that should have been paid by the insurance carrier. The commenters suggested that reinstatement be limited to those circumstances in which coverage is available through the plan's insurance carrier or, in the alternative, that the employer should not be liable for insurer's practices that violate USERRA. Section 4317(b) of USERRA requires reinstatement of employer-provided insurance upon reemployment, and section 1002.168(a) makes no exceptions to that reinstatement requirement other than the limited exceptions contained in 4317(b) itself. The additional exceptions proposed by the commentators are not appropriate, because they would reduce the protections provided by USERRA. Employers that utilize third-party insurance plans to provide health coverage for employees are obliged to negotiate coverage that is compliant with USERRA to avoid possible liability for failure to properly reinstate coverage upon reemployment. In this context, USERRA's legislative history suggests there are circumstances in which an insurance company could be considered an employer under USERRA and could not ''refuse to modify their policies in order for employer's (sic) to comply with [Section 4317 of USERRA].'' S. Rep. No. 103–158, at 42 (1993).

One commenter recommended that section 1002.168 provide that reinstatement of health plan coverage must be immediate, even in cases where the employer is unable to immediately reemploy the returning employee for reasons permitted under the statute. USERRA requires prompt, but not necessarily immediate, reemployment. See section 1002.181. The statute requires reinstatement of health plan coverage ''upon reemployment,'' not upon application for reemployment. See 38 U.S.C. 4317(b)(1). Therefore, an employer must reinstate coverage upon the employee's prompt reemployment, and the Department declines to adopt the commenter's suggestion.

Section 1002.169 (proposed section 1002.168) provides that where a returning employee chooses to delay reinstatement of health plan coverage for a period of time following reemployment, the employer may allow the delay but is not required by USERRA to do so. The requirement to reinstate health plan coverage without the imposition of exclusions or waiting periods (except for service-connected conditions and exclusions or waiting periods that would have been imposed had coverage not been terminated as the result of military service) exists only upon reemployment, not later. The Department also sought comments on whether the rule should provide that a service member be permitted to delay electing continuation health plan coverage under some circumstances. In addition, in a case where health plan coverage was terminated or suspended by reason of military service, if the employee is permitted to delay reinstatement to the health plan for a period of time after the date of reemployment, the Department invited comments as to whether such delayed reinstatement coverage should be subject to an exclusion or waiting period. See 38 U.S.C. 4317(b)(1).

The Department received six comments in response. Of these, one commenter recommended the final rule provide that where the employee chooses to delay reinstatement of health plan coverage to a time after

reemployment, the employer must reinstate the coverage immediately with no exclusions or waiting periods. Another commenter suggested allowing a reemployed service member the same amount of time to elect reinstatement in the health plan as the employer allows newly hired employees to choose to enroll in the plan, and such period of time would vary from employer to employer. Another commenter proposed that if an employee elects to delay reinstatement in the health plan, the employer should be permitted to impose exclusions or waiting periods. Two commenters noted that various rules under other statutes such as HIPAA and the IRC might affect the ability of the employer to immediately reinstate the coverage for an employee who chooses to wait until some time after reemployment to request reinstatement of the coverage. The final commenter suggested the rule provide that an employer should treat an employee who chooses to delay health plan reinstatement until some time following reemployment the same as it treats other similarly situated employees who are returning from a leave of absence where health plan coverage was interrupted.

After reviewing these comments, the Department maintains its original position that an employer may, but is not required to, reinstate an employee's health plan coverage if the employee chooses to delay reinstatement following his or her reemployment under USERRA. This interpretation is consistent with the statute's requirement that reinstatement of health coverage must be made ''upon reemployment,'' and restores a service member to the position he or she would have been in if there had been no absence from work for military service. Although the provision does not mandate that an employer permit an employee to delay reinstatement at the employee's option, the provision balances the interests of both employers and employees, and provides sufficient flexibility for both.

Section 1002.170 (proposed section 1002.169) deals with special rules governing multiemployer health plans. Generally, under USERRA, if the employer cancels health plan coverage for its employees while the service member is performing service, or if the employer goes out of business, the service member's coverage terminates also. USERRA's treatment of multiemployer health plans provides an exception to this result. Section 1002.170 requires continued health plan coverage in a multiemployer plan even when the service member's employer no longer exists, or no longer participates in the plan. Any liability under the multiemployer plan for employer contributions and benefits under USERRA is to be allocated as provided by the sponsor maintaining the plan. If the sponsor does not provide for an allocation of responsibility, the liability is allocated to the last employer employing the person before the period of uniformed service. Where that employer is no longer functional, the liability is allocated to the plan.

The Department received three comments from the multiemployer plan community concerning the application of USERRA to those types of health plans referred to variously as ''credit bank,'' ''dollar bank'' or ''hour bank'' plans. This type of plan (''bank'' plan) is typically provided by a multiemployer plan, particularly in industries where employment may be sporadic or seasonal. ''Bank'' plans establish accounts in which employees save prospective health benefits credits that may be spent later, and typically use a lag period system for accumulating credits for eligibility and coverage. For example, work performed by an employee in January could result in credit to the employee's health benefits bank account in February that will result in eligibility to use the credits in March. If under the terms of a ''bank'' plan an employee must work 150 hours to have coverage for a month and the employee works 200 hours, the 50 hours in excess of the amount required for coverage is credited to the employee in a ''bank'' for future use. The hours from the ''bank'' can be used by the employee to provide health plan coverage for months when the employee does not work.

The comments received concerning ''bank'' plans requested that the Department provide guidance as to whether an employee should be allowed to deplete the balance of ''banked'' credits during a period of service in the uniformed services. The commenters indicated that USERRA's requirement of immediate reinstatement in a health plan upon reemployment may require the plan to fund the health coverage of a person that had depleted the ''banked'' hours during service and therefore lacked the credits necessary to initiate or resume coverage upon reemployment. After considering these comments, the Department has added new section 1002.171 to provide that a ''bank'' plan may permit an employee to deplete ''banked'' credits in order to continue coverage at no cost to the employee so long as the plan provides for reinstatement of the coverage upon reemployment. The plan may require the employee to pay the full cost of the reinstated coverage until the employee has earned enough credits after reemployment to resume normal coverage. In addition, if the ''banked'' credits are depleted during the applicable eligibility period, the employee must be permitted at his or her option to pay for continuation coverage for the balance of the period. Alternatively, the plan may permit an employee to ''freeze'' existing credits when leaving to perform military service, pay for continuation coverage as provided for in section 1002.166, and then restore those credits intact upon reemployment. The employer should counsel the employee about these options and the consequences of selecting one or the other. See new section 1002.171.

Finally, one commenter expressed concern that the effective dates for coverage under USERRA and COBRA are different in the case of ''bank'' plans, and recommended that the rule be amended to adopt the COBRA standard so that the two periods are consistent. The commenter states that under COBRA, the continuation coverage would not begin until any ''banked'' credits are depleted, whereas under USERRA the continuation coverage begins upon the person's departure from employment to perform military service. The Department declines to modify the effective date for continuation coverage under USERRA because it is mandated by statute. See 38 U.S.C. 4317(a)(1).

In addition to the changes made in response to the comments, the Department made technical corrections to two health plan provisions. First, subsection (b) of section 1002.168 (proposed section 1002.167), which referenced reinstatement procedures applicable to multiemployer plans in proposed section 1002.169, was deleted, and the subsequent subsection was re-lettered accordingly, because proposed section 1002.169 did not discuss reinstatement procedures. Second, section 1002.170 (proposed section 1002.169) was revised to more closely track section 4317(a)(3) of the statute.

**Subpart E—Reemployment Rights and Benefits**

*Prompt Reemployment*

One of the stated purposes of USERRA is ''to minimize the disruption to the lives of persons performing service in the uniformed services * * * by providing for [their] prompt reemployment.'' 38 U.S.C. 4301(a)(2). Section 4313 requires that a returning service member who meets the eligibility requirements of section 4312 be ''promptly reemployed'' in the

appropriate position. 38 U.S.C. 4313(a). The circumstances of each individual case will determine the meaning of ''prompt.'' See H.R. Rep. No. 103–65, Pt. I, at 32 (1993); S. Rep. No. 103–158, at 54 (1993). Section 1002.181 provides guidance for the ''prompt'' reinstatement of returning service members. The regulation states, as a general rule, that the employer shall reinstate the employee as soon as practicable under the circumstances. Reinstatement must occur within two weeks after he or she applies for reemployment ''absent unusual circumstances.'' The reasonableness of any delay depends on a variety of factors, including, for example, the length of the service member's absence or intervening changes in the circumstances of the employer's business. An employer does not have the right to delay or deny reemployment because the employer filled the service member's pre-service position and no comparable position is vacant, or because a hiring freeze is in effect. Moreover, prompt reemployment should be required even in cases in which re-training or re-certification is mandated by law, because the obligation to reemploy in those circumstances may be met by reemployment to a comparable position while re-training or re-certification is sought. Finally, if the period of service is less than 31 days, then the statute requires that the returning employee simply report back to work; these regulations require that such a person will be immediately reemployed.

The Department invited comments as to whether allowing the employer two weeks to reemploy the service member returning from a period of service of more than 30 days best effectuates the purpose of this provision of USERRA. In response, the Department received nine comments, which include three comments that agreed with the two-week reemployment period, three comments that recommended the Department enlarge the reemployment period to 30 days, particularly in those cases following long periods of military service, and two comments seeking guidance regarding those circumstances in which the two-week period may be excused. Finally, one commenter, concerned that the regulation can be misread to permit employer discretion to take up to two weeks to reemploy an employee absent for a period of service of less than 31 days, seeks inclusion in the text of this provision a mandate requiring reemployment the next day following the completion of service.

After reviewing these comments, the Department has concluded that it will retain section 1002.181 as it was proposed. The Department has considered the advantages and disadvantages associated with altering the two-week reemployment period, and has concluded that two weeks represents an equitable balance between the interests of employers, who may face some challenges in reemploying an employee in the organizational structure after a lengthy period of absence, and the interests of employees, who have been making the greatest of sacrifices in service to their country. In addition, employers unduly burdened by the two week reemployment period may rely on the ''unusual circumstances'' exception to reemployment within two weeks, although it is the Department's view that these exceptions should be narrowly drawn and will be relatively rare. An example of ''unusual circumstances'' would be where a service member seeks reemployment with his or her employer, who, apart from the service member, employs only one current employee. The current employee is near the end of a highly complex, months-long project, which is due to be completed just four weeks from the point at which the service member makes an application for reemployment. The employer is prepared to comply with its obligation to reemploy the returning service member, and will have work for him or her following the completion of the current project in four weeks, but cannot reemploy the returning employee until that time. Under these unusual circumstances, the employer would not be expected to reemploy its employee within two weeks. Finally, in response to the comment above seeking more clarity in the provision regarding prompt reemployment following brief periods of service, the Department notes that section 1002.181 already states that ''prompt reemployment'' following brief periods of service ''generally means the next regularly scheduled work day.'' See section 1002.181.

*Reemployment Position*

In construing an early precursor statute to USERRA, the Selective Training and Service Act of 1940, 50 U.S.C. Appendix, 308(b, c), the Supreme Court recognized a basic principle in the early reemployment protections provided for veterans, which was to become a bedrock concept of all subsequent veterans reemployment legislation. Thus, in *Fishgold* v. *Sullivan Drydock and Repair Corp.,* 328 U.S. 275, 284–85 (1946), the Supreme Court stated that the returning service member ''does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war.'' Id. *Fishgold* principally involved the issue of a veteran's seniority; however, the principle applies with equal force to all aspects of the service member's return to the work force. The returning service member therefore should be restored to ''a position which, on the moving escalator of terms and conditions affecting that particular [pre-service] employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment.'' *Oakley* v. *Louisville & Nashville R.R.,* 338 U.S. 278, 283 (1949). The position to which the returning service member should be restored has become known as the ''escalator position.'' The requirement that the service member be reemployed in the escalator position is codified in section 4313 of USERRA. 38 U.S.C. 4313.

Sections 1002.191 and 1002.192 implement general principles related to a returning veteran's right to reemployment in this escalator position. Sections 1002.193, 1002.194 and 1002.195 clarify that seniority, status, pay, length of service, and service-related disability may affect the service member's reemployment position. Sections 1002.196 and 1002.197 explain the employer's obligations to reemploy the service member based on the duration of the person's absence from the workplace. Section 1002.198 describes the criteria to be followed by the employer in making reasonable efforts to enable the service member to qualify for the reemployment position. Finally, section 1002.199 provides guidance for employers in determining the priority of two or more service members who are eligible for the same employment position.

The Department received several comments from employers and employer associations inquiring about the application of the escalator position to six particular circumstances: employers who use bidding systems for job assignments; the use of promotions based on an employer's discretion; reductions in force, layoffs, and disciplinary procedures; bargaining units on strike at time of reemployment; apprenticeships; and probationary periods. The Department will provide guidance on each of these cases in turn.

*Bidding Systems:* Many employers, for example, employers in the airline and railroad industries, use seniority-based bidding systems to award jobs and other perquisites of employment to their employees. The Equal Employment Advisory Council (EEAC) submitted a

comment asking how the escalator principle should apply to a returning service member seeking reemployment when the employer has a seniority-based bidding system in place. The EEAC proposed that the Department create an exception to the escalator principle, so that service members returning to a reemployment position in which they have missed an opportunity to bid on a particular job or other perquisite are not entitled to recover that missed opportunity: ''The final regulations should provide a temporary exception for employers that have a legitimate, bona fide bidding system in place. Where jobs, shifts, and/or locations are opened to employee bid frequently, *e.g.* every 120 days, returning employees could be slotted in accordance with the employer's operational needs (but with full escalator pay and benefits) until the next regularly occurring bid.''

USERRA's intent is to ensure that returning service members are accorded the status, pay and benefits to which they are entitled had they not served in the uniformed services, generally without exception. In its administrative enforcement of the Act, the Department has long interpreted the statute and its predecessor to require that a returning service member should be awarded a job or other perquisite of employment if it is reasonably certain that the service member would have received it but for the interruption due to military service. See Veterans' Reemployment Rights Handbook at 13–4 (1988); sections 1002.191, 1002.193, 1002.213, 1002.214; 1002.236. This approach comports with the statute and its legislative history governing the nature of the reemployment position. The Department concludes that, as a general matter, a reemployed employee should not be required to wait for the next regularly occurring opportunity to bid in order to seek promotions and other benefits tied to the ''escalator'' position.

*Discretionary Promotions:* The EEAC suggests that in the case of promotions based on employer discretion, section 1002.192 requires employers ''to speculate whether a returning employee would have (1) sought the promotion in the first instance and (2) have been chosen over the successful candidate. * * * Section 1002.192 [should state] that: Your escalator position would not include a promotion based on discretionary factors.'' Similarly, a large human resources consulting firm submitted that ''[b]ecause most employees are promoted based on demonstrated ability and experience, rather than length of service, the escalator principle cannot operate even-handedly for all employees. The escalator principle is appropriate only in workforces where pay increases and promotions occur automatically (*e.g.* according to collective bargaining agreements or tenure tracks,) rather than for achievement or merit.''

Under the statute and case law, a returning service member is entitled to a promotion upon reemployment if there is a reasonable certainty that the employee would have been promoted absent military service. *Coffy* v. *Republic Steel,* 447 U.S. 191, 197–98 (1980); *Goggin* v. *Lincoln St. Louis,* 702 F.2d 698, 701 (8th Cir. 1983). The statute's legislative history similarly states that returning service members are entitled to whatever position it is reasonably certain the employee would have attained but for the military service. H.R. Rep. No. 103–65, Pt. I, at 39 (1993). However, case law and longstanding Departmental policy are clear that if the promotion depends ''not simply on seniority or some other form of automatic progression but on an exercise of discretion on the part of the employer,'' the returning service member may not be entitled to the promotion. *McKinney* v. *The Missouri-Kansas-Texas Railroad Company,* 357 U.S. 265 (1958); Veterans' Reemployment Rights Handbook at 10–2 (''distinction must be made between those benefits which are largely dependent upon length of service, and thus are perquisites of seniority, and those benefits which are largely dependent upon management discretion. * * * A reemployed veteran claiming a right to a promotion or other benefit allegedly missed during military service must demonstrate that it was reasonably certain that he would have received the benefit if he had remained continuously employed.'')

Sections 1002.191 and 1002.192 advances these principles, and incorporates the reasonable certainty test as it applies to discretionary and non-discretionary promotions. In addition, it is consistent with the case law because it does not rely on the label associated with particular personnel actions, *e.g.*, ''discretionary promotions,'' or ''seniority-based promotions,'' and the analysis instead focuses on whether a personnel action was ''reasonably certain.'' The final rule promotes the application of a case-by-case analysis rather than a rule that could result in the unwarranted denial of promotions to returning service members based on how the promotion was labeled rather than whether or not it was ''reasonably certain.''

*Reductions in Force (RIFs), Layoffs, and Disciplined Employees:* An individual submitted a comment asking that the final rule ''explicitly address layoffs, RIFs and, most significantly, disciplinary actions including removal/discharge actions which were interrupted by the employee's service.'' Regarding reductions-in-force and layoffs, section 1002.42 establishes that employees that are laid off with recall rights may be entitled to reemployment upon return if the employer would have recalled the employee but for the military service. This section also notes that similar principles apply in other cases in which an employee may be absent from work at the onset of military leave or upon return from service, such as in cases in which the employee is on non-military leave when activated.

In the event that a returning employee was subject to a disciplinary review at the time of the onset of service, or in the event that the employer discovers conduct prior to reemployment that may subject the returning service member to disciplinary review upon reemployment, the Department concludes that the employer retains the reemployment obligation in such cases. However, the employer may resume the disciplinary review upon reemployment at the point at which it was left at the time of the onset of military service, or may initiate such review based on conduct discovered prior to reemployment. The Department has long interpreted the statute to prohibit an employer from denying reemployment rights on the basis that the employee would have been discharged had he or she not left for military service. Veterans' Reemployment Rights Handbook at 8–1 (1988). However, the Department recognizes that there may be some instances in which the returning employee may be legitimately subject to an employer's disciplinary review following reemployment. In these circumstances, the employer retains the obligation to reemploy the service member, thus giving rise to USERRA's prohibition of discharge following reemployment for one year except for just cause in section 4316(c), and serving to ensure that any post-service discipline or discharge will be justifiable, legitimate, and not pretextual. See also section 1002.247 and 1002.248.

*Employee Bargaining Unit on Strike:* The Department received one comment seeking further clarification on the determination of the escalator position when the returning service member's bargaining unit is or has been on strike. As section 1002.42 indicates, an employee in this situation remains an employee for purposes of reemployment

rights governed by USERRA. However, employers and employees should be aware that the employee's reemployment rights may be affected by Federal labor law under the National Labor Relations Act, 29 U.S.C. 141, *et seq.* (NLRA), which includes decisional law under the NLRA governing reinstatement rights of workers engaged in a work stoppage.

*Apprenticeships and Probationary Periods:* The Building and Construction Trades Department of the AFL–CIO argues that an employer should not be required to reemploy a returning service member who was part of a bona fide apprenticeship program on the escalator position with an advanced pay rate until the employee takes a test or undergoes a skills evaluation upon which the advanced rate is contingent. Similarly, the National School Board Association (NSBA) takes the position that a teacher's time away on military leave should not be counted towards a teacher's completion of a probationary period. The NSBA argues that the probationary period for a teacher is a time for the employer to observe and evaluate the teacher as well as a time to train the teacher, and urges the Department to determine that the probationary period for teachers is akin to a skills test and returning service members should still be required to complete the probationary period before attaining a tenured post probationary period.

With regard to apprenticeships and the escalator position, the Department has long held that if the apprentice position is bona fide and not merely a time-in-grade requirement, the returning service member should be restored as an apprentice at a level that reflects both the experience and training he or she received pre-service. Upon completion of the apprenticeship post-service, the employee should be entitled to ''journeyman'' seniority plus any seniority that would have accrued during military service had the journeyman status been attained during the period of uniformed service. See Veterans' Reemployment Rights Handbook at 11–3. Similarly, the Department has long held that if a probationary period is a bona fide period of observation and evaluation, the returning service member must complete the remaining period of probation upon reemployment. See Veteran's Reemployment Rights Handbook at 3–6, 3–7, 13–11 (1988). Therefore, the Department concludes that if an employee who left employment for military service was in the midst of a bona fide apprenticeship program or probationary period that required actual training and/or observation in the positions, rather than merely time served in the position, the employee should be allowed to complete the apprenticeship or probationary period following reemployment. Once the employee completes the apprenticeship or probationary period, the employee's pay and seniority should reflect both the pre- and post-service time in the apprenticeship or probationary period, plus the time served in the military.

In some workplaces, where opportunities for promotion are conditioned upon the employee passing a skills test or examination, determining the escalator position will require administering a makeup promotional exam. If a reemployed service member was eligible to take such a promotional exam and missed it while performing military service, the employer should provide the employee with an opportunity to take the missed exam after a reasonable period of time to acclimate to the employment position. See, e.g., *Fink* v. *City of New York,* 129 F.Supp.2d 511, 519 (S.D.N.Y. 2001). In some cases, success on a promotional exam entitles an employee to an immediate promotion, and in some cases it entitles an employee only to a particular placement on an eligibility list. If the reemployed employee is successful on the makeup exam, and there is a reasonable certainty that, given the results of that exam, the reemployed employee would have been promoted during the time he or she was in military service, then the reemployed employee's promotion must be made effective as of the date it would have occurred had the employment not been interrupted by military service. Similarly, if the reemployed employee is successful on the makeup exam, and there is a reasonable certainty that, given the results of that exam, the reemployed employee would have been placed in a particular position on an eligibility list during the time he or she was in military service, then the reemployed employee's placement on the list must be made effective as of the date it would have occurred had the employment not been interrupted by military service. This requirement is similar to the requirement in section 1002.236, that obliges an employer to give a reemployed employee, after a reasonable amount of time to adjust to the reemployment position, a missed skills test or examination that is the basis of a merit pay increase. Section 1002.193 implements these requirements.

The Department invited comment as to whether this interpretation best effectuates the purpose of this provision, or whether the issue of promotional exams requires more detailed treatment in these regulations. The Department received six comments in response, several of which were generally supportive of the provision. The Society for Human Resources Management (SHRM) and WorldatWork expressed overall support for the requirements of the provision. Two commenters, the National Employment Lawyers Association and ORC Worldwide, a management consulting firm, seek more guidance on the provision, in particular, on the length of time that an employer reasonably permits an employee to adjust to the employment position before administering a makeup exam. Two commenters, EEAC and one representing a municipal government, argue that the provision is unworkable because it is impossible to accurately predict a returning service member's retroactive placement on the escalator having given him or her a makeup exam.

Section 1002.193 is consistent with the general principles regarding the application of the escalator provision, which require that a service member receive a missed promotion upon reemployment if there is a reasonable certainty that the promotion would have been granted. *McKinney* v. *Missouri-Kansas-Texas R.R. Co.,* 357 U.S. 265. 274 (1958); *Tilton* v. *Missouri Pacific R.R. Co.,* 376 U.S. 169, 177 (1964). In addition, recent USERRA case law dealing precisely with the issue of missed promotional exams also supports this provision of the rule. *Fink* v. *City of New York,* 129 F.Supp.2d 511, 519–20 (E.D.N.Y. 2001). In that case, the court affirmed the jury award in favor of a fire marshall who missed a promotional exam because of his military service, holding that there was enough evidence for the jury to conclude that the plaintiff's military status was a motivating factor in the decision to deny him a promptly administered promotional exam upon reemployment. Id. at 520. As the court stated, ''the employer must sometimes treat [service members] differently from other employees in order to assure that they receive the same benefits as their coworkers. Thus, * * * where a neutral employment policy provides that a promotional exam shall only be administered on a particular date to all employees, it may constitute discrimination to refuse to allow veterans away on leave on the date in question to take a make-up exam upon their return from service.'' Id. at 519.

Accordingly, section 1002.193 requires an employer to administer its otherwise neutral evaluative employment practices in a manner that affords a returning service member the opportunity, after a reasonable period of time for adjustment, to participate in or meet the standards of that practice. As with apprenticeship systems and probationary periods addressed above, upon successfully meeting the evaluative standards, the employee's reemployment position should be adjusted based on the prior date he or she would have completed the process had he or she not entered military service. Regarding the question of what amount of time is reasonable to permit an employee to adjust, the Department has revised section 1002.193 to reflect that no fixed time will be deemed a reasonable amount of time in all cases. However, in determining a reasonable time to schedule a makeup exam, employers should take into account a variety of factors, including but not limited to, the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. See section 1002.193.

The Department received two additional comments regarding promotions and the escalator position. The first commenter suggests that the rule require employers to permit employee access to all personnel records so that returning service members will be fully informed of missed promotional opportunities. The Department is without authority in the statute to require such a result. Finally, the Department declines to adopt the suggestion of one commenter that suggests the provision should state its applicability to cross-departmental promotions within an organization because it is ambiguous.

Depending on the circumstances, section 4313 of USERRA either permits or requires the employer to reemploy a returning service member in a position with equivalent (or the nearest approximation to ''equivalent'') seniority, status and pay to the escalator or pre-service position. 38 U.S.C. 4313(a)(2)(A), (B), (3)(A), (B). Although ''seniority'' and ''pay'' are generally well-understood terms, USERRA does not define ''status'' as it is used in section 4313 of the Act. Case law interpreting VRRA, a precursor to USERRA, recognized status as encompassing a broader array of rights than either seniority or pay. Job status varies from position to position, but generally refers to the incidents or attributes attached to, and inherent in, a particular job. The term often includes the rank or responsibility of the position, its duties, location, working conditions, and the pay and seniority rights attached to the position. See H.R. Rep. No. 103–65, Pt. I, at p. 31 (1993); *Duarte* v. *Agilent Technologies, Inc.,* 366 F.Supp.2d 1039, 1045 (D.Colo. 2005). Examples of status may be the exclusive right to a sales territory; the opportunity to advance in a position; eligibility for possible election to a position with the employee representative organization; greater availability of work where piece rates apply; the opportunity to work additional hours and to advance in a job; the opportunity to withdraw from a union; the opportunity to obtain a license; or, the opportunity to work a particular shift. The facts and circumstances surrounding the position determine whether a specific attribute is part of the position's status for USERRA purposes. Sections 1002.193 and .194 implement these provisions of the Act.

The Department received one comment regarding proposed section 1002.194, which establishes the principle that the escalator principle may result in adverse consequences upon reemployment. The proposed section stated that depending on an employee's circumstances, his or her ''seniority rank'' may cause reemployment in a higher or lower position, laid off, or even terminated. The commenter correctly suggests that there are ''escalator-based'' factors other than seniority, such as job location, job classification, or shift assignment, which may affect the reemployment position. The Department agrees that the first two sentences of the provision are too narrowly drawn, although the latter portion of the provision accurately captures the issue. Accordingly, the Department has made the necessary revision. See section 1002.194.

The statute makes the duration of a returning employee's period of service a critical factor in determining the reemployment position to which the employee is entitled upon return from service. After service of 90 days or less, the person is entitled to reinstatement in the position of employment in which he or she would have been employed if not for the interruption in employment due to uniformed service (the escalator position). 38 U.S.C. 4313(a)(1)(A). The employer must make reasonable efforts to assist the individual in becoming qualified for the reemployment position. In the event the returning employee cannot become qualified for the escalator position despite reasonable efforts by the employer, the returning employee is entitled to the employment position in which he or she was employed on the date that the period of service commenced. 38 U.S.C. 4313(a)(1)(B). These requirements are implemented in section 1002.196. The Department received one comment on this provision, requesting that it include the definition of ''escalator position.'' ''Escalator position'' is defined in section 1002.192, and consequently it is not necessary to define it in section 1002.196.

The service member returning from a period of service longer than 90 days is similarly entitled to reemployment in the escalator position, but, at the employer's option, may also be reinstated in any position for which the employee is qualified with the same seniority, status, and pay as the escalator position. 38 U.S.C. 4313(a)(2)(A). This statutory option is intended to provide the employer with a degree of flexibility in meeting its reemployment obligations. As with an employee returning from a shorter period of service, the employer must first make reasonable efforts to qualify the individual for the escalator position or for the position of like seniority, status, and pay. In the event the returning employee cannot become qualified for one of these positions despite reasonable employer efforts, the person is entitled to the employment position in which he or she was employed on the date that the period of service commenced, or a position of like seniority, status, and pay. 38 U.S.C. 4313(a)(2)(B). These requirements are implemented in section 1002.197.

In some instances, the service member may not be able to qualify for either the escalator position or the pre-service position (or a position similar in seniority, status, and pay to either of these positions) despite reasonable employer efforts. In such an event, the employee is entitled to be reemployed in any other position that is the nearest approximation to the escalator position. If there is no such position for which the returning service member is qualified, he or she is entitled to reemployment in any other position that is the nearest approximation to the pre-service position. In either event, the returning service member must be reemployed with full seniority. 38 U.S.C. 4313(a)(4). This requirement is implemented by sections 1002.196(c) and .197(c).

The Department received one comment regarding section 1002.197, which sought an amendment to permit

employers to reemploy employees in lesser positions temporarily, while employers ''find a position of appropriate status.'' The Department declines the suggestion. The priority of positions established in section 1002.197 is based on priorities set by statute, 38 U.S.C 4313(a)(2). Moreover, such an amendment would conflict with the statute's requirement that service members must be promptly reemployed, see section 1002.181, in the escalator position, see section 1002.192. Section 1002.197 reflects that a position other than the escalator position may be used only in those cases in which the service member is not qualified to perform the duties of the escalator position.

Notwithstanding the escalator principle, USERRA does not require an employer to reinstate a returning service member in an employment position if he or she is not qualified to perform the civilian job. See section 1002.198. USERRA defines ''qualified'' as ''having the ability to perform the essential tasks of the position.'' 38 U.S.C. 4303(9). The Department understands the statutory term ''qualify'' in 38 U.S.C. 4313 to include the employer's affirmative obligation to make reasonable efforts to assist the returning employee in acquiring the ability to perform the essential tasks of the reemployment position. This understanding is reflected in the language used in the regulations. The Department requested comments on whether this interpretation is proper, and received only two comments, both of which agreed with the interpretation.

An individual's performance qualifications are a function of his or her ability to perform the ''essential tasks'' of the employment position. This regulation provides guidelines for determining whether a given task is essential for proper performance of the position. In general, whether a task is essential for a position will depend on its relationship to the actual performance requirements of the position rather than, for example, the criteria enumerated in a job description. An employer may not decline to rehire a returning service member simply because he or she is unable to do some auxiliary, but nonessential, parts of the job.

The Department invited comments as to whether this interpretation best effectuates the purpose of this provision, and received seven comments in response. Four of the seven suggested, for reasons of consistency, that the USERRA rule adopt the definition of ''essential functions'' from the regulations promulgated under the Americans with Disabilities Act (ADA), 42 U.S.C 12101, et seq. See 29 CFR 1630.2(n). The ADA defines a ''qualified individual with a disability'' as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position the individual holds or desires. 42 U.S.C. 12111(8). The ADA regulations define ''essential functions'' generally as ''the fundamental job duties of the employment position * * *. The term * * * does not include the marginal functions of the position.'' 29 CFR 1630.2(n)(1).

The ADA regulation lists a number of factors that could render a job function ''essential,'' including: (1) The position exists to perform the function; (2) there are a limited number of employees available among whom performance of the job function can be distributed; and/or (3) the function is highly specialized so the incumbent is hired for his or her expertise or ability to perform the function. 29 CFR 1630.2(n)(2). The ADA regulation provides examples of ''evidence of whether a particular function is essential,'' including: (1) The employer's judgment as to which functions are essential; (2) written job descriptions developed before the hiring process begins; (3) the amount of time on the job spent performing the function; (4) the consequences of not requiring the individual to perform the function; (5) the terms of a collective bargaining agreement; (6) the work experience of past incumbents in the job; and/or (7) the current work experience of incumbents in similar jobs. 29 CFR 1630.2(n)(3).

After considering all these comments, the Department has revised section 1002.198 to adopt the regulatory definition of ''essential functions'' under the ADA. Many of the ''essential tasks'' listed in proposed section 1002.198 were similar to those listed in the ADA's ''essential functions'' regulation. USERRA's legislative history does not address whether ''essential tasks'' is akin to or different from the ADA's ''essential functions.'' However, a number of ADA cases use the term ''tasks'' interchangeably with ''functions.'' See *Allen* v. *Pacific Bell,* 348 F.3d 1113, 1114–15 (9th Cir. 2003); *Byrne* v. *Avon Prods. Inc.,* 328 F.3d 379, 381 (7th Cir.), cert. denied, 540 U.S. 881 (2003); *Kvorjak* v. *Maine,* 259 F.3d 48, 55 (1st Cir. 2001); *Reed* v. *Heil Co.,* 206 F.3d 1055, 1057, 1062–63 (11th Cir. 2000). Accordingly, in order to provide employers and employees with some regulatory consistency, the Department is making the suggested revision. See section 1002.198(a)(2).

The remaining commenters on section 1002.198 made a variety of suggestions: one comment noted that the listing of essential tasks reads as if it were exhaustive, and suggested that it instead be revised so that it is non-exhaustive; one comment noted that the use of the word ''and'' between the penultimate and the last listed items suggests that all listed items must apply to a particular task in order for the task to be essential, and recommended using ''and/or'' instead, as does the ADA essential functions regulation; one comment objected to the provision's distinction between actual performance requirements and the criteria enumerated in a job description; one comment objected to the discussion of the listed items as ''factors'' because it thought that this suggested that all of the listed terms had to be considered, and suggested that the list should be written instead in terms of what would be evidence that a task is essential; the same comment also stated that the list should include a number of other items, including: (1) The business consequences of an employee's inability to perform a task, and not merely the safety consequences; (2) consideration of written job descriptions prepared before the issue of the employee's reemployment arose as evidence that the employer considered the task to be essential; (3) the work experience of other employees in the same or similar positions because the job may have changed in the employee's absence; and (4) a statement that performing the job under certain conditions could be essential, such as interacting with others, environmental extremes, attendance, etc. After considering these comments, the Department has revised the list in section 1002.198 to reflect that it is not exhaustive. These factors and other relevant circumstances may be employed to ascertain whether a task is essential to the performance of a particular position. See section 1002.198(a)(2).

Section 1002.198 also describes the employer's obligation to assist a service member returning for reemployment in becoming qualified for a civilian position. USERRA requires the employer to make reasonable efforts to enable the returning service member to qualify for a position that he or she would be entitled to if qualified. Section 4303(10) defines ''reasonable efforts'' as ''actions, including training provided by an employer, that do not place an undue hardship on the employer.'' 38 U.S.C. 4303(10); section 1002.5(i). Section 4303(15) defines ''undue hardship'' as ''actions [taken by an employer]

requiring significant difficulty or expense, when considered in light of * * * the overall financial resources of the employer'' and several other stated factors. 38 U.S.C. 4303(15); section 1002.5(n). Depending upon an employer's size and resources, a given level of effort might be an undue hardship for one employer and yet reasonable for another. The employer has the burden of proving that the training, retraining, or other efforts to enable the returning employee to qualify would impose an undue hardship. The rule describes the criteria that apply in determining whether the steps for aiding the service member in becoming qualified impose an undue hardship on the employer.

The Department received five comments regarding an employer's obligation to make reasonable efforts to qualify returning service members in becoming qualified for the reemployment position. Of these, one comment generally agreed with the Department's approach. The second comment suggested that the employer's obligations should be reduced by placing limits on the training an employer must provide to assist a returning employee. The Department concludes that section 1002.198 appropriately reflects the statute's intent, and reiterates that employers that are unduly burdened by this obligation may rely on the ''undue hardship'' defense to reemployment. See section 1002.139(b).

Two comments regarding section 1002.198 were submitted by one commenter, who requested that the provision be amended to reflect both that an employer's qualification efforts include any training necessary to update a returning employee's skills if the employee is no longer qualified to perform the job due to technological advances, and to reflect that an employer must permit an employee a sufficient amount of time to become qualified. The Department concludes that the commenter's suggestions are covered by section 1002.5(i), which defines an employer's ''reasonable efforts,'' and includes those actions, including training provided by an employer, that do not place an undue hardship on the employer.

The final commenter on section 1002.198 suggested corrections to references to the regulatory definitions of ''reasonable efforts'' supplied in subsection (b) of the provision, and the Department has made the corrections.

Section 1002.199 implements USERRA section 4313(b), which governs the priority of reemploying two (or more) service members who are entitled to reemployment in the same position. 38 U.S.C. 4313(b). The individual who first vacated the employment position for military service has the highest priority for reemployment. 38 U.S.C. 4313(b)(1). If this priority means another returning service member is denied reemployment in that position, the USERRA rules that give reemployment options to the employer would govern the reemployment of the second person. Thus, the second service member is entitled to ''any other position'' offering status and pay similar to the denied position according to the statutory rules generally applicable to returning service members. 38 U.S.C. 4313(b)(2)(A). A disabled service member in this situation would be entitled to any other position offering status and pay similar to the denied position according to the rules governing disabled service members. 38 U.S.C. 4313(b)(2)(B).

*Seniority Rights and Benefits*

Section 4316(a) provides that a reemployed service member is entitled to ''the seniority and other rights and benefits determined by seniority'' that the service member had attained as of the date he or she entered the service, together with the additional seniority he or she would have attained if continuously employed during the period of service. 38 U.S.C. 4316(a). As with the principles governing the determination of the reemployment position, this provision reflects the escalator principle. As applied to seniority rights under section 4316(a), the escalator principle entitles the returning service member to the ''same seniority and other rights and benefits determined by seniority that [the service member] would have attained if [his or her] employment had not been interrupted by service in the uniformed services.'' S. Rep. No. 103–158, at 57 (1993); see also H.R. Rep. No. 103–65, Pt. I, at 33 (1993). Section 1002.210 states the basic escalator principle as it applies to seniority and seniority-based rights and benefits. It bears emphasis here that the escalator principle is outcome-neutral in terms of the effect of restoring the service member's seniority. For example, the application of the principle does not offer protection against adverse job consequences that result from placing the service member in his or her proper position on the seniority escalator. Finally, this section explains that the rights and benefits protected by USERRA upon reemployment include those provided by employers and those required by statute, such as the right to leave under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 et seq. (FMLA). Accordingly, a reemployed service member would be eligible for FMLA leave if the number of months and the number of hours of work for which the service member was employed by the civilian employer, together with the number of months and number of hours of work for which the service member would have been employed by the civilian employer during the period of military service, meet FMLA's eligibility requirements.

The Department received two questions regarding the application of USERRA's seniority provisions to rights under the FMLA. The Equal Employment Advisory Council contended that allowing time spent on military leave to count when determining FMLA eligibility contradicts the definition of ''service'' under the FMLA regulations, and suggested its deletion or a revision consistent with the FMLA regulations. In 2002, the Department issued guidance from VETS, the Wage and Hour Division, which administers and enforces the FMLA, and the Solicitor of Labor, concluding that the time and hours an employee would have worked but for his or her military service should be combined with the time employed and the hours actually worked to meet the eligibility criteria of the FMLA. See Memorandum of July 22, 2002, *Protection of Uniformed Service Member's Rights to Family and Medical Leave* at *http://www.dol.gov/vets/media/fmlarights.pdf.* The Department determined that:

> Under USERRA, a person who is reemployed is entitled to the rights and benefits he (or she) would have attained if he had remained continuously employed. [Footnote omitted.] The ''rights and benefits'' protected by USERRA include those provided by employers and those required by statute, such as the right to leave under the FMLA. Accordingly, a returning service member would be entitled to FMLA leave if the hours that he or she would have worked for the civilian employer during the period of military service would have met the FMLA eligibility threshold. Therefore, in determining whether a veteran meets the FMLA eligibility requirement, the months employed and the hours that were actually worked for the civilian employer should be combined with the months and hours that would have been worked during the twelve months prior to the start of the leave requested but for the military service.

The Department has read the two statutes in harmony, so that neither is made ineffective, and so that reemployed service members are not denied family leave to which they would otherwise be entitled but for their uniformed service. See, e.g., *Pittsburgh & Lake Erie Railroad Company* v.

*Railway Labor Executives' Association,* 491 U.S. 490, 510 (1989) (when two statutes are capable of coexistence, the two should be construed, absent clearly expressed Congressional intention to the contrary, to regard each as effective). Therefore, the Department has retained section 1002.210's inclusion of rights protected under the FMLA, except that it has clarified that in the event that a service member is denied FMLA leave for failing to satisfy the FMLA's hours of work requirement due to absence from employment necessitated by military service, the service member may have a cause of action under USERRA but not under the FMLA. See section 1002.210.

The Department received one comment from a human resources firm requesting further guidance on the computation, for FMLA purposes, of hours a service member would have worked but for military service. Because of the variables involved with each employer and each employee, the Department is unable to provide detailed guidance in this regulation in response to the inquiry. However, employers should develop reasonable methods for computation of hours that would have been worked but for the military service. The guidance provided in section 1002.267 regarding the computation of pension contributions during military absence may serve as a model in many cases.

The final comment regarding section 1002.210 resulted in an additional modification to the text of the rule. The commenter asked whether an employee continues to accrue seniority and seniority-based rights and benefits if the employee is not immediately reemployed following discharge from service due to a service-related illness or injury. USERRA provides, and this rule reiterates, that an employee may have up to two years to report to or submit an application for reemployment to the employer if necessary in order to recover from the illness or injury incurred in, or aggravated during, the performance of service. See section 1002.116. Section 1002.210 has been amended to reflect that an employee continues to accrue seniority-based rights and benefits during any period required for recovery from service-related illnesses or injuries. The Department made a corresponding modification to section 1002.259, which establishes the period of time that must be considered to determine pension entitlement, in order to respond to an inquiry whether the time that an employee is absent from work under section 1002.74 prior to the beginning of a period of military service should be considered service with the employer for purposes of determining the employee's USERRA pension entitlements upon reemployment. Under the revisions to both section 1002.210 and section 1002.259, the entire period of absence from work due to or necessitated by service in the uniformed services, including preparation time and recuperation time, is to be considered service with the employer upon reemployment for computation of seniority and seniority-based rights, including pension entitlements.

Section 1002.211 makes clear that USERRA section 4316(a) is not a statutory mandate to impose seniority systems on employers. Rather, USERRA requires only that those employers who provide benefits based on seniority restore the returning service member to his or her proper place on the seniority ladder.

Section 1002.212 adopts the basic definition of seniority-based rights and benefits developed in Supreme Court decisions. This definition imposes two requirements: First, the benefit must be provided as a reward for length of service rather than a form of short-term compensation for services rendered; second, the service member's receipt of the benefit, but for his or her absence due to service, must have been reasonably certain. *See Coffy* v. *Republic Steel Corp.,* 447 U.S. 191, 197–98 (1980); *Alabama Power Co.* v. *Davis*, 431 U.S. 581 (1977); see also S. Rep. No.103–158, at 57 (1993), citing with approval *Goggin* v. *Lincoln, St. Louis,* 702 F.2d 698, 701 (8th Cir. 1983) (summarizing Supreme Court formulation of two-part definition of ''perquisites of seniority''). Section 1002.212(c) adds a third consideration which derives from another Supreme Court decision, *McKinney* v. *Missouri-Kansas-Texas R.R. Co.,* 357 U.S. 265 (1958). In that case, the Court allowed consideration of the employer's ''actual practice'' in making advancement an automatic benefit based on seniority under the collective bargaining agreement. Id. at 274. Accordingly, section 1002.212(c) adds the requirement that ''actual custom or practice'' in conferring or withholding a benefit also determines whether the benefit is a perquisite of seniority.

The Department received a comment requesting additional guidance on the determination of rights and benefits based on length of service versus rights and benefits for actual services rendered. Because the Department anticipates that a bright-line rule would be unworkable in application to the myriad of factual situations that may arise in the employment setting, the analysis must revolve around the general guidelines established in the rule. Finally, the Department received a comment suggesting that, with regard to an employer's ''actual custom or practice'' as a consideration in providing or withholding a right or benefit as a reward for length of service, the word ''actual'' should be deleted. The commenter argues that the term will breed disputes over whether a practice is ''actual'' or in flux. The Department views the inclusion of the word ''actual'' as key to the implementation of this provision, and intends it to differentiate between those practices that are carried out in the workplace and those that are merely written in a handbook but have not been realized.

Section 1002.213 further defines one aspect of seniority-based rights and benefits: The requirement that receipt of the benefit be ''reasonably certain.'' The proposed regulation describes a ''reasonably certain'' likelihood as a ''high probability'' that the returning service member would have obtained the seniority-based benefit if continuously employed. A ''high probability'' is less than an ''absolute certainty,'' which the Supreme Court has rejected in analyzing the degree of probability a reemployed service member must satisfy in order to establish that his or her advancement would have been ''reasonably certain'' but for the period of service. See *Tilton* v. *Missouri Pacific Railroad Co.,* 376 U.S. 169, 180 (1964). The employer may not deny a reemployed service member seniority-based rights or benefits based on a scenario of unlikely events that allegedly could have occurred during the period of service.

Proposed section 1002.214 established that the returning employee is also entitled to claim perquisites of seniority that first became available to co-workers or that were modified while he or she was in the service. The Department received one comment on this provision, suggesting that it provide an alternate, and more lucid, illustration of the application of this provision in section 1002.214(b). After considering the comment, and reviewing a number of examples that may serve to illustrate the point, the Department has concluded that the response provided in section 1002.214(b) is vague and does not provide practical guidance on the issue addressed. In addition, the principle established in section 1002.214(a) is simply a reiteration of the principle established in section 1002.210 regarding the seniority-based rights and benefits to which a returning

employee is entitled. As a result, the Department has removed the section in its entirety from the final rule.

*Disabled Employees*

USERRA imposes additional requirements in circumstances involving the reemployment of a disabled service member. A disabled service member is entitled, to the same extent as any other individual, to the escalator position he or she would have attained but for military service. If the disability is not an impediment to the service member's qualifications for the escalator position, then the disabling condition is irrelevant for USERRA purposes. If the disability limits the service member's ability to perform the job, however, the statute imposes a duty on the employer to make reasonable efforts to accommodate the disability. 38 U.S.C. 4313(a)(3). In some instances, an employer is unable to accommodate a service member's disability despite reasonable efforts. If, despite the employer's reasonable efforts to accommodate the disability, the returning disabled service member cannot become qualified for his or her escalator position, that person is entitled to be reemployed ''in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer.'' 38 U.S.C. 4313(a)(3)(A). If no such position exists, the service member is entitled to reemployment ''in a position which is the nearest approximation * * *in terms of seniority, status, and pay consistent with circumstances of such person's case.'' 38 U.S.C. 4313(a)(3)(B). See, e.g., *Hembree* v. *Georgia Power Co.,* 637 F.2d 423 (5th Cir. 1981); *Blake* v. *City of Columbus*, 605 F. Supp. 567, 571 (D. Ohio 1984).

Section 1002.225 sets forth the priority of reemployment positions for which the disabled service member should be considered. The regulation also implements the statutory requirement for reasonable accommodation of the returning service member's disability. Such accommodations may include placing the reemployed person in an alternate position, on ''light duty'' status; modifying technology or equipment used in the job position; revising work practices; or, shifting job functions. The appropriate level of accommodation depends on the nature of the service member's disability, the requirements for properly performing the job, and any other circumstances surrounding the particular situation. See 38 U.S.C. 4303(9), (10), and (15); 4313(a)(3); H.R. Rep. No. 103–65, Pt. I, at 31 (1993); S. Rep. No. 103–158, at 53 (1993).

Section 1002.226 establishes that the employer must make reasonable accommodations for any disability incurred in, or aggravated during, a period of service. The accommodation requirement is not limited to disabilities incurred during training or combat, so long as they are incurred during the period of service. Any disability that is incurred or aggravated outside of a period of service (including a disability incurred between the end of the period of service and the date of reemployment) is not covered as a service-related disability for USERRA purposes. The disability must have been incurred or aggravated when the service member applies for reemployment, even if it has not yet been detected. If the disability is discovered after the service member resumes work and it interferes with his or her job performance, then the reinstatement process should be restarted under USERRA's disability provisions.

A returning service member may have rights under USERRA based on a service-related disability that is not permanent. A service member who incurs a temporary disability may be entitled to interim reemployment in an alternate position provided he or she is qualified for the position and the disability will not affect his or her ability to perform the job. If no such alternate position exists, the disabled service member would be entitled to reinstatement under a ''sick leave'' or ''light duty'' status until he or she completely recovers.

In identifying an alternate position for a disabled service member, the focus should be on the returning service member's ability to perform the essential duties of the job. The position must be one that the person can safely perform without unreasonable risk to the person or fellow employees. The disabled service member is required to provide information on his or her education and experience, the extent of the disability, and his or her present capabilities. The employer then has the duty to disclose all positions that the service member may be qualified to perform. Because the employer has greater knowledge of the various positions and their requirements in the organization, the employer, and not the service member, is exclusively responsible for accommodating the disability by identifying suitable positions within the service member's abilities and capabilities.

The Department received four comments regarding the provisions implementing USERRA's requirements concerning the reemployment of a disabled service member. One commenter suggests that the Department should amend section 1002.225 to moderate the employer's duty to make reasonable efforts to accommodate the disability to reflect that an employee should bear some responsibility in cooperating in his or her own reemployment. The Department views the statute as imposing a duty on the employer to make reasonable efforts to accommodate the disability. 38 U.S.C. 4313(a)(3). In addition, as stated above, because the employer has greater knowledge of the various positions and their requirements in the organization, the burden is appropriately placed on the employer. Nevertheless, it is customary to assume that an employee seeking reemployment will cooperate with the employer's reasonable efforts to accommodate a disabled employee.

The Department received two comments regarding this provision from one commenter. The commenter requested that the provision include a statement indicating that as with a non-disabled employee, a disabled employee is entitled to reemployment on the escalator position. The commenter also requested that the Department indicate in section 1002.225(b) that in reemploying a returning service member in ''the nearest approximation'' to the equivalent escalator position, such position may be one that is higher or lower, depending on the circumstances. The Department agrees that both suggestions clarify the text of the final rule, and has made the amendments. See section 1002.225.

Finally, the Department received a suggestion that it employ the ADA's regulatory standards, in particular, the ADA's provisions concerning a ''qualified individual with a disability'' and ''reasonable accommodations.'' The Department declines this suggestion because neither term is used in USERRA. In addition, although interpretations of the ADA may be useful in providing some guidance under USERRA's provisions regarding accommodating an employee with a disability, the Department is reluctant to adopt extensive portions of complex regulations promulgated under other statutes not administered or enforced by the Department, and notes that there are significant differences in the coverage of the two statutes. For example, the ADA covers only ''disabilities'' as defined in that statute, whereas USERRA covers any disability incurred in or aggravated during service in the uniformed services.

Finally, the Department received one comment requesting that it require employers to provide lifetime disability coverage for employees disabled as the result of their service in the uniformed services. Such a request is beyond the mandates set out in the statute.

*Rate of Pay*

The escalator principle also determines the returning service member's rate of pay after an absence from the workplace due to military service. As with respect to benefits and the reemployment position, the application of this fundamental principle with respect to pay is intended to restore the returning service member to the employment position that he or she would have occupied but for the interruption in employment occasioned by military service. See generally *Fishgold* v. *Sullivan Drydock and Repair Corp,* 328 U.S. 275 (1946). Section 1002.236 implements the escalator principle for purposes of determining the reemployed service member's rate of pay. The regulation also addresses the various elements of compensation that often comprise the returning service member's ''rate of pay.'' Depending on the particular position, the rate of pay may include more than the basic salary. The regulation lists various types of compensation that may factor into determining the employee's overall compensation package under the escalator principle. The list is not exclusive; any compensation, in whatever form, that the employee would have received with reasonable certainty if he or she had remained continuously employed should be considered an element of compensation. The returning employee's rate of pay may therefore include pay increases, differentials, step increases, merit increases, periodic increases, or performance bonuses.

In some workplaces, merit pay increases are conditioned upon the employee passing a skills or performance evaluation. The employer should allow a reasonable period of time for the employee to become acclimated in the escalator position before such an evaluation is administered. In order that the employee not be penalized financially for his or her military service, the employee must be reemployed at the higher rate of pay, assuming that it is reasonably certain that the employee would otherwise have attained the merit pay increase during the period of military service. This requirement is similar to the requirement in Section 1002.193, which obliges an employer to give a reemployed employee, after a reasonable amount of time to adjust to the reemployment position, a missed skills test or examination that is the basis of an opportunity for promotion.

The Department invited comments as to whether this interpretation best effectuates the purpose of this provision, or whether the issue of merit pay requires more detailed treatment in these regulations, and received seven comments in response. One commenter expressed overall support for the provision, but found it unworkable due to the difficulty in accurately predicting the date of the returning service member's retroactive placement on the escalator. Three commenters seek more guidance on the provision, in particular, on the length of time given to the returning service member to acclimate before administering a makeup evaluation and on the amount of the merit or performance pay increase. One commenter argues that granting full seniority, and awarding equal pay, to returning service members penalizes workers remaining on the job who have obtained valuable training and experience while the service member was on military leave. One commenter argues that the escalator principle uses a ''presumption'' in favor of granting a salary increase, which it believes is inappropriate when advancements are based on measurable performance or merit evaluations. Finally, one commenter argues the escalator principle does not apply to merit or performance based salary increases because they are not seniority-based, and even if the principle applies, it should be pro rated and not retroactive.

The regulation's provision regarding rate of pay is consistent with general principles concerning the application of the escalator provision under the statute and case law, which require that a service member receive such compensation upon reemployment if there is a reasonable certainty that the compensation would have been granted. See, e.g., *McKinney* v. *Missouri-Kansas-Texas R.R. Co.,* 357 U.S. 265 (1958); *Tilton* v. *Missouri Pacific R.R. Co.,* 376 U.S. 169 (1964). A returning veteran cannot show within the reasonable certainty required by the Act that he or she would have enjoyed the advancement or increased compensation by virtue of continuing employment where the advancement or increased compensation depends on an employer's discretionary choice not exercised prior to the entry into service. *Tilton,* 376 U.S. at 180. Therefore, in response to those comments that object to this provision and its retroactive application for reasons of impracticality, burden, or unfairness, the Department declines to modify the provision in reaction to these concerns, as the provision adheres to the obligations required under the statute and the long-standing case law governing its interpretation.

Consistent with section 1002.193 concerning a similar comment about missed promotional exams, the Department has amended section 1002.236 to include factors an employer should consider in timing the administration of a makeup test or examination for the purposes of determining applicable pay increases. The Department suggests that no fixed time will be appropriate to all cases, and in determining a reasonable time to schedule a makeup test or examination, employers should take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the duties and responsibilities of the reemployment position, and the nature and responsibilities of the service member while serving in the uniformed service. See section 1002.236.

Finally, in response to comments stating that the escalator principle should not apply to merit pay increases, the Department emphasizes that what is critical is not whether the employer characterizes the compensation increases as merit-based, but whether the raise would have been attained with reasonable certainty if not for the service in the uniformed services. To clarify this point, the Department has amended section 1002.236 to reflect that when considering whether merit or performance increases would have been attained with reasonable certainty, an employer may examine the returning employee's own work history, his or her history of merit increases, and the work and pay history of employees in the same or similar position. See section 1002.236. Finally, in determining rate of pay, as in other situations, application of the escalator principle may leave the returning service member with less than he or she had before performing service. Thus, if nondiscriminatory adverse changes in the employment position's pay structure would with reasonable certainty have lowered the compensation rate during the period of service if he or she had remained continuously employed, the escalator principle may operate to diminish the returning service member's pay.

*Protection Against Discharge*

Section 4316(c) of USERRA provides service members special protection from discharge from civilian employment after returning from uniformed service. If the individual served over 180 days

before reemployment, then he or she may not be discharged from the employment position within one year after reemployment except for cause. 38 U.S.C. 4316(c)(1). If the individual served between 31 and 180 days in the military, he or she may not be discharged from the employment position within 180 days after reemployment except for cause. 38 U.S.C. 4316(c)(2). A reinstated service member whose duration of service lasted 30 days or less has no similar protection from discharge; however, the individual is protected by USERRA's anti-discrimination provisions, 38 U.S.C. 4311, as explained in sections 1002.18–.23. Section 1002.247 elaborates the general rules for protection against discharge based on the duration of service prior to reemployment.

Prohibiting a reemployed service member's discharge, except for cause, ensures that the service member has a reasonable amount of time to get accustomed to the employment position after a significant absence. A period of readjustment may be especially warranted if the service member has assumed a new employment position after the military service. The discharge protection also guards against an employer's bad faith or pro forma reinstatement followed by an unjustified termination of the reemployed service member. Moreover, the time period for special protection does not start until the service member has been fully reemployed and any benefits to which the employee is entitled have been restored. Even assuming the service member receives the benefit of the full protection period prior to dismissal, an employer nevertheless violates the Act if the reason for discharging the service member is impermissible under USERRA.

Section 4316(c) does not provide complete protection from discharge to a reemployed service member for the duration of the protected period. An employer may dismiss a reemployed service member even during the protected period for just cause. Depending on the circumstances of the specific case, just cause may include unacceptable or unprofessional public behavior, incompetent or inefficient performance of duties, or criminal acts. An employer may also discharge the service member for cause if the application of the escalator principle results in a legitimate layoff or in the elimination of the job position itself, provided the person would have faced the same consequences had he or she remained continuously employed. Section 1002.248 provides general guidelines for establishing just cause to discharge a reemployed service member during the protected period, and places the burden of proof on the employer to demonstrate that it is reasonable to discharge the person. See H.R. Rep. No. 103–65, Pt. 1, at 35 (1993); S. Rep. No. 103–158, at 63 (1993).

The Department received six comments regarding these provisions. One commenter took issue with proposed section 1002.248's statement that a reemployed service member may be discharged either for cause or because of the application of the escalator principle. The commenter suggests that citing only two potential reasons for discharge is too limited, and there are other ''legitimate nondiscriminatory reasons'' for an employee's discharge. After considering the comment, the Department concludes that proposed section 1002.248 was unclear, and has amended the provision. Accordingly, to sustain an employee's discharge during the protected period, the employer bears the burden of proving either that the discharge was based on the employee's conduct or it was the result of some other legitimate nondiscriminatory reason that would have affected any employee in the reemployed service member's position, regardless of his or her protected status or activity. See *Duarte* v. *Agilent Technologies, Inc.*, 366 F.Supp.2d 1039, 1046 (D.Colo. 2005). Other reasons for discharge may include the elimination of the employee's position, corporate reorganization or ''downsizing,'' and layoff, provided that those reasons are legitimate, nondiscriminatory and non-pretextual.

A second comment on these provisions criticizes the use of the phrase ''just cause'' interchangeably with ''cause'' in the preamble, and suggests that the Department should refrain from using ''just cause.'' The Department notes that the text of the rule employs only the term ''cause,'' as does the statute, although the statute's drafters employed both terms in the legislative history. See S. Rep. 103–158 (1993) at 63. The Department intends that its use of the term ''just cause'' in the preamble is synonymous with its use of the term ''cause'' in the text of the rule, and concludes that the use of both terms is not misleading or confusing. A third comment objects to the Department placing the burden on the employer to prove that a discharge during the protected period was based on cause. The inclusion of this provision was based on the legislative history regarding USERRA's protection against discharge, which itself stated that the burden of proving that the discharge was for cause belongs on the employer. See H.R. Rep. 103–65, Pt. I, at 35 (1993); S. Rep. 103–158, at 63 (1993). A fourth commenter suggests that section 1002.248 either provide a specific list of what events constitute cause for discharge, or refer to the application of State law for a definition of what constitutes cause. The Department must reject both suggestions. First, it is impossible to identify an exhaustive list of all events or conduct that would justify a discharge for cause. Second, for the purposes of the protection against discharge, the Department intends that USERRA's interpretation and enforcement rely not on the importation or application of State statute or common law, but instead on the development of Federal decisional law under the statute and these regulations. The fifth comment argued that a discharge for cause should apply only where an employer has an established formal grievance and appeal process. USERRA allows an employer to discharge a reemployed employee for cause, and does not require that the employer have a formal grievance and appeal procedure in order to exercise this right. However, as discussed above, in any case involving a discharge during the statutorily protected period, the employer has the burden of proving that the discharge was for cause. Consequently, this suggested change has not been made.

Finally, the last comment regarding these provisions resulted in a change to the text of the rule. The commenter requests that the provision should clarify that the prerequisite of notice to employees that certain conduct may result in discharge should include a reference that such notice may either be express or fairly implied, citing H.R. Rep. 103–65, Pt. I, at 35 (1993). The Department agrees that the legislative history supports the suggestion, and has made the requested revision. See section 1002.248.

*Pension Plan Benefits*

USERRA establishes specific rights for reemployed service members in their employee pension benefit plans; the Act's specific provisions for pension benefit plans supersede general provisions elsewhere in the statute. 38 U.S.C. 4318(a)(1)(A). USERRA defines an employee pension benefit plan in the same way that the term is defined under the Employee Retirement Income Security Act of 1974 (ERISA). See 29 U.S.C. Chapter 18; 38 U.S.C. 4318(a). The term ''employee pension benefit plan'' includes any plan, fund or program established or maintained by

an employer or by an employee organization, or by both, that provides retirement income or results in the deferral of income for a period of time extending to or beyond the termination of the employment covered by the plan. Profit sharing and stock bonus plans that meet this test are included. USERRA provides that once the service member is reemployed, he or she is treated as not having a break in service with the employer or employers maintaining the plan even though the service member was away from work performing military service.

Sections 1002.259 to .267 describe the types of employee pension benefit plans that come within the Act and the pension benefits that must be provided to reemployed service members. Although USERRA relies on the ERISA definition of an employee pension benefit plan, some plans excluded from ERISA coverage may be subject to USERRA. For example, USERRA (but not ERISA) extends coverage to plans sponsored by religious organizations and plans established under State or Federal law for governmental employees. Benefits paid pursuant to federally legislated programs such as Social Security or the Railroad Retirement Act, however, are not covered by USERRA. USERRA coverage also does not include benefits under the Thrift Savings Plan (TSP); the rights of reemployed service members to benefits under the TSP are governed by another Federal statute. See 5 U.S.C. 8432b. 38 U.S.C. 4318(a)(1)(B). Section 1002.260.

As sections 1002.259 to .267 illustrate, each period of uniformed service is treated as an uninterrupted period of employment with the employer(s) maintaining the pension plan in determining eligibility for participation in the plan, the non-forfeitability of accrued benefits, and the accrual of service credits, contributions and elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code) under the plan. 38 U.S.C. 4318(a)(2)(B). As a result, for purposes of calculating these pension benefits, or for determining the amount of contributions or deferrals to the plan, the reemployed service member is treated as though he or she had remained continuously employed for pension purposes.

The Department received a comment apparently suggesting that USERRA's provisions regarding employer pension obligations conflict with an employer's ability to terminate a pension plan under the Employee Retirement Income Security Act (ERISA). USERRA does not prohibit pension plan termination, and therefore no change to the final rule is warranted.

The Department received one comment concerning pension plan entitlements of employees whose employers provide them with partial or full civilian pay while the employees are absent from employment to perform military service. This compensation is commonly referred to as ''differential pay,'' and the amount and duration of the benefit varies widely. The commenter asked the Department to indicate whether employees who receive ''differential pay'' are entitled to make employee contributions or elective deferrals to their pension plan based on the differential pay received while absent from employment to perform military service. The Department notes that ''differential pay'' is not required by USERRA, and is a form of compensation from employers to employees.

The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) issued proposed regulations that address the ability of employees on military leave to make pension contributions based on differential pay. These proposed regulations can be found at 70 FR 31214–0 (May 31, 2005), and interpret the provisions of section 415 of the IRC, which governs benefits and contributions under qualified retirement plans. The Treasury Department's press release concerning the proposed rule states, in pertinent part:

> Significantly, the proposed regulations will specifically provide that National Guard and Reserve members are permitted to continue to contribute to their employer's retirement plan while on active duty. . . The rules relating to post termination compensation and the associated clarifications on the ability to contribute to retirement plans for members of the National Guard and Reserve will also apply to section 403(b) tax deferred annuities and Section 457 eligible deferred compensation plans. Plan administrators may rely on today's proposed regulations immediately to allow service members to contribute to qualified retirement plans.

JS–2471, Office of Public Affairs, Department of the Treasury, May 25, 2005.

The Department received two comments regarding section 1002.259, which establishes the general principle that upon reemployment, an employee must be treated as not having a break in service with the employer for the purposes of ''participation, vesting and accrual'' of pension benefits. Both comments requested that the provision be broadened to include an employee's ''eligibility'' for pension benefits. The phrase ''participation, vesting and accrual'' includes an employee's ''eligibility'' for pension benefits, and therefore no modification is needed in response to the commenters' suggestions.

Another commenter requested that the Department clarify the entitlement to pension credit in cases in which an employee permanently and lawfully loses reemployment rights, for instance, where an employee dies during the period of military service or where an employer is excused from its reemployment obligations based on a statutory defense under 38 U.S.C 4312(d)(1) (incorporated in section 1002.139). The commenter suggested that the final rule provide that if a person permanently and lawfully loses the right to reemployment during a period of military service, such person (or his or her estate) is entitled to receive pension credit for the period beginning with departure from pre-service employment and ending on the date reemployment rights are lost. Because section 4318(a) of USERRA states that pension entitlements do not accrue until the returning employee is reemployed, the Department declines to adopt the commenter's proposal.

As noted in Subpart C, above, section 1002.74 of the final rule provides that an employee is, in some cases, entitled to time off from employment prior to the beginning of a period of military service where such time off is ''necessitated by'' the employee's forthcoming service in the uniformed services. A commenter requested the Department clarify whether such period of time must also be considered service with the employer for purposes of determining the employee's USERRA pension entitlements upon reemployment following the service. The Department has responded by amending section 1002.259 to clarify that the entire period of absence due to or necessitated by service in the uniformed services is to be considered service with the employer upon reemployment for pension purposes. This period includes preparation time, as described above, and time following the completion of service within which a person may apply for reemployment and/or recover from an illness or injury incurred in or aggravated by the military service. See section 1002.259. The Department made a corresponding amendment to the final rule to clarify that the entire period of absence due to or necessitated by military service is to be considered in determining a person's entitlement to seniority and seniority benefits upon reemployment. See Subpart E, above, and section 1002.210.

Sections 1002.261 and 1002.262 clarify who must make the contribution

and/or deferral attributable to a particular period of military service and the timeframes within which payments are to be made to the plan. Section 1002.261 also describes how funding obligations differ depending on whether a plan is a defined benefit or defined contribution plan. The Department received one comment requesting the final rule indicate whether ''cash balance'' and similar ''hybrid'' plans should be considered defined benefit plans for USERRA purposes. The Department consulted with the IRS and the Treasury Department on this issue, and has been advised that, for their purposes, ''cash balance'' and other ''hybrid'' plans are considered defined benefit plans. The Department will apply the same treatment to these plans for USERRA's purposes.

The employer who reemploys the service member is responsible for funding any employer contribution to the plan to provide the benefits described in the Act and the regulation. 38 U.S.C. 4318(b)(1). Some plans do not require or permit employer contributions. In that case, the plan is funded by employee contributions or elective deferrals. Other plans provide that the employer will match a certain portion of the employee contribution or deferral. If employer contributions are contingent on employee contributions or elective deferrals, such as where the employer matches all or a portion of the employee deferral or contribution, the reemployed service member is entitled to the employer contribution only to the extent that he or she makes the employee contributions or elective deferrals to the plan. 38 U.S.C. 4318(b)(2).

USERRA is silent with respect to the amount of time the employer has to pay to the plan the contributions attributable to a reemployed service member's period of military service. In proposed section 1002.262, the Department required that employer contributions to a pension plan that are not contingent on employee contributions or elective deferrals must be made no later than 30 days after the date of the person's reemployment. An exception to this limit was provided in cases in which it was impossible or unreasonable for the employer to meet the timeframe, and, in that case, contributions were to be made as soon as practicable. Interested parties were requested to comment on this proposed requirement, and the Department specifically requested public comment on whether the proposed 30-day period is too long or too short.

The Department received eight comments on proposed section 1002.262, and only one commenter, the National Employment Lawyer's Association, favored the provision, suggesting that the 30-day period was reasonable in light of the exception for situations where it was impossible or unreasonable to comply. Other commenters included WorldatWork, Profit Sharing/401(k) Council of America, Investment Company Institute, Society for Human Resources Management, Hewitt Associates, and two law firms. Seven comments indicated that the 30-day period was too short, and requested that the period be extended. Three of the seven commenters suggested the period be expanded to ninety days following reemployment. A fourth comment proposed that employer contributions be made when they would normally be due for the plan year in which the employee is reemployed. Two additional commenters suggested the contributions be due no earlier than the end of the calendar quarter following the quarter in which the employee is reemployed. The final commenter suggested the contributions be due either when they can reasonably be segregated from the employer's general assets or at the beginning of the quarter following the quarter in which the employee is reemployed, whichever is earlier. Because the beginning of the quarter following reemployment could conceivably be the next day, the Department construes this commenter to have intended the inclusion of the statement, ''whichever is later.''

After weighing all these comments, the Department has amended section 1002.262(a) to provide that employer contributions to a pension plan that are not dependent on employee contributions must be made within ninety days following reemployment or when contributions are normally made for the year in which the military service was performed, whichever is later. In some cases involving an extended period of service, both timeframes may apply. For instance, assume a case in which employer contributions for a particular calendar year are made on February 15 of the following year. An employee leaves the employer to perform military service on May 1, 2004. The employee completes the service in early 2005, applies for reemployment, and is reemployed on February 10, 2005. In this case, pension contributions attributable to the period of the absence due to military service in 2004 (May 1–December 31) would be due 90 days after February 10, 2005, the date of reemployment, because that date is later than February 15, 2005, the date contributions for 2004 are normally made. Pension contributions attributable to the period of the absence for military service in 2005 (January 1–February 9) would be due on February 15, 2006, because that date is later than the date that is 90 days following reemployment.

Where pension benefits are derived from employee contributions or elective deferrals, or from a combination of employee contributions or elective deferrals and matching employer contributions, the reemployed service member may make his or her contributions or deferrals during a time period starting with the date of reemployment and continuing for up to three times the length of the employee's immediate past period of military service, with the repayment period not to exceed five years. 38 U.S.C. 4318(b)(2); section 1002.262(b). No payment by the service member may exceed the amount that would have been required or permitted during the period of time had the service member remained continuously employed. 38 U.S.C. 4318(b)(2). Any permitted or required amount of employee contributions or elective deferrals would be adjusted for any employee contributions or elective deferrals made to the plan during the employee's period of service. Any employer contributions that are contingent on employee contributions or elective deferrals must be made according to the plan's requirements for employer matching contributions.

The Department invited comments as to whether this interpretation best effectuates the purpose of this provision, and received three general comments in response. One commenter requested the final rule specify that the employee make-up contributions be sequential, that is, that the first make-up payments be attributable to the earliest part of the absence to perform service. The Department declines to impose this requirement on all employers and pension plans, and instead suggests that employers and plan administrators develop reasonable rules for the allocation of make-up contributions that are appropriate for the type and size of the particular plan.

The second general comment asked that the Department indicate how to apply the provision in the case of a reemployed employee who began making up missed contributions or elective deferrals, and then entered a subsequent period of military service during the repayment period but before having made up all the missed contributions or elective deferrals. Specifically, the commenter proposed

that the repayment period should be tolled during the second period of military service, and then resumed when the person was reemployed following the subsequent service. USERRA provides that the repayment period for a particular period of military service begins upon reemployment. See 38 U.S.C. 4318(b)(2). Therefore, the Department concludes that if a person enters a second period of military service during the make-up period for a prior period of military service, USERRA does not require that the first makeup period be tolled; the repayment period for the first period of service will continue to run during the subsequent period of service. When the person returns from the second period of service, the repayment period for the second period would commence upon the ''second'' reemployment, and the person may also have any time remaining from the first repayment period. The Department notes, however, that USERRA does not prevent an employer or plan from voluntarily extending the first period in the event of an employee's second period of military service.

The third general comment concerning employee make-up of missed contributions or elective deferrals suggested that section 1002.262(b) be amended to provide a period of five years within which a reemployed employee may make up missed contributions or elective deferrals. The Department declines to adopt this recommendation, because the period permitted in section 1002.262(b) is based on the period established under the statute. See 38 U.S.C. 4318(b)(2).

Under USERRA, a reemployed service member has the right to make his or her contributions or elective deferrals, but is not required to do so. Elective deferrals can be made up only to the extent that the employee has compensation from the employer that can be deferred. Proposed section 1002.262 provided that, if an individual cannot make up missed contributions as an elective deferral because he or she does not have enough compensation from the employer to defer (for example, if the individual is no longer employed by the employer), the plan must provide an equivalent opportunity for the individual to receive the maximum employer matching contributions that were available under the plan during the period of uniformed service through a match of after-tax contributions. This provision generated ten separate comments from eight sources, including WorldAtWork, Profit Sharing/401(k) Council of America, National Employment Lawyers Association, Investment Company Institute, and two law firms with expertise in the field, and none of the commenters expressed support for the provision. Four of the comments requested clarification with respect to four issues: the effect of the provision on the treatment of highly compensated employees; the effect of these contributions on non-discrimination testing provisions in various sections of the Internal Revenue Code; whether an employee who is terminated for cause based on conduct is entitled to this right; and issues associated with after-tax contributions generally.

The remaining commenters were opposed to this provision on various additional grounds. Commenters cited administrative costs in re-tooling administrative systems for plans that do not currently allow after-tax contributions, because pre- and after-tax contributions must be tracked and accounted for separately. Most significantly, commenters expressed concerns that compliance with the proposed provision might cause a plan to encounter problems with the IRC or tax regulations because of this rule's requirement that plans accept after-tax contributions from persons who are not employees. Finally, two commenters suggested that to avoid after-tax contributions to a former employer's pension plan and achieve the same result, the final rule should provide for establishment of an Individual Retirement Account by the former employee with matching contributions from the former employer.

After considering all the comments, the Department has concluded that it will remove from section 1002.262(b) of the final rule the provision that would have required a plan to permit a person to continue to make-up missed contributions or elective deferrals after leaving employment with the post-service employer. In construing the statute liberally in favor of service members, the Department's original view of section 4318(b)(2) of the Act was that service members should be permitted the entire period established by the statute for missed contributions, regardless of whether the service member remained reemployed during that period. This view was supported by the fact that neither the face of section 4318(b)(2), nor the legislative history, contains a limitation on the statutory period that requires a service member to remain reemployed in order to make up contributions. However, after considering the comments, the Department ultimately views section 4318(b)(2) as unclear on this point, in particular, because of its references to ''a person reemployed.'' Thus, this provision of the Act is better viewed as establishing a right to make up missed contributions that is conditioned upon continued employment following reemployment. This interpretation of section 4318(b)(2) is consistent with the statute as a whole, which generally establishes no rights or benefits that extend beyond the termination of employment or reemployment. Notwithstanding, if a reemployed employee leaves and then returns to employment with his or her post-service employer, the employee may resume repayments at his or her discretion regardless of the break in employment, so long as time remains in the statutory period (three times the length of the employee's immediate past period of military service, not to exceed five years).

Policy reasons further support the revision to this provision. VETS recognizes that the proposed section would have benefited a relatively small number of returning service members who were reemployed, sought to make up missed contributions, left employment with the post-service employer, and still wanted the opportunity to make up missed contributions. Comments from industry experts indicated that the costs to pension plans associated with the provision would be significant. In addition, industry experts noted that those plan costs were likely to be allocated to the plan, so that other plan participants, including other uniformed service members, may suffer some detriment to their pension entitlements. As a result of this extensive legal and policy analysis, and the conclusions reached above, the Department has modified this provision. See section 1002.262(b).

USERRA does not specify whether the returning service member is entitled to partial credit in return for making up part (but not all) of the missed employee contributions or elective deferrals, but it does not require that the employee make up the full amount. Given that returning service members sometimes face financial hardships on their return to civilian employment, and in view of the remedial purposes of USERRA, the Department interprets the Act to permit the employee to partially make up missed employee contributions (including required employee contributions to a defined benefit plan) or elective deferrals. In such a situation, the employer is required to make any contributions that are contingent on employee make-up contributions or elective deferrals only to the extent that the employee makes such partial

contributions or elective deferrals. See section 1002.262(c). For example, in a plan where the employee may or must contribute from zero to five percent of his or her compensation, and receive a commensurate employer match, the reemployed service member must be permitted to partially make up a missed contribution and receive the employer match. Where contributions from all employees are handled in a similar, consistent fashion under the plan, either the plan documents or the normal, established practices of the plan control the disposition of partial contributions or elective deferrals. See section 1002.262(e) and (f).

Section 1002.263 of the proposed rule provided that employees are not required to pay any interest when making up contributions or elective deferrals attributable to a period of military service. The Department received a comment asking whether employees are permitted to include interest when making up missed contributions or elective deferrals attributable to a period of military service. The statute requires that such employee payments must not exceed the amount the employee would have been permitted or required to contribute had the person remained continuously employed. See 38 U.S.C. 4318(b)(2). Based on the statute, the Department has amended section 1002.263 to clarify that employees are neither permitted nor required to pay interest when making up missed contributions or elective deferrals. See section 1002.263.

Under section 1002.264 in the proposed rule, if the service member has withdrawn his or her account balance from the employee pension benefit plan prior to entering military service, he or she must be allowed to repay the withdrawn amounts upon reemployment. The amount to be repaid also includes any interest that would have been earned had the monies not been withdrawn. Repayment entitles the individual to appropriate credit in the plan. The reemployed service member may repay his or her withdrawals during a time period starting with the date of reemployment and continuing for up to three times the length of the employee's immediate past period of military service, with the repayment period not to exceed five years; during the time period provided by 26 U.S.C. 411(a)(7)(C) (if applicable); or within such longer time period as may be agreed to between the employer and service member. Proposed section 1002.264 applied to defined benefit plans and defined contribution plans. The Department invited comments on whether or how this section should apply to defined contribution plans.

Five commenters responded to the Department concerning this provision, including Profit Sharing/401(k) Council of America (PSCA), Investment Company Institute, Hewitt Associates, and Society for Human Resource Management. PSCA was generally supportive of the proposed section, but recommended the repayment period be amended to ''be consistent with the requirements under the IRC.'' Three commenters were unequivocally opposed to the provision allowing for repayment of withdrawals. As with the first comment, these commenters were concerned that compliance with the proposed provision could cause plans to become disqualified under the IRC. Additionally, the commenters noted that plans would incur substantial costs in amending procedures to accommodate this repayment provision, which could involve after-tax payments being made in some cases. Additionally, one commenter requested the Department clarify the timing of the withdrawal, submitting that proposed section 1002.264 could be read to apply the repayment entitlement to withdrawals made far in advance of the military service and unrelated to that service.

After weighing all the comments, the Department has made significant revisions to section 1002.264. First, the Department concludes that this provision is more appropriately applied only to defined benefit plans. As in the case of the provision regarding the entitlement to make up missed contributions or elective deferrals in section 1002.262(b), VETS recognizes this provision would benefit relatively few returning service members who incurred the penalties and tax burden associated with a withdrawal from a defined contribution plan and wanted to repay that amount, generally through after-tax payments. VETS also recognizes that this provision similarly would have required defined contribution plans to incur the substantial costs of compliance in order to track and account for pre- and after-tax money separately, and that those costs could reduce the benefits paid to other plan participants, including other uniformed service members. Accordingly, the final rule will limit the entitlement to repay withdrawals to defined benefit plans. Second, the Department agrees with the comment above, and originally intended, that plan withdrawals covered under this provision would be limited to those made in connection with a period of military service. Accordingly, section 1002.264 has been revised to reflect this limitation. Third, for reasons similar to those stated above regarding the limitation on the entitlement to make up missed contributions or elective deferrals in section 1002.262(b), the entitlement to repay withdrawals will be conditioned upon the person being employed with their post-service employer. As is the case in section 1002.262(b), if a reemployed employee leaves and then returns to employment with the post-service employer, the employee may resume repayments at his or her discretion regardless of the break in post-service employment, so long as time remains in the repayment period. Finally, proposed section 1002.264(b), which allowed for repayment within the time period provided by 26 U.S.C. 411(a)(7)(C), has been deleted from the final rule because the Department has determined that its inclusion was confusing and ultimately unnecessary because the time period is already established by the Internal Revenue Code. See section 1002.264.

The final comment received concerning section 1002.264 recommended the repayment period be extended in cases where an employee is unable to repay in a timely manner for a reason related to the person's military service. The Department is not adopting this suggestion, as the current language allows for a longer repayment period that is agreed to by the employer and the employee. See section 1002.264. The Department expects that employers and employees will negotiate such longer periods in good faith.

Section 1002.265 specifies that a reemployed service member's pension entitlement may vary depending on the type of pension plan, and the Department received a single comment on this provision. In referring to the defined contribution plans provision, in which the reemployed person is not entitled to earnings experienced and forfeitures that occurred during military service, the commenter appears to confuse it with section 1002.264, related to withdrawal of funds from a plan. Because the meaning and intent of the comment are vague and unclear, the Department is unable to supply a response.

The employer must allocate its contribution on behalf of the employee in the same manner as contributions made for other employees during the period of the service member's service were allocated. However, under proposed section 1002.265, the employer is not required to allocate earnings experienced and forfeitures that occurred during the period of military service to the reemployed

service member. 38 U.S.C. 4318(b)(1). A commenter asked whether the amount of funds in the employee's pension account when the person leaves employment to perform military service should experience normal gains and losses (excluding forfeitures) during the period of absence to the same extent as the accounts of active employees. Funds left in the employee's account when he or she departs to perform military service accrue normal gains and losses (excluding forfeitures). However, the gains or losses that accrued during the person's absence for uniformed service are not applied to contributions made by the employer or the employee after reemployment.

Special rules apply to multiemployer plans. 38 U.S.C. 4318(b)(1). Section 1002.266 focuses on the operation of multiemployer plans. ERISA defines the term ''multiemployer plan'' as a plan to which more than one employer is required to contribute; which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer; and which satisfies regulations prescribed by the Secretary of Labor. 29 U.S.C. 1002(37). An individual's period of uniformed service that qualifies as employment for purposes of section 4318(a)(2) is also employment under the terms of the pension benefit plan; any applicable collective bargaining agreement under 29 U.S.C. 1145; or any similar Federal or State law requiring employers who contribute to multiemployer plans to make contributions as specified in plan documents.

With a multiemployer plan, a service member does not have to be reemployed by the same employer for whom he or she worked prior to the period of service in order to be reinstated in the pension plan. Proposed section 1002.266(c) stated that so long as the post-service employer is a contributing employer to the plan, the service member is entitled to be treated as though he or she experienced no break in service under the plan. One commenter contended that this provision is overly broad and should be limited based on the language of the statute, the legislative history, and the applicable case law. The commenter proposed that in cases in which the pre-service and post-service employer are different, but both employers participate in the same multiemployer pension plan, the pre- and post-service employers must be related by a common job referral or hiring scheme beyond their common participation in the plan.

USERRA bases the availability of pension protections on the reemployment of a service member. 38 U.S.C. 4318(a)(2)(A) (''a person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employer's maintaining the plan''). The statute's legislative history indicates that term ''employer'' is to be construed broadly so that it encompasses not just the traditional single employer relationship, but also those employer relationships in which ''a service member works for several employers in industries such as construction, longshoring, etc., where the employees are referred to employment.'' H.R. Rep. No. 103–65, Pt. I, at 21 (1993); accord S. Rep. No. 103–158, at 42 (1993) (''In addition to the traditional interpretations of the term, the Committee intends a broad construction of ''employer'' to include relationships in which an employee works for multiple employers within an industry or is referred to employment in such industries as construction or longshoring.'')

Both the House and the Senate reports cite *Imel* v. *Laborers Pension Trust Fund for Northern California,* 904 F.2d 1327 (9th Cir.), cert. denied, 489 U.S. 939 (1990), as a leading case on the pension obligations where the pre- and post-service employers are different. In Imel, the court imposed liability on the multiemployer plan to provide pension credit to the plaintiff for his years of military service where the pre-service and post-service employers were dissimilar. The court found that the two employers were operating in the same Northern California construction industry which, broadly construed, was Imel's employer, and that the two employers both utilized, and were therefore connected by, their common use of the union's job referral practice. Id. at 1330, 1333.

The Department concludes that this legislative history suggests that mere participation by different pre- and post-service employers in a common multiemployer plan is not enough to invoke pension liability for service-related absences. Accordingly, the Department has amended section 1002.266(c) to reflect that in cases in which an employee is reemployed by an employer that is different from his or her pre-service employer, and the pre- and post-service employer contribute to the same multiemployer pension plan, the two employers must be connected by a common job referral plan or practice in order for USERRA's pension obligations to attach to the post-service employer. See section 1002.266(c).

Section 1002.266 describes the allocation of the employer's obligation to fund employer contributions for reemployed service members participating in multiemployer plans. Initially, the benefits liability is to be allocated as specified by the sponsor maintaining the plan. 38 U.S.C. 4318(b)(1)(A). Both of the bargaining parties, usually the union(s) and the employers, and the plan trustees of a multiemployer plan are sponsors of the plan. The initial allocation by the plan sponsor(s) is likely to vary from plan to plan. For purposes of USERRA, if the plan documents make no provision to allocate the obligation to contribute, then the individual's last employer before the service period is liable for the employer contributions. In the event that entity no longer exists or functions, the plan must nevertheless provide coverage to the service member. 38 U.S.C. 4318(b)(1)(B).

By authorizing the plan sponsors to designate how the contribution is to be paid, Congress intended to give employers, employee organizations and plan trustees (all of whom are plan sponsors) flexibility in structuring the payment obligation to suit the plan's particular circumstances. ''The Committee intends that multiemployer pension plan trustees or bargaining parties should be able to adopt uniform standard rules under which another employer, such as the last employer for which the individual worked before going into the uniformed service or the employer for which the returning service member had the most service during a given period following release from the uniformed service, may be considered the 'reemploying' employer for purposes of the pension provisions of Chapter 43. The Committee also intends for multi-employer pension plan trustees to have the right to determine that it would be more appropriate not to make any individual employer liable for such costs and thus to be able to adopt rules under which returning service members' reconstructed benefits would be funded out of plan contributions and other assets without imposing a specific additional funding obligation on any one employer.'' S. Rep. No. 103–158, at 65 (1993). With respect to both multiemployer and single employer plans, however, the Committee indicated: ''It is the intent of the Committee that, with respect to allocations to individual account plans under section 3(34) of ERISA, allocations to the accounts of returning service members not be accomplished by reducing the account balances of other plan participants.'' Id.

The Department received one comment concerning funding obligations of defined contribution

multiemployer pension plans. The commenter requested the Department explain how such plans ''might be expected'' to fund obligations, particularly given Congress's intent that funding obligations not be met by reducing the account balances of other plan participants. The commenter points out that, unlike single-employer plans, multiemployer defined contribution plans often will not have a designated source of funds that is sufficient to fund a plan's USERRA obligations, particularly in cases in which such obligations are significant, such as when employees return following an extended absence to perform military service. While forfeitures and interest provide a source of funds that might be utilized to fund USERRA obligations, that source may not always be enough. The commenter submits that in some cases, the only way in which a multiemployer defined contribution plan can fund its obligations under USERRA might be to reduce the account balance of other participants in the plan. While the Department acknowledges this possibility, it nevertheless expects plans to comport with USERRA's intent that the funding of obligations required by USERRA should avoid a reduction in the account balances of other plan participants, and plans should develop reasonable procedures to achieve this result to the greatest extent possible.

If an employer participating in a multiemployer plan reemploys an individual who is entitled to pension benefits attributable to military service, then the employer must notify the plan administrator of the reemployment within 30 days. 38 U.S.C. 4318(c). USERRA requires this notice because multiemployer plan administrators may not be aware that a contributing employer has reemployed a person who may have a pension claim arising from his or her military service. In contrast, administrators of single employer pension plans are more likely to have access to such information. This notice requirement is implemented by section 1002.266(b).

The Department received one comment recommending that in the multiemployer context, section 1002.266 should require that ''non-obvious entities,'' such as hiring halls, share the obligation to notify the plan of the reemployment. The commenter points out that in cases in which the reemploying employer is different from the pre-service employer, the reemploying employer may be unaware that it has reemployed the person pursuant to USERRA and therefore will be unable to fulfill its notice obligation. As noted above, the Department has modified section 1002.266(c) to reflect that in cases in which different pre-service and post-service employers participate in a multiemployer plan, they must also be linked by a common means or practice of hiring the employee, such as common participation in a union hiring hall. In addition, the Department agrees with the comment that in these cases, the post-service employer may be unable to comply with its 30-day notice obligation to the plan until it knows that it has reemployed a person pursuant to USERRA. Accordingly, the Department has modified section 1002.266(b) to provide that the 30-day period within which notice to the plan must be made does not begin until the reemploying employer has knowledge that the employee was reemployed under USERRA. In addition, the amended provision further states that the returning service member should notify the employer upon reemployment that he or she has been reemployed following a period of military service. The Department declines to adopt the recommendation to require that non-employers such as hiring halls provide notice to plans, because the statute places that obligation only upon the reemploying employer. See 38 U.S.C. 4318(c).

Section 4318(b)(3) of the statute describes the method for calculating the reemployed service member's compensation for the period of military service to determine the amount the employer and service member must contribute under the plan. 38 U.S.C. 4318(b)(3). Section 1002.267 provides that the compensation the reemployed service member would have earned had he or she remained continuously employed provides the usual benchmark. If that amount cannot be determined with reasonable certainty (for example, where the compensation rate varies based on commissions or tips), the compensation rate may be based on the service member's average compensation rate during the 12-month period before the service period. For an employee who worked fewer than 12 months before entering the service, the entire employment period just prior to the service period may be used.

The Department received three comments regarding this provision. One commenter recommended this provision should apply only where the employee's absence for military service was a year or more in duration. The Department declines to adopt this recommendation, which would create a hierarchy of entitlements based on the duration of service that is not supported by the statute. The Department received two comments concerning the method in which the employee's imputed compensation during the period of absence for military service should be calculated. One of the commenters proposed the rule state that pay raises that would have been awarded during the period of service be included in the calculation. The other suggested the rule state that any seasonal variations in compensation be included in the calculation. The Department concludes that section 1002.267 adequately addresses these issues, and therefore no change is necessary.

Although a service member who is not reemployed under the Act would not be entitled to pension benefits for his or her period of service, any vested accrued benefit in the plan to which the service member was entitled prior to entering military service would remain intact whether or not he or she was reemployed. Joint Explanatory Statement on H.R. 995, 103–353, at 2507 (1994); H.R. Rep. No. 103–65, Pt. I, at 36–37 (1993). The terms of the plan document control the manner and timing of distributions of vested accrued benefits from the plan if the service member is not reemployed by a participant employer.

USERRA provides specific guidance on certain aspects of the reemployed service member's pension plan rights. At the same time, employers, fiduciaries and plan administrators must also comply with other laws that regulate plan administration but are beyond the scope of these proposed regulations. Federal and State laws governing the establishment and operation of pension plans, such as ERISA or the Internal Revenue Code of 1986, as amended, and the regulations of the Pension Benefit Guaranty Corporation, continue to apply in the context of providing benefits under USERRA. Thus, for example, while section 4318(b)(1)(A) provides that liability for funding multiemployer pension plan benefits for a reemployed service member shall be allocated as the plan sponsor specifies, laws other than USERRA govern the technical aspects of the allocation.

## Subpart F—Compliance Assistance, Enforcement and Remedies

### *Compliance Assistance*

USERRA authorizes the Secretary of Labor to provide assistance to any person regarding the employment and reemployment rights and benefits provided under the statute. 38 U.S.C. 4321. The Secretary acts through the Veterans' Employment and Training Service (VETS). USERRA promotes the

resolution of complaints without resort to litigation. In order to facilitate this process, section 4321 allows VETS to request assistance from other Federal and State agencies and volunteers engaged in similar or related activities. Section 1002.277 describes VETS' authority to provide assistance to both employees and employers. VETS' assistance is not contingent upon the filing of a USERRA complaint.

The Department received two comments concerning its assistance in USERRA cases. The first commenter suggested that the regulation explicitly provide in section 1002.277, which states that that the ''Secretary of Labor, through [VETS], provides assistance to any person or entity with respect to [USERRA],'' that the Secretary is ''required'' to provide such assistance. The Department concludes that in stating that the Secretary ''shall provide'' such assistance, USERRA's directive is mandatory, and the proposed rule adequately reflects the mandate. A second commenter requested that the assistance provided to the Department by the National Committee for Employer Support of the Guard and Reserve (ESGR) be mentioned in the final rule. The ESGR is an agency within the Office of the Assistant Secretary of Defense for Reserve Affairs, and was established to promote cooperation and understanding between Reserve component members and their civilian employers and to assist in the resolution of conflicts arising from an employee's military commitment. The Department works closely with ESGR in its administration of USERRA, and the ESGR provides valuable service to this Department in this regard. However, the Department concludes it is not necessary to amend the text of the rule to include this acknowledgement.

*Investigation and Referral*

Section 1002.288 implements USERRA's section 4322, which authorizes VETS to enforce an individual's USERRA rights. Any person claiming rights or benefits under USERRA may file a complaint with VETS if his or her employer fails or refuses to comply with the provisions of USERRA, or indicates that it will not comply in the future. 38 U.S.C. 4322(a). This avenue, however, is optional. Nothing in section 4322 requires an individual to file a complaint with VETS, to request assistance from VETS, or to await notification from VETS of the right to bring an enforcement action. *Palmatier* v. *Michigan Dept. of State Police,* 1996 WL 925856 (W.D. Mich. 1996). Invoking VETS' enforcement authority is an alternative provided by the statute once an employee decides to file a USERRA complaint. See *Gagnon* v. *Sprint Corp.,* 284 F.3d 839, 854 (8th Cir.), cert. denied 537 U.S. 1001 (2002). See also sections 1002.288 and 1002.303. Alternatively, the individual may file a complaint directly in the appropriate United States district court or State court in cases involving a private sector or State employer, respectively (or the Merit Systems Protection Board in cases involving a Federal executive agency). See 38 U.S.C. 4323(b) (direct action against State or private employer); 38 U.S.C. 4324(b) (direct action against Federal executive agency). The Office of Personnel Management has issued a separate body of regulations that implement USERRA for employees of Federal executive agencies. See 5 CFR Part 353.

Section 1002.288 also implements the statutory criteria for the form of a complaint. 38 U.S.C. 4322(b). Any complaint submitted to VETS must be in writing, using VETS Form 1010, which may be found at http://www.dol.gov/libraryforms/forms/vets/vets-1010.pdf. In addition, VETS has recently developed an electronic Form 1010, which can be accessed through the USERRA e-laws Advisor on its Web site at: *http://www.dol.gov/vets.* Claimants may complete and submit the ''e1010'' online, and they will be automatically notified that their complaint has been received and forwarded to the appropriate VETS staff member. The Department has amended section 1002.288 to include the option of electronic filing of the form 1010.

The regulation also contains the procedures for processing a complaint. See section 1002.289. VETS provides technical assistance to a potential claimant upon request, and his or her employer if appropriate. 38 U.S.C. 4322(c). Technical assistance is not limited to filing a complaint; it also includes responding to requests for information on specific issues that are not yet part of a formal USERRA complaint. Once an individual files a complaint, VETS must conduct an investigation. If the agency determines that a violation of USERRA has occurred, VETS undertakes ''reasonable efforts'' to effectuate compliance by the employer (or other entity) with its USERRA obligations. Section 1002.289-.290; 38 U.S.C. 4322(d). VETS notifies the claimant of the outcome of the investigation and the claimant's right to request that VETS refer the case to the Attorney General. See 38 U.S.C. 4322(e), 4323.

The Department received one comment concerning its efforts to achieve compliance with USERRA, specifically regarding its obligation to notify the claimant of the results of a USERRA investigation. The commenter voiced disapproval that the Department ''communicate[s] the results of its investigation to complaining employees but not to employers.'' The comment requests that the final rule be modified to provide that VETS will inform both the employee and the employer of the results of its investigation. Section 4322(e) of USERRA requires that the Department ''shall notify the person who submitted the complaint'' of the results of the investigation if the Department is unable to resolve the complaint, and section 1002.290 reflects this mandate. Further, in those cases in which VETS' investigation indicates that a violation of USERRA has occurred, VETS must make reasonable efforts to resolve the complaint by ensuring that the employer comes into compliance. See 38 U.S.C. 4322(d). As a practical matter, efforts to achieve compliance would necessitate notice to the employer and an opportunity to discuss the investigative findings.

Section 1002.289 sets forth VETS' authority to use subpoenas in connection with USERRA investigations. VETS may (i) require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation; and (ii) enforce the subpoena by requesting the Attorney General to apply to a district court for an appropriate order. 38 U.S.C. 4326(a)–(b). VETS' subpoena authority does not apply to the judicial or legislative branch of the Federal Government. 38 U.S.C. 4326(d).

*Enforcement of Rights and Benefits Against a State or Private Employer*

Section 4323 establishes the procedures for enforcing USERRA rights against a State or private employer. ''State'' includes the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States. 38 U.S.C. 4303(14). The political subdivisions of a State (counties, municipalities and school districts), however, are private employers for enforcement purposes. 38 U.S.C. 4323(j). Although USERRA does not define ''private employer,'' the term includes all employers other than the Federal Government or a State. Sections 1002.303 to .314 implement section 4323 of the Act.

An aggrieved individual may initiate a USERRA action either by filing an action in court or by filing a complaint

with VETS. If a complaint is filed with VETS and voluntary compliance cannot be achieved, the claimant may request VETS to refer the complaint to the Attorney General. 38 U.S.C. 4323(a)(1). If the Attorney General considers the complaint meritorious, the Attorney General may represent the claimant and file a complaint in the appropriate U.S. district court. In cases where representation is provided by the Attorney General, the complainant is the plaintiff if the case is brought against a private employer, including a political subdivision of a State; however, if the complaint involves a State employer, it is brought in the name of the United States. A claimant may also proceed directly to the courts in the following circumstances: (i) The claimant foregoes informal resolution by VETS; (ii) the claimant declines referral of the complaint to the Attorney General after an unsuccessful informal resolution; or, (iii) the Attorney General refuses to represent the claimant after referral. 38 U.S.C. 4323(a)(2). Sections 1002.303 and .304 implement these provisions.

Section 4323 establishes requirements for several aspects of the judicial process involving USERRA complaints, which are explained in sections 1002.305 through 1002.311. The United States district courts have jurisdiction over actions against a State or private employer brought by the United States, and actions against a private employer by a person. For actions brought by a person against a State, the action may be brought in a State court of competent jurisdiction. 38 U.S.C. 4323(b); section 1002.305. Venue for an action between the United States and a State lies in any Federal district in which the State exercises authority or carries out functions. Venue for an action against a private employer lies in any Federal district in which the employer maintains a place of business. 38 U.S.C. 4323(c); section 1002.307. Only persons claiming rights or benefits under USERRA (or the United States acting on their behalf) have standing to initiate a USERRA action. 38 U.S.C. 4323(f). Section 1002.308 therefore prohibits employers or other entities (such as pension plans or unions) from initiating actions. See H.R. Rep. No. 103–65, Pt. I, at 39 (1993). As for the respondents necessary to maintain an action, the statute requires only the employer or prospective employer to be named as necessary parties, and section 1002.239 implements this provision. 38 U.S.C. 4323(g); see H.R. Rep. No. 103–65, Pt. I, at 39 (1993).

No fees or court costs may be imposed on the claimant. In addition, the court may award a prevailing claimant his or her attorney's fee, expert witness fees, and other litigation expenses. 38 U.S.C. 4323(h); section 1002.310.

No State statute of limitations applies to a USERRA proceeding. 38 U.S.C. 4323(i). Section 1002.311 provides that an unreasonable delay by the claimant in asserting his or her rights that causes prejudice to the employer may result in dismissal of the claim under the doctrine of laches. See H.R. Rep. No. 103–65, Pt. I, at 39 (1993). The legislative history relies in part on a Sixth Circuit decision, which held that any limitation upon a former employee's right to sue is derived from the equitable doctrine of laches rather than an analogous State statute of limitations. See *Stevens* v. *Tennessee Valley Authority,* 712 F.2d 1047, 1049 (6th Cir. 1983) (decided under the predecessor Veterans' Reemployment Rights Act).

The Department has long taken the position that no Federal statute of limitations applied to actions under USERRA. USERRA's provision that State statutes of limitations are inapplicable, together with USERRA's legislative history, show that the Congress intended that the only time-related defense that may be asserted in defending against a USERRA claim is the equitable doctrine of laches. 38 U.S.C. 4323(i); see S. Rep. No. 103–158, at 70 (1993); H.R. Rep. No. 103–65, Pt. I, at 39 (1993). However, a Federal district court has ruled that USERRA claims are subject to a four-year statute of limitations enacted prior to the enactment of USERRA that imposes a general limitations period for all Federal causes of action where no statute of limitations is ''otherwise provided by law,'' 28 U.S.C. 1658. *Rogers* v. *City of San Antonio,* 2003 WL 1566502, *7 (W.D. Tex.) (applying section 1658 because ''USERRA was essentially a new Act'' designed to replace entirely the VRRA in order to ''clarify, simplify, and where necessary, strengthen the existing veterans'' employment and reemployment rights provisions''), reversed on other grounds, *Rogers* v. *City of San Antonio,* 392 F.3d 758, 772 fn. 36, 773 (5th Cir. 2004) (court declined to consider whether no statute of limitations applies to USERRA, noting the Department of Labor's position in its Notice of Proposed Rule Making, because the plaintiffs argued at the district court level that the four-year limitations period applied and therefore waived the no-limitations argument in the proceedings below).

Another recent district court decision, *Akhdary* v. *City of Chattanooga,* No. 1:01–CV–106, 2002 WL 32060140 (E.D. Tenn. May 22, 2002), held that 28 U.S.C. 1658 does not apply to USERRA claims. The recent decision of the United States Supreme Court in *Jones* v. *R.R. Donnelley & Sons Co.,* 541 U.S. 369(2004) is not dispositive because USERRA ''otherwise provides by law'' that no statute of limitations applies, and because, with respect to some USERRA claims, the cause of action previously existed under the VRRA and consequently predates the effective date of 28 U.S.C. 1658.

The Department received seven comments concerning the applicability of a Federal statute of limitations to actions under USERRA. Commenters included the National Employment Lawyers Association (NELA), ORC Worldwide, Equal Employment Advisory Council, Society for Human Resource Management, Food Marketing Institute, U.S. Chamber of Commerce, and a law firm. NELA recommended that the Department declare in the final rule that 28 U.S.C. 1658 does not apply to actions under USERRA, and that the Department rejects those court decisions to the contrary. The remaining six commenters opposed the Department's position on the issue for various reasons: Two comments argued that the proposed provision exceeds the Department's regulatory authority because it is outside of any statutory authority and because it is ''vague and unclear''; one comment suggested deleting the provision pending resolution of the matter by the courts; and the three remaining comments submitted that 28 U.S.C. 1658 conclusively applies to actions under USERRA.

After considering these comments, the Department will continue to adhere to its view that section 1658 does not apply to USERRA for two reasons. First, as noted above, because USERRA ''otherwise provides by law'' adequate guidance on the statute of limitations issue, the residual limitations period in section 1658 is inapplicable. See, e.g., *Miller* v. *City of Indianapolis,* 281 F.3d 648, 653–654 (7th Cir. 2002) (court held that laches barred claims under USERRA; parties did not argue the application of § 1658 and the court did not raise its applicability). In addition, as noted above, the Wallace court specifically rejected the argument that a Federal statute of limitations applied to a claim under USERRA's predecessor, the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), which includes the same Congressional intent that no limitations period other than laches should apply. *Wallace* v. *Hardee's of Oxford,* 874 F. Supp. 374, 376–77 (M.D. Ala. 1995). The court

reasoned that Congress enacted the bar on use of State statutes of limitations specifically to overrule case law on that issue. The Wallace court further concluded that Congress did not enact a bar on use of Federal statutes of limitations because there was no need—no court had ever applied a Federal limitations statute to decide a claim under USERRA. Id.

The Department views the Supreme Court's interpretation of section 1658 in R.R. Donnelley as supportive of the argument that the four-year limitations period should apply only to statutes whose claims have been resolved through the borrowed application of State statutes of limitations, a category that does not include USERRA. In R.R. Donnelley, the Court relied heavily on Congress's purpose in enacting section 1658, and looked beyond the terms of the phrase ''arising under'' to examine ''the context in which [section 1658] was enacted and the purposes it was designed to accomplish.'' Id. at 377. The Court concluded that ''a central purpose'' of section 1658 was to minimize the occasions for the practice of borrowing State statutes of limitations. Id. at 380, fn. 13 (citing H.R. Rep. No. 101–734 at 24 (1990)). The Court's holding thus ''best serves Congress'' interest in alleviating the uncertainty inherent in the practice of borrowing State statutes of limitations while at the same time protecting settled interests.'' Id. at 382.

Unlike statutes to which section 1658 was intended to apply, USERRA has no ''void'' that has ''created so much unnecessary work for federal judges.'' Id at 380. Because USERRA already prohibits borrowing of State statutes of limitations, it is not the type of statute Congress had in mind when it enacted section 1658. In fact, courts have ''borrowed'' from USERRA and its predecessors in order to determine an appropriate statute of limitations for claims under other statutes. See, e.g., Stevens, 712 F.2d at 1056 (''borrowing'' from the most analogous Federal statute, VRRA, to determine that laches rather than State limitations period applies to action under the Veteran's Preference Act). These decisions indicate that USERRA offers enough guidance on the statute of limitations issue that it should fall within the ''otherwise provided by law'' exception to section 1658.

The second basis for the argument that section 1658 does not apply to claims under USERRA is also found in the R.R. Donnelley case. In R.R. Donnelley, the Court determined that the limitations statute governs a cause of action ''if the plaintiff's claim against the defendant was made possible by a post-1990 enactment.'' R.R. Donnelley, 541 U.S. at 382. Many, and possibly most, claims arising under 1994's USERRA were possible under USERRA's predecessor statutes and therefore not ''made possible by a post-1990 enactment'' within the meaning of R.R. Donnelley. USERRA is simply a Congressional reaffirmation of decades-old law governing reemployment rights of service members, and contains few new causes of action, See, e.g., *Akhdary* v. *City of Chattanooga,* 2002 WL 32060140, *6 (E.D. Tenn. 2002) (section 1658 does not apply to claims under USERRA because USERRA amends the preexisting law of the VRRA). But see *Rogers* v. *City of San Antonio.*

Although the Department will continue to advance the view that section 1658 does not apply to cases arising under USERRA, there are conflicting decisions regarding the applicability of section 1658 to USERRA, and the issue will ultimately be resolved by the courts. Until the issue is resolved, potential USERRA plaintiffs would be well advised to file USERRA claims within section 1658's four-year period. Accordingly, the Department has amended section 1002.311 to acknowledge that at least one court has held that 28 U.S.C. 1658 applies to actions under USERRA, and that individuals asserting rights under USERRA should determine whether the issue of the applicability of the Federal four-year statute of limitations has been resolved and, in any event, act promptly to preserve their rights under USERRA.

Finally on the issue of time-barred claims, Rep. John Boehner, Chairman of the U.S. House of Representatives Committee on Education and the Workforce, requested the final rule provide some explanation of the ''equitable doctrine of laches,'' which is the common-law principle applicable to USERRA cases that serves to bar untimely actions. Section 1002.311, which states that USERRA claims may be barred as untimely if ''an individual unreasonably delays asserting his or her rights, and that unreasonable delay causes prejudice to the employer,'' adequately incorporates the principles that govern the doctrine of laches.

With respect to remedies, the court has broad authority to protect the rights and benefits of persons covered by USERRA. The court may order the employer to comply with USERRA's provisions; compensate the claimant for lost wages and/or benefits; and pay additional, liquidated, damages equivalent to the lost wages/benefits if it determines that the employer's violation is willful. 38 U.S.C. 4323(d)(1). The legislative history establishes that ''a violation shall be considered to be willful if the employer or potential employer 'either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [provisions of this chapter].' '' H.R. Rep. No. 103–65, Pt. I, at 38 (1993), quoting *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 617 (1993) (holding that a violation of the ADEA is willful if the employee either knew or showed reckless disregard for whether the statute prohibited its conduct); see also *Fink* v. *City of New York*, 129 F.Supp.2d 511, 523–25; *Duarte* v. *Agilent Technologies, Inc.*, 366 F.Supp.2d 1039, 1048. Section 1002.312 lists the possible remedies allowed under section 4323(d). Section 1002.313 states that compensation consisting of lost wages, benefits or liquidated damages derived from any action brought on behalf of the United States shall be paid directly to the aggrieved individual. Finally, the court may use its equity powers to enforce the rights guaranteed by USERRA. 38 U.S.C. 4323(e); section 1002.314.

The Department received one comment broadly concerning the issues of enforcement and court procedures, arguing that the proposed regulations were attempting to create substantive rights not provided for by USERRA and that are ''inconsistent with a number of federal statutes and court decisions.'' In addition, the comment states that through the regulations, the Department is attempting to ''establish jurisdiction, venue, statutes of limitation, * * * [and] provide remedies not set forth by statute.'' In registering its complaint, the commenter fails to specify the allegedly conflicting ''federal statutes and court decisions'' to which it refers. Moreover, following a thorough review during the rule-making process and the preparation for publication of the final rule, the Department is confident that every provision in the final rule has a sound basis in the statute's directives, its legislative intent, and in case law under USERRA.

*Effective Date and Compliance Deadlines*

These regulations impose no new legal requirements but explain existing ones, in some cases for the first time. In the Notice of Proposed Rulemaking, the Department proposed that these regulations be effective 30 days after publication of the final rule, and requested comment on whether this would allow adequate time for covered parties to come into full compliance. The Department noted at that time that it expected that most employers were already in full compliance. However, to

the extent that these regulations clarify USERRA's requirements and require adjustments in employer policies and practices, the Department expressed its intent to allow a reasonable amount of time for the transition to take place.

The Department received eight comments concerning the proposed effective date of the final rule following its publication. One of the commenters, an employer association, agreed that the 30-day effective date was reasonable. Three commenters recommended adoption of a 90-day effective date. The remaining four commenters recommended longer periods that ranged from 180 days to the end of the benefits plan year following the plan year in which the final rule is published. In addition, one commenter who proposed a 90-day effective date indicated that the additional time is necessary to permit small businesses the opportunity to ''study'' the regulations. All commenters proposing an expansion of time based their recommendations on the need for employers and plan administrators to have sufficient time to make adjustments to health and benefit plans necessitated by provisions in the proposed rule.

As noted in Subparts D and E, above, the Department has made several significant revisions to the health and pension plan provisions. After considering the comments from health and pension plan experts, the Department concludes that these modifications have eliminated the administrative burden associated with those sections of the proposed rule. As a result, the Department anticipates that significant plan adjustments, as raised in the comments, will not be necessary. In addition, as stated above, the regulations impose no new legal requirements but merely explain existing ones; small and large businesses alike should not require additional time to ''study'' and come into compliance with a statute to which they have been subject for many years. For all these reasons, the Department has retained the provision that states that the rule will become effective 30 days after publication of the final rule.

## VI. Procedural Determinations

### *A. Paperwork Reduction Act*

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*), Federal agencies must seek Office of Management and Budget (OMB) approval for all collections of information (*i.e.*, paperwork). As part of the approval process, agencies must solicit comment from affected parties with regard to the collections of information, including the cost and burden-hour estimates made for these collections by the agencies. The paperwork cost and burden-hour estimates that an agency submits to OMB are termed an ''Information Collection Request'' (ICR).

In the proposed rule, VETS requested the public to comment on the information-collection (*i.e.*, reporting and recordkeeping) requirements contained in the ICR that it submitted to OMB (69 FR 56282). The following chart describes these requirements.

COMPARISON OF FINAL RULE AND STATUTORY LANGUAGE CONTAINING PAPERWORK REQUIREMENTS

| Final provision and language | Statutory provision and language |
|---|---|
| 1002.85(a) The employee or an appropriate officer of the uniformed service in which his or her service is to be performed, must notify the employer that the employee intends to leave the employment position to perform service in the uniformed services. * * * | 4312(a)(1) [Reemployment rights and benefits available if] the person (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to such person's employer[.] |
| 1002.85(c) The employee's notice to the employer may be either verbal or written. | |
| 1002.115 * * * Upon completing service in the uniformed services, the employee must notify the pre-service employer of his or her intent to return to the employment position by either reporting to work or submitting a timely application for reemployment. | 4312(a)(3) [Reemployment rights and benefits available if] the person reports to, or submits an application for reemployment to, such employer in accordance with the provisions of subsection (e). |
| 1002.118 * * * The employee may apply orally or in writing. | |
| 1002.193 * * * The employer must determine the seniority rights, status, and rate of pay as though the employee had been continuously employed during the period of service. | 4313(a)(2)(A) [A person entitled to reemployment shall be promptly reemployed] in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay [with certain exceptions]. |
| 1002.266(b) * * * An employer that contributes to a multiemployer plan and that reemploys the employee * * * must provide written notice of reemployment to the plan administrator. * * * | 4318(c) Any employer who reemploys a person under this chapter and who is an employer contributing to a multiemployer plan * * * under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall * * * provide information, in writing, of such reemployment to the administrator of the plan. |
| 1002.288 A complaint may be filed with VETS either in writing, using VETS Form 1010, or electronically, using VETS Form e1010 * * * [and] must include the name and address of the employer, a summary of the basis for the complaint, and a request for relief. | 4322(b) Such complaint shall be in writing, be in such form as [VETS] may prescribe, include the name and address of the employer against whom the complaint is filed, and contain a summary of the allegations that form the basis of for the complaint. |

**Note:** VETS Form 1010 currently is approved by OMB, #1293–0002, expiration date March 2007.

The following four paragraphs describe the burden and cost estimates for the paperwork requirements described in this chart.

*Notifying employers of departure from employment (1002.85).* Based on its extensive industry knowledge, VETS determined that, in the overwhelming majority of cases, employees will provide this information orally, and that it will take them only a few seconds to complete the necessary communication. In view of the brief period of communication involved, VETS believes that this information-collection provision will impose a de minimus burden on employees and employers; therefore, VETS claims no burden for this activity.

*Notifying employers of plan to return to pre-service employment (1002.115).* Similar to the previous paragraph, VETS estimates that in the vast majority of instances in which employees communicate the required notice to employers, they will do so orally and

will take only a few seconds to complete the task. Therefore, VETS considers this information-collection provision to be de minimus, and claims no burden for this activity.

*Determining reemployment positions (1002.193).* Estimates made by the Department of Defense indicate that 50,000 to 125,000 service members covered by USERRA will demobilize in the coming year. For the purpose of making burden-hour and cost estimates for this provision, VETS assumes that the maximum number of service members (i.e., 125,000) will demobilize each year, and that all of these service members plan to resume their pre-service employment positions (a highly unlikely possibility). Using its extensive experience with the same provision in the USERRA statute, VETS estimates that a secretary (at an hourly wage rate of $18.99, including benefits) takes about 20 minutes (.33 hour) to compile and review the necessary information (i.e., seniority rights, status, and rate of pay) and to make a preliminary determination regarding a returning service member's reemployment position, and that a supervisor (at an hourly wage rate of $22.97, including benefits) requires an average of 10 minutes (.17 hour) to review this information and approve the final determination. Therefore, this provision will result in an annual employer burden of 62,500 hours at a cost of $1,271,451.

*Notifying plan administrators of reemployment (1002.266(b)).* Data compiled by the Department of Labor from 1998 indicate that about 6 percent of all private-wage and salary workers participate in multiemployer defined-benefit plans. As noted previously, 50,000 to 125,000 service members covered by USERRA will demobilize in the coming year. If 6 percent of these uniformed-service members reenroll in a multiemployer pension plan after demobilization, then this information-collection provision will apply to 7,500 of these returning service members. Based on its previous experience with this provision in the USERRA statute, VETS determined that it takes about 30 minutes (.5 hours) for a secretary to type and mail a standardized letter to a plan administrator that provides the administrator with notification of an employee's reemployment status. Therefore, the annual burden-hour and cost estimates for the proposed information-collection provision are 3,750 hours and $71,213.

VETS received no public comment on the four proposed collections of information, nor is any other record evidence available indicating that the Agency's cost and burden-hour estimates as described in the proposal are incorrect or need revision. Therefore, VETS did not revise any of the proposed collections of information contained in the ICR for this final rule.

In the final rule, the Department added the following statement to section 1002.171: ''The employer should counsel the employee about these options and the consequences of selecting one or the other.'' The use of the verb ''should'' makes this provision advisory, i.e., the employer has discretion in determining whether to communicate information about the available options to an employee. Therefore, this provision is not enforceable, and will not be enforced, by VETS. Consequently, the Agency is not including this provision in its estimate of the paperwork burden attributable to this final rule.

The first four paperwork requirements described in the Table above have been approved by OMB, # 1293–0011, which expires December, 2008. The final paperwork requirement relating to VETS Form 1010, was previously approved by OMB, # 1293–0002, which expires March, 2007.

*B. Final Economic Analysis and Regulatory Flexibility Certification*

VETS is treating this final rule as a ''significant regulatory action'' within the meaning of Executive Order 12866 (58 FR 51735; September 30, 1993) (''Order''), because of its importance to the public and the Department's priorities. However, because this final rule is not ''economically significant'' as defined in section 3(f)(1) of EO 12866 as discussed below, it does not require a full economic-impact analysis under section 6(a)(3)(C) of the Order. Additionally, the rule will impose no additional costs on any private or public sector entity, and will not meet any of the criteria for an economically significant or major rule specified by the Order or relevant statutes. Consequently, the final rule is not a ''major rule'' under the Unfunded Mandates Reform Act, 2 U.S.C. 1501, et seq., or Section 801 of the Small Business Regulatory Enforcement Fairness Act (SBREFA), 5 U.S.C. 801.

One commenter took exception to the cost determinations made by VETS in the proposed rule. This commenter had concerns about the cost of the proposed regulations for small businesses. In expressing these concerns, the commenter asserted:

> Because there is no size limitation in the USERRA, these regulations will apply to employers of any size. To say that this regulation will impose no costs at all on employers is unrealistic * * *. To the extent that employers have handled [compliance with USERRA] differently because of ambiguity, these changes will likely have a cost impact which will apply to all employers, even the smallest. Merely by publishing these regulations, employers will be on more notice about their obligations and[,] therefore[,] will be more likely to come into compliance.

The Agency concludes that this commenter misunderstood its use of the term ''cost'' as used in this context. Accordingly, VETS used the term in the proposal to describe additional costs, over and above the costs of complying with USERRA, that employers would bear in complying with the proposed regulations. In addition, the commenter noted that compliance with the proposed standard may increase employer costs because some employers may have misinterpreted the USERRA provisions, or because additional employers may come into compliance. However, VETS believes that employers have an existing statutory obligation to comply with USERRA, and any increase in compliance, or alteration in the manner of compliance, that results from the final rule only ensures that employers are meeting these statutory obligations. Consequently, the final regulations will afford service members with all of the benefits to which they are entitled under USERRA.

Another commenter objected to the statement in the proposal that the regulations would ''impose no new legal requirements'' and ''would not impose any additional costs on employers'' (Ex. 60). Accordingly, this commenter asserted that proposed section 1002.266(c) would increase compliance costs by holding contributing employers to a multiemployer pension plan responsible for the participation, vesting, and benefit-accrual protections to which returning service members would be entitled, even though they were not the pre-service employers of that employee. The Agency has responded to this comment in Subpart E of Section V (''Section-by-Section Summary of Final Rule and Discussion of Comments'') of this preamble. Based on this response, VETS believes that final section 1002.266(c) will not increase the cost to employers of complying with these final regulations.

In the proposed rule, VETS noted that the Senate Committee report accompanying the passage of USERRA noted that the ''[Congressional Budget Office] estimates that the enactment of [section 9 of USERRA, transitioning from the predecessor veterans' reemployment rights law to USERRA] would entail no significant cost.'' (See

S. Rep. No. 103–158, at 82 (1993)). The same report states further on page 84, under the heading ''Regulatory Impact Statement,'' that:

[T]he Committee [on Veterans' Affairs] has made an evaluation of the regulatory impact which would be incurred in carrying out the Committee bill. The Committee finds that the enactment of the bill would not entail any significant new regulation of individuals or business * * *.

In this regard, USERRA is the latest in a series of laws protecting veterans' employment and reemployment rights going back to the Selective Training and Service Act of 1940. USERRA's immediate predecessor was the Veterans' Reemployment Rights Act (''VRRA''). USERRA continued the fundamental protections of the VRRA and the case law interpreting the VRRA while clarifying that law, and VETS considers that by recodifying and clarifying longstanding statutory and case law under the VRRA, USERRA did not impose new economic burdens on employers.

This final rule implements USERRA, and while it imposes no new costs, VETS considers that it may provide some economic benefits. For example, delays may occur when employers respond to employee claims and inquiries concerning USERRA due to confusion or ambiguity as to the correct interpretation of USERRA. Moreover, some employee claims are contested in part because of a lack of employer knowledge about the statute. The final rule should reduce these costs by: providing employers with accurate information necessary to respond efficiently and effectively to employee claims; potentially reducing the number of contested claims and the resulting need for administrative resolution or legal action; expediting the settlement of outstanding claims because employers and employees will have an enhanced knowledge of their rights and responsibilities under USERRA; and reducing the number of inquiries made by employers and employees to administrative agencies such as VETS and the Office of Personnel Management. In addition, by lessening the possibility of contested claims, the final rule also will reduce the likelihood that employees will receive liquidated damages from employers should the claims prove successful.

VETS noted in the proposal that it:

[E]xpects the rule to benefit both pension- and health-plan sponsors and participants by helping to dispel plan administrators' uncertainty about compliance with USERRA provisions, and by reducing delays and the risk of inadvertent noncompliance. The rule may assist participants and beneficiaries to better understand their USERRA rights as well, thereby averting disputes and lost opportunities to elect continuing health-plan coverage, or to obtain reinstated pension-plan coverage.

VETS maintains these views with respect to this final rule. Therefore, based on this discussion and the record evidence, VETS concludes that the final rule will not impose any additional costs on employers. Consequently, this final rule requires no final economic analysis. Furthermore, because the final rule imposes no costs on employers, VETS certifies that it will not have a significant impact on a substantial number of small businesses; accordingly, the Agency need not prepare a final regulatory flexibility analysis. In this regard, VETS finds that the economic burden of the final rule is equitably distributed across businesses, including small businesses, because the number of employees covered by the final rule will vary in proportion to the size of the business (i.e., small businesses have proportionally fewer covered employees than medium or large businesses).

*C. Unfunded Mandates*

The Congressional Budget Office (''CBO'') determined that State and local governments would incur no cost resulting from passage of USERRA (see S. Rep. No. 103–158, at 84 (1993)). Consequently, under this final rule, State and local governments will incur an obligation to comply with USERRA to the same extent as private employers; therefore, when USERRA (and this final rule) impose no cost on private employers, they also impose no cost on State and local government employers. The House Committee Report for USERRA (H.R. Rep. No. 103–65, Pt. I, at 49–51 (1993)) contained similar CBO language. However, the CBO determined that, because of changes to Thrift Savings Plan provisions, the cost for the Federal government to comply with USERRA are about $1 million in FY 1994 and 1995, and zero cost thereafter.

The Agency reviewed this final rule according to the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*) and Executive Order 12875 (58 FR 58093; October 26, 1993). Based on the CBO determinations described in the previous paragraph, the Agency has determined that this final rule does not include any Federal mandate that will result in increased expenditures by State, local, or tribal governments in the aggregate of more than $100 million, or increased expenditures by the private sector of more than $100 million. Therefore, the Agency concludes that this final rule: (1) Will not affect State, local, or tribal entities significantly or uniquely; (2) does not contain an unfunded mandate requiring consultation with these entities; and (3) will not impose substantial direct compliance costs on Native American tribal governments. Accordingly, this final rule does not mandate that State, local, or tribal governments adopt new, unfunded regulatory obligations.

*D. Federalism*

This final rule does not have federalism implications as specified under Executive Order 13132 (64 FR 43255; August 10, 1999) because it has no 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. Section 4302 of USERRA provides that its provisions supersede any and all laws of the States as they relate to any rights and benefits provided under USERRA if such State laws reduce, limit, or eliminate in any manner any right or benefit provided by USERRA. Accordingly, the requirements implemented by this final rule do not alter these fundamental statutory provisions with respect to military service members' and veterans' employment and reemployment rights and benefits. Therefore, this final rule has no implications for the States, or for the relationship or distribution of power between the national government and the States.

*E. Congressional Review Act and Executive Order 12866*

Consistent with the Congressional Review Act, 5 U.S.C. 801, *et seq.*, the Department will submit to Congress and to the Comptroller General of the United States, a report regarding the issuance of this Final Rule prior to the effective date set forth at the outset of this document.

OMB has determined that this rule is not a ''major rule'' as defined by the Congressional Review Act (Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996), and that it is not ''economically significant,'' as defined by Executive Order 12866, as it will not have an economic impact of $100 million in any one year. USERRA is the latest in a series of laws protecting service members' employment and reemployment rights dating back to 1940, and USERRA continues the fundamental protections contained in those longstanding statutes. As the Senate Committee report accompanying the passage of USERRA noted, the Congressional Budget Office determined that the enactment of USERRA would impose no new economic burdens on

employers. See S. Rep. No. 103–158, at 82 (1993). Similarly, the Senate Report's Regulatory Impact Statement concluded that USERRA's regulatory impact ''would not entail any significant new regulation of individuals or business* * *.'' As would be expected, therefore, the vast majority of these regulations simply restate statutory requirements that would be self-implementing, even in the absence of the regulatory action. Accordingly, USERRA and promulgation of this rule impose no additional costs on employers or on any private or public sector entity that would approach the $100 million threshold.

As noted above, VETS received two comments regarding its conclusion in the proposed rule that the regulation would not impose any additional costs on the regulated community. One comment suggested that the final rule would increase compliance costs to employers because the clarifications contained in the rule may result in modifications to employers' compliance strategies and the novelty of the rule may increase overall compliance. VETS recognizes that the rule may lead to an increase in compliance, but the complexity inherent in assessing the economic costs and benefits of this rule and the relative paucity of data associated with implementation costs provide insufficient information to estimate what the effect of additional compliance might be. However, as discussed below, VETS does not consider that such costs would approach the $100 million threshold, and no commenter suggested that it would.

One of the primary effects of USERRA is that employees who have been absent from civilian employment due to military service will be reinstated to the appropriate reemployment position. Because employees absent from employment for military service are not required to be compensated by their civilian employer during that service, and because temporary replacements hired during the period of military service may be displaced by returning service members, costs to employers in complying with the reinstatement obligation will reflect insubstantial administrative expenditures. An additional effect of USERRA is its reduction of employment discrimination against members of the uniformed service, which presents no additional costs to compliant employers and offers an intangible economic good to the economy, which is moved toward a discrimination-free model. Similarly, USERRA's provision that employees may continue their employment-based health coverage during uniformed service specifies that employees must pay for that benefit at no more than 102% of the cost of the premium, so that employers' premium and administrative costs of maintaining the coverage are minimized.

USERRA's requirement that employers reasonably accommodate employees returning from service with a service-related illness or injury presents some costs to employers. However, when costs to the economy associated with a similar requirement under the Americans with Disabilities Act, 42 U.S.C 12101, were evaluated, those costs were calculated to be well below the $100 million threshold, in part due to increased productivity resulting from the optimization of investment in human capital. See 56 FR 8578, 8582–8584 (Feb. 28, 1991). Moreover, by comparison, the ADA's ''reasonable accommodation'' requirement is broader than USERRA's in that it is not limited to the provision of reasonable accommodations only to employees returning from service with service-related illnesses or injuries. Accordingly, reasonable accommodation costs to employers under USERRA should be less significant than similar costs generated by implementation of the ADA.

USERRA's provision that employers maintain their obligation to provide pension benefits to employees absent from employment due to military service as if there were no break in service does impose costs on employers and plans. However, VETS estimates that such costs will be incurred by a small percentage of covered employers, and that the resulting impact on the economy from this provision is not great. A second comment suggested that the rule imposed additional pension-related costs on post-service employers beyond those costs already imposed by the statute. However, VETS has narrowed the provision of the rule at issue in the comment, and concludes that the provision includes no additional regulatory costs beyond those associated with statutory compliance. As a final note, the benefits of USERRA and this implementing regulation include outcomes that cannot be readily and precisely monetized or quantified but that greatly outweigh any minimal additional costs. As noted above, these include the societal benefit of nondiscrimination in employment. Further, by protecting employment and reemployment rights of service members, USERRA and this regulation remove disincentives to enlistment and promote a national defense. After considering all comments, the conclusion that this rule presents minimal additional costs to private or public sector entities remains sound. Accordingly, this regulation is not a major rule for purposes of the Congressional Review Act, nor economically significant for purposes of Executive Order 12866.

## VII. Statutory and Rulemaking Background

The Uniformed Services Employment and Reemployment Rights Act (USERRA), Pub. L. 103–353, 108 Stat. 3150 (codified at 38 U.S.C. 4301–4333), became law on October 13, 1994, replacing the Veterans' Reemployment Rights Act (VRRA). Congress enacted USERRA, in part, to clarify the ambiguities of the VRRA and strengthen the rights of service members and veterans. USERRA's guiding principle is that a person who leaves civilian employment to perform service in the uniformed services is entitled to return to that job with the seniority, status, and rate of pay that would have accrued during the absence, provided the person meets USERRA's eligibility criteria. USERRA applies to voluntary or involuntary military service in peacetime as well as wartime. Its provisions apply to virtually all employers, regardless of size. USERRA also codifies 55 years of accumulated case law and clarifies previously existing rights and obligations. For most purposes, USERRA applies to reemployments initiated on or after December 12, 1994. Congress enacted amendments to the Act in 1996, 1998, 2000, and 2004.

## VIII. Statutory Authority

This regulation is proposed pursuant to the authority in section 4331(a) of USERRA (Pub. L. 103–353, 108 Stat. 3150, 38 U.S.C. 4331(a)).

## List of Subjects in 20 CFR Part 1002

Labor, Veterans, Pensions.

## Final Regulation

■ For the reasons set out in the preamble, the Department revises Part 1002 of Chapter IX of Title 20 of the Code of Federal Regulations implementing the provisions of USERRA as follows:

## PART 1002—REGULATIONS UNDER THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994

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**Authority:** Veterans Benefits Improvement Act of 2004 (VBIA) Pub. L. 108–454 (Dec. 10, 2004).

## Subpart A—Introduction to the Regulations under the Uniformed Services Employment and Reemployment Rights Act of 1994

### General Provisions

#### § 1002.1 What is the purpose of this part?

This part implements the Uniformed Services Employment and Reemployment Rights Act of 1994 (''USERRA'' or ''the Act''). 38 U.S.C. 4301–4334. USERRA is a law that establishes certain rights and benefits for employees, and duties for employers. USERRA affects employment, reemployment, and retention in employment, when employees serve or have served in the uniformed services. There are five subparts to these regulations. Subpart A gives an introduction to the USERRA regulations. Subpart B describes USERRA's anti-discrimination and anti-retaliation provisions. Subpart C explains the steps that must be taken by a uniformed service member who wants to return to his or her previous civilian employment. Subpart D describes the rights, benefits, and obligations of persons absent from employment due to service in the uniformed services, including rights and obligations related to health plan coverage. Subpart E describes the rights, benefits, and obligations of the returning veteran or service member. Subpart F explains the role of the Department of Labor in enforcing and giving assistance under USERRA. These regulations implement USERRA as it applies to States, local governments, and private employers. Separate regulations published by the Federal Office of Personnel Management implement USERRA for Federal executive agency employers and employees.

#### § 1002.2 Is USERRA a new law?

USERRA is the latest in a series of laws protecting veterans' employment and reemployment rights going back to the Selective Training and Service Act of 1940. USERRA's immediate predecessor was commonly referred to as the Veterans' Reemployment Rights Act (VRRA), which was enacted as section 404 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974. In enacting USERRA, Congress emphasized USERRA's continuity with the VRRA and its intention to clarify and strengthen that law. Congress also emphasized that Federal laws protecting veterans' employment and reemployment rights for the past fifty years had been successful and that the large body of case law that had developed under those statutes remained in full force and effect, to the extent it is consistent with USERRA. USERRA authorized the Department of Labor to publish regulations implementing the Act for State, local government, and private employers. USERRA also authorized the Office of Personnel Management to issue regulations implementing the Act for Federal executive agencies (other than some Federal intelligence agencies). USERRA established a separate program for employees of some Federal intelligence agencies.

#### § 1002.3 When did USERRA become effective?

USERRA became law on October 13, 1994. USERRA's reemployment provisions apply to members of the uniformed services seeking civilian reemployment on or after December 12, 1994. USERRA's anti-discrimination and anti-retaliation provisions became effective on October 13, 1994.

#### § 1002.4 What is the role of the Secretary of Labor under USERRA?

(a) USERRA charges the Secretary of Labor (through the Veterans' Employment and Training Service) with providing assistance to any person with respect to the employment and reemployment rights and benefits to which such person is entitled under the Act. More information about the Secretary's role in providing this assistance is contained in Subpart F.

(b) USERRA also authorizes the Secretary of Labor to issue regulations implementing the Act with respect to States, local governments, and private employers. These regulations are issued under this authority.

(c) The Secretary of Labor delegated authority to the Assistant Secretary for Veterans' Employment and Training for administering the veterans' reemployment rights program by Secretary's Order 1–83 (February 3, 1983) and for carrying out the functions and authority vested in the Secretary pursuant to USERRA by memorandum of April 22, 2002 (67 FR 31827).

#### § 1002.5 What definitions apply to USERRA?

(a) *Attorney General* means the Attorney General of the United States or any person designated by the Attorney General to carry out a responsibility of the Attorney General under USERRA.

(b) *Benefit, benefit of employment, or rights and benefits* means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues to the employee because of an employment contract, employment agreement, or employer policy, plan, or practice. The term includes rights and benefits under a pension plan, health plan, or employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or the location of employment.

(c) *Employee* means any person employed by an employer. The term also includes any person who is a citizen, national or permanent resident alien of the United States who is employed in a workplace in a foreign country by an employer that is an entity incorporated or organized in the United States, or that is controlled by an entity organized in the United States. ''Employee'' includes the former employees of an employer.

(d)(1) *Employer*, except as provided in paragraphs (d)(2) and (3) of this section, means any person, institution, organization, or other entity that pays salary or wages for work performed, or

that has control over employment opportunities, including—

(i) A person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities, except in the case that such entity has been delegated functions that are purely ministerial in nature, such as maintenance of personnel files or the preparation of forms for submission to a government agency;

(ii) The Federal Government;

(iii) A State;

(iv) Any successor in interest to a person, institution, organization, or other entity referred to in this definition; and,

(v) A person, institution, organization, or other entity that has denied initial employment in violation of 38 U.S.C. 4311, USERRA's anti-discrimination and anti-retaliation provisions.

(2) In the case of a National Guard technician employed under 32 U.S.C. 709, the term ''employer'' means the adjutant general of the State in which the technician is employed.

(3) An employee pension benefit plan as described in section 3(2) of the Employee Retirement Income Security Act of 1974 (ERISA)(29 U.S.C. 1002(2)) is considered an employer for an individual that it does not actually employ only with respect to the obligation to provide pension benefits.

(e) *Health plan* means an insurance policy, insurance contract, medical or hospital service agreement, membership or subscription contract, or other arrangement under which health services for individuals are provided or the expenses of such services are paid.

(f) *National Disaster Medical System (NDMS) is an agency within the Federal Emergency Management Agency, Department of Homeland Security, established by the* Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Public Law 107–188. *The NDMS* provides medical-related assistance to respond to the needs of victims of public health emergencies. Participants in the NDMS are volunteers who serve as intermittent Federal employees when activated. For purposes of USERRA coverage only, these persons are treated as members of the uniformed services when they are activated to provide assistance in response to a public health emergency or to be present for a short period of time when there is a risk of a public health emergency, or when they are participating in authorized training. See 42 U.S.C. 300hh–11(e).

(g) *Notice*, when the employee is required to give advance notice of service, means any written or verbal notification of an obligation or intention to perform service in the uniformed services provided to an employer by the employee who will perform such service, or by the uniformed service in which the service is to be performed.

(h) *Qualified*, with respect to an employment position, means having the ability to perform the essential tasks of the position.

(i) *Reasonable efforts*, in the case of actions required of an employer, means actions, including training provided by an employer that do not place an undue hardship on the employer.

(j) *Secretary* means the Secretary of Labor or any person designated by the Secretary of Labor to carry out an activity under USERRA and these regulations, unless a different office is expressly indicated in the regulation.

(k) *Seniority* means longevity in employment together with any benefits of employment that accrue with, or are determined by, longevity in employment.

(l) *Service in the uniformed services* means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority. Service in the uniformed services includes active duty, active and inactive duty for training, National Guard duty under Federal statute, and a period for which a person is absent from a position of employment for an examination to determine the fitness of the person to perform such duty. The term also includes a period for which a person is absent from employment to perform funeral honors duty as authorized by law (10 U.S.C. 12503 or 32 U.S.C. 115). The Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. 107–188, provides that service as an intermittent disaster-response appointee upon activation of the National Disaster Medical System (NDMS) or as a participant in an authorized training program is deemed ''service in the uniformed services.'' 42 U.S.C. 300hh–11(e)(3).

(m) *State* means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States (including the agencies and political subdivisions thereof); however, for purposes of enforcement of rights under 38 U.S.C. 4323, a political subdivision of a State is a private employer.

(n) *Undue hardship*, in the case of actions taken by an employer, means an action requiring significant difficulty or expense, when considered in light of—

(1) The nature and cost of the action needed under USERRA and these regulations;

(2) The overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(3) The overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and,

(4) The type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer.

(o) *Uniformed services* means the Armed Forces; the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty; the commissioned corps of the Public Health Service; and any other category of persons designated by the President in time of war or national emergency. For purposes of USERRA coverage only, service as an intermittent disaster response appointee of the NDMS when federally activated or attending authorized training in support of their Federal mission is deemed ''service in the uniformed services,'' although such appointee is not a member of the ''uniformed services'' as defined by USERRA.

### § 1002.6 What types of service in the uniformed services are covered by USERRA?

USERRA's definition of ''service in the uniformed services'' covers all categories of military training and service, including duty performed on a voluntary or involuntary basis, in time of peace or war. Although most often understood as applying to National Guard and reserve military personnel, USERRA also applies to persons serving in the active components of the Armed Forces. Certain types of service specified in 42 U.S.C. 300hh-11 by members of the National Disaster Medical System are covered by USERRA.

### § 1002.7 How does USERRA relate to other laws, public and private contracts, and employer practices?

(a) USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of

those it protects. In other words, an employer may provide greater rights and benefits than USERRA requires, but no employer can refuse to provide any right or benefit guaranteed by USERRA.

(b) USERRA supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA, including the establishment of additional prerequisites to the exercise of any USERRA right or the receipt of any USERRA benefit. For example, an employment contract that determines seniority based only on actual days of work in the place of employment would be superseded by USERRA, which requires that seniority credit be given for periods of absence from work due to service in the uniformed services.

(c) USERRA does not supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes an employment right or benefit that is more beneficial than, or is in addition to, a right or benefit provided under the Act. For example, although USERRA does not require an employer to pay an employee for time away from work performing service, an employer policy, plan, or practice that provides such a benefit is permissible under USERRA.

(d) If an employer provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA. For example, even though USERRA does not require it, an employer may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employer to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave.

## Subpart B—Anti-Discrimination and Anti-Retaliation

### Protection From Employer Discrimination and Retaliation

#### § 1002.18 What status or activity is protected from employer discrimination by USERRA?

An employer must not deny initial employment, reemployment, retention in employment, promotion, or any benefit of employment to an individual on the basis of his or her membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services.

#### § 1002.19 What activity is protected from employer retaliation by USERRA?

An employer must not retaliate against an individual by taking any adverse employment action against him or her because the individual has taken an action to enforce a protection afforded any person under USERRA; testified or otherwise made a statement in or in connection with a proceeding under USERRA; assisted or participated in a USERRA investigation: or, exercised a right provided for by USERRA.

#### § 1002.20 Does USERRA protect an individual who does not actually perform service in the uniformed services?

Yes. Employers are prohibited from taking actions against an individual for any of the activities protected by the Act, whether or not he or she has performed service in the uniformed services.

#### § 1002.21 Do the Act's prohibitions against discrimination and retaliation apply to all employment positions?

The prohibitions against discrimination and retaliation apply to all covered employers (including hiring halls and potential employers, see sections 1002.36 and .38) and employment positions, including those that are for a brief, nonrecurrent period, and for which there is no reasonable expectation that the employment position will continue indefinitely or for a significant period. However, USERRA's reemployment rights and benefits do not apply to such brief, nonrecurrent positions of employment.

#### § 1002.22 Who has the burden of proving discrimination or retaliation in violation of USERRA?

The individual has the burden of proving that a status or activity protected by USERRA was one of the reasons that the employer took action against him or her, in order to establish that the action was discrimination or retaliation in violation of USERRA. If the individual succeeds in proving that the status or activity protected by USERRA was one of the reasons the employer took action against him or her, the employer has the burden to prove the affirmative defense that it would have taken the action anyway.

#### § 1002.23 What must the individual show to carry the burden of proving that the employer discriminated or retaliated against him or her?

(a) In order to prove that the employer discriminated or retaliated against the individual, he or she must first show that the employer's action was motivated by one or more of the following:

(1) Membership or application for membership in a uniformed service;

(2) Performance of service, application for service, or obligation for service in a uniformed service;

(3) Action taken to enforce a protection afforded any person under USERRA;

(4) Testimony or statement made in or in connection with a USERRA proceeding;

(5) Assistance or participation in a USERRA investigation; or,

(6) Exercise of a right provided for by USERRA.

(b) If the individual proves that the employer's action was based on one of the prohibited motives listed in paragraph (a) of this section, the employer has the burden to prove the affirmative defense that the action would have been taken anyway absent the USERRA-protected status or activity.

## Subpart C—Eligibility For Reemployment

### General Eligibility Requirements for Reemployment

#### § 1002.32 What criteria must the employee meet to be eligible under USERRA for reemployment after service in the uniformed services?

(a) In general, if the employee has been absent from a position of civilian employment by reason of service in the uniformed services, he or she will be eligible for reemployment under USERRA by meeting the following criteria:

(1) The employer had advance notice of the employee's service;

(2) The employee has five years or less of cumulative service in the uniformed services in his or her employment relationship with a particular employer;

(3) The employee timely returns to work or applies for reemployment; and,

(4) The employee has not been separated from service with a disqualifying discharge or under other than honorable conditions.

(b) These general eligibility requirements have important qualifications and exceptions, which are described in detail in §§ 1002.73 through 1002.138. If the employee meets these eligibility criteria, then he or she is eligible for reemployment unless the employer establishes one of the defenses described in § 1002.139. The employment position to which the employee is entitled is described in §§ 1002.191 through 1002.199.

**§ 1002.33 Does the employee have to prove that the employer discriminated against him or her in order to be eligible for reemployment?**

No. The employee is not required to prove that the employer discriminated against him or her because of the employee's uniformed service in order to be eligible for reemployment.

## Coverage of Employers and Positions

**§ 1002.34 Which employers are covered by USERRA?**

(a) USERRA applies to all public and private employers in the United States, regardless of size. For example, an employer with only one employee is covered for purposes of the Act.

(b) USERRA applies to foreign employers doing business in the United States. A foreign employer that has a physical location or branch in the United States (including U.S. territories and possessions) must comply with USERRA for any of its employees who are employed in the United States.

(c) An American company operating either directly or through an entity under its control in a foreign country must also comply with USERRA for all its foreign operations, unless compliance would violate the law of the foreign country in which the workplace is located.

**§ 1002.35 Is a successor in interest an employer covered by USERRA?**

USERRA's definition of ''employer'' includes a successor in interest. In general, an employer is a successor in interest where there is a substantial continuity in operations, facilities, and workforce from the former employer. The determination whether an employer is a successor in interest must be made on a case-by-case basis using a multi-factor test that considers the following:

(a) Whether there has been a substantial continuity of business operations from the former to the current employer;

(b) Whether the current employer uses the same or similar facilities, machinery, equipment, and methods of production;

(c) Whether there has been a substantial continuity of employees;

(d) Whether there is a similarity of jobs and working conditions;

(e) Whether there is a similarity of supervisors or managers; and,

(f) Whether there is a similarity of products or services.

**§ 1002.36 Can an employer be liable as a successor in interest if it was unaware that an employee may claim reemployment rights when the employer acquired the business?**

Yes. In order to be a successor in interest, it is not necessary for an employer to have notice of a potential reemployment claim at the time of merger, acquisition, or other form of succession.

**§ 1002.37 Can one employee be employed in one job by more than one employer?**

Yes. Under USERRA, an employer includes not only the person or entity that pays an employee's salary or wages, but also includes a person or entity that has control over his or her employment opportunities, including a person or entity to whom an employer has delegated the performance of employment-related responsibilities. For example, if the employee is a security guard hired by a security company and he or she is assigned to a work site, the employee may report both to the security company and to the site owner. In such an instance, both employers share responsibility for compliance with USERRA. If the security company declines to assign the employee to a job because of a uniformed service obligation (for example, National Guard duties), then the security company could be in violation of the reemployment requirements and the anti-discrimination provisions of USERRA. Similarly, if the employer at the work site causes the employee's removal from the job position because of his or her uniformed service obligations, then the work site employer could be in violation of the reemployment requirements and the anti-discrimination provisions of USERRA.

**§ 1002.38 Can a hiring hall be an employer?**

Yes. In certain occupations (for example, longshoreman, stagehand, construction worker), the employee may frequently work for many different employers. A hiring hall operated by a union or an employer association typically assigns the employee to the jobs. In these industries, it may not be unusual for the employee to work his or her entire career in a series of short-term job assignments. The definition of ''employer'' includes a person, institution, organization, or other entity to which the employer has delegated the performance of employment-related responsibilities. A hiring hall therefore is considered the employee's employer if the hiring and job assignment functions have been delegated by an employer to the hiring hall. As the employer, a hiring hall has reemployment responsibilities to its employees. USERRA's anti-discrimination and anti-retaliation provisions also apply to the hiring hall.

**§ 1002.39 Are States (and their political subdivisions), the District of Columbia, the Commonwealth of Puerto Rico, and United States territories, considered employers?**

Yes. States and their political subdivisions, such as counties, parishes, cities, towns, villages, and school districts, are considered employers under USERRA. The District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and territories of the United States, are also considered employers under the Act.

**§ 1002.40 Does USERRA protect against discrimination in initial hiring decisions?**

Yes. The Act's definition of employer includes a person, institution, organization, or other entity that has denied initial employment to an individual in violation of USERRA's anti-discrimination provisions. An employer need not actually employ an individual to be his or her ''employer'' under the Act, if it has denied initial employment on the basis of the individual's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. Similarly, the employer would be liable if it denied initial employment on the basis of the individual's action taken to enforce a protection afforded to any person under USERRA, his or her testimony or statement in connection with any USERRA proceeding, assistance or other participation in a USERRA investigation, or the exercise of any other right provided by the Act. For example, if the individual has been denied initial employment because of his or her obligations as a member of the National Guard or Reserves, the company or entity denying employment is an employer for purposes of USERRA. Similarly, if an entity withdraws an offer of employment because the individual is called upon to fulfill an obligation in the uniformed services, the entity withdrawing the employment offer is an employer for purposes of USERRA.

**§ 1002.41 Does an employee have rights under USERRA even though he or she holds a temporary, part-time, probationary, or seasonal employment position?**

USERRA rights are not diminished because an employee holds a temporary, part-time, probationary, or seasonal employment position. However, an employer is not required to reemploy an employee if the employment he or she

left to serve in the uniformed services was for a brief, nonrecurrent period and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period. The employer bears the burden of proving this affirmative defense.

**§ 1002.42 What rights does an employee have under USERRA if he or she is on layoff, on strike, or on a leave of absence?**

(a) If an employee is laid off with recall rights, on strike, or on a leave of absence, he or she is an employee for purposes of USERRA. If the employee is on layoff and begins service in the uniformed services, or is laid off while performing service, he or she may be entitled to reemployment on return if the employer would have recalled the employee to employment during the period of service. Similar principles apply if the employee is on strike or on a leave of absence from work when he or she begins a period of service in the uniformed services.

(b) If the employee is sent a recall notice during a period of service in the uniformed services and cannot resume the position of employment because of the service, he or she still remains an employee for purposes of the Act. Therefore, if the employee is otherwise eligible, he or she is entitled to reemployment following the conclusion of the period of service even if he or she did not respond to the recall notice.

(c) If the employee is laid off before or during service in the uniformed services, and the employer would not have recalled him or her during that period of service, the employee is not entitled to reemployment following the period of service simply because he or she is a covered employee. Reemployment rights under USERRA cannot put the employee in a better position than if he or she had remained in the civilian employment position.

**§ 1002.43 Does an individual have rights under USERRA even if he or she is an executive, managerial, or professional employee?**

Yes. USERRA applies to all employees. There is no exclusion for executive, managerial, or professional employees.

**§ 1002.44 Does USERRA cover an independent contractor?**

(a) No. USERRA does not provide protections for an independent contractor.

(b) In deciding whether an individual is an independent contractor, the following factors need to be considered:

(1) The extent of the employer's right to control the manner in which the individual's work is to be performed;

(2) The opportunity for profit or loss that depends upon the individual's managerial skill;

(3) Any investment in equipment or materials required for the individual's tasks, or his or her employment of helpers;

(4) Whether the service the individual performs requires a special skill;

(5) The degree of permanence of the individual's working relationship; and,

(6) Whether the service the individual performs is an integral part of the employer's business.

(c) No single one of these factors is controlling, but all are relevant to determining whether an individual is an employee or an independent contractor.

## Coverage of Service in the Uniformed Services

**§ 1002.54 Are all military fitness examinations considered ''service in the uniformed services?''**

Yes. USERRA's definition of ''service in the uniformed services'' includes a period for which an employee is absent from a position of employment for the purpose of an examination to determine his or her fitness to perform duty in the uniformed services. Military fitness examinations can address more than physical or medical fitness, and include evaluations for mental, educational, and other types of fitness. Any examination to determine an employee's fitness for service is covered, whether it is an initial or recurring examination. For example, a periodic medical examination required of a Reserve component member to determine fitness for continued service is covered.

**§ 1002.55 Is all funeral honors duty considered ''service in the uniformed services?''**

(a) USERRA's definition of ''service in the uniformed services'' includes a period for which an employee is absent from employment for the purpose of performing authorized funeral honors duty under 10 U.S.C. 12503 (members of Reserve ordered to perform funeral honors duty) or 32 U.S.C. 115 (Member of Air or Army National Guard ordered to perform funeral honors duty).

(b) Funeral honors duty performed by persons who are not members of the uniformed services, such as members of veterans' service organizations, is not ''service in the uniformed services.''

**§ 1002.56 What types of service in the National Disaster Medical System are considered ''service in the uniformed services?''**

Under a provision of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, 42 U.S.C. 300hh 11(e)(3), ''service in the uniformed services'' includes service performed as an intermittent disaster-response appointee upon activation of the National Disaster Medical System or participation in an authorized training program, even if the individual is not a member of the uniformed services.

**§ 1002.57 Is all service as a member of the National Guard considered ''service in the uniformed services?''**

The National Guard has a dual status. It is a Reserve component of the Army, or, in the case of the Air National Guard, of the Air Force. Simultaneously, it is a State military force subject to call-up by the State Governor for duty not subject to Federal control, such as emergency duty in cases of floods or riots. National Guard members may perform service under either Federal or State authority, but only Federal National Guard service is covered by USERRA.

(a) National Guard service under Federal authority is protected by USERRA. Service under Federal authority includes active duty performed under Title 10 of the United States Code. Service under Federal authority also includes duty under Title 32 of the United States Code, such as active duty for training, inactive duty training, or full-time National Guard duty.

(b) National Guard service under authority of State law is not protected by USERRA. However, many States have laws protecting the civilian job rights of National Guard members who serve under State orders. Enforcement of those State laws is not covered by USERRA or these regulations.

**§ 1002.58 Is service in the commissioned corps of the Public Health Service considered ''service in the uniformed services?''**

Yes. Service in the commissioned corps of the Public Health Service (PHS) is ''service in the uniformed services'' under USERRA.

**§ 1002.59 Are there any circumstances in which special categories of persons are considered to perform ''service in the uniformed services?''**

Yes. In time of war or national emergency the President has authority to designate any category of persons as a ''uniformed service'' for purposes of USERRA. If the President exercises this authority, service as a member of that category of persons would be ''service in the uniformed services'' under USERRA.

**§ 1002.60 Does USERRA cover an individual attending a military service academy?**

Yes. Attending a military service academy is considered uniformed service for purposes of USERRA. There are four service academies: The United States Military Academy (West Point, New York), the United States Naval Academy (Annapolis, Maryland), the United States Air Force Academy (Colorado Springs, Colorado), and the United States Coast Guard Academy (New London, Connecticut).

**§ 1002.61 Does USERRA cover a member of the Reserve Officers Training Corps?**

Yes, under certain conditions.

(a) Membership in the Reserve Officers Training Corps (ROTC) or the Junior ROTC is not ''service in the uniformed services.'' However, some Reserve and National Guard enlisted members use a college ROTC program as a means of qualifying for commissioned officer status. National Guard and Reserve members in an ROTC program may at times, while participating in that program, be receiving active duty and inactive duty training service credit with their unit. In these cases, participating in ROTC training sessions is considered ''service in the uniformed services,'' and qualifies a person for protection under USERRA's reemployment and anti-discrimination provisions.

(b) Typically, an individual in a College ROTC program enters into an agreement with a particular military service that obligates such individual to either complete the ROTC program and accept a commission or, in case he or she does not successfully complete the ROTC program, to serve as an enlisted member. Although an individual does not qualify for reemployment protection, except as specified in (a) above, he or she is protected under USERRA's anti-discrimination provisions because, as a result of the agreement, he or she has applied to become a member of the uniformed services and has incurred an obligation to perform future service.

**§ 1002.62 Does USERRA cover a member of the Commissioned Corps of the National Oceanic and Atmospheric Administration, the Civil Air Patrol, or the Coast Guard Auxiliary?**

No. Although the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA) is a ''uniformed service'' for some purposes, it is not included in USERRA's definition of this term. Service in the Civil Air Patrol and the Coast Guard Auxiliary similarly is not considered ''service in the uniformed services'' for purposes of USERRA. Consequently, service performed in the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA), the Civil Air Patrol, and the Coast Guard Auxiliary is not protected by USERRA.

## Absence From a Position of Employment Necessitated by Reason of Service in the Uniformed Services

**§ 1002.73 Does service in the uniformed services have to be an employee's sole reason for leaving an employment position in order to have USERRA reemployment rights?**

No. If absence from a position of employment is necessitated by service in the uniformed services, and the employee otherwise meets the Act's eligibility requirements, he or she has reemployment rights under USERRA, even if the employee uses the absence for other purposes as well. An employee is not required to leave the employment position for the sole purpose of performing service in the uniformed services. For example, if the employee is required to report to an out of State location for military training and he or she spends off-duty time during that assignment moonlighting as a security guard or visiting relatives who live in that State, the employee will not lose reemployment rights simply because he or she used some of the time away from the job to do something other than attend the military training. Also, if an employee receives advance notification of a mobilization order, and leaves his or her employment position in order to prepare for duty, but the mobilization is cancelled, the employee will not lose any reemployment rights.

**§ 1002.74 Must the employee begin service in the uniformed services immediately after leaving his or her employment position in order to have USERRA reemployment rights?**

No. At a minimum, an employee must have enough time after leaving the employment position to travel safely to the uniformed service site and arrive fit to perform the service. Depending on the specific circumstances, including the duration of service, the amount of notice received, and the location of the service, additional time to rest, or to arrange affairs and report to duty, may be necessitated by reason of service in the uniformed services. The following examples help to explain the issue of the period of time between leaving civilian employment and beginning of service in the uniformed services:

(a) If the employee performs a full overnight shift for the civilian employer and travels directly from the work site to perform a full day of uniformed service, the employee would not be considered fit to perform the uniformed service. An absence from that work shift is necessitated so that the employee can report for uniformed service fit for duty.

(b) If the employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.

(c) If the employee leaves a position of employment in order to enlist or otherwise perform service in the uniformed services and, through no fault of his or her own, the beginning date of the service is delayed, this delay does not terminate any reemployment rights.

## Requirement of Notice

**§ 1002.85 Must the employee give advance notice to the employer of his or her service in the uniformed services?**

(a) Yes. The employee, or an appropriate officer of the uniformed service in which his or her service is to be performed, must notify the employer that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below. In cases in which an employee is employed by more than one employer, the employee, or an appropriate office of the uniformed service in which his or her service is to be performed, must notify each employer that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below.

(b) The Department of Defense USERRA regulations at 32 CFR 104.3 provide that an ''appropriate officer'' can give notice on the employee's behalf. An ''appropriate officer'' is a commissioned, warrant, or non-commissioned officer authorized to give such notice by the military service concerned.

(c) The employee's notice to the employer may be either verbal or written. The notice may be informal and does not need to follow any particular format.

(d) Although USERRA does not specify how far in advance notice must be given to the employer, an employee should provide notice as far in advance as is reasonable under the circumstances. In regulations promulgated by the Department of Defense under USERRA, 32 CFR 104.6(a)(2)(i)(B), the Defense

Department ''strongly recommends that advance notice to civilian employers be provided at least 30 days prior to departure for uniformed service when it is feasible to do so.''

**§ 1002.86 When is the employee excused from giving advance notice of service in the uniformed services?**

The employee is required to give advance notice of pending service unless giving such notice is prevented by military necessity, or is otherwise impossible or unreasonable under all the circumstances.

(a) Only a designated authority can make a determination of ''military necessity,'' and such a determination is not subject to judicial review. Guidelines for defining ''military necessity'' appear in regulations issued by the Department of Defense at 32 CFR 104.3. In general, these regulations cover situations where a mission, operation, exercise or requirement is classified, or could be compromised or otherwise adversely affected by public knowledge. In certain cases, the Secretary of Homeland Security, in consultation with the Secretary of Defense, can make a determination that giving of notice by intermittent disaster-response appointees of the National Disaster Medical System is precluded by ''military necessity.'' See 42 U.S.C. 300hh–11(e)(3)(B).

(b) It may be impossible or unreasonable to give advance notice under certain circumstances. Such circumstances may include the unavailability of the employee's employer or the employer's representative, or a requirement that the employee report for uniformed service in an extremely short period of time.

**§ 1002.87 Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?**

No. The employee is not required to ask for or get his or her employer's permission to leave to perform service in the uniformed services. The employee is only required to give the employer notice of pending service.

**§ 1002.88 Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?**

No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.

## Period of Service

**§ 1002.99 Is there a limit on the total amount of service in the uniformed services that an employee may perform and still retain reemployment rights with the employer?**

Yes. In general, the employee may perform service in the uniformed services for a cumulative period of up to five (5) years and retain reemployment rights with the employer. The exceptions to this rule are described below.

**§ 1002.100 Does the five-year service limit include all absences from an employment position that are related to service in the uniformed services?**

No. The five-year period includes only the time the employee spends actually performing service in the uniformed services. A period of absence from employment before or after performing service in the uniformed services does not count against the five-year limit. For example, after the employee completes a period of service in the uniformed services, he or she is provided a certain amount of time, depending upon the length of service, to report back to work or submit an application for reemployment. The period between completing the uniformed service and reporting back to work or seeking reemployment does not count against the five-year limit.

**§ 1002.101 Does the five-year service limit include periods of service that the employee performed when he or she worked for a previous employer?**

No. An employee is entitled to a leave of absence for uniformed service for up to five years with each employer for whom he or she works. When the employee takes a position with a new employer, the five-year period begins again regardless of how much service he or she performed while working in any previous employment relationship. If an employee is employed by more than one employer, a separate five-year period runs as to each employer independently, even if those employers share or co-determine the employee's terms and conditions of employment.

**§ 1002.102 Does the five-year service limit include periods of service that the employee performed before USERRA was enacted?**

It depends. USERRA provides reemployment rights to which an employee may become entitled beginning on or after December 12, 1994, but any uniformed service performed before December 12, 1994, that was counted against the service limitations of the previous law (the Veterans Reemployment Rights Act), also counts against USERRA's five-year limit.

**§ 1002.103 Are there any types of service in the uniformed services that an employee can perform that do not count against USERRA's five-year service limit?**

(a) USERRA creates the following exceptions to the five-year limit on service in the uniformed services:

(1) Service that is required beyond five years to complete an initial period of obligated service. Some military specialties require an individual to serve more than five years because of the amount of time or expense involved in training. If the employee works in one of those specialties, he or she has reemployment rights when the initial period of obligated service is completed;

(2) If the employee was unable to obtain orders releasing him or her from service in the uniformed services before the expiration of the five-year period, and the inability was not the employee's fault;

(3)(i) Service performed to fulfill periodic National Guard and Reserve training requirements as prescribed by 10 U.S.C. 10147 and 32 U.S.C. 502(a) and 503; and,

(ii) Service performed to fulfill additional training requirements determined and certified by a proper military authority as necessary for the employee's professional development, or to complete skill training or retraining;

(4) Service performed in a uniformed service if he or she was ordered to or retained on active duty under:

(i) 10 U.S.C. 688 (involuntary active duty by a military retiree);

(ii) 10 U.S.C. 12301(a) (involuntary active duty in wartime);

(iii) 10 U.S.C. 12301(g) (retention on active duty while in captive status);

(iv) 10 U.S.C. 12302 (involuntary active duty during a national emergency for up to 24 months);

(v) 10 U.S.C. 12304 (involuntary active duty for an operational mission for up to 270 days);

(vi) 10 U.S.C. 12305 (involuntary retention on active duty of a critical person during time of crisis or other specific conditions);

(vii) 14 U.S.C. 331 (involuntary active duty by retired Coast Guard officer);

(viii) 14 U.S.C. 332 (voluntary active duty by retired Coast Guard officer);

(ix) 14 U.S.C. 359 (involuntary active duty by retired Coast Guard enlisted member);

(x) 14 U.S.C. 360 (voluntary active duty by retired Coast Guard enlisted member);

(xi) 14 U.S.C. 367 (involuntary retention of Coast Guard enlisted member on active duty); and

(xii) 14 U.S.C. 712 (involuntary active duty by Coast Guard Reserve member for natural or man-made disasters).

(5) Service performed in a uniformed service if the employee was ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(6) Service performed in a uniformed service if the employee was ordered to active duty (other than for training) in support of an operational mission for which personnel have been ordered to active duty under 10 U.S.C. 12304, as determined by a proper military authority;

(7) Service performed in a uniformed service if the employee was ordered to active duty in support of a critical mission or requirement of the uniformed services as determined by the Secretary concerned; and,

(8) Service performed as a member of the National Guard if the employee was called to respond to an invasion, danger of invasion, rebellion, danger of rebellion, insurrection, or the inability of the President with regular forces to execute the laws of the United States.

(b) Service performed to mitigate economic harm where the employee's employer is in violation of its employment or reemployment obligations to him or her.

**§ 1002.104 Is the employee required to accommodate his or her employer's needs as to the timing, frequency or duration of service?**

No. The employee is not required to accommodate his or her employer's interests or concerns regarding the timing, frequency, or duration of uniformed service. The employer cannot refuse to reemploy the employee because it believes that the timing, frequency or duration of the service is unreasonable. However, the employer is permitted to bring its concerns over the timing, frequency, or duration of the employee's service to the attention of the appropriate military authority. Regulations issued by the Department of Defense at 32 CFR 104.4 direct military authorities to provide assistance to an employer in addressing these types of employment issues. The military authorities are required to consider requests from employers of National Guard and Reserve members to adjust scheduled absences from civilian employment to perform service.

## Application for Reemployment

**§ 1002.115 Is the employee required to report to or submit a timely application for reemployment to his or her pre-service employer upon completing the period of service in the uniformed services?**

Yes. Upon completing service in the uniformed services, the employee must notify the pre-service employer of his or her intent to return to the employment position by either reporting to work or submitting a timely application for reemployment. Whether the employee is required to report to work or submit a timely application for reemployment depends upon the length of service, as follows:

(a) *Period of service less than 31 days or for a period of any length for the purpose of a fitness examination.* If the period of service in the uniformed services was less than 31 days, or the employee was absent from a position of employment for a period of any length for the purpose of an examination to determine his or her fitness to perform service, the employee must report back to the employer not later than the beginning of the first full regularly-scheduled work period on the first full calendar day following the completion of the period of service, and the expiration of eight hours after a period allowing for safe transportation from the place of that service to the employee's residence. For example, if the employee completes a period of service and travel home, arriving at ten o'clock in the evening, he or she cannot be required to report to the employer until the beginning of the next full regularly-scheduled work period that begins at least eight hours after arriving home, i.e., no earlier than six o'clock the next morning. If it is impossible or unreasonable for the employee to report within such time period through no fault of his or her own, he or she must report to the employer as soon as possible after the expiration of the eight-hour period.

(b) *Period of service more than 30 days but less than 181 days.* If the employee's period of service in the uniformed services was for more than 30 days but less than 181 days, he or she must submit an application for reemployment (written or verbal) with the employer not later than 14 days after completing service. If it is impossible or unreasonable for the employee to apply within 14 days through no fault of his or her own, he or she must submit the application not later than the next full calendar day after it becomes possible to do so.

(c) *Period of service more than 180 days.* If the employee's period of service in the uniformed services was for more than 180 days, he or she must submit an application for reemployment (written or verbal) not later than 90 days after completing service.

**§ 1002.116 Is the time period for reporting back to an employer extended if the employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service?**

Yes. If the employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service, he or she must report to or submit an application for reemployment to the employer at the end of the period necessary for recovering from the illness or injury. This period may not exceed two years from the date of the completion of service, except that it must be extended by the minimum time necessary to accommodate circumstances beyond the employee's control that make reporting within the period impossible or unreasonable. This period for recuperation and recovery extends the time period for reporting to or submitting an application for reemployment to the employer, and is not applicable following reemployment.

**§ 1002.117 Are there any consequences if the employee fails to report for or submit a timely application for reemployment?**

(a) If the employee fails to timely report for or apply for reemployment, he or she does not automatically forfeit entitlement to USERRA's reemployment and other rights and benefits. Rather, the employee becomes subject to the conduct rules, established policy, and general practices of the employer pertaining to an absence from scheduled work.

(b) If reporting or submitting an employment application to the employer is impossible or unreasonable through no fault of the employee, he or she may report to the employer as soon as possible (in the case of a period of service less than 31 days) or submit an application for reemployment to the employer by the next full calendar day after it becomes possible to do so (in the case of a period of service from 31 to 180 days), and the employee will be considered to have timely reported or applied for reemployment.

**§ 1002.118 Is an application for reemployment required to be in any particular form?**

An application for reemployment need not follow any particular format. The employee may apply orally or in writing. The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer. The employee is permitted but not required to identify a particular reemployment position in which he or she is interested.

**§ 1002.119 To whom must the employee submit the application for reemployment?**

The application must be submitted to the pre-service employer or to an agent or representative of the employer who has apparent responsibility for receiving employment applications. Depending upon the circumstances, such a person could be a personnel or human resources officer, or a first-line supervisor. If there has been a change in ownership of the employer, the application should be submitted to the employer's successor-in-interest.

**§ 1002.120 If the employee seeks or obtains employment with an employer other than the pre-service employer before the end of the period within which a reemployment application must be filed, will that jeopardize reemployment rights with the pre-service employer?**

No. The employee has reemployment rights with the pre-service employer provided that he or she makes a timely reemployment application to that employer. The employee may seek or obtain employment with an employer other than the pre-service employer during the period of time within which a reemployment application must be made, without giving up reemployment rights with the pre-service employer. However, such alternative employment during the application period should not be of a type that would constitute cause for the employer to discipline or terminate the employee following reemployment. For instance, if the employer forbids employees from working concurrently for a direct competitor during employment, violation of such a policy may constitute cause for discipline or even termination.

**§ 1002.121 Is the employee required to submit documentation to the employer in connection with the application for reemployment?**

Yes, if the period of service exceeded 30 days and if requested by the employer to do so. If the employee submits an application for reemployment after a period of service of more than 30 days, he or she must, upon the request of the employer, provide documentation to establish that:

(a) The reemployment application is timely;

(b) The employee has not exceeded the five-year limit on the duration of service (subject to the exceptions listed at § 1002.103); and,

(c) The employee's separation or dismissal from service was not disqualifying.

**§ 1002.122 Is the employer required to reemploy the employee if documentation establishing the employee's eligibility does not exist or is not readily available?**

Yes. The employer is not permitted to delay or deny reemployment by demanding documentation that does not exist or is not readily available. The employee is not liable for administrative delays in the issuance of military documentation. If the employee is reemployed after an absence from employment for more than 90 days, the employer may require that he or she submit the documentation establishing entitlement to reemployment before treating the employee as not having had a break in service for pension purposes. If the documentation is received after reemployment and it shows that the employee is not entitled to reemployment, the employer may terminate employment and any rights or benefits that the employee may have been granted.

**§ 1002.123 What documents satisfy the requirement that the employee establish eligibility for reemployment after a period of service of more than thirty days?**

(a) Documents that satisfy the requirements of USERRA include the following:

(1) DD (Department of Defense) 214 Certificate of Release or Discharge from Active Duty;

(2) Copy of duty orders prepared by the facility where the orders were fulfilled carrying an endorsement indicating completion of the described service;

(3) Letter from the commanding officer of a Personnel Support Activity or someone of comparable authority;

(4) Certificate of completion from military training school;

(5) Discharge certificate showing character of service; and,

(6) Copy of extracts from payroll documents showing periods of service;

(7) Letter from National Disaster Medical System (NDMS) Team Leader or Administrative Officer verifying dates and times of NDMS training or Federal activation.

(b) The types of documents that are necessary to establish eligibility for reemployment will vary from case to case. Not all of these documents are available or necessary in every instance to establish reemployment eligibility.

## Character of Service

**§ 1002.134 What type of discharge or separation from service is required for an employee to be entitled to reemployment under USERRA?**

USERRA does not require any particular form of discharge or separation from service. However, even if the employee is otherwise eligible for reemployment, he or she will be disqualified if the characterization of service falls within one of four categories. USERRA requires that the employee not have received one of these types of discharge.

**§ 1002.135 What types of discharge or separation from uniformed service will make the employee ineligible for reemployment under USERRA?**

Reemployment rights are terminated if the employee is:

(a) Separated from uniformed service with a dishonorable or bad conduct discharge;

(b) Separated from uniformed service under other than honorable conditions, as characterized by regulations of the uniformed service;

(c) A commissioned officer dismissed as permitted under 10 U.S.C. 1161(a) by sentence of a general court-martial; in commutation of a sentence of a general court-martial; or, in time of war, by order of the President; or,

(d) A commissioned officer dropped from the rolls under 10 U.S.C. 1161(b) due to absence without authority for at least three months; separation by reason of a sentence to confinement adjudged by a court-martial; or, a sentence to confinement in a Federal or State penitentiary or correctional institution.

**§ 1002.136 Who determines the characterization of service?**

The branch of service in which the employee performs the tour of duty determines the characterization of service.

**§ 1002.137 If the employee receives a disqualifying discharge or release from uniformed service and it is later upgraded, will reemployment rights be restored?**

Yes. A military review board has the authority to prospectively or retroactively upgrade a disqualifying discharge or release. A retroactive upgrade would restore reemployment rights providing the employee otherwise meets the Act's eligibility criteria.

**§ 1002.138 If the employee receives a retroactive upgrade in the characterization of service, will that entitle him or her to claim back wages and benefits lost as of the date of separation from service?**

No. A retroactive upgrade allows the employee to obtain reinstatement with the former employer, provided the employee otherwise meets the Act's eligibility criteria. Back pay and other benefits such as pension plan credits attributable to the time period between discharge and the retroactive upgrade are not required to be restored by the employer in this situation.

### Employer Statutory Defenses

**§ 1002.139 Are there any circumstances in which the pre-service employer is excused from its obligation to reemploy the employee following a period of uniformed service? What statutory defenses are available to the employer in an action or proceeding for reemployment benefits?**

(a) Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if the employer establishes that its circumstances have so changed as to make reemployment impossible or unreasonable. For example, an employer may be excused from reemploying the employee where there has been an intervening reduction in force that would have included that employee. The employer may not, however, refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee;

(b) Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if it establishes that assisting the employee in becoming qualified for reemployment would impose an undue hardship, as defined in § 1002.5(n) and discussed in § 1002.198, on the employer; or,

(c) Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if it establishes that the employment position vacated by the employee in order to perform service in the uniformed services was for a brief, nonrecurrent period and there was no reasonable expectation that the employment would continue indefinitely or for a significant period.

(d) The employer defenses included in this section are affirmative ones, and the employer carries the burden to prove by a preponderance of the evidence that any one or more of these defenses is applicable.

## Subpart D—Rights, Benefits, and Obligations of Persons Absent from Employment Due to Service in the Uniformed Services

### Furlough and Leave of Absence

**§ 1002.149 What is the employee's status with his or her civilian employer while performing service in the uniformed services?**

During a period of service in the uniformed services, the employee is deemed to be on furlough or leave of absence from the civilian employer. In this status, the employee is entitled to the non-seniority rights and benefits generally provided by the employer to other employees with similar seniority, status, and pay that are on furlough or leave of absence. Entitlement to these non-seniority rights and benefits is not dependent on how the employer characterizes the employee's status during a period of service. For example, if the employer characterizes the employee as ''terminated'' during the period of uniformed service, this characterization cannot be used to avoid USERRA's requirement that the employee be deemed on furlough or leave of absence, and therefore entitled to the non-seniority rights and benefits generally provided to employees on furlough or leave of absence.

**§ 1002.150 Which non-seniority rights and benefits is the employee entitled to during a period of service?**

(a) The non-seniority rights and benefits to which an employee is entitled during a period of service are those that the employer provides to similarly situated employees by an employment contract, agreement, policy, practice, or plan in effect at the employee's workplace. These rights and benefits include those in effect at the beginning of the employee's employment and those established after employment began. They also include those rights and benefits that become effective during the employee's period of service and that are provided to similarly situated employees on furlough or leave of absence.

(b) If the non-seniority benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, the employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services. In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be ''comparable'' to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.

(c) As a general matter, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employer to an employee on a military leave of absence only if the employer provides that benefit to similarly situated employees on comparable leaves of absence.

**§ 1002.151 If the employer provides full or partial pay to the employee while he or she is on military leave, is the employer required to also provide the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?**

Yes. If the employer provides additional benefits such as full or partial pay when the employee performs service, the employer is not excused from providing other rights and benefits to which the employee is entitled under the Act.

**§ 1002.152 If employment is interrupted by a period of service in the uniformed services, are there any circumstances under which the employee is not entitled to the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?**

If employment is interrupted by a period of service in the uniformed services and the employee knowingly provides written notice of intent not to return to the position of employment after service in the uniformed services, he or she is not entitled to those non-seniority rights and benefits. The employee's written notice does not waive entitlement to any other rights to which he or she is entitled under the Act, including the right to reemployment after service.

**§ 1002.153 If employment is interrupted by a period of service in the uniformed services, is the employee permitted upon request to use accrued vacation, annual or similar leave with pay during the service? Can the employer require the employee to use accrued leave during a period of service?**

(a) If employment is interrupted by a period of service, the employee must be permitted upon request to use any accrued vacation, annual, or similar leave with pay during the period of service, in order to continue his or her civilian pay. However, the employee is not entitled to use sick leave that accrued with the civilian employer during a period of service in the uniformed services, unless the employer

allows employees to use sick leave for any reason, or allows other similarly situated employees on comparable furlough or leave of absence to use accrued paid sick leave. Sick leave is usually not comparable to annual or vacation leave; it is generally intended to provide income when the employee or a family member is ill and the employee is unable to work.

(b) The employer may not require the employee to use accrued vacation, annual, or similar leave during a period of service in the uniformed services.

## Health Plan Coverage

### § 1002.163 What types of health plans are covered by USERRA?

(a) USERRA defines a health plan to include an insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or arrangement under which the employee's health services are provided or the expenses of those services are paid.

(b) USERRA covers group health plans as defined in the Employee Retirement Income Security Act of 1974 (ERISA) at 29 U.S.C. 1191b(a). USERRA applies to group health plans that are subject to ERISA, and plans that are not subject to ERISA, such as those sponsored by State or local governments or religious organizations for their employees.

(c) USERRA covers multiemployer plans maintained pursuant to one or more collective bargaining agreements between employers and employee organizations. USERRA applies to multiemployer plans as they are defined in ERISA at 29 U.S.C. 1002(37). USERRA contains provisions that apply specifically to multiemployer plans in certain situations.

### § 1002.164 What health plan coverage must the employer provide for the employee under USERRA?

If the employee has coverage under a health plan in connection with his or her employment, the plan must permit the employee to elect to continue the coverage for a certain period of time as described below:

(a) When the employee is performing service in the uniformed services, he or she is entitled to continuing coverage for himself or herself (and dependents if the plan offers dependent coverage) under a health plan provided in connection with the employment. The plan must allow the employee to elect to continue coverage for a period of time that is the lesser of:

(1) The 24-month period beginning on the date on which the employee's absence for the purpose of performing service begins; or,

(2) The period beginning on the date on which the employee's absence for the purpose of performing service begins, and ending on the date on which he or she fails to return from service or apply for a position of employment as provided under sections 1002.115–123 of these regulations.

(b) USERRA does not require the employer to establish a health plan if there is no health plan coverage in connection with the employment, or, where there is a plan, to provide any particular type of coverage.

(c) USERRA does not require the employer to permit the employee to initiate new health plan coverage at the beginning of a period of service if he or she did not previously have such coverage.

### § 1002.165 How does the employee elect continuing health plan coverage?

USERRA does not specify requirements for electing continuing coverage. Health plan administrators may develop reasonable requirements addressing how continuing coverage may be elected, consistent with the terms of the plan and the Act's exceptions to the requirement that the employee give advance notice of service in the uniformed services. For example, the employee cannot be precluded from electing continuing health plan coverage under circumstances where it is impossible or unreasonable for him or her to make a timely election of coverage.

### § 1002.166 How much must the employee pay in order to continue health plan coverage?

(a) If the employee performs service in the uniformed service for fewer than 31 days, he or she cannot be required to pay more than the regular employee share, if any, for health plan coverage.

(b) If the employee performs service in the uniformed service for 31 or more days, he or she may be required to pay no more than 102% of the full premium under the plan, which represents the employer's share plus the employee's share, plus 2% for administrative costs.

(c) USERRA does not specify requirements for methods of paying for continuing coverage. Health plan administrators may develop reasonable procedures for payment, consistent with the terms of the plan.

### § 1002.167 What actions may a plan administrator take if the employee does not elect or pay for continuing coverage in a timely manner?

The actions a plan administrator may take regarding the provision or cancellation of an employee's continuing coverage depend on whether the employee is excused from the requirement to give advance notice, whether the plan has established reasonable rules for election of continuation coverage, and whether the plan has established reasonable rules for the payment for continuation coverage.

(a) *No notice of service and no election of continuation coverage:* If an employer provides employment-based health coverage to an employee who leaves employment for uniformed service without giving advance notice of service, the plan administrator may cancel the employee's health plan coverage upon the employee's departure from employment for uniformed service. However, in cases in which an employee's failure to give advance notice of service was excused under the statute because it was impossible, unreasonable, or precluded by military necessity, the plan administrator must reinstate the employee's health coverage retroactively upon his or her election to continue coverage and payment of all unpaid amounts due, and the employee must incur no administrative reinstatement costs. In order to qualify for an exception to the requirement of timely election of continuing health care, an employee must first be excused from giving notice of service under the statute.

(b) *Notice of service but no election of continuing coverage:* Plan administrators may develop reasonable requirements addressing how continuing coverage may be elected. Where health plans are also covered under the Consolidated Omnibus Budget Reconciliation Act of 1985, 26 U.S.C. 4980B (COBRA), it may be reasonable for a health plan administrator to adopt COBRA-compliant rules regarding election of continuing coverage, as long as those rules do not conflict with any provision of USERRA or this rule. If an employer provides employment-based health coverage to an employee who leaves employment for uniformed service for a period of service in excess of 30 days after having given advance notice of service but without making an election regarding continuing coverage, the plan administrator may cancel the employee's health plan coverage upon the employee's departure from employment for uniformed service, but must reinstate coverage without the imposition of administrative reinstatement costs under the following conditions:

(1) Plan administrators who have developed reasonable rules regarding the period within which an employee

may elect continuing coverage must permit retroactive reinstatement of uninterrupted coverage to the date of departure if the employee elects continuing coverage and pays all unpaid amounts due within the periods established by the plan;

(2) In cases in which plan administrators have not developed rules regarding the period within which an employee may elect continuing coverage, the plan must permit retroactive reinstatement of uninterrupted coverage to the date of departure upon the employee's election and payment of all unpaid amounts at any time during the period established in section 1002.164(a).

(c) *Election of continuation coverage without timely payment:* Health plan administrators may adopt reasonable rules allowing cancellation of coverage if timely payment is not made. Where health plans are covered under COBRA, it may be reasonable for a health plan administrator to adopt COBRA-compliant rules regarding payment for continuing coverage, as long as those rules do not conflict with any provision of USERRA or this rule.

**§ 1002.168 If the employee's coverage was terminated at the beginning of or during service, does his or her coverage have to be reinstated upon reemployment?**

(a) If health plan coverage for the employee or a dependent was terminated by reason of service in the uniformed services, that coverage must be reinstated upon reemployment. An exclusion or waiting period may not be imposed in connection with the reinstatement of coverage upon reemployment, if an exclusion or waiting period would not have been imposed had coverage not been terminated by reason of such service.

(b) USERRA permits a health plan to impose an exclusion or waiting period as to illnesses or injuries determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed services. The determination that the employee's illness or injury was incurred in, or aggravated during, the performance of service may only be made by the Secretary of Veterans Affairs or his or her representative. Other coverage, for injuries or illnesses that are not service-related (or for the employee's dependents, if he or she has dependent coverage), must be reinstated subject to paragraph (a) of this section.

**§ 1002.169 Can the employee elect to delay reinstatement of health plan coverage until a date after the date he or she is reemployed?**

USERRA requires the employer to reinstate health plan coverage upon request at reemployment. USERRA permits but does not require the employer to allow the employee to delay reinstatement of health plan coverage until a date that is later than the date of reemployment.

**§ 1002.170 In a multiemployer health plan, how is liability allocated for employer contributions and benefits arising under USERRA's health plan provisions?**

Liability under a multiemployer plan for employer contributions and benefits in connection with USERRA's health plan provisions must be allocated either as the plan sponsor provides, or, if the sponsor does not provide, to the employee's last employer before his or her service. If the last employer is no longer functional, liability for continuing coverage is allocated to the health plan.

**§ 1002.171 How does the continuation of health plan benefits apply to a multiemployer plan that provides health plan coverage through a health benefits account system?**

(a) Some employees receive health plan benefits provided pursuant to a multiemployer plan that utilizes a health benefits account system in which an employee accumulates prospective health benefit eligibility, also commonly referred to as ''dollar bank,'' ''credit bank,'' and ''hour bank'' plans. In such cases, where an employee with a positive health benefits account balance elects to continue the coverage, the employee may further elect either option below:

(1) The employee may expend his or her health account balance during an absence from employment due to service in the uniformed services in lieu of paying for the continuation of coverage as set out in § 1002.166. If an employee's health account balance becomes depleted during the applicable period provided for in § 1002.164(a), the employee must be permitted, at his or her option, to continue coverage pursuant to § 1002.166. Upon reemployment, the plan must provide for immediate reinstatement of the employee as required by § 1002.168, but may require the employee to pay the cost of the coverage until the employee earns the credits necessary to sustain continued coverage in the plan.

(2) The employee may pay for continuation coverage as set out in § 1002.166, in order to maintain intact his or her account balance as of the beginning date of the absence from employment due to service in the uniformed services. This option permits the employee to resume usage of the account balance upon reemployment.

(b) Employers or plan administrators providing such plans should counsel employees of their options set out in this subsection.

## Subpart E—Reemployment Rights and Benefits

### Prompt Reemployment

**§ 1002.180 When is an employee entitled to be reemployed by his or her civilian employer?**

The employer must promptly reemploy the employee when he or she returns from a period of service if the employee meets the Act's eligibility criteria as described in Subpart C of these regulations.

**§ 1002.181 How is ''prompt reemployment'' defined?**

''Prompt reemployment'' means as soon as practicable under the circumstances of each case. Absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment. For example, prompt reinstatement after a weekend National Guard duty generally means the next regularly scheduled working day. On the other hand, prompt reinstatement following several years of active duty may require more time, because the employer may have to reassign or give notice to another employee who occupied the returning employee's position.

### Reemployment Position

**§ 1002.191 What position is the employee entitled to upon reemployment?**

As a general rule, the employee is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service. This position is known as the escalator position. The principle behind the escalator position is that, if not for the period of uniformed service, the employee could have been promoted (or, alternatively, demoted, transferred, or laid off) due to intervening events. The escalator principle requires that the employee be reemployed in a position that reflects with reasonable certainty the pay, benefits, seniority, and other job perquisites, that he or she would have attained if not for the period of service. Depending upon the specific circumstances, the employer may have the option, or be required, to reemploy

the employee in a position other than the escalator position.

**§ 1002.192 How is the specific reemployment position determined?**

In all cases, the starting point for determining the proper reemployment position is the escalator position, which is the job position that the employee would have attained if his or her continuous employment had not been interrupted due to uniformed service. Once this position is determined, the employer may have to consider several factors before determining the appropriate reemployment position in any particular case. Such factors may include the employee's length of service, qualifications, and disability, if any. The reemployment position may be either the escalator position; the pre-service position; a position comparable to the escalator or pre-service position; or, the nearest approximation to one of these positions.

**§ 1002.193 Does the reemployment position include elements such as seniority, status, and rate of pay?**

(a) Yes. The reemployment position includes the seniority, status, and rate of pay that an employee would ordinarily have attained in that position given his or her job history, including prospects for future earnings and advancement. The employer must determine the seniority rights, status, and rate of pay as though the employee had been continuously employed during the period of service. The seniority rights, status, and pay of an employment position include those established (or changed) by a collective bargaining agreement, employer policy, or employment practice. The sources of seniority rights, status, and pay include agreements, policies, and practices in effect at the beginning of the employee's service, and any changes that may have occurred during the period of service. In particular, the employee's status in the reemployment position could include opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility, and geographical location.

(b) If an opportunity for promotion, or eligibility for promotion, that the employee missed during service is based on a skills test or examination, then the employer should give him or her a reasonable amount of time to adjust to the employment position and then give a skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an employee to adjust to reemployment before scheduling a makeup test or examination, an employer may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. If the employee is successful on the makeup exam and, based on the results of that exam, there is a reasonable certainty that he or she would have been promoted, or made eligible for promotion, during the time that the employee served in the uniformed service, then the promotion or eligibility for promotion must be made effective as of the date it would have occurred had employment not been interrupted by uniformed service.

**§ 1002.194 Can the application of the escalator principle result in adverse consequences when the employee is reemployed?**

Yes. The Act does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employer to assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.

**§ 1002.195 What other factors can determine the reemployment position?**

Once the employee's escalator position is determined, other factors may allow, or require, the employer to reemploy the employee in a position other than the escalator position. These factors, which are explained in §§ 1002.196 through 1002.199, are:

(a) The length of the employee's most recent period of uniformed service;

(b) The employee's qualifications; and,

(c) Whether the employee has a disability incurred or aggravated during uniformed service.

**§ 1002.196 What is the employee's reemployment position if the period of service was less than 91 days?**

Following a period of service in the uniformed services of less than 91 days, the employee must be reemployed according to the following priority:

(a) The employee must be reemployed in the escalator position. He or she must be qualified to perform the duties of this position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

(b) If the employee is not qualified to perform the duties of the escalator position after reasonable efforts by the employer, the employee must be reemployed in the position in which he or she was employed on the date that the period of service began. The employee must be qualified to perform the duties of this position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

(c) If the employee is not qualified to perform the duties of the escalator position or the pre-service position, after reasonable efforts by the employer, he or she must be reemployed in any other position that is the nearest approximation first to the escalator position and then to the pre-service position. The employee must be qualified to perform the duties of this position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

**§ 1002.197 What is the reemployment position if the employee's period of service in the uniformed services was more than 90 days?**

Following a period of service of more than 90 days, the employee must be reemployed according to the following priority:

(a) The employee must be reemployed in the escalator position or a position of like seniority, status, and pay. He or she must be qualified to perform the duties of this position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

(b) If the employee is not qualified to perform the duties of the escalator

position or a like position after reasonable efforts by the employer, the employee must be reemployed in the position in which he or she was employed on the date that the period of service began or in a position of like seniority, status, and pay. The employee must be qualified to perform the duties of this position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

(c) If the employee is not qualified to perform the duties of the escalator position, the pre-service position, or a like position, after reasonable efforts by the employer, he or she must be reemployed in any other position that is the nearest approximation first to the escalator position and then to the pre-service position. The employee must be qualified to perform the duties of this position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

**§ 1002.198 What efforts must the employer make to help the employee become qualified for the reemployment position?**

The employee must be qualified for the reemployment position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position. The employer is not required to reemploy the employee on his or her return from service if he or she cannot, after reasonable efforts by the employer, qualify for the appropriate reemployment position.

(a)(1) ''Qualified'' means that the employee has the ability to perform the essential tasks of the position. The employee's inability to perform one or more non-essential tasks of a position does not make him or her unqualified.

(2) Whether a task is essential depends on several factors, and these factors include but are not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions developed before the hiring process begins;

(iii) The amount of time on the job spent performing the function;

(iv) The consequences of not requiring the individual to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(b) Only after the employer makes reasonable efforts, as defined in § 1002.5(i), may it determine that the employee is not qualified for the reemployment position. These reasonable efforts must be made at no cost to the employee.

**§ 1002.199 What priority must the employer follow if two or more returning employees are entitled to reemployment in the same position?**

If two or more employees are entitled to reemployment in the same position and more than one employee has reported or applied for employment in that position, the employee who first left the position for uniformed service has the first priority on reemployment in that position. The remaining employee (or employees) is entitled to be reemployed in a position similar to that in which the employee would have been reemployed according to the rules that normally determine a reemployment position, as set out in §§ 1002.196 and 1002.197.

## Seniority Rights and Benefits

**§ 1002.210 What seniority rights does an employee have when reemployed following a period of uniformed service?**

The employee is entitled to the seniority and seniority-based rights and benefits that he or she had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if he or she had remained continuously employed. In determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. The rights and benefits protected by USERRA upon reemployment include those provided by the employer and those required by statute. For example, under USERRA, a reemployed service member would be eligible for leave under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601–2654 (FMLA), if the number of months and the number of hours of work for which the service member was employed by the civilian employer, together with the number of months and the number of hours of work for which the service member would have been employed by the civilian employer during the period of uniformed service, meet FMLA's eligibility requirements. In the event that a service member is denied FMLA leave for failing to satisfy the FMLA's hours of work requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA but not under the FMLA.

**§ 1002.211 Does USERRA require the employer to use a seniority system?**

No. USERRA does not require the employer to adopt a formal seniority system. USERRA defines seniority as longevity in employment together with any employment benefits that accrue with, or are determined by, longevity in employment. In the absence of a formal seniority system, such as one established through collective bargaining, USERRA looks to the custom and practice in the place of employment to determine the employee's entitlement to any employment benefits that accrue with, or are determined by, longevity in employment.

**§ 1002.212 How does a person know whether a particular right or benefit is a seniority-based right or benefit?**

A seniority-based right or benefit is one that accrues with, or is determined by, longevity in employment. Generally, whether a right or benefit is seniority-based depends on three factors:

(a) Whether the right or benefit is a reward for length of service rather than a form of short-term compensation for work performed;

(b) Whether it is reasonably certain that the employee would have received the right or benefit if he or she had remained continuously employed during the period of service; and,

(c) Whether it is the employer's actual custom or practice to provide or withhold the right or benefit as a reward for length of service. Provisions of an employment contract or policies in the employee handbook are not controlling if the employer's actual custom or practice is different from what is written in the contract or handbook.

**§ 1002.213 How can the employee demonstrate a reasonable certainty that he or she would have received the seniority right or benefit if he or she had remained continuously employed during the period of service?**

A reasonable certainty is a high probability that the employee would have received the seniority or seniority-based right or benefit if he or she had been continuously employed. The employee does not have to establish that he or she would have received the benefit as an absolute certainty. The employee can demonstrate a reasonable certainty that he or she would have received the seniority right or benefit by showing that other employees with seniority similar to that which the employee would have had if he or she had remained continuously employed received the right or benefit. The employer cannot withhold the right or benefit based on an assumption that a

series of unlikely events could have prevented the employee from gaining the right or benefit.

## Disabled Employees

### § 1002.225 Is the employee entitled to any specific reemployment benefits if he or she has a disability that was incurred in, or aggravated during, the period of service?

Yes. A disabled service member is entitled, to the same extent as any other individual, to the escalator position he or she would have attained but for uniformed service. If the employee has a disability incurred in, or aggravated during, the period of service in the uniformed services, the employer must make reasonable efforts to accommodate that disability and to help the employee become qualified to perform the duties of his or her reemployment position. If the employee is not qualified for reemployment in the escalator position because of a disability after reasonable efforts by the employer to accommodate the disability and to help the employee to become qualified, the employee must be reemployed in a position according to the following priority. The employer must make reasonable efforts to accommodate the employee's disability and to help him or her to become qualified to perform the duties of one of these positions:

(a) A position that is equivalent in seniority, status, and pay to the escalator position; or,

(b) A position that is the nearest approximation to the equivalent position, consistent with the circumstances of the employee's case, in terms of seniority, status, and pay. A position that is the nearest approximation to the equivalent position may be a higher or lower position, depending on the circumstances.

### § 1002.226 If the employee has a disability that was incurred in, or aggravated during, the period of service, what efforts must the employer make to help him or her become qualified for the reemployment position?

(a) USERRA requires that the employee be qualified for the reemployment position regardless of any disability. The employer must make reasonable efforts to help the employee to become qualified to perform the duties of this position. The employer is not required to reemploy the employee on his or her return from service if he or she cannot, after reasonable efforts by the employer, qualify for the appropriate reemployment position.

(b) ''Qualified'' has the same meaning here as in § 1002.198.

## Rate of Pay

### § 1002.236 How is the employee's rate of pay determined when he or she returns from a period of service?

The employee's rate of pay is determined by applying the same escalator principles that are used to determine the reemployment position, as follows:

(a) If the employee is reemployed in the escalator position, the employer must compensate him or her at the rate of pay associated with the escalator position. The rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that the employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service. In addition, when considering whether merit or performance increases would have been attained with reasonable certainty, an employer may examine the returning employee's own work history, his or her history of merit increases, and the work and pay history of employees in the same or similar position. For example, if the employee missed a merit pay increase while performing service, but qualified for previous merit pay increases, then the rate of pay should include the merit pay increase that was missed. If the merit pay increase that the employee missed during service is based on a skills test or examination, then the employer should give the employee a reasonable amount of time to adjust to the reemployment position and then give him or her the skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an employee to adjust to reemployment before scheduling a makeup test or examination, an employer may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. The escalator principle also applies in the event a pay reduction occurred in the reemployment position during the period of service. Any pay adjustment must be made effective as of the date it would have occurred had the employee's employment not been interrupted by uniformed service.

(b) If the employee is reemployed in the pre-service position or another position, the employer must compensate him or her at the rate of pay associated with the position in which he or she is reemployed. As with the escalator position, the rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that the employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service.

## Protection Against Discharge

### § 1002.247 Does USERRA provide the employee with protection against discharge?

Yes. If the employee's most recent period of service in the uniformed services was more than 30 days, he or she must not be discharged except for cause—

(a) For 180 days after the employee's date of reemployment if his or her most recent period of uniformed service was more than 30 days but less than 181 days; or,

(b) For one year after the date of reemployment if the employee's most recent period of uniformed service was more than 180 days.

### § 1002.248 What constitutes cause for discharge under USERRA?

The employee may be discharged for cause based either on conduct or, in some circumstances, because of the application of other legitimate nondiscriminatory reasons.

(a) In a discharge action based on conduct, the employer bears the burden of proving that it is reasonable to discharge the employee for the conduct in question, and that he or she had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge.

(b) If, based on the application of other legitimate nondiscriminatory reasons, the employee's job position is eliminated, or the employee is placed on layoff status, either of these situations would constitute cause for purposes of USERRA. The employer bears the burden of proving that the employee's job would have been eliminated or that he or she would have been laid off.

## Pension Plan Benefits

### § 1002.259 How does USERRA protect an employee's pension benefits?

On reemployment, the employee is treated as not having a break in service with the employer or employers

maintaining a pension plan, for purposes of participation, vesting and accrual of benefits, by reason of the period of absence from employment due to or necessitated by service in the uniformed services.

(a) Depending on the length of the employee's period of service, he or she is entitled to take from one to ninety days following service before reporting back to work or applying for reemployment (See § 1002.115). This period of time must be treated as continuous service with the employer for purposes of determining participation, vesting and accrual of pension benefits under the plan.

(b) If the employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, service, he or she is entitled to report to or submit an application for reemployment at the end of the time period necessary for him or her to recover from the illness or injury. This period, which may not exceed two years from the date the employee completed service, except in circumstances beyond his or her control, must be treated as continuous service with the employer for purposes of determining the participation, vesting and accrual of pension benefits under the plan.

**§ 1002.260 What pension benefit plans are covered under USERRA?**

(a) The Employee Retirement Income Security Act of 1974 (ERISA) defines an employee pension benefit plan as a plan that provides retirement income to employees, or defers employee income to a period extending to or beyond the termination of employment. Any such plan maintained by the employer or employers is covered under USERRA. USERRA also covers certain pension plans not covered by ERISA, such as those sponsored by a State, government entity, or church for its employees.

(b) USERRA does not cover pension benefits under the Federal Thrift Savings Plan; those benefits are covered under 5 U.S.C. 8432b.

**§ 1002.261 Who is responsible for funding any plan obligation to provide the employee with pension benefits?**

With the exception of multiemployer plans, which have separate rules discussed below, the employer is liable to the pension benefit plan to fund any obligation of the plan to provide benefits that are attributable to the employee's period of service. In the case of a defined contribution plan, once the employee is reemployed, the employer must allocate the amount of its make-up contribution for the employee, if any; his or her make-up employee contributions, if any; and his or her elective deferrals, if any; in the same manner and to the same extent that it allocates the amounts for other employees during the period of service. In the case of a defined benefit plan, the employee's accrued benefit will be increased for the period of service once he or she is reemployed and, if applicable, has repaid any amounts previously paid to him or her from the plan and made any employee contributions that may be required to be made under the plan.

**§ 1002.262 When is the employer required to make the plan contribution that is attributable to the employee's period of uniformed service?**

(a) The employer is not required to make its contribution until the employee is reemployed. For employer contributions to a plan in which the employee is not required or permitted to contribute, the employer must make the contribution attributable to the employee's period of service no later than ninety days after the date of reemployment, or when plan contributions are normally due for the year in which the service in the uniformed services was performed, whichever is later. If it is impossible or unreasonable for the employer to make the contribution within this time period, the employer must make the contribution as soon as practicable.

(b) If the employee is enrolled in a contributory plan he or she is allowed (but not required) to make up his or her missed contributions or elective deferrals. These makeup contributions or elective deferrals must be made during a time period starting with the date of reemployment and continuing for up to three times the length of the employee's immediate past period of uniformed service, with the repayment period not to exceed five years. Makeup contributions or elective deferrals may only be made during this period and while the employee is employed with the post-service employer.

(c) If the employee's plan is contributory and he or she does not make up his or her contributions or elective deferrals, he or she will not receive the employer match or the accrued benefit attributable to his or her contribution because the employer is required to make contributions that are contingent on or attributable to the employee's contributions or elective deferrals only to the extent that the employee makes up his or her payments to the plan. Any employer contributions that are contingent on or attributable to the employee's make-up contributions or elective deferrals must be made according to the plan's requirements for employer matching contributions.

(d) The employee is not required to make up the full amount of employee contributions or elective deferrals that he or she missed making during the period of service. If the employee does not make up all of the missed contributions or elective deferrals, his or her pension may be less than if he or she had done so.

(e) Any vested accrued benefit in the pension plan that the employee was entitled to prior to the period of uniformed service remains intact whether or not he or she chooses to be reemployed under the Act after leaving the uniformed service.

(f) An adjustment will be made to the amount of employee contributions or elective deferrals the employee will be able to make to the pension plan for any employee contributions or elective deferrals he or she actually made to the plan during the period of service.

**§ 1002.263 Does the employee pay interest when he or she makes up missed contributions or elective deferrals?**

No. The employee is not required or permitted to make up a missed contribution in an amount that exceeds the amount he or she would have been permitted or required to contribute had he or she remained continuously employed during the period of service.

**§ 1002.264 Is the employee allowed to repay a previous distribution from a pension benefits plan upon being reemployed?**

Yes, provided the plan is a defined benefit plan. If the employee received a distribution of all or part of the accrued benefit from a defined benefit plan in connection with his or her service in the uniformed services before he or she became reemployed, he or she must be allowed to repay the withdrawn amounts when he or she is reemployed. The amount the employee must repay includes any interest that would have accrued had the monies not been withdrawn. The employee must be allowed to repay these amounts during a time period starting with the date of reemployment and continuing for up to three times the length of the employee's immediate past period of uniformed service, with the repayment period not to exceed five years (or such longer time as may be agreed to between the employer and the employee), provided the employee is employed with the post-service employer during this period.

**§ 1002.265 If the employee is reemployed with his or her pre-service employer, is the employee's pension benefit the same as if he or she had remained continuously employed?**

The amount of the employee's pension benefit depends on the type of pension plan.

(a) In a non-contributory defined benefit plan, where the amount of the pension benefit is determined according to a specific formula, the employee's benefit will be the same as though he or she had remained continuously employed during the period of service.

(b) In a contributory defined benefit plan, the employee will need to make up contributions in order to have the same benefit as if he or she had remained continuously employed during the period of service.

(c) In a defined contribution plan, the benefit may not be the same as if the employee had remained continuously employed, even though the employee and the employer make up any contributions or elective deferrals attributable to the period of service, because the employee is not entitled to forfeitures and earnings or required to experience losses that accrued during the period or periods of service.

**§ 1002.266 What are the obligations of a multiemployer pension benefit plan under USERRA?**

A multiemployer pension benefit plan is one to which more than one employer is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer. The Act uses ERISA's definition of a multiemployer plan. In addition to the provisions of USERRA that apply to all pension benefit plans, there are provisions that apply specifically to multiemployer plans, as follows:

(a) The last employer that employed the employee before the period of service is responsible for making the employer contribution to the multiemployer plan, if the plan sponsor does not provide otherwise. If the last employer is no longer functional, the plan must nevertheless provide coverage to the employee.

(b) An employer that contributes to a multiemployer plan and that reemploys the employee pursuant to USERRA must provide written notice of reemployment to the plan administrator within 30 days after the date of reemployment. The returning service member should notify the reemploying employer that he or she has been reemployed pursuant to USERRA. The 30-day period within which the reemploying employer must provide written notice to the multiemployer plan pursuant to this subsection does not begin until the employer has knowledge that the employee was reemployed pursuant to USERRA.

(c) The employee is entitled to the same employer contribution whether he or she is reemployed by the pre-service employer or by a different employer contributing to the same multiemployer plan, provided that the pre-service employer and the post-service employer share a common means or practice of hiring the employee, such as common participation in a union hiring hall.

**§ 1002.267 How is compensation during the period of service calculated in order to determine the employee's pension benefits, if benefits are based on compensation?**

In many pension benefit plans, the employee's compensation determines the amount of his or her contribution or the retirement benefit to which he or she is entitled.

(a) Where the employee's rate of compensation must be calculated to determine pension entitlement, the calculation must be made using the rate of pay that the employee would have received but for the period of uniformed service.

(b)(1) Where the rate of pay the employee would have received is not reasonably certain, such as where compensation is based on commissions earned, the average rate of compensation during the 12-month period prior to the period of uniformed service must be used.

(2) Where the rate of pay the employee would have received is not reasonably certain and he or she was employed for less than 12 months prior to the period of uniformed service, the average rate of compensation must be derived from this shorter period of employment that preceded service.

## Subpart F—Compliance Assistance, Enforcement and Remedies

### Compliance Assistance

**§ 1002.277 What assistance does the Department of Labor provide to employees and employers concerning employment, reemployment, or other rights and benefits under USERRA?**

The Secretary, through the Veterans' Employment and Training Service (VETS), provides assistance to any person or entity with respect to employment and reemployment rights and benefits under USERRA. This assistance includes a wide range of compliance assistance outreach activities, such as responding to inquiries; conducting USERRA briefings and Webcasts; issuing news releases; and, maintaining the elaws USERRA Advisor (located at *http://www.dol.gov/elaws/userra.htm*), the e-VETS Resource Advisor and other web-based materials (located at *http://www.dol.gov/vets*), which are designed to increase awareness of the Act among affected persons, the media, and the general public. In providing such assistance, VETS may request the assistance of other Federal and State agencies, and utilize the assistance of volunteers.

### Investigation and Referral

**§ 1002.288 How does an individual file a USERRA complaint?**

If an individual is claiming entitlement to employment rights or benefits or reemployment rights or benefits and alleges that an employer has failed or refused, or is about to fail or refuse, to comply with the Act, the individual may file a complaint with VETS or initiate a private legal action in a court of law (*see* § 1002.303). A complaint may be filed with VETS either in writing, using VETS Form 1010, or electronically, using VETS Form e1010 (instructions and the forms can be accessed at *http://www.dol.gov/elaws/vets/userra/1010.asp*). A complaint must include the name and address of the employer, a summary of the basis for the complaint, and a request for relief.

**§ 1002.289 How will VETS investigate a USERRA complaint?**

(a) In carrying out any investigation, VETS has, at all reasonable times, reasonable access to and the right to interview persons with information relevant to the investigation. VETS also has reasonable access to, for purposes of examination, the right to copy and receive any documents of any person or employer that VETS considers relevant to the investigation.

(b) VETS may require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation. In case of disobedience of or resistance to the subpoena, the Attorney General may, at VETS' request, apply to any district court of the United States in whose jurisdiction such disobedience or resistance occurs for an order enforcing the subpoena. The district courts of the United States have jurisdiction to order compliance with the subpoena, and to punish failure to obey a subpoena as a contempt of court. This paragraph does not authorize VETS to seek issuance of a subpoena to the legislative or judicial branches of the United States.

**§ 1002.290 Does VETS have the authority to order compliance with USERRA?**

No. If VETS determines as a result of an investigation that the complaint is meritorious, VETS attempts to resolve the complaint by making reasonable efforts to ensure that any persons or entities named in the complaint comply with the Act.

If VETS' efforts do not resolve the complaint, VETS notifies the person who submitted the complaint of:

(a) The results of the investigation; and,

(b) The person's right to proceed under the enforcement of rights provisions in 38 U.S.C. 4323 (against a State or private employer), or 38 U.S.C. 4324 (against a Federal executive agency or the Office of Personnel Management (OPM)).

**§ 1002.291 What actions may an individual take if the complaint is not resolved by VETS?**

If an individual receives a notification from VETS of an unsuccessful effort to resolve his or her complaint relating to a State or private employer, the individual may request that VETS refer the complaint to the Attorney General.

**§ 1002.292 What can the Attorney General do about the complaint?**

(a) If the Attorney General is reasonably satisfied that an individual's complaint is meritorious, meaning that he or she is entitled to the rights or benefits sought, the Attorney General may appear on his or her behalf and act as the individual's attorney, and initiate a legal action to obtain appropriate relief.

(b) If the Attorney General determines that the individual's complaint does not have merit, the Attorney General may decline to represent him or her.

## Enforcement of Rights and Benefits Against a State or Private Employer

**§ 1002.303 Is an individual required to file his or her complaint with VETS?**

No. The individual may initiate a private action for relief against a State or private employer if he or she decides not to apply to VETS for assistance.

**§ 1002.304 If an individual files a complaint with VETS and VETS' efforts do not resolve the complaint, can the individual pursue the claim on his or her own?**

Yes. If VETS notifies an individual that it is unable to resolve the complaint, the individual may pursue the claim on his or her own. The individual may choose to be represented by private counsel whether or not the Attorney General decides to represent him or her as to the complaint.

**§ 1002.305 What court has jurisdiction in an action against a State or private employer?**

(a) If an action is brought against a State or private employer by the Attorney General, the district courts of the United States have jurisdiction over the action. If the action is brought against a State by the Attorney General, it must be brought in the name of the United States as the plaintiff in the action.

(b) If an action is brought against a State by a person, the action may be brought in a State court of competent jurisdiction according to the laws of the State.

(c) If an action is brought against a private employer or a political subdivision of a State by a person, the district courts of the United States have jurisdiction over the action.

(d) An action brought against a State Adjutant General, as an employer of a civilian National Guard technician, is considered an action against a State for purposes of determining which court has jurisdiction.

**§ 1002.306 Is a National Guard civilian technician considered a State or Federal employee for purposes of USERRA?**

A National Guard civilian technician is considered a State employee for USERRA purposes, although he or she is considered a Federal employee for most other purposes.

**§ 1002.307 What is the proper venue in an action against a State or private employer?**

(a) If an action is brought by the Attorney General against a State, the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function.

(b) If an action is brought against a private employer, or a political subdivision of a State, the action may proceed in the United States district court for any district in which the employer maintains a place of business.

**§ 1002.308 Who has legal standing to bring an action under USERRA?**

An action may be brought only by the United States or by the person, or representative of a person, claiming rights or benefits under the Act. An employer, prospective employer or other similar entity may not bring an action under the Act.

**§ 1002.309 Who is a necessary party in an action under USERRA?**

In an action under USERRA only an employer or a potential employer, as the case may be, is a necessary party respondent. In some circumstances, such as where terms in a collective bargaining agreement need to be interpreted, the court may allow an interested party to intervene in the action.

**§ 1002.310 How are fees and court costs charged or taxed in an action under USERRA?**

No fees or court costs may be charged or taxed against an individual if he or she is claiming rights under the Act. If the individual obtains private counsel for any action or proceeding to enforce a provision of the Act, and prevails, the court may award reasonable attorney fees, expert witness fees, and other litigation expenses.

**§ 1002.311 Is there a statute of limitations in an action under USERRA?**

USERRA does not have a statute of limitations, and it expressly precludes the application of any State statute of limitations. At least one court, however, has held that the four-year general Federal statute of limitations, 28 U.S.C. 1658, applies to actions under USERRA. *Rogers* v. *City of San Antonio,* 2003 WL 1566502 (W.D. Texas), *reversed on other grounds,* 392 F.3d 758 (5th Cir. 2004). But see *Akhdary* v. *City of Chattanooga,* 2002 WL 32060140 (E.D. Tenn.). In addition, if an individual unreasonably delays asserting his or her rights, and that unreasonable delay causes prejudice to the employer, the courts have recognized the availability of the equitable doctrine of *laches* to bar a claim under USERRA. Accordingly, individuals asserting rights under USERRA should determine whether the issue of the applicability of the Federal statute of limitations has been resolved and, in any event, act promptly to preserve their rights under USERRA.

**§ 1002.312 What remedies may be awarded for a violation of USERRA?**

In any action or proceeding the court may award relief as follows:

(a) The court may require the employer to comply with the provisions of the Act;

(b) The court may require the employer to compensate the individual for any loss of wages or benefits suffered by reason of the employer's failure to comply with the Act;

(c) The court may require the employer to pay the individual an amount equal to the amount of lost wages and benefits as liquidated damages, if the court determines that the employer's failure to comply with the Act was willful. A violation shall be considered to be willful if the employer either knew or showed reckless disregard for whether its conduct was prohibited by the Act.

(d) Any wages, benefits, or liquidated damages awarded under paragraphs (b) and (c) of this section are in addition to, and must not diminish, any of the other rights and benefits provided by USERRA (such as, for example, the right to be employed or reemployed by the employer).

**§ 1002.313 Are there special damages provisions that apply to actions initiated in the name of the United States?**

Yes. In an action brought in the name of the United States, for which the relief includes compensation for lost wages, benefits, or liquidated damages, the compensation must be held in a special deposit account and must be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the individual because of the Federal Government's inability to do so within a period of three years, the compensation must be converted into the Treasury of the United States as miscellaneous receipts.

**§ 1002.314 May a court use its equity powers in an action or proceeding under the Act?**

Yes. A court may use its full equity powers, including the issuance of temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate the rights or benefits guaranteed under the Act.

Signed at Washington, DC, this 8th day of December, 2005.

**Charles S. Ciccolella,**

*Assistant Secretary for Veterans' Employment and Training.*

[FR Doc. 05–23961 Filed 12–16–05; 8:45 am]

BILLING CODE 4510–79–P

## DEPARTMENT OF LABOR

## Veterans' Employment and Training Service

## 20 CFR Part 1002

**RIN 1293–AA14**

## Notice of Rights and Duties Under the Uniformed Services Employment and Reemployment Rights Act

**AGENCY:** Veterans' Employment and Training Service, Department of Labor.

**ACTION:** Final rule.

**SUMMARY:** On March 10, 2005, the Veterans' Employment and Training Service (VETS) of the Department of Labor (Department or DOL) issued an interim final rule to implement a requirement of the Veterans Benefits Improvement Act of 2004 (VBIA), Public Law 108–454 (Dec. 10, 2004). The VBIA amended the Uniformed Services Employment and Reemployment Rights Act (USERRA) by adding a requirement that employers provide a notice of the rights, benefits, and obligations of employees and employers under USERRA. The text of this notice was included in the interim final rule, and the Department sought comment on that text. This preamble to the final rule addresses comments received during the comment period. This final rule does not affect the Department's pending proposal to implement USERRA, which was published in the **Federal Register** of September 20, 2004.

**DATES:** *Effective Date:* This rule will be effective on January 18, 2006.

**FOR FURTHER INFORMATION CONTACT:** For information, contact Mr. Kenan Torrans, Office of Operations and Programs, Veterans' Employment and Training Service (VETS), U.S. Department of Labor, Room S1316, 200 Constitution Ave., NW., Washington, DC 20210. Telephone: 202–693–4731 (this is not a toll-free number). Electronic mail: *torrans-william@dol.gov.* For press inquiries, contact Michael Biddle, Office of Public Affairs, U.S. Department of Labor, Room S–1032, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: 202–693–5051 (this is not a toll-free number). Electronic mail: *biddle.michael@dol.gov.*

Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:**

### I. Background

The Veterans Benefits Improvement Act of 2004 (VBIA), Public Law 108–454 (Dec. 10, 2004), amended several provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301–4333. In part, the VBIA imposed a new requirement, codified at 38 U.S.C. 4334, that ''Each employer shall provide to persons entitled to rights and benefits under [USERRA] a notice of the rights, benefits, and obligations of such persons and such employers under [USERRA].'' Employers may provide the notice by posting it where employee notices are customarily placed. However, employers are free to provide the notice to employees in other ways that will minimize costs while ensuring that the full text of the notice is provided (e.g., by handing or mailing out the notice, or distributing the notice via electronic mail).

The VBIA required the Secretary of Labor to make available to employers the text of the required notice not later than March 10, 2005, ninety days after the enactment of the VBIA. The publication of the interim final rule containing the text of the notice was pursuant to this Congressional mandate. Effective March 10, 2005, the VBIA requires employers to provide the notice ''to persons entitled to rights and benefits'' under USERRA.

The VBIA also created a demonstration project under which approximately half of the claims against Federal executive agencies arising under USERRA will be transferred by the Department of Labor to the Office of Special Counsel. Section 204(a) of the VBIA directs the ''Secretary of Labor and the Office of Special Counsel [to] carry out a demonstration project under which certain claims against Federal executive agencies under [USERRA] are referred to * * * the Office of Special Counsel for assistance, including investigation and resolution of the claim as well as enforcement of rights with respect to the claim.'' Under this demonstration project, the Secretary of Labor transfers to OSC those cases involving Federal executive agency employees with odd-numbered social security numbers. The demonstration project began on February 8, 2005, and will end on September 30, 2007.

USERRA provides employment and reemployment rights for members of the uniformed services, including veterans and members of the Reserve and National Guard. Under USERRA, service members who leave their civilian jobs for military service can perform their duties with the knowledge that they will be able to return to their jobs with the same pay, benefits, and status they would have attained had they not been away on duty. USERRA also prohibits employers from discriminating against these individuals in employment because of their military service.

Over 500,000 members of the National Guard and Reserve have been mobilized since the President's declaration of a national emergency following the attacks of September 11, 2001. As service members conclude their tours of duty and return to civilian employment, it is important that employees be fully informed of their USERRA rights, benefits, and obligations. It is also important for service members to know how the Department can assist them in enforcing these rights. Providing employees with a notice of the USERRA rights, benefits, and obligations of employees and employers advances these dual objectives of informing the public about both the rights and obligations established by USERRA and about the availability of the

Department's assistance in protecting those rights.

The Department invited the public to comment on the interim final rule, and the comment period closed on May 9, 2005. The Department received five timely comments regarding the proposed text of the employer notice, and fully considered each comment. The Department adopted proposed revisions to the text of the notice recommended in two of the five comments, all of which are discussed below.

The Department received one comment from Representatives Steve Buyer and Lane Evans, the Chairman and Ranking Member of the Committee on Veteran's Affairs, U.S. House of Representatives. This comment suggests that the text of the notice should reference the role given to the U.S. Office of Special Counsel (OSC) during the demonstration project referred to above, and should also include the OSC's contact information and logo. The Department agrees that a comprehensive notice of rights and obligations under USERRA should include the fact that certain claims by employees of Federal executive agencies may be referred to the OSC for investigation and resolution pursuant to the demonstration project. In response to this comment, the Department will make available text of a separate notice appropriate for distribution to federal employees by federal executive agencies, available on VETS Web site (at *http://www.dol.gov/elaws/userra.htm*), and that text includes reference to OSC's role in investigating and resolving some complaints against Federal executive agencies during the period of the demonstration project. The Department further agrees that the inclusion of the insignia of other agencies would be a useful reminder to both employees and employers that USERRA requires a multi-agency partnership in its administration and enforcement. To that end, the Department has developed and made available on its Web site (at *http://www.dol.gov/elaws/userra.htm*) two posters—one for use by private and State employers and one for use by Federal agency employers '' that can be posted in order to comply with the notification mandate of 38 U.S.C. 4334(a). The two posters include the logos and telephone numbers of VETS as well as the other agencies that assist VETS in the administration and enforcement of USERRA. OSC's logo and telephone number, as well as a brief description of the demonstration project, appear on the poster that is appropriate for use by Federal agencies.

The Members' comment more specifically suggests that the text of the notice should state that individuals needing ''assistance in filing a complaint with OSC, or information about [ ] USERRA rights, please telephone'' or e-mail OSC directly. The VBIA's establishment of the demonstration project does not alter USERRA's basic structure or the Department's primary administrative responsibility to provide assistance, receive complaints, and investigate all but ''certain'' claims against Federal administrative agencies. VBIA Sec. 204(a). For those ''certain'' claims, defined in the VBIA as USERRA claims that also involve a ''prohibited personnel practice'' in violation of 5 U.S.C. 1212 (VBIA Sec. 204(b)) or USERRA claims filed by claimants with odd-numbers social security numbers (VBIA Sec. 204(c)), the Department must first identify and then refer such claims to OSC. VBIA Sec. 204(a). Including OSC as a primary contact point in the text of the notice, as suggested by the comment, may confuse claimants, delay the processing of claims, and ultimately hinder the utility of the demonstration project. It is crucial that the text of the notice provide simple, clear, and accurate information and guidance about contacting DOL, the initial and the primary contact agency for all USERRA problems. By contrast, while the DOL will include on the poster's borders other agencies' insignia and telephone numbers to reflect the unique multi-agency partnership at work, those depictions do not provide substantive advice to individuals on actions to take with USERRA-related problems and therefore do not result in potential confusion to individuals needing USERRA assistance or a delay in processing their claims.

The Department received a comment from an attorney employed by the Federal Emergency Management Agency (FEMA). This comment seeks mention of USERRA protection for members of the National Disaster Medical System (NDMS). Under 42 U.S.C. 300hh–11(e)(3), a section of the statute that created the NDMS, certain service in the NDMS is considered to be service in the uniformed services for the purposes of USERRA, although the appointee is not considered to be a member of the uniformed services. Because this service is the only USERRA-covered service not contained in USERRA itself and, as a result, may be overlooked, the Department has modified the proposed text of the notice in response to this comment.

Another comment sought guidance on the logistics of employer posting: How long must a USERRA poster remain on a bulletin board; can new employees be notified by e-mail, and if so, how often must they be notified; and, will some combination of e-mail notice and internet posting suffice? The VBIA requires only that employers ''provide'' to their employees a notice of their rights and benefits under USERRA, and compliance with this requirement may be met by posting a notice of such rights and benefits ''where employee notices are customarily placed.'' 38 U.S.C. 4334. There are a number of alternative means by which an employer may achieve compliance with this requirement, and the Department does not want to unduly restrict the use of all alternatives by sanctioning some but not others. As a result, the Department advises employers to use their best judgment and discretion in determining the means by which to provide notice to employees of their rights under USERRA and in achieving compliance with the notice requirement.

Another comment recommends that the Department include the text of the notice of rights in two particular locations on its Web site. The text of the notice is available on the VETS Web site at *http://www.dol.gov/vets/programs/userra/poster.htm* and on the Department's elaws Web site at *http://www.dol.gov/elaws/userra.htm.*

The final comment received requests that the text of the notice advise that ''spouses and dependants'' of service members are protected against discrimination and retaliation. USERRA's anti-discrimination provisions protect those individuals that are a past or present member of the uniformed service, have applied for membership in the uniformed service, or are obligated to serve in the uniformed service. USERRA's anti-retaliation provisions protect those individuals that assist in the enforcement of USERRA rights, including testifying or making a statement in connection with a proceeding under USERRA, even if that person has no service connection. In those cases in which spouses and dependents of individuals serving in the uniformed service themselves meet these requirements, USERRA's protections would apply, and the text of the notice makes clear these prerequisites. To the extent that the comment seeks an affirmative statement that spouses and dependents are protected from discrimination by their own employers because they are related to an individual covered by USERRA, such a request exceeds the coverage of the statute.

## II. Administrative Information

*Executive Order 12866—Regulatory Planning and Review*

The final rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined that this proposed rule is not an ''economically significant'' regulatory action under section 3(f)(1) of Executive Order 12866. Based on a preliminary analysis of the data, the rule is not likely to: (1) Have an annual effect on the economy of $100 million; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; or (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof. As a result, the Department has concluded that a full economic impact and cost/benefit analysis is not required for the final rule under Section 6(a)(3) of the Order.

*Regulatory Flexibility Act*

Under the Regulatory Flexibility Act, Public Law 96–354 (94 Stat. 1164; 5 U.S.C. 601 *et seq.*), Federal agencies are required to analyze the anticipated impact of proposed rules on small entities. VETS has notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act at 5 U.S.C. 605(b), that this final rule will not have a significant economic impact on a substantial number of small entities.

The basis for that certification is that this final rule will not have a significant economic impact on any employers because it only makes available to them information required to be posted or disseminated by statute. This information concerns employee rights, benefits, and obligations already available under Federal law. Accordingly, VETS concludes that the final rule will not have a significant economic impact on a substantial number of small business entities. Therefore, under the Regulatory Flexibility Act, 5 U.S.C. 605(b), a regulatory flexibility analysis is not required.

The Internal Revenue Service received 29,916,033 business tax returns in Fiscal Year 2003. *http://www.irs.gov/pub/irs-soi/03db03nr.xls.* The Small Business Administration (SBA) estimates that of all business tax returns filed, approximately 23 percent are filed by firms that employ employees *http://www.sba.gov/advo/laws/rfaguide.pdf.* As a result, taking 23 percent of the 29.9 million returns filed in FY 2003, there were approximately 6,880,690 private employers with employees in FY 2003. For purposes of comparison, the U.S. Census Bureau cites a figure of at least 7,743,444 business establishments with employees for the year 2002, the most recent year for which such statistics are available. See *http://www.census.gov/econ/census02/advance/TABLE1.HTM.* Consequently, VETS estimates that in FY2005 fewer than 8,000,000 private employers with employees are potentially covered by this final rule. Assuming a cost of $0.15 for reproducing a copy of the notice and 0.1 hour of clerical time at $19.05 per hour (based on National Compensation Survey: Occupational Wages in the United States, July 2002, Bureau of Labor Statistics, U.S. Department of Labor, June 2003) to post or otherwise disseminate the notice, the per-employer cost for providing employees the notice contained in this rule is approximately $2.00 and the total cost for all private employers to comply is less than $16,000,000. Consequently, VETS concludes that the cost of compliance will not have a significant economic impact on a substantial number of small entities.

*Unfunded Mandates Reform Act of 1995*

This final rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. USERRA applies to all public employers. The Census Bureau lists a total of 265,641 state and local governments in its 2002 Compendium of Public Employment; *http://www.census.gov/prod/2004pubs/gc023x2.pdf.* Consequently, VETS estimates that fewer than 300,000 state and local employers are covered by this final rule. Assuming a cost of $0.15 for reproducing a copy of the notice and 0.1 hour of clerical time at $19.05 per hour (based on National Compensation Survey: Occupational Wages in the United States, July 2002, Bureau of Labor Statistics, U.S. Department of Labor, June 2003) to post or otherwise disseminate the notice, the per-employer cost for providing employees the notice contained in this rule is less than $2.00 and the total cost for all state and local employers to comply is less than $600,000, and as discussed above the total cost for all private employers to comply is less than $16,000,000. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

*Small Business Regulatory Enforcement Fairness Act of 1996*

This final rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996 (SBREFA). The standards for determining whether a rule is a major rule as defined by section 804 of SBREFA are similar to those used to determine whether a rule is an ''economically significant regulatory action'' within the meaning of Executive Order 12866. Because VETS certified that this final rule is not an economically significant rule under Executive Order 12866, VETS certifies that it also is not a major rule under SBREFA. It will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

*Executive Order 13132—Federalism*

This final rule will not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, VETS has determined that this final rule does not have sufficient federalism implications to warrant the preparation of a summary impact statement.

*Paperwork Reduction Act*

The public disclosure of information supplied by the Federal government to the recipient for the purpose of disclosure to the public is not included within the definition of ''collection of information'' under the Paperwork Reduction Act (PRA). See 5 CFR 1320.3(c)(2). Here, the notice made available by this final rule is supplied by the Department of Labor. Consequently, the Department concludes that the Paperwork Reduction Act is inapplicable to this final rule.

*Congressional Review Act*

Consistent with the Congressional Review Act, 5 U.S.C. 801, *et seq.*, the Department will submit to Congress and to the Comptroller General of the United States, a report regarding the issuance of this Final Rule prior to the effective date set forth at the outset of this document.

OMB has determined that this rule is not a ''major rule'' as defined by the Congressional Review Act (Section 804 of the Small Business Regulatory

Enforcement Fairness Act of 1996). This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

**List of Subjects in 20 CFR Part 1002**

Administrative practice and procedure, Employment, Enforcement, Labor, Veterans, and Working Conditions.

■ For the reasons stated in the Preamble, the Veterans' Employment and Training Service, Department of Labor, amends part 1002 to chapter IX of title 20 of the Code of Federal Regulations to read as follows:

## PART 1002—REGULATIONS UNDER THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994

■ 1. The authority citation for part 1002 continues to read as follows:

**Authority:** Veterans Benefits Improvement Act of 2004 (VBIA), Pub. L. 108–454 (Dec. 10, 2004), 38 U.S.C. 4334.

■ 2. The appendix to part 1002 is revised to read as follows:

## Appendix to Part 1002—Notice of Your Rights Under USERRA

Pursuant to 38 U.S.C. 4334(a), each employer shall provide to persons entitled to rights and benefits under USERRA a notice of the rights, benefits, and obligations of such persons and such employers under USERRA. The requirement for the provision of notice under this section may be met by the posting of one of the following notices where employers customarily place notices for employees. The following texts are provided by the Secretary of Labor to employers pursuant to 38 U.S.C. 4334(b). Text A is appropriate for use by employers in the private sector and for State government employers. Text B is appropriate for use by Federal Executive Agencies.

**Text A—For Use by Private Sector and State Government Employers**

*Your Rights Under USERRA*

A. The Uniformed Services Employment and Reemployment Rights Act

USERRA protects the job rights of individuals who voluntarily or involuntarily leave employment positions to undertake military service or certain types of service in the National Disaster Medical System. USERRA also prohibits employers from discriminating against past and present members of the uniformed services, and applicants to the uniformed services.

B. Reemployment Rights

You have the right to be reemployed in your civilian job if you leave that job to perform service in the uniformed service and:

- You ensure that your employer receives advance written or verbal notice of your service;
- You have five years or less of cumulative service in the uniformed services while with that particular employer;
- You return to work or apply for reemployment in a timely manner after conclusion of service; and
- You have not been separated from service with a disqualifying discharge or under other than honorable conditions.

If you are eligible to be reemployed, you must be restored to the job and benefits you would have attained if you had not been absent due to military service or, in some cases, a comparable job.

C. Right To Be Free From Discrimination and Retaliation

If you:

- Are a past or present member of the uniformed service;
- Have applied for membership in the uniformed service; or
- Are obligated to serve in the uniformed service;

then an employer may not deny you

- Initial employment;
- Reemployment;
- Retention in employment;
- Promotion; or
- Any benefit of employment.

because of this status.

In addition, an employer may not retaliate against anyone assisting in the enforcement of USERRA rights, including testifying or making a statement in connection with a proceeding under USERRA, even if that person has no service connection.

D. Health Insurance Protection

- If you leave your job to perform military service, you have the right to elect to continue your existing employer-based health plan coverage for you and your dependents for up to 24 months while in the military.
- Even if you don't elect to continue coverage during your military service, you have the right to be reinstated in your employer's health plan when you are reemployed, generally without any waiting periods or exclusions (e.g., pre-existing condition exclusions) except for service-connected illnesses or injuries.

E. Enforcement

- The U.S. Department of Labor, Veterans' Employment and Training Service (VETS) is authorized to investigate and resolve complaints of USERRA violations.

For assistance in filing a complaint, or for any other information on USERRA, contact VETS at 1–866–4–USA–DOL or visit its Web site at *http://www.dol.gov/vets.* An interactive online USERRA Advisor can be viewed at *http://www.dol.gov/elaws/userra.htm.*

- If you file a complaint with VETS and VETS is unable to resolve it, you may request that your case be referred to the Department of Justice for representation.
- You may also bypass the VETS process and bring a civil action against an employer for violations of USERRA.

The rights listed here may vary depending on the circumstances. The text of this notice was prepared by VETS, and may be viewed on the Internet at this address: *http://www.dol.gov/vets/programs/userra/poster.htm.* Federal law requires employers to notify employees of their rights under USERRA, and employers may meet this requirement by displaying the text of this notice where they customarily place notices for employees.

**Text B—For Use by Federal Executive Agencies**

*Your Rights Under USERRA*

A. The Uniformed Services Employment and Reemployment Rights Act

USERRA protects the job rights of individuals who voluntarily or involuntarily leave employment positions to undertake military service or certain types of service in the National Disaster Medical System. USERRA also prohibits employers from discriminating against past and present members of the uniformed services, and applicants to the uniformed services.

B. Reemployment Rights

You have the right to be reemployed in your civilian job if you leave that job to perform service in the uniformed service and:

- You ensure that your employer receives advance written or verbal notice of your service;
- You have five years or less of cumulative service in the uniformed services while with that particular employer;
- You return to work or apply for reemployment in a timely manner after conclusion of service; and
- You have not been separated from service with a disqualifying discharge or under other than honorable conditions.

If you are eligible to be reemployed, you must be restored to the job and benefits you would have attained if you had not been absent due to military service or, in some cases, a comparable job.

C. Right To Be Free From Discrimination and Retaliation

If you:

- Are a past or present member of the uniformed service;
- Have applied for membership in the uniformed service; or
- Are obligated to serve in the uniformed service;

then an employer may not deny you

- Initial employment;
- Reemployment;
- Retention in employment;
- Promotion; or
- Any benefit of employment.

because of this status.

In addition, an employer may not retaliate against anyone assisting in the enforcement of USERRA rights, including testifying or making a statement in connection with a proceeding under USERRA, even if that person has no service connection.

D. Health Insurance Protection

• If you leave your job to perform military service, you have the right to elect to continue your existing employer-based health plan coverage for you and your dependents for up to 24 months while in the military.

• Even if you don't elect to continue coverage during your military service, you have the right to be reinstated in your employer's health plan when you are reemployed, generally without any waiting periods or exclusions (e.g., pre-existing condition exclusions) except for service-connected illnesses or injuries.

E. Enforcement

• The U.S. Department of Labor, Veterans' Employment and Training Service (VETS) is authorized to investigate and resolve complaints of USERRA violations.

For assistance in filing a complaint, or for any other information on USERRA, contact VETS at 1–866–4–USA–DOL or visit its Web site at *http://www.dol.gov/vets.* An interactive online USERRA Advisor can be viewed at *http://www.dol.gov/elaws/userra.htm.* In some cases involving USERRA claims against Federal executive agencies, a complaint filed with VETS before September 30, 2007, may be transferred to the Office of Special Counsel for investigation and resolution pursuant to a demonstration project established under Section 204 of the Veterans Benefits Improvement Act of 2004, Public Law 108–454 (Dec. 10, 2004).

• If VETS is unable to resolve a complaint that has not been transferred for investigation under the demonstration project, you may request that your case be referred to the Office of Special Counsel for representation.

• You may also bypass the VETS process and bring a civil action against an employer for violations of USERRA.

The rights listed here may vary depending on the circumstances. The text of this notice was prepared by VETS, and may be viewed on the Internet at this address: *http://www.dol.gov/vets/programs/userra/poster.htm.* Federal law requires employers to notify employees of their rights under USERRA, and employers may meet this requirement by displaying the text of this notice where they customarily place notices for employees.

U.S. Department of Labor, Veterans' Employment and Training Service, 1–866–487–2365.

Signed at Washington, DC, this 8th day of December, 2005.

**Charles S. Ciccolella,**

*Assistant Secretary for Veterans' Employment and Training.*

[FR Doc. 05–23960 Filed 12–16–05; 8:45 am]

BILLING CODE 4510–79–P

Federal Register

Monday,
December 19, 2005

# Part III

# Environmental Protection Agency

## 40 CFR Parts 63, 70, and 71

## Exemption of Certain Area Sources From Title V Operating Permit Programs; Final Rule

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 63, 70, and 71**

**[OAR–2004–0010; FRL–8008–5]**

**RIN 2060–AM31**

## Exemption of Certain Area Sources From Title V Operating Permit Programs

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The EPA is finalizing permanent exemptions from the title V operating permit program for five categories of nonmajor (area) sources that are subject to national emission standards for hazardous air pollutants (NESHAP). The EPA is making a finding for these categories, consistent with the Clean Air Act requirement for making such exemptions, that compliance with title V permitting requirements is impracticable, infeasible, or unnecessarily burdensome on the source categories. The five source categories are dry cleaners, halogenated solvent degreasers, chrome electroplaters, ethylene oxide (EO) sterilizers and secondary aluminum smelters. The EPA declines to make a finding for a sixth category, area sources subject to the NESHAP for secondary lead smelters. A previous deferral from permitting for this category expired on December 9, 2004, subjecting all such sources to the title V program.

**DATES:** This final rule is effective on December 19, 2005.

**ADDRESSES:** *Docket.* Docket No. OAR–2004–0010, containing supporting information used to develop the proposed and final rules, is available for public inspection and copying between 8 a.m. and 4:30 p.m., Monday through Friday (except government holidays) at the Air and Radiation Docket (Air Docket) in the EPA Docket Center, (EPA/DC) EPA West Building, Room B102, 1301 Constitution Avenue, NW., Washington, DC 20004.

**FOR FURTHER INFORMATION CONTACT:** Mr. Jeff Herring, U.S. EPA, Information Transfer and Program Implementation Division, C304–04, Research Triangle Park, North Carolina 27711, telephone number (919) 541–3195, facsimile number (919) 541–5509, or electronic mail at *herring.jeff@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does This Action Apply to Me?*

The entities affected by this rulemaking are area sources subject to a NESHAP promulgated under section 112 of the Clean Air Act (Act) since 1990, listed in the table below. An ''area source'' under the NESHAP regulations is a source that is not a ''major source'' of hazardous air pollutants (HAP). A ''major source'' under the NESHAP regulations is ''any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any [HAP] or 25 tons per year or more of any combination of [HAP] * * *'' See definitions of ''area source'' and ''major source'' at 40 CFR 63.2.

This final rule affects only whether area sources regulated by certain NESHAP are required to obtain a title V operating permit and whether title V permits may be issued to these and other area sources once EPA has promulgated exemptions from title V for them. It has no other effect on any requirements of the NESHAP regulations, nor on the requirements of State or Federal title V operating permit programs.

The affected categories are:

| Category | NESHAP | Estimated number of sources [1] |
|---|---|---|
| Perchloroethylene dry cleaning | Part 63, Subpart M | [2] 28,000 |
| Hard and decorative chromium electroplating and chromium anodizing | Part 63, Subpart N | 5,000 |
| Commercial ethylene oxide sterilization | Part 63, Subpart O | 100 |
| Halogenated solvent cleaning | Part 63, Subpart T | 3,800 |
| Secondary aluminum production | Part 63, Subpart RRR | 1,316 |
| Secondary lead smelting | Part 63, Subpart X | 3 |

*B. How Can I Get Copies of This Document and Other Related Information?*

1. *Docket.* The EPA has established an official public docket for this action under Docket ID No. OAR–2004–0010. 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. Documents in the official public docket are listed in the index list in EPA's electronic public docket and comment system, EDOCKET. Documents are available both electronically and in hard copy. Electronic documents may be obtained through EDOCKET. Hard copy documents may be viewed at the Air Docket in the EPA Docket Center, (EPA/DC) EPA West Building, Room B102, 1301 Constitution Ave., NW., Washington, DC 20004. This docket facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742. A reasonable fee may be charged for copying docket materials.

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/* or the federal-wide eRulemaking site at *http://www.regulations.gov.*

An electronic version of a portion of the public docket is available through EDOCKET at *http://www.epa.gov/edocket/.* To view public comments, review the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Publicly available docket materials that are not available electronically may be

[1] This estimated number includes both major and area sources, even though only area sources will be affected by this rulemaking. Almost all dry cleaners are area sources. Also, EPA believes less than half of EO sterilizers are area sources (see docket item 106). For other categories listed here, EPA does not have information on the number of area sources.

[2] The proposal of March 25, 2005 estimated up to 30,000 dry cleaners would be affected by this rulemaking. Based on new information available to EPA, we now believe up to 28,000 dry cleaners are potentially affected by this rulemaking.

viewed at the docket facility identified above. Once in the system, select ''search,'' then key in the appropriate docket identification number.

*C. Where Can I Obtain Additional Information?*

In addition to being available in the docket, an electronic copy of today's notice is also available on the World Wide Web through the Technology Transfer Network (TTN). Following signature by the EPA Administrator, a copy of today's notice will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at *http://www.epa.gov/ttn/oarpg.* The TTN provides information and technology exchange in various areas of air pollution control. If more information regarding the TTN is needed, call the TTN HELP line at (919) 541–5384.

*D. How Is This Preamble Organized?*

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I. National Technology Transfer Advancement Act
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## II. Background

Section 502(a) of the Clean Air Act (Act) sets forth the sources required to obtain operating permits under title V. These sources include: (1) Any affected source subject to the acid deposition provisions of title IV of the Act; (2) any major source; (3) any source required to have a permit under Part C or D of title I of the Act; (4) ''any other source (including an area source) subject to standards or regulations under section 111 [new source performance standards] or 112 [NESHAP)]'' and (5) any other stationary source in a category designated by regulations promulgated by the Administrator. See 40 CFR 70.3(a) and 71.3(a). The requirements of section 502(a) are primarily implemented through the operating permit program rules: Part 70, which sets out the minimum requirements for title V operating permit programs administered by State, local, and tribal permitting authorities (57 FR 32261, July 21, 1992), and part 71, the federal operating permit program requirements that apply where EPA or a delegate agency authorized by EPA to carry out a Federal permit program is the title V permitting authority (61 FR 34228, July 1, 1996). The area sources subject to NSPS under section 111 or NESHAP under section 112 [addressed in category (4) above] are identified in §§ 70.3(a)(2) and (3) and §§ 71.3(a)(2) and (3) as among the sources subject to title V permitting requirements.

Section 502(a) of the Act also provides that ''the Administrator may, in the Administrator's discretion and consistent with the applicable provisions of [the Clean Air Act], promulgate regulations to exempt one or more source categories (in whole or in part) from the requirements [of title V] if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, except that the Administrator may not exempt any major source from such requirements.''

In the part 70 final rule of July 21, 1992, EPA permanently exempted from title V two categories of area sources that are subject to section 111 and 112 standards established prior to the part 70 rule (pre-1992 standards): New residential wood heaters subject to subpart AAA of part 60 (NSPS), and asbestos demolition and renovation operations subject to subpart M of part 61 (NESHAP). See §§ 70.3(b)(4) and 71.3(b)(4). The EPA also allowed permitting authorities under part 70 the option to defer permitting for other area sources subject to pre-1992 standards, while for part 71 purposes, we simply deferred issuing permits to them. See 57 FR 32261–32263 (July 21, 1992), and §§ 70.3(b)(1) and 71.3(b)(1).

The post-1992 standards, including the NESHAP for area sources that are the subject of today's final rule, previously have been addressed in §§ 70.3(b)(2) and 71.3(b)(2), which state that EPA will determine whether to exempt from title V permitting any or all area sources subject to post-1992 NSPS or NESHAP at the time each new standard is promulgated. Subsequently, EPA issued title V exemptions for several area sources subject to NESHAP in final rules under part 63:

- All area sources within the NESHAP for publicly owned treatment works (POTW), Subpart VVV. See § 63.1592 (63 FR 64742, October 21, 2002).
- Those area sources conducting cold batch cleaning within the NESHAP for halogenated solvent cleaning, Subpart T. See § 63.468(j) (59 FR 61802, December 2, 1994).
- Three types of area sources within the NESHAP for hard and decorative chromium electroplating and chromium anodizing tanks, Subpart T. See § 63.340(e)(1) (61 FR 27785, June 3, 1996).

The EPA has issued three post-1992 NESHAP that defer the requirement for area sources to obtain title V permits:

- Area sources subject to the NESHAP for perchloroethylene dry cleaning, subpart M; chromium electroplating and anodizing, subpart N; commercial ethylene oxide sterilization, subpart O; and secondary lead smelting, subpart X. See 61 FR 27785, June 3, 1996;
- Area sources subject to the NESHAP for halogenated solvent cleaning, subpart T. See 59 FR 61801, December 2, 1994, as amended by 60 FR 29484, June 5, 1995; and
- Area sources subject to the NESHAP for secondary aluminum production, subpart RRR. See 65 FR 15690, March 23, 2000.

The first two rules established deferrals of area source permitting, which expired on December 9, 1999. The expiration date for these deferrals was extended to December 9, 2004 in another final rule (64 FR 69637, December 14, 1999). The third rule provided deferrals for secondary aluminum area sources, which also expired on December 9, 2004. Thus, today's final rule addresses all six categories of area sources subject to a post-1992 NESHAP that were subject to deferrals from permitting that expired on December 9, 2004.

The EPA published a notice of proposed rulemaking on March 25, 2005 (70 FR 15250), where we proposed to exempt from title V five categories of area sources subject to NESHAP: Dry cleaners, halogenated solvent degreasers, chrome electroplaters, ethylene oxide (EO) sterilizers and secondary aluminum smelters. As support for the proposed exemptions, we discussed why compliance with title V appeared to be impracticable, infeasible, or unnecessarily burdensome on the area sources, consistent with the exemption criteria of section 502(a) of the Act. Also, we discussed a sixth category, area sources subject to the NESHAP for secondary lead smelters, but we did not propose to exempt them.

Today's final rule is unchanged from the proposal, except for a revision to § 63.360(f), which sets forth the title V exemption for area sources subject to the NESHAP for EO sterilizers. The change to the EO sterilizer rule is needed to clarify which sources under the NESHAP are subject to today's title V exemptions, and it is discussed further in section VIII.J of this preamble.

## III. What Does Today's Action Involve?

### *A. What Revisions Are Being Made to Part 63?*

Today's final rule exempts five categories of area sources from title V by revising certain language in the NESHAP rules under part 63, as we proposed on March 25, 2005 (70 FR 15250). This is achieved through two types of changes to the NESHAP rules.

First, we have revised each of the five NESHAP to say that area sources subject to the NESHAP are exempt from the obligation to obtain permits under parts 70 or 71, unless the source would be required to obtain these permits for another reason, as defined in the part 70 or 71 rules, such as when the source triggers another applicability provision of §§ 70.3(a) or 71.3(a). For example, if an exempt area source increases its HAP emissions such that it becomes a major source, the former area source will be required to get a title V permit because it is a major source, consistent with §§ 70.3(a)(1) and 71.3(a)(1). Consequently, when a former area source becomes a major source, the major source permit must include all NESHAP requirements that apply to the major source, including the requirements of the NESHAP that formerly provided for the title V exemption.[3] This is so because §§ 70.3(c)(1) and 71.3(c)(1) require permits for major source to include ''all applicable requirements for all relevant emissions units in the major source.'' Also, we added a second sentence to each NESHAP to say ''notwithstanding the previous sentence,'' the source ''must continue to comply with the provisions of this subpart applicable to area sources.'' The purpose of this sentence is to explain that area sources that are exempted from title V are not exempted from any emission limitations, standards, or any other requirements of the NESHAP.

Second, we have revised the table in each NESHAP that shows how the general provisions of subpart A of part 63 apply to that particular NESHAP, except for the dry cleaning NESHAP, which has no such table. For sources other than dry cleaners, the ''comment'' column for the § 63.1(c)(2) entry in the tables simply states that area sources subject to the subpart are exempt from title V permitting obligations.

[3] Note that when an area source becomes a major source, depending on the specific requirements of the NESHAP, the emissions standards may change from generally achievable control technology (GACT), which may be established for area sources, to maximum achievable control technology (MACT), which is required for major sources, but also may be established for area sources. Also, see § 63.1(c)(5).

We have made one change to the rule language of the proposal. In the final rule, we have revised the regulatory language of § 63.360(f), which sets forth the title V exemption for EO sterilizers. For more discussion of the proposed regulatory language and why we are changing it in the final rule, see section VIII.J below.

Also, we are not making any changes to the NESHAP for secondary lead smelters, consistent with our proposal, because we are not establishing a title V exemption for area sources subject to it. See section V below for a more detailed explanation of our decision regarding lead smelters.

### *B. What Revisions Are Being Made to Parts 70 and 71?*

Today's final rule also revises parts 70 and 71, as we proposed, to make the rules more consistent with our interpretation that State and local agencies, tribes, and EPA (permitting authorities) may not issue title V permits to area sources after we promulgate title V exemptions for them. In the proposal, we explained that section 502(a) of the Act provides that only those area sources required to get permits, and not exempted by EPA through notice and comment rulemaking, are properly subject to title V requirements. Also, we explained that section 506(a) of the Act, which provides that permitting authorities ''may establish additional permitting requirements not inconsistent with this Act,'' does not override the more specific language of section 502(a). We also explained that section 506(a) preserves the ability for permitting authorities to establish additional permitting requirements, such as procedural requirements, for sources properly covered by the program, and that section 116 of the Act allows State and other non-federal permitting agencies (State agencies) to issue non-title V permits to area sources that have been exempted from title V. See section VI below for further discussion of our interpretations of the Act in this regard.

First, we proposed to delete the ''at least'' language of § 70.3(a) that has been interpreted to allow State agencies to require permits from area sources, once we have exempted the area sources from title V, because this language is inconsistent with section 502(a) of the Act. No similar changes are necessary for part 71. Second, we proposed to delete language in § 70.3(b)(3) and § 71.3(b)(3) that allows exempt sources to ''opt to apply for a permit under a part 70 program,'' as it is inconsistent with section 502(a) to let exempted area sources volunteer for a title V permit.

Third, we proposed to delete the prefatory phrase of § 70.3(b)(4), ''Unless otherwise required by the state to obtain a part 70 permit,'' because it suggests that States agencies may require title V permits for exempted area sources, such as for residential wood heaters and asbestos demolition and renovation, which would be inconsistent with section 502(a) of the Act. Today's rule makes these revisions final, unchanged from the proposal.

## IV. What Are the Reasons for the Title V Exemptions?

### *A. General Approach*

In the proposal of March 25, 2005 (70 FR 15250), we explained our general approach to implementing the exemption criteria of section 502(a) of the Act. Section 502(a) of the Act provides, in part, that the Administrator may ''promulgate regulations to exempt one or more source categories (in whole or in part) from the requirements of this subsection if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, except that the Administrator may not exempt any major source from such requirements.'' In addition, EPA explained that the legislative history of Section 502(a) suggests that EPA should not grant exemptions where doing so would adversely affect public health, welfare, or the environment. See Chafee-Baucus Statement of Senate Managers, Environment and Natural Resources Policy Division 1990 CAA Leg. Hist. 905, Compiled November, 1993 (in that ''[t]he Act requires EPA to protect the public health, welfare and the environment, * * * this provision of the permits title prevents EPA from exempting sources or source categories from the requirements of the permit program if such exemptions would adversely affect public health, welfare, or the environment'').

In developing this rulemaking, EPA sought and relied on information from State and local agencies on the level of oversight they perform on these area sources. They responded with information on whether they issue permits, perform routine inspections, provide compliance assistance, and on compliance rates for them. We also received input from State small business ombudsmen and several trade associations representing dry cleaning, metal finishing, solvent cleaning, and the aluminum industry, including information on the sources and the compliance assistance programs currently available for them. In addition, the proposal provided a 60-day public comment period and public citizens, non-profit organizations, State agency representatives, and affected industry representatives responded with comments, which are included in the docket.

In the proposal, we discussed on a case-by-case basis the extent to which one or more of the four factors supported title V exemptions for a given source category, and then we assessed whether considered together those factors demonstrated that compliance with title V requirements would be ''unnecessarily burdensome'' on the category, consistent with section 502(a) of the Act. See 70 FR 15253, March 25, 2005.

One commenter said we should have evaluated and discussed all four factors for each category of area sources, suggesting that we ignored factors that did not support title V exemptions for each category of area sources. In response, we have considered, and discuss in this preamble, all four factors for each category of area sources for today's final rule. See the explanation below for an overview of our analysis of each factor. Also, see section IV.B through F for detailed discussion of the four factors for each category of area sources, section VIII.A for detailed EPA response to this comment, and section VIII.D, which provides detailed EPA response to this comment, and other comments, on proposed factor four.

The first factor discussed in the proposal is whether title V would result in significant improvements to the compliance requirements, including monitoring, recordkeeping, and reporting, that are already required by the NESHAP. This preamble refers to this evaluation as probing whether title V is ''unnecessary'' to improve compliance for these NESHAP requirements at area sources. Thus, a finding that title V does not result in significant improvements to compliance, as compared to operating subject to the NESHAP without a title V permit, is described as supporting a conclusion that title V permitting is ''unnecessary'' for area sources in that category, consistent with the ''unnecessarily burdensome'' criterion of section 502(a) of the Act. Title V provides authority to add monitoring requirements in permits in appropriate circumstances, and also imposes a number of monitoring, recordkeeping and reporting requirements that are designed to enhance compliance. We analyze below the extent to which Title V could improve compliance for the area sources covered by today's rule.

Part 70 and 71 set forth, in three principal sections, monitoring requirements that may be included in title V permits for area sources. Section 70.6(a)(3)(i)(A) requires that title V permits include ''[a]ll monitoring and analysis procedures or test methods required under applicable monitoring and testing requirements.'' This means, for example, that monitoring required by a NESHAP must be included in a title V permit issued to a source covered by a NESHAP. Second, § 70.6(a)(3)(i)(B) goes further, and provides that ''[w]here the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit'' may be included in a title V permit. Importantly, however, where periodic monitoring exists in the underlying requirement, such as a NESHAP, permit writers are not authorized by this regulation to add additional periodic monitoring in a permit. See *Appalachian Power Co.* v. *EPA,* 208 F.3d 1015, 1028 (D.C. Cir. 2000). Finally, § 70.6(c)(1), provides that permits must contain ''consistent with [the periodic monitoring rule in § 70.6(a)(3)], compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit.''[4]

The EPA's interpretation of § 70.6(c)(1) has evolved over time. In November and December 2000, EPA partially granted two petitions for objections to State-issued part 70 permits. See In the Matter of Pacificorp, Petition No. VIII–00–1 (November 16, 2000); In the Matter of Fort James Camas Mill, Petition No. X–19999–1 (December 22, 2000). In both decisions, EPA held that § 70.6(c)(1) empowers State permitting authorities to review, on a case-by-case basis, the sufficiency of each permittee's monitoring requirements, independent of the authority provided by the periodic monitoring rule. On September 17, 2002, EPA published a proposed rule that would have codified this interpretation of § 70.6(c)(1). See 67 FR 58561. After considering comments, however, EPA issued a final rule (the ''umbrella monitoring rule'') providing that § 70.6(c)(1) does not allow permit writers to add monitoring requirements beyond those that are authorized by the periodic monitoring rule. See 69 FR

[4] Similar provisions appear in EPA regulations in Part 71 stipulating monitoring provisions for federally-issued title V permits.

3202, 3204 (January 22, 2004). This rule was the subject of litigation in the United States Court of Appeals for the District of Columbia Circuit (DC Circuit), and the Court recently vacated and remanded the rule on the basis that EPA failed to provide adequate notice in its proposal of the option that it adopted in its final rule. See *Environmental Integrity Project* v. *EPA,* 205 U.S. App. LEXIS 21930 (D.C. Cir. 2005).

In EPA's March 25, 2005 proposal to exempt five categories of area sources from title V requirements, EPA explained that ''under the umbrella monitoring rule and the periodic monitoring rule, title V permits would not typically add any new monitoring requirements for post-1992 NESHAP, including the NESHAP addressed in today's proposal.'' See 70 FR 15254. The recent decision in *Environmental Integrity Project* vacating the umbrella monitoring rule does not change our view that subjecting these area sources to title V will not likely lead to monitoring beyond that required by the underlying NESHAP. All of the NESHAP were issued after the 1990 amendments to the Act, and were therefore designed to meet all of the Act's current monitoring requirements. Interested parties that believed those regulations failed to provide for sufficient monitoring had an opportunity to comment on the proposed NESHAP and to challenge EPA's rulemaking decisions in court. Any such opportunity has now passed. Thus, even if § 70.6(c)(1) is interpreted to allow ''sufficiency'' monitoring independent of the authority that exists through the periodic monitoring rule, EPA is confident that no such additional monitoring would appropriately be added in title V permits issued to the five categories of area sources we exempt from title V today.[5] Therefore, the monitoring component of the first factor favors title V exemptions for all of the categories of sources for which exemptions are provided in this rule, because title V is ''unnecessary'' to provide adequate monitoring for them. Also, see EPA response to comment that title V permits are needed to define monitoring for electroplaters, in section VIII.G.

As part of the first factor, we have also considered the extent to which title V could potentially enhance compliance for area sources covered by today's rule through recordkeeping or reporting requirements, including requirements for a six-month monitoring report, deviation reports, and an annual compliance certification. See §§ 70.6(a)(3) and 71.6(a)(3), §§ 70.6(c)(1) and 71.6(c)(1), and §§ 70.6(c)(5) and 71.6(c)(5). In the proposal, we stated that the recordkeeping and reporting requirements of the NESHAP for electroplaters, EO sterilizers, and secondary aluminum smelters are substantially equivalent to those of title V. After considering comments received on the proposal, we continue to believe the compliance requirements for these NESHAP are substantially equivalent to those of title V. Also, see EPA response to comments on issues related to factor one, including section VIII.I, concerning comment that the compliance requirements for EO sterilizers and secondary aluminum are not substantially equivalent to those of title V.

In the proposal, we did not discuss recordkeeping and reporting in the context of factor one for dry cleaners or degreasers, but we do so in today's final rule in response to comment. As mentioned above, these NESHAP have monitoring requirements consistent with the title V monitoring requirements. However, they do not contain reporting requirements that are identical to the title V requirements for deviation reports, six-month monitoring reports, and annual compliance certification. [See §§ 70.6(a)(3)(iii) and 71.6(a)(3)(iii).]

The NESHAP for dry cleaners requires a log to be keep on-site to document the dates that weekly leak detection and repair activities are conducted, the results of weekly monitoring of temperature and perchloroethylene concentrations, and a rolling monthly calculation of annual perchlorethylene consumption. It does not require a 6-month monitoring report, ''prompt'' deviation reports, or annual compliance certification, directly comparable to the compliance requirements of § 70.6(a)(3)(iii)(A) and (B), and § 70.6(c)(5).

The NESHAP for degreasers requires exceedances of monitoring parameters to be reported at least semiannually and it requires an annual compliance report, which for most sources, is composed of a statement that operators have been trained on operation of cleaning machines and their control devices and an estimate of solvent consumption on an annual basis, but it does not require a 6-month monitoring report, ''prompt'' deviation reports, or annual compliance certification, directly comparable to the requirements of § 70.6(a)(3)(iii)(A) and (B), and § 70.6(c)(5).

Although the reporting requirements of these two NESHAP are not directly comparable to those of title V, this does not mean that the reporting requirements of these two NESHAP are inadequate to achieve compliance on their own. Indeed, in issuing the NESHAP for these sources, EPA determined that the recordkeeping and reporting requirements contained therein were adequate, and EPA continues to believe that this is the case. The EPA acknowledges these additional title V reporting measures may provide some marginal compliance benefits. However, EPA believes that they would not be significant. Because the monitoring required by the two NESHAP is consistent with the monitoring requirements of title V, and because each NESHAP has adequate recordkeeping and reporting requirements tailored to the NESHAP, we conclude that the first factor supports a title V exemption for these sources. [See additional explanation for dry cleaners and degreasers in sections IV.B and D below.]

The second factor considered in determining whether title V is ''unnecessarily burdensome'' for these categories is whether title V permitting would impose significant burdens on these area sources and whether these burdens would be aggravated by difficulty they may have in obtaining assistance from permitting agencies. We used this factor to assess whether title V satisfies the ''burdensome'' component of the ''unnecessarily burdensome'' criterion of section 502(a) of the Act. We discussed this factor in the proposal as supporting our exemption findings for dry cleaners, chrome electroplaters, solvent degreasers, and secondary aluminum smelters, but we did not specifically discuss it with respect to EO sterilizers. However, in the proposal, we stated a belief that title V burdens and costs would be significant for all five categories of area sources, and this statement included EO sterilizers. See discussion of the second factor in the proposal, 70 FR 15254.

To help us assess factor two, we collected information on the burdens and costs of title V and economic data for the area sources, and we placed this information in the docket prior to our proposal. See economic information for the five industry groups (docket item 04), and information on burdens and costs of title V in the information

[5] It has been EPA's consistent position that post-1990 NESHAP include all monitoring required under the Act. See, *e.g.*, the preamble to EPA's compliance assurance monitoring rule, 64 FR 54940 (October 22, 1997) and EPA's advance notice of proposed rulemaking soliciting comments on Clean Air Act requirements that may include inadequate monitoring requirements, 70 FR 7905 (February 16, 2005) (specifically not soliciting comment on standards promulgated after 1990 because they contain adequate monitoring under the Act).

collection requests (ICRs) for part 70 and 71 (docket items 80 and 81). Note that the economic information is for the broad industry group, which includes both area sources and major sources under title V. However, despite this, certain assumptions about their economic characteristics are possible because almost all of them are small businesses with limited resources. For example, many dry cleaners are small ''mom-and-pop'' retail establishments, which will have greater difficulty in meeting regulatory demands than large corporations with trained environmental staffs and greater resources. The ICRs for part 70 and 71 describe title V burdens and costs in the aggregate, they are not designed for use in estimating title V burdens and costs for any particular sources. The ICRs do not include specific estimates of burdens and costs for area sources because area sources were subject to title V deferrals at the time the ICRs were approved. However, the ICRs describe in detail various activities undertaken at title V sources, including activities for major sources with standard permits, and certain activities for major sources with general permits, and area sources may be issued either standard or general permits, so many of the same burdens and costs described in the ICRs will also apply to these area sources. See general permit rules, §§ 70.6(d) and 71.6(d). In the proposal, we included a list of source activities associated with part 70 and 71 that impose title V burdens and costs, whether the source has a standard or general permit, and we described how permits for area sources may have a somewhat reduced scope, based on §§ 70.3(c)(2) and 71.3(c)(2), compared to major source permits. Despite the potential for reduction of burdens for area sources, we proposed finding that the burdens and costs of title V would be significant for these area sources, similar to those for major sources. Thus, we proposed finding that V is ''burdensome'' for these area sources, consistent with the ''unnecessarily burdensome'' criterion of section 502(a) of the Act.

Our review of comments and further consideration of these issues has not led us to a different view for all categories of area sources. For EO sterilizers, as in the proposal, EPA has no reliable information on the economic resources of area sources but, as described below, believes that a number of area sources are small businesses with limited economic resources. See section IV.E. Given the lack of specific economic information for EO sterilizers, EPA is not making a specific finding as to whether factor two supports an exemption for this source category. Thus, we find today that factor two supports title V exemptions for all categories of area sources, except for EO sterilizers, where other factors support the exemption. See 70 FR 15258–15259 for more on the burdens of general permitting for area sources. Also, see sections VII and VIII.K below for more on our alternative proposal to require general permits for area sources in lieu of exempting them, section VIII.C below for more on title V cost estimates for area sources, and section VIII.L below for more on title V costs estimates for sources with general permits.

EPA's general belief, stated in the proposal, that title V burdens and costs would be significant for EO sterilizers was not based on any particular study or docket support, but instead on a general assessment of the types of smaller establishments likely to meet the ''area source'' definition of part 63 and conduct EO sterilization activities, e.g., small contract sterilization businesses, conducting off-site sterilization services for manufacturers of medical equipment and supplies, pharmaceuticals, spices, and cosmetics. See docket items 88 and 106.

In response to the comment that we should consider all four factors in evaluating each category of area sources for exemptions, we note that the docket does not contain reliable information on the economic resources of area sources in this category, but EPA reaffirms the general belief that there are area sources in the EO sterilizer category that would be small businesses or other small establishments with limited economic resources. Nevertheless, because specific information on the economic resources of EO sterilizers is lacking, EPA is basing its decision to exempt this category from title V on its assessment of the other three factors and additional rationale noted in its evaluation of the legislative history of title V. [See section IV.D.] Also, see section VIII.A for more detailed EPA response to the comment that we should consider all four factors in evaluating each category of area sources for exemptions.

The third factor, which is closely related to the second factor, is whether the costs of title V permitting for these area sources would be justified, taking into consideration any potential gains in compliance likely to occur for such sources. We discussed factor three in the proposal as supporting our exemption findings for dry cleaners, but we did not discuss it with respect to the other four categories of area sources we proposed for title V exemption. See more discussion on factor three in the proposal, including a detailed listing of many of the mandatory activities imposed by title V for area sources, 70 FR 15254. As described above in the context of our discussion of factor two, we find that costs of title V are significant for all categories except for EO sterilizer, where sufficient economic data are lacking for such a finding. Nevertheless, the types of enterprises within the EO sterilizer category are strongly suggestive that title V would be an economic burden for some, if not all, of the area sources. Also, through factor one and/or revised factor four for each category of area sources in the proposal, both of which examine the ability of title V permits to improve compliance over that required by the NESHAP, we established that title V is ''unnecessary'' for NESHAP compliance. Although there may be some compliance benefits from title V for some area sources, we believe they will be small, and not justified by title V costs and burdens for them.

Accordingly, for all categories of area sources we exempt today, we conclude that title V costs are not justified considering the potential for gains in compliance from title V, and thus, factor three supports title V exemptions for all five categories of area sources, consistent with section 502(a) of the Act. See economic data for all industry groups, docket item 04, and information on title V burdens and costs, docket items 80 and 81. See section VIII.A for more detailed EPA response to the comment that we should consider all four factors in evaluating each category of area sources for exemptions.

The fourth factor considered in the proposal is whether oversight, outreach, and compliance assistance programs by the EPA, or a delegate State or local agency, primarily responsible for implementing and enforcing the NESHAP, could achieve high compliance with particular NESHAP, without relying on title V permitting. We used this factor to help examine whether title V is ''unnecessary'' for NESHAP compliance for these area sources. See the discussion of factor four in the proposal, 70 FR 15254, March 25, 2005. We discussed this factor as supporting our exemption findings of the proposal for dry cleaners, solvent degreasers and EO sterilizers, but we did not discuss it for electroplaters and secondary aluminum.

To help us assess this factor we collected information from State and local air pollution control agencies (State agencies), summarized in the ''State survey'' which we placed in the docket for this rulemaking (docket item

02). The State survey shows that many State agencies have compliance oversight programs that result in high compliance for the dry cleaners, solvent degreasers and EO sterilizers, and that high compliance for them does not necessarily depend on title V. This point was repeated by State and local agencies who submitted comments on the proposal, all of which are in support of the proposed exemptions for the five categories of area sources, see docket items, 11, 16, 59, 61, and 65.

One commenter opined that factor four is inconsistent with Congressional intent concerning the ''unnecessarily burdensome'' criterion of section 502(a) of the Act, because it examines the future possibility that a State might adopt alternatives to title V that are sufficient to achieve compliance with the NESHAP, without title V, rather than examining whether actual programs are in place to achieve compliance with the NESHAP, without title V permits. In response, we have revised factor four in the final rule, and we have analyzed all five categories of area sources based on the revised factor. Revised factor four is whether there are implementation and enforcement programs in place that are sufficient to assure compliance with the NESHAP for area sources, without relying on title V permits. As further described in section VIII.D below, there are implementation and enforcement programs in place sufficient to assure compliance with the NESHAP for all five categories of area sources addressed in today's final rule, in all parts of the nation, without title V permits. These programs take several forms, including programs of implementation and enforcement conducted by EPA under the statutory authority of sections 112, 113, and 114, and State delegation of this responsibility under section 112(l) of the Act, implemented through subpart E of part 63. Second, section 507 of the Act requires a small business assistance program (SBAP) for each State and for EPA, and these programs are in place, and they may be used to assist area sources subject to NESHAP that have been exempted from title V permitting. Third, States and EPA often conduct voluntary compliance assistance, outreach, and education programs (compliance assistance programs), which are not required by statute. The statutory requirements for implementation and enforcement of NESHAP in section 112 apply to NESHAP that regulate all sources, including area sources. Thus factor four is satisfied for each of these categories of area sources by the statutory requirements alone. However, additional voluntary programs conducted by State and local agencies supplement the mandated programs and enhance the success of the programs.

We used the compliance rate information in the State survey as a check on our assumption that the statutory programs for implementation and enforcement of NESHAP, together with other efforts by State agencies would result in adequate compliance for these sources, without relying on title V permits. The State survey lists various State oversight programs, without indicating whether they are conducted voluntarily or under statutory authority. Also, the compliance rate information in the survey suggests that adequate compliance is being achieved in practice for all of these categories of area sources (with more than half of the agencies that responded reported high compliance for each category). [See the State survey, docket item 02.]

However, for secondary aluminum, fewer State and local agencies responded with examples of compliance oversight programs and information on compliance rates, compared to other categories. We believe these data are explained by the timing of the State survey relative to the effective date of the secondary aluminum standard, rather than suggesting any deficiencies in State implementation and enforcement for the NESHAP. The earliest date that compliance with the secondary aluminum NESHAP was required for sources was about the same time as the data collection phase of the State survey, and thus, State and local agencies did not have much experience with compliance oversight for them, or much compliance data upon which to base their survey responses for secondary aluminum. The secondary aluminum NESHAP did not require sources to be in compliance until March 24, 2003 (all other NESHAP were effective much earlier than this), while the majority of State and local input for the State survey occurred from March to June of 2003. [See the final rule for secondary aluminum, 65 FR 15690, March 23, 2000, docket item 77, and documentation of the data collection phase of the State survey, docket items 93 and 94.] We believe that State agencies are implementing this NESHAP in the same manner as others and, based on that belief, the statutory program, and the information in the State survey, we conclude that factor four supports title V exemptions for area sources subject to the secondary aluminum NESHAP.

The analysis of factor four we performed for the final rule continues to support title V exemptions for dry cleaners, degreasers, and EO sterilizers, as we proposed, and it additionally supports exemptions for electroplaters and secondary aluminum smelters. Thus, for the final rule, factor four helps to demonstrate that title V is ''unnecessary'' for NESHAP compliance, consistent with the ''unnecessarily burdensome'' criterion of section 502(a) for all area sources we exempt today. Also, see section VIII.A for more detailed EPA response to the comment that we should consider all four factors in evaluating each category of area sources for exemptions, and section VIII.D for additional EPA responses to comments on proposed factor four.

In the proposal, we stated our belief that exempting these five categories of area sources from title V permitting would not adversely affect public health, welfare, or the environment, consistent with the legislative history of section 502(a). The reasons EPA explained in the proposal were the factors supporting exemptions discussed above and two other reasons: (1) That placing all requirements for these sources in permits would do little to help improve their compliance with the NESHAP, because of the simplicity of the sources and the NESHAP, and the fact that these sources are not typically subject to more than one NESHAP, and few other requirements under the Act, and (2) because requiring permits for them could, at least in the first few years of implementation, potentially adversely affect public health, welfare, or the environment by shifting State agency resources away from assuring compliance for major sources with existing permits to issuing new permits for these area sources, potentially reducing overall air program effectiveness. For the final rule, we continue to believe that title V exemptions for these five categories of area sources will not adversely affect public health, welfare, or the environment for the same reasons discussed in the proposal. See the proposal, 70 FR 15254–15255, and EPA response to comments on this issue in section VIII.E below.

In conclusion, the four factors and other rationale of the final rule are appropriate to analyze whether title V permitting is ''unnecessarily burdensome'' for these five categories of area sources, and we finalize title V exemptions for them based on our analyses of these four factors and other rationale. The clarification of the factors we did not discuss in the proposal, including the revision of factor four, contained in today's final rule, does not change our view, as stated in the

proposal, that title V is ''unnecessarily burdensome'' for the five categories of area sources we exempt today. Thus, for these reasons we are exempting from title V area sources subject to the part 63 NESHAP for dry cleaners, halogenated solvent degreasers, chrome electroplaters, EO sterilizers and secondary aluminum smelters. See sections IV.B through F, below for more detail on our analysis of the four factors for each category of area sources we exempt today.

*B. Dry Cleaners*

In the proposal, we described how factors two, three, and four support title V exemptions for area sources subject to the NESHAP for perchlorethylene dry cleaners, subpart M. We did not discuss factor one for dry cleaners, other than to note that title V would not result in additional monitoring for these sources, but we do so today below in response to comment. See the general discussion of monitoring and the specific discussion of dry cleaners in the proposal, 70 FR 15254–15256, March 25, 2005.

First, in the proposal, we explained that title V burdens and costs are significant for dry cleaners (factor two), and thus title V will be ''burdensome'' for them. Dry cleaners are typically small ''mom and pop'' retail establishments employing only five people on average, with extremely limited technical and economic resources, and low profit margins, and title V costs would represent an excessively high percentage of sales for them. See the economic profile for dry cleaners, docket item 04. In addition, concerning factor two, the burdens of title V for dry cleaners would not likely be mitigated by assistance from permitting authorities because the authorities would likely not be able to meet the high demand caused by title V permitting for up to 28,000 dry cleaners nationally. Thus, we believe title V costs are significant for dry cleaners, and that title V is ''burdensome'' for them, because most are small businesses with limited resources, that would be subject to numerous mandatory source activities under part 70 or 71 that would represent significant costs to them in light of their resources, whether they have standard or general permits.

Second, as described in the proposal, factor four, whether adequate oversight by State agencies could achieve high compliance with NESHAP, without relying on title V permits, supports a conclusion that title V will be ''unnecessary'' for NESHAP compliance, and thus, that title V exemptions are appropriate for dry cleaners. However, in response to comments, we have revised factor four (explained below), and revised factor four continues to support the conclusion that title V is ''unnecessary'' for compliance with the NESHAP for dry cleaners. Revised factor four is whether there are implementation and enforcement programs in place that are sufficient to assure compliance with the NESHAP for area sources, without relying on title V permits. As further described in section VIII.D below, there are implementation and enforcement programs in place sufficient to assure compliance with the dry cleaning NESHAP, without title V, in all parts of the nation. Also, the State survey (docket item 02) shows that most States and local agencies report that they conduct State permitting programs, programs of routine inspection, and provide different types of compliance assistance tools to help assure compliance with the NESHAP, often in combination, and that more than half of the agencies that reported compliance rate information reported high compliance for dry cleaners Also, many State and local agencies reported to us that compliance with the dry cleaning NESHAP can best be achieved through compliance assistance efforts, such as compliance outreach and education programs, and compliance tools, including such tools as calendars designed to schedule NESHAP compliance activities, and inspection checklists for the NESHAP, rather than by using title V permits. See State and local input on compliance assistance programs for area sources, including dry cleaners (docket items 02, 03, 06, and 08); an example of a compliance calendar for dry cleaners (docket item 90), and an inspection checklist for dry cleaners (docket item 95); and State and local agency comments in support of the proposed exemptions (docket items 11, 16, 59, 61, and 65). The EPA agrees with those commenters who stated that non-title V compliance approaches are more likely to be successful for implementing the dry cleaning NESHAP. Also, see section VIII.D below for more on our decision to revise factor four.

Third, in the proposal, we explained that the costs of title V for dry cleaners are not justified taking into consideration the potential gains in compliance likely to occur from title V (the third factor). Consistent with the explanation above of factor two for dry cleaners, title V costs will be significant for them. Also, consistent with revised factor four for dry cleaners, title V is ''unnecessary'' for NESHAP compliance for them, so it follows that the potential for gains in compliance is low. Thus, for dry cleaners, title V costs are high and the potential for compliance gains from title V are low. Although there may be some compliance benefits from title V for dry cleaners (discussed below), we believe they will be small, and not justified by title V costs and burdens for them. Accordingly, for dry cleaners, we conclude that title V costs are not justified taking into consideration the potential for gains in compliance from title V.

In addition, as we explained in the proposal, the large number of dry cleaners that are area sources (up to 28,000 nationally) makes it likely that permitting them would strain the resources of State agencies, potentially reducing overall air program effectiveness, and thus, potentially adversely affecting public health, welfare, or the environment.

With respect to factor one for dry cleaners, we explained in the proposal that title V would not result in additional monitoring for these sources, and we have reaffirmed this conclusion today. See section IV.A. We did not discuss the recordkeeping and reporting component of factor one in the proposal, but we do so here in response to comment. As discussed in section IV.A, the dry cleaning NESHAP does not contain reporting requirements that are directly comparable to the title V requirements for deviation reports, six-month monitoring reports, and annual compliance certification. [See §§ 70.6(a)(3)(iii) and 71.6(a)(3)(iii).] However, this does not mean that the reporting requirements of the NESHAP are inadequate to achieve compliance on their own. Indeed, in issuing the NESHAP for these sources, EPA determined that the recordkeeping and reporting requirements contained therein were adequate, and EPA continues to believe that this is the case. [See 58 FR 49354, September 22, 1993.] We acknowledge that the additional reporting requirements that would be provided through title V may have some marginal compliance benefits, however, we believe they would not be significant. Because the monitoring required by the NESHAP is consistent with the monitoring requirements of title V, and because the NESHAP itself has adequate recordkeeping and reporting requirements tailored to the NESHAP, we conclude that factor one supports an exemption for dry cleaners. Also for dry cleaners, factor four (described above) independently supports that title V is ''unnecessary'' for NESHAP compliance. Consequently, our view of the appropriateness of a title V exemption for dry cleaners is unaffected by our expanded analysis of

factor one for them, and we exempt them in today's final rule.

Thus, factors one, two, three, and revised factor four, support the exemption findings of the proposal, and EPA concludes that title V exemptions are appropriate for area sources subject to the NESHAP for dry cleaners, consistent with the ''unnecessarily burdensome'' criterion of section 502(a) of the Act.

*C. Chrome Electroplaters*

In the proposal we described how factors one and two support title V exemptions for area sources subject to the NESHAP for hard and decorative chrome electroplating and chromic acid anodizing (electroplaters), subpart N. We did not discuss factors three and four for electroplaters in the proposal, but we do so below in response to comment. See the discussion of electroplaters in the proposal, 70 FR 15256, March 25, 2005.

First, in the proposal, we stated that title V would impose significant burdens (including costs) for electroplaters (the second factor), and thus, title V will be ''burdensome'' for them. We based this view on our review of economic information (docket item 04), and information on title V burdens and costs (docket items 80 and 81). After viewing the comments received, and upon further consideration we continue to believe that title V burdens and costs are significant for electroplaters that are area sources because most are small businesses with limited resources, that would be subject to numerous mandatory activities under parts 70 or 71, that would impose significant costs in lights of their resources, whether they had a general or standard permit. Also, see discussion of the second factor in section IV.A above.

Second, in the proposal, we explained that the compliance requirements of title V and the NESHAP for electroplaters are substantially equivalent, so title V will not result in any new significant compliance requirements over those already required by the NESHAP (the first factor), and thus, title V will be ''unnecessary'' for NESHAP compliance. We reaffirm this finding today with respect to monitoring, in section IV.A. See section VIII.B for response to a comment that the interpretation of title V's monitoring requirements in the proposal was flawed, and section VIII.G below for EPA response to a comment that title V permits are needed to define monitoring requirements for electroplaters. With respect to recordkeeping and reporting, the electroplating NESHAP requires area sources to submit on-going compliance status reports, including a description of the NESHAP emission limitations or work practice standards, the operating parameters monitored to show compliance, information about the results of monitoring, including about excess emissions and exceedances of monitoring parameters, and a certification by a responsible official that work practices are followed. This report is required on an annual or six-month basis, depending on the frequency of periods of excess emissions. These reports result in information that is substantially equivalent with respect to assuring compliance as that required in six-month monitoring reports, deviation reports, and annual compliance certification reports under title V.

In the proposal, we did not discuss factor three, whether title V costs are justified, for electroplaters, taking into consideration any potential gains in compliance likely to occur through title V, but our analysis of factor three for the final rule is that it supports title V exemptions for them. Consistent with the explanation above of factor two, title V costs are significant for electroplaters. Also, for electroplaters, consistent with factors one (discussed above) and revised factor four (discussed below), both of which examine the ability of title V permits to improve compliance over that required by the NESHAP, title V is ''unnecessary'' for NESHAP compliance, so it follows that the potential for gains in compliance from title V will be low. Thus, for electroplaters, title V costs are high and the potential for gains in compliance from title V is low. Although there may be some compliance benefits from title V for electroplaters, we believe they will be small, and not justified by title V costs and burdens for them. Accordingly, for electroplaters, we conclude that title V costs are not justified considering the potential for gains in compliance from title V.

Also, in the proposal, we did not discuss factor four, whether adequate oversight by State agencies could achieve high compliance with NESHAP, without relying on title V permits, for electroplaters. In response to comments, we have revised factor four, and revised factor four supports the title V exemption findings of the proposal for electroplaters. Revised factor four is whether there are implementation and enforcement programs in place that are sufficient to assure compliance with the NESHAP for area sources, without relying on title V permits. As further described in section VIII.D below, there are implementation and enforcement programs in place sufficient to assure compliance with the electroplating NESHAP, in all part of the nation, without title V. Also, the State survey (docket item 02) shows that most States and local agencies report that they conduct State permitting programs, programs of routine inspection, and provide different types of compliance assistance tools to help assure compliance with the electroplating NESHAP, often in combination, and that more than half of the agencies that reported compliance rate information reported high compliance for electroplaters. Also, many State and local agencies reported to us that compliance with the NESHAP for area sources, including for the electroplating NESHAP, can best be achieved through compliance assistance efforts, such as compliance outreach and education programs, and compliance tools, rather than by using title V permits. See State and local input on compliance assistance programs for area sources (docket items 02, 03, 06 and 08); and State and local agency comments on the proposal, all of which are in support of the proposed title V exemptions for the five categories of area sources (docket Items, 11, 16, 59, 61, and 65). Also, see section VIII.D below for EPA response to comments on factor four.

Thus, factors one, two, three, and revised factor four, support the exemption findings of the proposal, and consequently, title V exemptions are appropriate for area sources subject to the NESHAP for electroplating, consistent with the ''unnecessarily burdensome'' criterion of section 502(a) of the Act.

*D. Solvent Degreasers*

In the proposal, we discussed how factors two and four support title V exemptions for area sources subject to the NESHAP for halogenated solvent degreasing, subpart T. With respect to factor one, we explained that title V would not result in additional monitoring for these sources, and we have reaffirmed this conclusion today. See Section IV.A. We did not discuss the recordkeeping and reporting component of factor one or factor three for degreasers, but we do so below in response to comment. See the discussion of degreasers in the proposal, 70 FR 15256–15257, March 25, 2005.

First, in the proposal, we explained that requiring title V permits would impose a significant burden on degreasers that they will have difficulty meeting with current resources (factor two), and thus, title V will be ''burdensome'' for them. Area source degreasers are typically small operations

employing only a few people, with limited technical and economic resources, and little experience in environmental regulations. Also, unlike the larger major sources, area source degreasing operations typically have no staff trained in environmental requirements and are generally unable to afford to hire outside professionals to assist them with understanding and meeting the permitting requirements. See the economic profile for degreasers, docket item 04. We received comment supporting this view (see docket item 31), and now we conclude that degreasers are small businesses with limited resources, subject to numerous mandatory activities under parts 70 or 71, that will be burdensome for them to meet, whether they have a general or standard permit; and that this means title V is ''burdensome'' for them. Also, see discussion of the second factor in section IV.A above.

Second, in the proposal, we explained that factor four, whether adequate oversight by State agencies could achieve high compliance with NESHAP, without relying on title V permits, supports title V exemptions for degreasers. In response to comments, we have revised factor four and revised factor four is whether there are implementation and enforcement programs in place that are sufficient to assure compliance with the solvent degreasing NESHAP for area sources, without relying on title V permits. The EPA concludes that there are implementation and enforcement programs in place sufficient to assure compliance with the degreasing NESHAP, in all parts of the nation, without title V (further described in section VIII.D below). Also, the State survey (docket item 02) shows that most States and local agencies report that they conduct State permitting programs, programs of routine inspection, and provide different types of compliance assistance tools to help assure compliance with the degreasing NESHAP, often in combination, and that more than half of the agencies that reported compliance rate information reported high compliance for degreasers. In addition, many State and local agencies reported to us that compliance with the degreaser NESHAP can best be achieved through compliance assistance efforts, such as compliance outreach and education programs, and compliance tools, rather than by using title V permits. [For example, see docket item 92, an inspection checklist for degreasers developed by a local air pollution control agency.] Thus, for the final rule, revised factor four supports that title V is ''unnecessary'' for NESHAP compliance for degreasers. See State and local agency input on compliance assistance programs (docket items 02. 03, 06, and 08), and State and local agency comments submitted in support of the proposed exemptions (docket items 11, 16, 59, 61, and 65). Also, see section VIII.D below for more on our decision to revise factor four; and section VIII.H below for EPA's response to comment on the appropriateness of title V exemptions when multiple applicable requirements apply to degreasers.

We did not thoroughly discuss factor one for degreasers in the proposal, but we do so here in response to comment. For the reasons explained in section IV.A, the degreasing NESHAP contains monitoring requirements for area sources that satisfy the requirements of the Act, and are sufficient to assure compliance with the NESHAP. However, as discussed in section IV.A, the degreasing NESHAP does not contain reporting requirements that are directly comparable to the title V requirements for deviation reports, six-month monitoring reports, and annual compliance certification. [See §§ 70.6(a)(3)(iii) and 71.6(a)(3)(iii).] However, this does not mean that compliance requirements of the NESHAP are inadequate to achieve compliance on their own. Indeed, in issuing the NESHAP for these sources, EPA determined that the recordkeeping and reporting requirements contained therein were adequate, and EPA continues to believe that this is the case. [See 59 FR 61801, December 2, 1994.] The EPA acknowledges these additional title V reporting measures may provide some marginal compliance benefits, however we believe they would not be significant. Because the monitoring required by the NESHAP is consistent with the monitoring requirements of title V, and because the NESHAP itself has adequate recordkeeping and reporting requirements tailored to the NESHAP, we conclude that the first factor supports a title V exemption for degreasers. Also, factor four (described above) independently supports the conclusion that title V is ''unnecessary'' for NESHAP compliance for degreasers, and thus, that a title V exemption is appropriate for them.

Also, in the proposal, we did not discuss factor three, whether title V costs are justified, taking into consideration any potential gains in compliance likely to occur for degreasers, but our analysis of factor three for the final rule is that it supports title V exemptions for them. Consistent with our analysis of factor two for degreasers (discussed above), title V costs are significant for them. Also, for degreasers, revised factor four (discussed above), which examines the ability of title V permits to improve compliance over that required by the NESHAP, supports that title V is ''unnecessary'' for NESHAP compliance, so it follows that the potential for gains in compliance from title V are low. Although there may be some compliance benefits from title V for degreasers, we believe they will be small, and not justified by title V burdens and costs for them. Accordingly, for degreasers, title V costs are not justified taking into consideration the potential for gains in compliance from title V, and thus, factor three also supports title V exemptions for degreasers.

Thus, factors one, two, three, and four support the exemption findings of the proposal, and EPA concludes that title V exemption is appropriate for area sources subject to the NESHAP for solvent degreasing, consistent with the ''unnecessarily burdensome'' criterion of section 502(a) of the Act.

*E. EO Sterilizers*

In the proposal, we described how factors one and four support a title V exemption for area sources subject to the NESHAP for EO sterilizers, subpart O. We did not discuss factors two and three for EO sterilizers, but we do so below in response to comments. See the discussion of EO sterilizers in the proposal, 70 FR 15256, March 25, 2005.

First, in the proposal, we compared the monitoring and reporting requirements of the EO sterilizer NESHAP with those of title V, and we stated that the requirements are substantially equivalent (the first factor), when sources employ continuous monitoring methods to assure proper operation and maintenance of control equipment, such as thermal oxidizers. Also, we said that sources that use scrubbers employ noncontinuous monitoring methods (e.g., weekly readings of glycol levels in tanks), and thus, the recordkeeping and reporting requirements for them would not be substantially equivalent to title V. Although we were not certain of the number of area sources that employ continuous monitoring methods under the NESHAP, we stated a belief that most sources would employ such methods, and we asked for comment on the percentage of sources that employ them. In addition, we noted that the EO sterilizer NESHAP does not require an annual compliance certification (as does title V), and we asked for comment on

the extent to which the lack of an annual compliance certification report requirement in the NESHAP would negatively affect compliance with the NESHAP.

For the final rule, we reviewed the EO sterilizer NESHAP once again, and we now conclude that sources with scrubbers are required to conduct ''continuous'' monitoring under the NESHAP, and therefore, that the recordkeeping and reporting requirements of title V and the NESHAP are substantially similar for all sources in the category. The EO sterilizer NESHAP at § 63.363(f) requires all sources to demonstrate continuous compliance, and it sets forth the monitoring requirements for demonstrating continuous compliance when the source employs scrubbers as emissions controls at § 63.364(b). [See Table 1 of § 63.360, for a list of the general provisions, subpart A of part 63, including definitions and reporting requirements, that apply for this NESHAP.] Because they conduct ''continuous'' monitoring, they are required to submit excess emissions and continuous monitoring system performance report and summary reports, to assess their compliance status on a semiannual basis, consistent with § 63.10(e)(3), the same as sources that use thermal oxidizers as emissions controls under the NESHAP. These reports provides compliance information that is substantially equivalent to that of §§ 70.6(a)(3)(iii) and 71.6(a)(3)(iii) for deviation reports and six-month monitoring reports (see explanation below).

The EO sterilizer NESHAP requires sources to submit considerable information to EPA, or its delegate agency, to assess compliance with its emission limitations and standards. Section 63.366(a)(3) requires an excess emissions and continuous monitoring system performance report and summary report of all sources with a continuous monitoring system (CMS), on a semiannual basis, consistent with § 63.366(e)(3). The excess emissions and continuous monitoring system performance report requires information on periods when the CMS is inoperative, periods of excess emissions and parameter monitoring exceedances, the nature and cause of each malfunction, any corrective actions taken, including repairs or adjustment made, and a certification of accuracy by a responsible official. The summary report, consistent with § 63.10(e)(3), is required to include an emissions data summary for control system parameters and a CMS performance summary, which provides detailed information on periods of monitoring system downtime and the reasons the system was inoperative, including a certification of accuracy by a responsible official. [See § 63.10(c)(5) through (13); and Table 1 of § 63.360.]

As described above, the compliance information already required to be reported by the EO sterilizer NESHAP is substantial, and it is similar to that required for annual compliance certification under title V [see §§ 70.6(c)(5) and 71.6(c)(5)]. Also, the compliance reports required by the NESHAP require certification by a responsible official, which is defined similarly in the two programs (see § 63.2, and §§ 70.2 and 71.2). For these reasons, we conclude that the lack of an annual compliance certification report under title V will not have a significant impact on compliance for the EO sterilizer NESHAP. In addition, as described in section IV.A, title V would not add any monitoring requirements for these sources.

Accordingly, we conclude that the EO sterilizer NESHAP provides compliance information that is substantially equivalent to the information required under title V. Thus, our analysis of factor one for the final rule is that it supports that title V is ''unnecessary'' for NESHAP compliance for EO sterilizers. Also, see section VIII.I below for EPA response to comments on EPA's analysis of the compliance requirements of the EO sterilizer NESHAP.

Second, in the proposal, we explained that factor four, whether adequate oversight by State agencies could achieve high compliance with NESHAP, without relying on title V permits, supports title V exemptions for EO sterilizers. In response to comment, we have revised factor four (explained below), and revised factor four continues to support that title V is ''unnecessary'' for compliance with the NESHAP for EO sterilizers, and thus, it supports title V exemptions for them. In the final rule, revised factor four is whether there are implementation and enforcement programs in place that are sufficient to assure compliance with the NESHAP for area sources, without relying on title V permits. As further described in section VIII.D below, there are implementation and enforcement programs in place sufficient to assure compliance with the EO sterilizer NESHAP, in all parts of the nation, without relying on title V permits. Also, the State survey (docket item 02) shows that most States and local agencies report that they conduct State permitting programs, programs of routine inspection, and provide different types of compliance assistance tools to help assure compliance with the EO sterilizer NESHAP, often in combination, and that more than half of the agencies that reported compliance rate information reported high compliance for EO sterilizers. Also, many State and local agencies reported that compliance with the EO sterilizer NESHAP can best be achieved through compliance assistance efforts, such as compliance outreach and education programs, and compliance tools, rather than by using title V permits. See State and local input on compliance assistance programs (docket items 02, 03, 06, and 08); and comments submitted by State and local agencies, all of which are in support of the proposed exemptions for the five categories of area sources (docket items 11,16, 59, 61, and 65). Also, see section VIII.D below for more on our decision to revise factor four, and section VIII.H and VIII.J below for EPA responses to comments on the proposed exemption for EO sterilizers.

In the proposal, concerning factor two, whether title V is a significant burden for these area sources, we stated a general belief that title V burdens and costs would be significant for all five categories of area source, and this statement included EO sterilizers. For EO sterilizers, this general belief was not based on any particular study or docket support, but instead on a general assessment of the types of smaller establishments likely to meet the ''area source'' definition of part 63 and conduct EO sterilization activities, *e.g.*, libraries and museums conducting fumigation of books and artifacts for conservation purposes, and small contract sterilization businesses, conducting off-site sterilization services for manufacturers of medical equipment and supplies, pharmaceuticals, spices, and cosmetics. See docket items 88 and 106.

In response to the comment that we should consider all four factors in evaluating each category of area sources for exemptions, we note that the docket does not contain reliable information on the economic resources of area sources in the EO sterilizer category, but EPA reaffirms the general belief that these types of sources are likely to include relatively small businesses or other establishments with limited economic resources. EPA is basing its decision to exempt EO sterilizer area sources from title V on a consideration of the limited information in the record on the types of establishments subject to the area source rule, and on its assessment of the other three factors and additional rationale noted in its evaluation of the legislative history of title V. [See section

IV.D.] EPA believes title V would be ''unnecessarily burdensome'' for EO sterilizer area sources, because title V would impose burdens that EPA believes would significantly outweigh the small compliance benefits expected from title V permitting for this category, satisfying the exemption criterion in section 502(a).

Also, in the proposal, we did not discuss factor three, whether title V costs are justified, taking into consideration any potential gains in compliance likely to occur, for EO sterilizers, but we clarify in today's final rule that factor three supports title V exemptions for them. We described above in the context of factor one and revised factor four, both of which examine the ability of title V permits to improve compliance over that required by the NESHAP, why we believe that title V is ''unnecessary'' for NESHAP compliance for them, so it follows that the potential for gains in compliance is low. Although there may be some compliance benefits from title V for EO sterilizers, we believe they will be small, and not justified by title V costs and burdens for them. Although we do not have reliable data on the economic resources of EO sterilizers, the costs of title V will be the same for these sources as other area sources addressed in this rule. In light of the low compliance benefits provided by title V for these sources, we do not believe that those costs are justified. Accordingly, for EO sterilizers, we conclude that title V costs are not justified taking into consideration the potential for gains in compliance from title V, and thus, factor three supports title V exemptions for them.

Thus, factors one, three, and four support the title V exemption findings of the proposal for area sources subject to the EO sterilizers NESHAP. There is insufficient information to conclude that factor two supports an exemption for EO sterilizers, but title V will impose some burdens regardless of the financial resources of EO sterilizers, and any burdens associated with title V compliance will be unnecessary, since title V will not provide any significant compliance benefits for them. Therefore, a title V exemption is appropriate for them, consistent with the ''unnecessarily burdensome'' criterion of section 502(a) of the Act.

*F. Secondary Aluminum*

In the proposal, we described how factors one and two support title V exemptions for area sources subject to the NESHAP for secondary aluminum, subpart RRR. We did not discuss factors three and four for them, but we do so below in response to comment. See the discussion of secondary aluminum in the proposal, 70 FR 15258, March 25, 2005.

First, in the proposal, we compared the recordkeeping and reporting requirements of the secondary aluminum NESHAP with those of title V, and we stated that the requirements are substantially equivalent (the first factor), when sources employ continuous monitoring methods to assure proper operation and maintenance of control equipment, such as when sources use thermal oxidizers for emission controls. Also, we said that sources that use scrubbers as emissions control do not employ continuous methods, and thus, the compliance requirements for them are not substantially equivalent to title V. Although we were not certain of the number of area sources that employ continuous monitoring methods under the NESHAP, we stated a belief that most sources would employ such methods, and we asked for comment on the percentage of sources that employ them. In addition, we noted that the secondary aluminum NESHAP does not require an annual compliance certification (as does title V), and we asked for comment on the extent that the lack of an annual compliance certification report requirement in the NESHAP would negatively affect compliance with the NESHAP.

For the final rule, we reviewed the secondary aluminum NESHAP once again and we now conclude that sources with scrubbers are required to conduct ''continuous'' monitoring under the NESHAP. The secondary aluminum NESHAP requires CMS for each add-on control device, including for scrubbers, when they are approved as an alternative monitoring method [*e.g.*, § 63.1510(w)]. [See Appendix A of subpart RRR, for a list of the general provisions of subpart A of part 63, including definitions and reporting requirements, that apply for this NESHAP; and the preamble for the final secondary aluminum NESHAP, 65 FR 15693, March 23, 2000, for more on the requirement for continuous compliance under the NESHAP.] Because they conduct ''continuous'' monitoring, they are required to submit excess emissions/summary reports to assess their compliance status, on a semiannual basis, consistent with § 63.10(e)(3), the same as other sources that use add-on controls, such as thermal oxidizers, under the NESHAP. These reports provide compliance information that is substantially equivalent to the requirements of §§ 70.6(a)(3)(iii) and 71.6(a)(3)(iii) for deviation reports and six-month monitoring reports (see detailed explanation below).

The secondary aluminum NESHAP requires sources to submit considerable information to EPA, or its delegate agency, to assess compliance with its emission limitations and standards. Section 63.1516(b) of the NESHAP requires an excess emissions/summary report for all sources with a CMS, on a semiannual basis, consistent with §§ 63.10(e)(3) and 63.10(c). The excess emissions report requires all monitoring data, information on periods when the CMS is inoperative, periods of excess emissions and parameter monitoring exceedances, the nature and cause of each malfunctions, any corrective actions taken, including repairs or adjustment made, certifications by a responsible official that certain work practices were performed, and the results of any performance tests conducted during the reporting period. The summary report, consistent with § 63.10(e)(3), is required to include an emissions data summary for control system parameters and a CMS performance summary, which provides detailed information on periods of monitoring system downtime and the reasons the system was inoperative, including a certification of accuracy by a responsible official. [See §§ 63.1516(b)(2) and (3); and § 63.1518].

As described above, the compliance information already required to be reported by the secondary aluminum NESHAP is substantial, and similar to that required for annual compliance certification under title V [see §§ 70.6(c)(5) and 71.6(c)(5)]. Also, the compliance reports required by the NESHAP require certification by a responsible official, which is defined similarly in the two programs (see § 63.2; and §§ 70.2 and 71.2). Because of the substantial information concerning compliance required to be reported by the secondary aluminum NESHAP, the lack of an annual compliance certification report under title V will not have a significant impact on compliance for the NESHAP, and we are satisfied that the recordkeeping and reporting component of factor one supports an exemption for area sources subject to this NESHAP. [Also, see docket item 89, a summary in tabular form of the monitoring, recordkeeping, reporting, and other compliance requirements of the secondary aluminum NESHAP.] As discussed in Section IV.A, the monitoring component of factor one also supports a title V exemption for secondary aluminum smelters.

Accordingly, we conclude that the secondary aluminum NESHAP provides compliance information that is

substantially equivalent to the information required under title V. Thus, our analysis of factor one for the final rule is that it supports that title V is ''unnecessary'' for NESHAP compliance for secondary aluminum. [Also, see section VIII.I below for EPA's response to significant comments on the proposed exemption for secondary aluminum smelters.]

Second, in the proposal, we discussed that title V permitting would impose a significant burden on these area sources that would be difficult for them to meet with current resources (the second factor). In 2001, there were over 1,300 facilities in the secondary aluminum industry. Half of these facilities employed fewer than 20 employees. These small sources will likely lack the technical resources needed to comprehend and comply with permitting requirements and the financial resources needed to hire the necessary staff or outside consultants. Accordingly, we conclude that title V is ''burdensome'' for them because almost all of them are small businesses with limited resources, and they will be subject to numerous mandatory sources activities under part 70 and 71, that it will be burdensome for them to meet, whether they have a standard or general permit. Thus, for the final rule, we believe factor two supports title V exemptions for secondary aluminum smelters.

We did not discuss factor three in the proposal, whether title V costs are justified, taking into consideration any potential gains in compliance likely to occur, for area sources subject to the NESHAP for secondary aluminum, but we clarify in today's final rule that factor three supports title V exemptions for them. We explained above that title V imposes significant burdens and costs on these area sources (factor two). Also, for secondary aluminum area sources, consistent with factor one (described above) and revised factor four (discussed below), both of which examine the ability of title V permits to improve compliance over that required by the NESHAP, title V is ''unnecessary'' for NESHAP compliance, so it follows that the potential for gains in compliance for them is low. Although there may be some compliance benefits from title V for secondary aluminum area sources, we believe they are small, and not justified by title V costs and burdens for them. Accordingly, for secondary aluminum, title V costs are not justified for area sources taking into consideration the potential for gains in compliance from title V, and thus, factor three supports title V exemptions for them.

In the proposal, we did not discuss factor four for secondary aluminum smelters, whether adequate oversight by State agencies could achieve high compliance with NESHAP, without relying on title V permits, for secondary aluminum. In response to comments, we have revised factor four, and revised factor four supports the conclusion that title V is ''unnecessary'' for compliance with the NESHAP for secondary aluminum, and thus, it supports a finding that title V exemptions are appropriate for them. Revised factor four is whether there are implementation and enforcement programs in place that are sufficient to assure compliance with the NESHAP for area sources, without relying on title V permits. As further described in section VIII.D below, there are implementation and enforcement programs in place sufficient to assure compliance with the secondary aluminum NESHAP, in all parts of the nation, without relying on title V. These programs take several forms, including programs conducted under the statutory authority of sections 112, 113, and 114 of the Act, State delegations under section 112(l), SBAP under section 507, and voluntary compliance assistance, outreach, and education programs. Factor four is satisfied for this category by the statutory requirement for implementation and enforcement of NESHAP in section 112, which applies to all NESHAP, including this one. For secondary aluminum, the State survey confirms that adequate compliance is being achieved in practice by States (more than half of the agencies that reported compliance rate information reported high compliance), but there were fewer examples of compliance oversight programs and fewer responses to the compliance rate question for this category, compared to other categories. We believe these data are explained by the timing of the State survey relative to the effective date of the secondary aluminum standard, rather than suggesting any deficiencies in State implementation and enforcement for the NESHAP. The timing of the State survey explains the response to questions concerning secondary aluminum because the earliest date that compliance with the secondary aluminum NESHAP was required was about the same time as the data collection phase of the State survey. Thus, State and local agencies did not have much experience with compliance oversight for secondary aluminum, or much compliance data upon which to base their survey responses for this category at the time the State survey was conducted. The secondary aluminum NESHAP did not require sources to be in compliance until March 24, 2003 (all other NESHAP were effective much earlier than this), while the majority of State and local input for the State survey occurred from March to June of 2003. [See the final rule for secondary aluminum, 65 FR 15690, March 23, 2000, docket item 77, and documentation of the data collection phase of the State survey, docket items 93 and 94.] Also, many State and local agencies reported to us that compliance with the NESHAP for area sources, including for the secondary aluminum NESHAP, can best be achieved through compliance assistance efforts, such as compliance outreach and education programs, and compliance tools, rather than by using title V permits. See State and local input on compliance assistance programs for area sources (docket items 02, 03, 06 and 08); and State and local agency comments on the proposal, all of which are in support of the proposed title V exemptions for the five categories of area sources (docket Items, 11, 16, 59, 61, and 65). For these reasons, we conclude in the final rule that factor four supports title V exemptions for area sources subject to the secondary aluminum NESHAP. [Also, see section VIII.D for EPA response to comments on proposed factor four.]

Thus, factors one, two, three, and four support the title V exemption findings, and, consequently, title V exemptions are appropriate for area sources subject to the NESHAP for secondary aluminum, consistent with the ''unnecessarily burdensome'' criterion of section 502(a) of the Act.

## V. What Is EPA's Decision for Secondary Lead Smelters?

In the proposal, we declined to make a finding that title V permitting for area sources subject to the NESHAP for secondary lead smelting would be impracticable, infeasible, or unnecessarily burdensome, and we asked for comment to help us determine if we should make such a finding. We considered the same factors for these area sources as we did for other categories of area sources, but we did not have a basis for finding that an exemption was warranted, as for the other area sources addressed in this rulemaking. We did not receive any information or data during the comment period sufficient to support a finding that permitting these area sources would be ''impracticable, infeasible, or unnecessarily burdensome'' on such sources or that exemptions would ''not adversely affect public health, welfare,

or the environment,'' nor did we receive any comments in opposition to our proposal not to exempt secondary lead area sources. For these reasons, the final rule will not exempt these area sources from title V requirements. See 70 FR 15259.

Any area source subject to the secondary lead NESHAP that has not already applied for a title V permit is required to submit a title V permit application by December 9, 2005, as provided in § 63.541(c) of subpart X. Also, as provided in § 70.3(c)(2) and § 71.3(c)(2), assuming the source is an area source and not subject to title V for another reason, the permit must include the requirements of subpart X and all other applicable requirements that apply to emissions units affected by subpart X, while any units not subject to subpart X may be excluded from the permit. (See 68 FR 57518, October 3, 2003, footnote #7 on page 57534.)

## VI. May Title V Permits Be Issued to Exempt Area Sources?

In the proposal, we explained and sought comment on our proposed interpretation of the Act as allowing only those area sources required to be permitted under section 502(a), and not exempted by EPA through notice and comment rulemaking to be subject to title V requirements. We are finalizing that interpretation in today's final rule. Thus, after the effective date of today's final rule, permitting authorities, including State and local agencies, tribes, and EPA, may not issue title V permits, including general permits, to area sources we exempt in today's final rule. This interpretation of the Act means that permitting authorities must stop issuing new title V permits to area sources we exempt today, unless they are subject to title V for another reason. Also, this means that any existing title V permits for such exempted area sources must be revoked or terminated after the effective date of today's final rule. However, to avoid disruptions to State programs, States may wait until renewal to end the effectiveness of such permits, unless an area source requests that this be done expeditiously. The EPA believes that State issuance of title V permits to area sources that EPA has exempted from title V permitting requirements would conflict with Congress's intent that EPA define the universe of sources subject to title V, and through inappropriate focus on sources that qualify for an exemption, would be an obstacle to implementation of the title V program. Even if the statute were ambiguous in this regard, EPA would exercise its discretion to interpret it this way to promote effective title V implementation. The proposal included a discussion of these issues, and in the final rule, EPA's interpretation of the Act in this regard is unchanged from the proposal. See section VI below for more on EPA's interpretation of these Act provisions. Note, however, that EPA interprets Section 116 of the Act to allow permitting authorities to issue non-title V permits to area sources that we have exempted from title V permitting. Such permits may include preconstruction permits, FESOPS or other State operating permits, or other permits not issued pursuant to an approved part 70 program.

## VII. May General Permits Be Issued as an Alternative to Title V Exemptions?

The EPA has decided not to adopt the alternative, discussed in the proposal, of allowing permitting authorities to issue general permits to these area sources. The proposal discussed general permitting as a streamlined process for issuing title V permits to a large number of similar sources, and it stated that these area sources may be good candidates for such permits. The proposal also analyzed the factors and other rationale we used for title V exemptions against the requirements for general permits, and we stated our belief that potential reductions in costs and burdens from requiring general permits would not be sufficient to alter our findings. [See this discussion in the proposal at FR 15258–15259.] With respect to the first factor, the proposal said that general and standard permits are subject to the same permit content requirements under §§ 70.6 and 71.6, so title V would affect units to which the NESHAP applies in the same manner for general permits, as for standard permits. For the second factor, the proposal stated that general permits would potentially simplify the permit application process, but general permits would require area sources to conduct many of the same mandatory activities as sources with standard permits, and thus, impose many of the same title V burdens and costs as standard permits. [See the list of source activities in the discussion of factor two in the proposal, 70 FR 15254.] For the third factor, the proposal observed that general permits may reduce the costs of applying for a permit, but the remaining costs to meet the permit requirements will continue to be a burden for these area sources. This is so because general permits reduce some burdens, but other significant burdens remain. And, we explained that EPA's outreach in recent years has shown that most State agencies generally do not believe that implementing NESHAP for area sources through permits will result in increased compliance, and that this would be true for general permits, as with standard ones. This point was also made in comments submitted by State and local agencies, all of which are in support of the proposed title V exemptions for the five categories of area sources, see docket items, 11, 16, 59, 61, and 65. For the fourth factor discussed in the proposal, we said the permit content requirements of §§ 70.6 and 71.6 are identical for general and standard permits, and the ability of State agencies to ensure NESHAP compliance outside of the title V programs will apply with equal force for general permits. Nevertheless, we offered general permitting as an alternative to title V exemptions in the proposal, and we sought comment on this alternative.

Some commenters expressed the view that general permitting should be required as an alternative to title V exemptions because they believe title V is critical for compliance with the NESHAP. Today's final rule does not require general permits for these area sources as an alternative to exempting them for several reasons. First, through factors one and revised factor four, which we use to examine the ability of title V permits to improve compliance over that required by the NESHAP, we established that title V is ''unnecessary'' for NESHAP compliance for these area sources, whether they have a general or standard permit. [See detailed analysis of the factors one and four in sections IV.A, VIII.A, and VIII.D.] Second, under section 504(d) of the Act, issuing general permits to sources subject to title V is an option for State and local agencies; an EPA decision not to exempt these sources does not provide a means of ensuring that they would then receive general permits. Also, because general permits are an option, State and local permitting authorities would not be required to issue them to area sources that request them. Because of this, the best course of action to avoid unnecessary burdens for these area sources, and to promote a focus by regulatory agencies on the type of oversight we believe will be most effective in achieving compliance, is to exempt them from title V in today's final rule. See section VII below for more on EPA's decision to not require general permits for these area sources.

## VIII. What Are EPA's Responses to Significant Comments?

This section of today's preamble discusses the more significant comments received on our March 25, 2005 proposal that are not addressed elsewhere in today's preamble, and

EPA's responses to these comments. The EPA's response to all comments (significant comments and other comments) is included in a response to comment document which is in the docket for this rulemaking.

*A. Is EPA's General Approach to Exemptions Consistent With the Act?*

Many commenters disagreed with the proposed title V exemptions because they did not agree that the four factors and other rationale we used to justify the exemptions were consistent with the Act. In response, the four factors and other rationale referred to in the proposal, and again in this final rule, are not intended to replace the statutory criteria for a title V exemption, but instead assist EPA in evaluating whether the statutory criteria are satisfied. Section 502(a) of the Act gives EPA discretion to exempt from title V area sources subject to NESHAP, if permitting them would be ''impractical, infeasible or unnecessarily burdensome'' on the area sources, while the legislative history for this provision suggests the EPA should also consider whether an exemption would ''adversely affect public health, welfare, or the environment.'' The EPA used the four factors to analyze whether title V would be ''unnecessarily burdensome'' on the area sources, consistent with section 502(a). (See the explanation of the four factors and other rationale of the proposal at 70 FR 15253–15255, March 25, 2005.)

Factor one was used to analyze whether title V is ''unnecessary'' for NESHAP compliance by examining whether title V would add substantial compliance requirements over those already required by the NESHAP. Factor two was used to analyze whether title V will impose significant burdens on area sources and whether these burdens will be aggravated by difficulties area sources will experience in obtaining assistance from State agencies. Factor three was used to analyze whether title V costs are justified considering potential gains in compliance from title V. If the costs of title V are high, burdens are also high because costs are burdens; and if potential compliance gains derived from title V are low, title V is more likely to be considered ''unnecessary'' for NESHAP compliance. Factor four was used in the proposal to analyze whether adequate oversight by State agencies could achieve high compliance with NESHAP without title V permits. If high compliance with NESHAP can be achieved without title V, title V will more likely be considered ''unnecessary'' for NESHAP compliance. We have revised factor four in response to comments received on the proposal. See more on revised factor four below.

In addition to the four factors, the EPA considered whether exempting these area source from the need for title V permits could cause adverse effects on public health, welfare, or the environment, at least on a temporary basis, or whether requiring title V permitting could have such adverse effects because of shifts in the resources of State agencies away from assuring compliance for major sources with existing permits to issuing new permits for these area sources. We do not believe that exemptions from title V permitting for these area sources will have adverse effects on public health, welfare or the environment. First, as we explained in section IV above, through our analysis of factors one and/or four for each of the five categories of area sources, we established that title V is ''unnecessary'' for compliance with the NESHAP, for each category of area source. Second, as we explained in the proposal, the vast majority of these area sources are typically subject to no more than one NESHAP, and few other requirements under the Act. Also, the area sources are simple sources with few emissions units and the NESHAP are relatively simple in how they apply to these area sources. Because of these characteristics, the likelihood that multiple NESHAP apply to the same area source is low, and thus the need for a title V permit to clarify multiple or overlapping NESHAP is also low. (See docket item 08 for State input on the likelihood that multiple requirements will apply and the relative simplicity of these sources.) Also, see EPA response to comments on whether title V permit are needed to define monitoring for electroplaters, section VIII.G, and EPA response to comment on whether degreasers should be exempted when there are multiple applicable requirement that apply to them, section VIII.H. In sum, EPA believes that the factors and additional rationale that it has considered in evaluating whether title V exemptions should be issued for the area sources covered by today's rule appropriately probe whether title V is ''unnecessarily burdensome'' for the area sources, and whether an exemption could cause adverse effects on public health, welfare or the environment.

Several commenters were concerned that title V exemptions for these area sources would result in the loss of certain title V benefits with respect to State implementation plan (SIP) requirements, and that this would result in adverse affects on public health, welfare, and the environment. We disagree with this comment because we do not believe title V exemptions for these area sources will have the effects suggested by the commenter to any significant extent for the reasons explained below.

First, the majority of area sources we exempt today (all of the dry cleaners and many solvent degreasers), emit HAP that are not a criteria pollutant subject to regulation under a SIP, so such adverse effects for SIP requirements could not occur for these sources. This is the case because § 51.100(s), which defines VOC for purposes of SIP, specifically excludes perchloroethylene (also known as tetrachloroethylene), methylene chloride (dichloromethane), and 1,1,1-trichloroethane (methyl chloroform) from the definition of VOC. Because the only HAP regulated by subpart M is perchloroethylene, all area source dry cleaners regulated under the NESHAP (estimated at up to 28,000 area sources) do not emit VOC. Also, many degreasers subject to subpart T use perchloroethylene, methylene chloride, or 1,1,1,-trichloroethane (including any combination of these), and if they emit no other HAP that are VOC, then they also would not be subject to SIP requirements for VOC. We estimate that there are up to 3,800 area source degreasers subject to the NESHAP, but we have no estimate of how many of these solely emit HAP that is not VOC. Also, EPA has focused on VOC in this discussion because we are unaware of any other criteria pollutant definitions that would be met by these three HAP.

Second, title V permits for area sources are limited in scope by §§ 70.3(c)(2) and 71.3(c)(2), which only require the emission units that cause the source to be subject to title V (in this case the units subject to NESHAP) to be included in the permit. Under these regulations, if SIP requirements apply to an emissions unit, and NESHAP does not, the unit is not required to be included in the area source permit. For example, for a dry cleaner, the permit would only address dry cleaning equipment, not other emissions units that may be collocated at the area source, such as comfort heating systems subject only to SIP requirements. This is quite different than for major sources because §§ 70.3(c)(1) and 71.3(c)(1) requires major source permits to include all emissions units at the source, even those that would not be subject to NESHAP. Thus, the extent that title V exemptions for area sources would result in loss of compliance benefits for SIP requirements is quite limited by the permit content requirements for area sources, as compared to major sources.

Third, in our experience the NESHAP are more stringent than typical SIP

requirements that would apply to these area sources. Because of this, if a SIP and NESHAP apply to the same unit, any deficiencies in the SIP requirements are likely to be corrected by the more stringent NESHAP requirements, without the need for title V permits. Also, these NESHAP compliance requirements are consistent with the Act, such that title V permits are not needed to improve the compliance requirements of NESHAP (this is described in more detail in section VIII.B below).

The commenter submitted no specific examples where emission units subject to NESHAP are also subject to SIP requirements, but two scenarios may be helpful in analyzing their claims, which we believe are without merit. Both examples involve the so-called ''generic applicable requirements'' that we believe would most commonly apply to these area sources. These are relatively simple requirements that apply identically to all emissions units at a facility. Also, both are examples where the HAP meets the definition of VOC under § 51.100(s) and potentially is subject to regulation under a SIP (although we are not sure all SIPs regulate such units). The first scenario is where a HAP, such as carbon tetrachloride, is regulated by the degreaser NESHAP, and it is also VOC regulated under the SIP by a pound per hour limit.[6] The second is where a HAP, such as dioxin/furan, is regulated by the secondary aluminum NESHAP,[7] and it is also PM regulated under the SIP by a process weight limit. In both cases, EPA believes the NESHAP will be far more stringent than the SIP requirements in terms of emission controls and compliance requirements. Because of this, the NESHAP requirements will ensure that the area source also meets the SIP requirements, and the compliance requirements of the NESHAP will be consistent with the compliance requirements of the Act, including title V. In addition, EPA has previously advised States that ''generic'' requirements of the SIP (described above), that are less stringent than other applicable requirements addressing the same units and pollutants may be omitted from title V permits, provided that the resulting ''streamlined'' terms and conditions achieve compliance with all the applicable requirements. [See discussion of treatment of ''generic'' requirements in White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program, March 6, 1996, docket item 100; and discussion of factor one in section IV.A of this preamble.]

In addition, we explained in the proposal that requiring permitting of area sources will likely cause, at least in the first few years of implementation, permitting authorities to shift resources away from assuring compliance for major sources with existing permits, to issuing new permits for area sources. This has the potential, at least temporarily, to reduce the overall effectiveness of States' title V permit programs, which could potentially adversely affect public health, welfare, or the environment. See docket item 08, where State officials explain that permitting all the area sources proposed for exemption would triple the number of title V permits issued in the State, and that it would be difficult for them to obtain approval to obtain additional full-time employees. Although State title V programs are required to have authority to raise title V fees as necessary to cover the costs of the program, in most States the program must seek budget and fee increases through the State legislature as part of the State budget process, which can lead to significant delays in getting approval to increase fees or resources to meet new demands. Also, see EPA response to comments on the legislative history guidance that title V exemptions for area sources should not cause adverse effects on public health, welfare, or the environment, in section VIII.E below.

One commenter said we should have discussed all four factors for each category of area sources, suggesting that we ignored factors that did not support the proposed title V exemptions for each category of area sources. In response, we did not discuss all four factors for each category of area sources in the proposal because we thought those factors we identified as present supported a finding that title V was ''unnecessarily burdensome,'' regardless of any determinations that could be made regarding factors not analyzed. Nevertheless, in response to this comment, and to provide a full discussion of all issues potentially relevant to this rulemaking, we discuss the four factors for each category of area sources elsewhere in the preamble for today's final rule.

*B. Does the First Factor Acknowledge Key Title V Requirements?*

One commenter thought the first factor, whether title V adds significant compliance requirements beyond those required by a NESHAP, was not appropriate for analyzing the exemption criterion of section 502(a) of the Act because it fails to acknowledge key title V requirements that would be lost under a title V exemption, directly at odds with sections 504(a) and 504(c) of Act.

In response, the proposal's discussion of factor one focused on the key compliance requirements of title V that are most likely to add significant compliance benefits for area sources subject to NESHAP. We explained that title V imposes a number of monitoring, recordkeeping, and reporting requirements for compliance. We focused our review on the requirements for monitoring, and the recordkeeping/reporting requirements for prompt reports of deviations from permit requirements (deviation reports) and for reports of required monitoring every six months (six-month monitoring reports) under §§ 70.6(a)(3)(iii) and 71.6(a)(3)(iii), and the requirement for an annual compliance certification by a responsible official under §§ 70.6(c)(5) and 71.6(c)(5). Nevertheless, to provide a more complete response to the comment in the final rule, we describe below several other compliance aspects of title V that we were silent on in the proposal, including the requirements of section 504(a) for the permit to include ''a schedule of compliance,'' and ''such other conditions as necessary to assure compliance with applicable requirements of the Act, including the requirements of the applicable implementation plan [*e.g.*, SIP],'' and the requirement of section 504(c) for permits to contain ''inspection'' and ''entry * * * requirements to assure compliance with the permit terms and conditions.''

Concerning the requirement of section 504(a) for schedules of compliance, there is independent authority for establishing schedules of compliance to bring noncompliant sources back into compliance under the general enforcement authority of section 113 of the Act, which applies to these NESHAP. Also, the approval criteria for delegation requests for NESHAP requires the Attorney General's written finding to say that the delegate agency has enforcement authorities that meet the requirements of § 70.11, which requires them to have authority to obtain an order, pursue a suit in court, or seek injunctive relief for violations, and this may result in a schedule of compliance, where appropriate, equivalent to any that may be obtained through title V. Thus, a title V permit is not necessary to establish a schedule of compliance for any of the area sources

[6] Note that these are the same emissions under different definitions, so if you control one, you control the other.

[7] The secondary aluminum NESHAP only regulates dioxin/furan emissions for a limited set of emission units for area sources, while additional HAP are regulated at additional emission units for major sources. [See § 63.1500(c).]

we exempt today, in the event of noncompliance with these NESHAP.

Concerning the requirement of section 504(a) that permits contain ''enforceable emission limitations and standards,'' the five NESHAP addressed in today's final rule establish such emission limitations and standards, and they are independently enforceable outside of title V permits. Also, title V does not contain authority for creating new emission limitations and standards under section 112 in title V permits, so no such emission limitations or standards would be lost through title V exemptions for these area sources.

Concerning the requirement of section 504(a) that permits include conditions to assure compliance with the requirements of the applicable implementation plan (the SIP, for example), we described in section VIII.A above why exempting these area sources from title V would not significantly affect compliance with SIP requirements that may also apply to such area sources. Also, we add that these SIP requirements are independently enforceable under the authority of section 110 of the Act, so their implementation and enforcement does not depend on title V.

Concerning the requirements of section 504(c) for permits to contain inspection and entry requirements, when EPA is responsible for implementation and enforcement of the NESHAP such requirements would be met under the authority granted EPA by section 114 of the Act. State and local agencies or tribes are required to have such authority as a condition of approval for any delegation request they make, consistent with section 112(l) of the Act. For example, agencies requesting delegation of NESHAP are required to submit, as part of their delegation request, a written finding by the State Attorney General (or General Counsel for local agencies and tribes) that they have legal authority ''to request information from regulated sources regarding their compliance status,'' under § 63.91(d)(3)(i)(B), and ''to inspect sources and any records required to determine a source's compliance status,'' under § 63.91(d)(3)(i)(C). In addition, as part of their delegation requests, agencies are required to submit a plan that ''assures expeditious compliance by all sources,'' including a description of ''inspection strategies.''

Also related to the comment and response above, several commenters said our analysis of factor one in the proposal was inadequate because we relied on an illegal interpretation of the Act's monitoring requirements through our reliance on the ''umbrella monitoring'' rule of January 22, 2004. These commenters argue that §§ 70.6(c)(1) and 71.6(c)(1) impose an additional case-by-case monitoring review called ''sufficiency monitoring,'' that is independent from the requirement for ''periodic monitoring'' under §§ 70.6(a)(3)(i)(B) and 71.6(a)(3)(i)(B). Also, they believe that if EPA conducted such a review, the result would be a determination that the compliance requirements of title V and the NESHAP are not substantially equivalent.

We disagree with this comment. As described more fully in section IV.A, even if ''sufficiency monitoring'' were required, additional monitoring requirements would not be imposed in title V permits for the area sources addressed by today's rule, because the NESHAP for them were all promulgated after the 1990 Clean Air Act amendments, and therefore contain all monitoring necessary to meet current requirements under the Act. In finalizing each of the NESHAP under part 63, EPA solicited and responded to comments on the adequacy of the monitoring, reporting, and recordkeeping provisions required by the NESHAP. Any opportunity to challenge the compliance requirements imposed through the five NESHAP has passed, and this rulemaking does not create new grounds for such challenges.

*C. Does This Rulemaking Adequately Address Title V Costs?*

Several commenters thought the costs of title V permitting for these area sources described in the proposal, relevant to factors two and three, were inflated and not representative, and instead, that the true costs of title V permitting for them would be much lower and not significant for them. Also, these commenters stated that the costs for title V for area sources would be a fraction of the costs for major sources because area sources have fewer emissions units, their operations are less complex, and they are simpler to permit.

In the discussion of factor two in section IV.A above, we described the information we used for the proposal, including economic information on the five industry groups (docket item 04) and information on title V burdens and costs from the ICRs for part 70 and 71 (docket items 80 and 81), to evaluate the impact of title V on these categories of area sources, including limitations on this information, and the assumptions we made for them concerning title V burdens and costs. Also, in the proposal, we acknowledged that these sources would generally have fewer emissions units, that their operations are less complex, and they would be simpler to permit, and we took these facts into consideration in our analyses. During the public comment period, no one submitted any information related to the area source categories to substantiate their claims that title V burdens and costs would not be significant for these area sources. Our review of comments and further consideration of these issues has not led us to a contrary view from the proposal. Thus, we find that factor two supports title V exemptions for the categories of area sources addressed in today's final rule.

Also relevant to factor two and three in the proposal, one commenter said that the EPA ignored Clean Air Act provisions designed to limit title V costs for small sources, while another commenter said States agencies are expected to have resources to meet this workload and fees to offset costs. Section 502(b)(3)(A) of the Act requires title V sources to pay annual fees, while section 507(f) of the Act, concerning SBAP, provides that the permitting authority may reduce any fee required under this Act to take into account the financial resources of small business stationary sources. In response, title V fees vary greatly from State to State, but because area sources have small emissions by definition and most State agencies charge emissions-based fees (on a per ton basis), fees would not comprise a substantial portion of the overall costs and burdens for these area sources. As the EPA explained in the proposal, there are many other burdens and costs of title V, unrelated to fees, such that whether fees are reduced or not, significant burdens and cost of title V would remain for these area sources. Section 502(b)(3)(A) of the Act requires fees to be charged that are sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the title V program. However, there are practical limitations on the ability of State agencies, tribes, and EPA to increase fees and provide additional resources for title V implementation, especially in a relatively short period of time. In many States, fee increases must typically be approved by the State legislature within the State budget process, and this may lead to significant delays in implementing new fee schedules to meet new demands. This limitation could lead to significant, albeit temporary, impairment of the title V programs for major sources, given the large workload a requirement to permit

these area sources would impose on State agencies. For example, if all these area sources were required to be permitted, up to 38,000 title V permit applications would be due by December 9, 2005, and title V permits for these sources would have to be issued or denied within 18 months of receipt of the applications, as required by section 503(a) and 503(c) of the Act.

Also relevant to factor two, one commenter pointed out that difficulties in obtaining compliance assistance from State agencies will be temporary. In response, EPA notes that even though such difficulties may be temporary, they would come at a critical time for sources and permitting authorities. For example, immediately upon becoming subject to title V, an area source which does not typically have employees trained in such matters, would need to quickly become familiar with the critical and pressing step of completing and submitting a permit application, required under § 70.5 and § 71.5. Since such applications are provided by individual permitting agencies, access to the agency to obtain assistance and guidance on completing the forms will be essential for area sources in order for them to complete and submit them by the mandatory deadline, currently December 9, 2005, in most jurisdictions. See 64 FR 69637, December 14, 1999, (setting the deadline of December 9, 2004 for deferrals to end). In addition, before applications are distributed to area sources, certain agencies may need to translate forms and other information into foreign languages, which in the EPA's experience, is often needed for small businesses, such as dry cleaners, in large urban communities, but not typically necessary for major sources. [For example, see a fact sheet developed for dry cleaners in Vietnamese, docket item 96 and the equivalent form in English, docket item 97.]

Another commenter thinks the title V costs would not be significant for area sources because they would merely be passed on to consumers. In response, no economic data for these categories of area sources were submitted by the commenter or otherwise available to the EPA to support this point, and any such assertion is entirely speculative. Costs cannot necessarily be passed on to consumers in highly competitive industries, or where there are highly price-responsive consumers. EPA believes that these situations may exist for these sources, and that passing prices on to consumers may, therefore, not be feasible for them. The commenter provided no information on competition in these industries, or on price-responsiveness of their consumers to support his assertions.

*D. What Is Our Analysis of Factor Four for the Final Rule?*

Commenters opposed to the EPA's reliance on the fourth factor in the proposal, whether adequate oversight could achieve high compliance with the NESHAP without title V, cited perceived flaws in the State survey (docket item 02), including that it does not contain representative data, that it has missing data, and that this missing data means that existing compliance with the NESHAP is not high. The proposal explained that information in the docket, including the State survey, shows that many permitting authorities have alternative compliance oversight programs that result in high NESHAP compliance without title V. During the public comment period, the EPA received comments from State and local agencies confirming this point. [See docket items 11, 16, 59, 61, and 65]. The EPA undertook the survey to collect information we thought would be relevant in our consideration of possible title V exemptions, and we believe State and local agencies made reasonable efforts to complete it. There is no definition for ''high'' compliance in the Act or EPA regulations, nor did the EPA suggest one to State agencies. States are primarily responsible for enforcement of the vast majority of Act requirements, including NESHAP, through delegation of EPA responsibilities, approved State programs, the SIP process, and other mechanisms, and we give considerable weight to their judgement on questions concerning the compliance status of sources. Moreover, even without such input from States, the EPA would have reached the same conclusion regarding high compliance absent title V because NESHAP are based on section 112 of the Act, which imposes stringent compliance requirements, independent of title V, and because States and EPA have adequate authority and actual implementation and enforcement programs in place sufficient to assure compliance with NESHAP, independent of title V.

Also concerning factor four of the proposal, one commenter said they believe Congressional intent was that these exemptions would only apply when a reasonable alternative to title V permitting is actually in place and achieving results, specifically citing the 1990 legislative history that the EPA ''is authorized to exempt sources from the new permit program if the exemption would be consistent with the Act's purposes. For example, the EPA may exempt certain small but numerous sources from the requirement to obtain a permit if a reasonable alternative is developed.'' S. Rep. No. 101–228, at 349 (1990). In response, the plain wording of the Senate Report is that it is an ''example'' of a justification for a title V exemption. Title V does not require EPA to develop such alternative programs as a prerequisite to granting exemptions. In any event, as described below, we believe there is existing authority in the Act and actual implementation and enforcement programs in place, as required under section 112, that are sufficient to assure compliance with these NESHAP, and thus, high compliance can be achieved with the NESHAP without title V in all jurisdictions where such sources may reside in the nation.

*First.* Statutory programs of implementation and enforcement of NESHAP are conducted by EPA under the authority of sections 112, 113, and 114 of the Act, while State and local agencies or tribes may be granted delegation of this responsibility under section 112(l) of the Act (implemented through subpart E of part 63). The EPA has primary responsibility for implementation and enforcement of all NESHAP under section 112 of the Act in all parts of the nation. Section 112(l) allows EPA to delegate to State or local agencies or tribes certain of its implementation and enforcement duties for NESHAP, based on a State request to do so, and satisfaction of certain criteria. There are several types of delegations, including ''straight delegation,'' which is adoption of the NESHAP without change, or the delegate agency may establish a program or rules to operate in place of the NESHAP, provided the program or rules are ''no less stringent'' than the NESHAP, and the delegate agency has adequate authority and resources to implement and enforce the delegated NESHAP (under all delegation options). Section 63.91(d) defines criteria that State and local agencies or tribes are required to meet prior to approval of requests for any type of NESHAP delegation, including that the request contain: (1) Written findings from the Attorney General (or General Counsel for local agencies and tribes) that they have certain legal authorities concerning enforcement and compliance, (2) a copy of the State statutes, regulations, and requirements that grant authority for them to implement and enforce the NESHAP, (3) a demonstration that they have adequate resources to implement and enforce all aspects of their NESHAP program, except for authorities retained by EPA, and (4) a plan that assures expeditious

compliance by all sources subject to the program. Also, depending on the type of delegation requested, §§ 63.92 through 63.95, and § 63.97 specify additional approval criteria. [Also, see section 112(l)(5), and the final rule for subpart E, 58 FR 62262, November 26, 1993, amended by 65 FR 55810, September 14, 2000]. In addition, under section 112(l)(6) EPA has authority to withdraw its approval of a delegation, or approval of an equivalent program or rule, if the delegate agency is not adequately implementing or enforcing the NESHAP; and under section 112(l)(7) EPA may enforce any NESHAP, including those it has delegated. Thus, even if a State does not have adequate authority to implement and enforce any NESHAP in their jurisdiction, EPA does have such authority, consequently, there can be no gap in implementation and enforcement for NESHAP that apply to area sources in any jurisdiction. [For example, see EPA's final rule approving the request of Indiana for delegation of all NESHAP for all sources not covered by the State's part 70 program, 62 FR 36460, July 8, 1997, docket item 98.]

*Second*. The EPA has general authority for enforcement of NESHAP under section 113, including authority to (1) issue an order requiring compliance or assessing an administrative penalty; (2) bring a civil action seeking to enjoin violations or the assessment of penalties; or (3) bring a criminal action to punish knowing violations. Section 114 allows the EPA to determine if violations have occurred through inspection, auditing, monitoring, recordkeeping, reporting, and entry onto premises.

*Third*. All States have established non-title V permitting programs, which may include operating and preconstruction permitting programs for minor sources, under section 110(a)(2)(C) of the Act. However, the EPA notes that several States have reported that their non-title V permits do not currently include NESHAP, so such permits would not always be immediately available for this purpose. Although some State agencies have established permitting programs under State law that include NESHAP for area sources, some have not, either because they do not have explicit State authority, or they have State authority, but they have chosen to not implement such a program so far. See the State survey (docket item 02), where States noted that they issue non-title V permits for certain of these area sources.

*Fourth*. All States and EPA are required to establish a small business assistance program (SBAP) under section 507 of the Act. These programs are required to assist small business with technical and environmental compliance assistance, and they are not limited to title V sources. Any activities for non-title V sources conducted by a SBAP may be funded by non-title V fees at State option, and EPA matching grants under section 105 of the Act may also be used for this purpose.[8] State SBAP programs are required by section 507 to provide information on compliance methods, to have a small business ombudsman, to provide assistance in determining applicable requirements and permitting requirements under the Act, and to refer sources to compliance auditors, or at State option, provide auditors for small sources. [For example, see docket item 91, a fact sheet concerning an SBAP implemented by a local air pollution control district.]

*Finally*. States may have voluntary compliance assistance programs in place for NESHAP requirements, such as the environmental results programs (ERP) or other similar programs. The EPA has encouraged States to adopt voluntary programs in the past, and the ERP, in particular, has been successful in assisting small sources with compliance in fourteen States across nine business-dominated sectors, including dry cleaners in Massachusetts and Michigan. See 70 FR 15260. In addition to the State survey, which includes information concerning State permitting programs, inspection, and compliance assistance programs, several permitting agencies submitted comments to describe their alternative programs for non-title V sources in additional detail. [See State and local comments, docket items 11, 16, 59, 61, and 65.] Importantly, no comments were received from State agencies saying that they would not be able to ensure compliance for these area sources if we promulgate title V exemptions for them.

### *E. Are These Exemptions Consistent With the Legislative History of The Act?*

Several commenters expressed concern that exemptions from title V would adversely affect public health, welfare, or the environment by weakening air quality standards, increasing HAP emissions, and by increasing morbidity in human populations, and that this would be inconsistent with the legislative history of section 502(a).

In response, section 112 of the Act, which authorizes NESHAP, is the primary vehicle under the Act for HAP reduction, not title V. See sections 112(b)(2), 112(c)(3), 112(d), 112(f), and 112(k) of the Act. For an overview of the EPA's national effort to regulate air toxics under section 112, see a July 19, 1999 notice (64 FR 38705), which includes a description of the EPA's integrated urban air toxics strategy, a strategy to address public health risks posed by air toxics from the large number of smaller area sources in urban areas. Today's rulemaking is not exempting any area sources from any section 112 requirements, such as those described in the July 19 notice, and section 112 gives the EPA, or its delegate agency, responsibility to implement and enforce section 112 standards, independent of title V. Thus, consistent with the legislative history and the EPA's analysis for each category of area sources addressed in this rulemaking, title V exemptions for these particular area sources will not thwart or in any way interfere with the implementation and enforcement of section 112 of the Act, and today's action should not adversely affect public health.

The EPA does not believe HAP increases will occur from title V exemptions for these area sources. The Act does not require emission reductions through title V permits. As we explained in the proposal (70 FR 15255), the EPA's outreach in recent years has shown that several State agencies believe, in their experience, implementing emissions standards for area sources through permits did not result in increased compliance with the emissions standards. EPA has evaluated the extent to which title V could improve compliance for these NESHAP, and EPA believes that successful implementation at such sources is better achieved through compliance assistance efforts, such as compliance outreach and education programs, rather than title V permits.

One commenter asserted that title V permitting will not divert resources from more significant sources because the Act requires State and local agencies to charge adequate fees to cover the costs of the title V program, including the costs of small business assistance programs under section 507 of the Act, and adequate personnel to administer the program, and because fees may be reduced for small sources. This commenter apparently was taking issue with EPA's statement in the proposal

[8] For more on the use of matching grants, see a August 4, 1993 memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, U.S. EPA, ''Reissuance of Guidance on Agency Review of State Fee Schedules for Operating Permit Programs under Title V,'' and a July 21, 1994 memorandum from Mary D Nichols, Assistant Administrator for Air and Radiation, U.S. EPA, ''Transition to Funding Portions of State and Local Air Programs with Permit Fees Rather than Federal Grants.''

that ''requiring permitting of area sources will likely cause, at least in the first few years of implementation, permitting authorities to shift resources away from assuring compliance for major sources with existing permits to issuing new permits for area sources. This has the potential, at least temporarily, to reduce the overall effectiveness of the States' title V permit programs, which could potentially adversely affect public health, welfare, or the environment.'' In response, EPA notes that there are practical limitations on the ability of State agencies, tribes, and EPA to increase fees and provide additional resources for title V implementation, especially in a relatively short period of time. As we described in the proposal (70 FR 15255), in many States, fee increases must typically be approved by the State legislature within the State budget process, and this may lead to significant delays in implementing new fee schedules to meet new title V demands. This limitation could lead to significant, albeit temporary, impairment of the title V program for major sources, given the large workload a requirement to permit these area sources would impose on State agencies. For example, if all these area sources were required to be permitted, up to 38,000 title V permit applications would be due by December 9, 2005, and title V permits for these sources would have to be issued or denied within 18 months of receipt of the applications, as required by section 503(a) and 503(c) of the Act.

*F. Is It Reasonable for EPA To Rely on the Information Cited in Support of the Proposal?*

Several commenters complained about the information EPA collected to support the findings of the proposal, particularly the State survey, concluding that it was so flawed that the findings are arbitrary and capricious under the APA or otherwise inconsistent with administrative rulemaking requirements. We disagree. In developing the proposal, EPA sought and relied on information from State agencies on the level of oversight and compliance rates for the area sources addressed in today's proposal. The results are summarized for each category of area sources in the State survey (docket item 02). The EPA also sought input from State small business ombudsmen and several trade associations, and they responded with information on the area sources and compliance assistance programs currently available to them. This information is also in the docket. See docket items 03, 06, and 08.

We have collected information we believe is useful and appropriate under the statute to establish a rational basis for evaluating whether the area sources addressed in today's rule satisfy the exemption criteria of section 502(a) of the Act. We summarized our outreach efforts and we collected cost and economic data, which we placed in the docket prior to the proposal. We considered all information available to us for this rulemaking, including that submitted during the public comment period, in making our exemption findings. Also see section X below for additional discussion of how this rulemaking satisfies administrative rulemaking requirements.

As to comments that the State survey is not complete, we believe much of the missing information can be explained by two factors: (1) State agency participation was voluntary, and (2) some States have more or less of these area sources, so experience with them varies. We did not base our decisions on missing data but on the data we have and our judgement as air quality experts, and we did not assume any particular meaning for missing data. Commenters had an opportunity to submit what they consider to be more complete or accurate information on compliance rates and the oversight activities of State agencies for these area sources during the comment period, but they did not do so.

Also, concerning information on burdens and costs of title V, for the current ICR, we provided the public with our draft analysis of burdens and costs under title V, including for general permits, and we received no comments.

*G. Are Permits Necessary To Define Monitoring for Chrome Electroplaters?*

One commenter stated that the monitoring requirements of the chrome electroplating NESHAP vary based on the type of control technique employed and the range of acceptable values, or a minimum and maximum, for each monitoring parameter at each area source, and that it would be useful for the public, regulatory agencies, and the source for its specific obligations to be spelled out in a permit.

The chrome electroplating NESHAP has extensive requirements for monitoring, recordkeeping, and reporting, including for monitoring system performance tests, and a written report to document the results of the performance test, which will document the monitoring techniques employed and the parameter ranges that show compliance. The NESHAP requires the source to conduct the performance tests needed to define the monitoring parameters that assure compliance by the source with its emissions limitations or standards, and this report is submitted to EPA or a delegate agency with such responsibilities, as defined at § 63.347(f), so neither the source or the regulatory agency will be confused about the specific monitoring that applies to area sources, absent a title V permit. Also, there is independent authority for public disclosure of information related to compliance with NESHAP under section 114(c) of the Act, which does not rely on title V for implementation. Public disclosure authority under section 114(c) of the Act extends to all information collected under NESHAP, even information required to be kept on-site, rather than submitted directly, except for trade secrets which may not be released to the public. Thus, if a member of the public wants information on compliance with the NESHAP, he or she may get it from the agency responsible for implementation and enforcement of the NESHAP (either EPA, or the State or local agency, or tribe), whether there is a title V permit or not. In addition, State or local agencies, or tribes, are required to submit, as part of their delegation request, a written finding by the State Attorney General (or General Counsel for local agencies and tribes) that the State has legal authority ''to request information from regulated sources regarding their compliance status,'' under § 63.91(d)(3)(i)(B), and legal authority ''to inspect sources and any records required to determine a source's compliance status,'' under § 63.91(d)(3)(i)(C). Therefore, title V is not necessary for State and local authorities to obtain compliance information from regulated sources. While it is helpful for the public, regulatory agencies, and the source for the specific requirements to be defined in a permit, we do not believe it is necessary for adequate compliance to occur, and we believe we have shown in today's final rule that title V would be unnecessarily burdensome on these area sources.

*H. May Degreasers Be Exempted When There Are Multiple Applicable Requirements?*

One commenter supports an exemption for degreasers, but only when they are not subject to other applicable requirements. They think the compliance requirements of the NESHAP will be substantially equivalent to title V only when the source is subject to only this NESHAP and the source is not subject to other NESHAP. In response, the EPA does not agree with this comment for the

following reasons. First, there are cases where more than one NESHAP for which a title V exemption is being finalized applies to degreasers, for example, where a degreaser is located at a chrome electroplater. But the requirements of the chrome electroplating and degreasing NESHAP do not significantly overlap for the emission units at such facilities, so this would not present a significant problem of complexity that would justify the burdens associated with issuing title V permits for such sources. Second, such concerns are largely offset by the relative simplicity of the emission control requirements of the degreaser NESHAP, which involves primarily work practice standards. For example, lids are required to be kept on containers at all times when not in use. However, EPA notes that where a degreaser is otherwise subject to title V, it will not be exempt from permitting. Thus, because degreasers are often collocated with major sources, as an adjunct to the primary activity occurring at the major source, many degreasers will be included in the major source permit for the collocated major source. This is so because, as we have clarified elsewhere in this preamble, major source permits must include all applicable requirements, and these exemptions are only for title V requirements at area sources.

*I. Are the Compliance Requirements of the EO Sterilizer and Secondary Aluminum NESHAP Substantially Equivalent to Title V?*

One commenter opined that the compliance requirements of the EO sterilizer and secondary aluminum NESHAP are not substantially equivalent to the compliance requirements of title V with respect to our analysis of factor one for area sources subject to these NESHAP because the EPA has no data to show how many sources employ continuous monitoring methods, and even if continuous methods are used, the reporting is not equivalent to title V reporting. Also, the commenter pointed out that the EO sterilizer and secondary aluminum NESHAP do not require an annual compliance certification (as does title V), and that this is another reason why the compliance requirements of the NESHAP and title V are not substantially equivalent as EPA proposed. Also, responding to a specific request of the proposal for input on the value of annual compliance certifications and the threat of enforcement for false certification for area sources subject to these NESHAP, the commenter said that completing a compliance certification will be important in bringing about better compliance because the act of signing one is not taken lightly and will produce positive results, including greater compliance efforts, and the submittal of more compliance plans.

In the proposal, we compared the compliance requirements of the EO sterilizer and secondary aluminum NESHAP with those of title V, and we stated for both that the recordkeeping and reporting requirements are substantially equivalent (the first factor), when sources employ continuous monitoring methods to assure proper operation and maintenance of control equipment, such as when sources use thermal oxidizers for emission controls. Also, we said that sources that use scrubbers as emission controls under both of these NESHAP employ noncontinuous monitoring methods, and thus, the recordkeeping and reporting requirements for them would not be substantially equivalent to the compliance requirements of title V. Although we were not certain of the number of area sources that employ continuous monitoring methods under either of the two NESHAP, we stated a belief that most sources would employ such methods, and we asked for comment on the percentage of sources that employ them. See the March 25, 2005 proposal's discussion of EO sterilizers (70 FR 15256) and secondary aluminum (70 FR 15258).

For the final rule, we reviewed the EO sterilizer and secondary aluminum NESHAP once again, and we now conclude that sources with scrubbers are required to conduct ''continuous'' monitoring under the NESHAP. Also, both of these NESHAP require sources that conduct ''continuous'' monitoring to submit excess emissions and continuous monitoring system performance report and summary reports to assess their compliance status on a semiannual basis, consistent with § 63.10(e)(3). These NESHAP require these reports for sources that use scrubbers for emissions controls, the same as they require them for sources that use thermal oxidizers as emissions controls. Under the two NESHAP, these reports provides compliance information that is substantially equivalent to the requirements of §§ 70.6(a)(3)(iii) and 71.6(a)(3)(iii) for deviation reports and six-month monitoring reports (see explanation below). [Also, see discussion of factor one for these area sources in sections IV.A, IV.E and IV.F, and more on why title V monitoring and the monitoring in these NESHAP are equivalent in section VIII.E.]

The compliance information already required to be reported by these two NESHAP is substantial, and similar to that required in annual compliance certifications under title V [see §§ 70.6(c)(5) and 71.6(c)(5)]. Also, the compliance reports required by the two NESHAP require certification by a responsible official, which is defined similarly in the two programs [see § 63.2, and §§ 70.2 and 71.2]. For these reasons, we conclude that the lack of an annual compliance certification report under title V will not have a significant impact on compliance for these NESHAP.

Also, in response to the comment that the act of signing the compliance certifications is valuable because it produces positive compliance results and that these results will be lost if we exempt these area sources from title V, we disagree that the title V exemptions will have this effect for these NESHAP. We conclude this in today's final rule because the EO sterilizer and secondary aluminum NESHAP both require the excess emissions and continuous monitoring system performance report and summary reports (described above) to be certified by a responsible official, similar to how this is done for title V. [See the requirements for certification by responsible official of § 63.363(a)(3) for EO sterilizers and § 63.10(e)(3)(v) for secondary aluminum.]

In the final rule, we conclude that the overall differences in compliance requirements, after considering all monitoring, recordkeeping, and reporting requirements, including the lack of annual compliance certification, are not great enough to have a significant impact on compliance for the EO sterilizer and secondary aluminum NESHAP, and we conclude that the compliance requirements of the NESHAP and title V rules are substantially equivalent. Thus, our analysis of factor one for the final rule is that it supports a finding that title V is ''unnecessary'' for compliance for area sources subject to the EO sterilizer and secondary aluminum NESHAP, consistent with the ''unnecessarily burdensome'' criterion of section 502(a) of the Act.

*J. Are the Proposed Revisions to EO Sterilizer NESHAP Appropriate?*

Several commenters were concerned that the proposed revision to § 63.360(f) would redefine what an ''area source'' is under the EO sterilizer NESHAP, resulting in fewer area sources. Also, they stated that the proposed rule change is inconsistent with the definition of ''major source'' and ''area source'' in section 112 of the Act, and

that it contradicts the proposed wording of Table 1 of § 63.360, which exempts ''area sources'' regardless of EO usage. Another commenter recommended that the rule language be revised to be consistent with parallel rule language for other subparts, which refers to ''area sources.''

In the final rule, § 63.360(f) has been revised to specify that exemptions from title V are for ''area sources,'' rather than ''sources using less than 10 tons [of EO],'' as we proposed. The intent of the proposal was to exempt area sources subject to the NESHAP from title V, not to change the applicability of the NESHAP. The EPA's March 2004 implementation guidance for this NESHAP (docket item 88) is clear that the definition of ''area source'' is the definition of § 63.2, which is based on actual emissions or potential to emit, and this definition should be used for title V purposes under the NESHAP.[9] Also, the guidance explains that usage of EO is the basis for applicability of the emission standards for various types of vents, under the NESHAP. Nevertheless, we are changing the rule language today to clarify that ''area sources'' subject to this standard are exempted from title V, and this change will not affect the NESHAP requirements that apply to any existing sources. With this change, § 63.360(f) is now also consistent with Table 1 of § 63.360, in the same subpart, and with the rule language of subparts M, N, T and RRR, that also refers to ''area sources.''

*K. Are Title V Permits Allowed for Area Sources Exempted From Title V?*

Several commenters disagreed with the EPA's proposed approach of not allowing permitting authorities to issue title V permits to area sources that EPA has exempted from title V. These commenters did not agree with EPA's proposed reading of section 502(a), 506(a), and 116 of the Act as requiring this result. Also, they did not agree that existing title V permits for such sources should be terminated, suspended, or revoked after exemptions from title V take effect.

Several commenters opined that EPA's proposed approach is inconsistent with section 502(a) of the Act. The proposal explains that section 502(a) of the Act grants the Administrator alone discretion to define the universe of area sources subject to title V. It follows that once the EPA exempts area sources through rulemaking, they may not be permitted under title V. No other provision of the Act is more specific on this matter than section 502(a). Similarly, an existing title V permit for an area source that has been exempted from title V must be revoked, terminated, or denied because the permit would conflict with our interpretation of section 502(a) of the Act. We also believe allowing title V permitting for area sources we have exempted would be an obstacle to the implementation of title V both because of the confusion and frustration such a situation would cause for the area sources, based on the common sense meaning of the term ''exemption,'' and because State efforts at title V permitting would be better spent addressing major sources and non-exempt area sources.

Several commenters were concerned that EPA's interpretation of section 502(a) of the Act is illegal because it conflicts with section 506(a), which allows States to have ''additional permitting requirements not inconsistent with this chapter.'' In light of the structure of section 502(a), EPA believes that section 506(a) is best read as allowing States to establish additional permitting requirements for sources that are already subject to title V permitting. Thus, under the EPA's interpretation, there is no conflict between the two sections because section 502(a) of the Act defines what sources must get a permit, while section 506(a) of the Act allows States flexibility in establishing permit requirements for sources properly subject to the program.

Several commenters stated that EPA's proposed reading of section 502(a) is illegal because it conflicts with section 116, which allows States to issue title V permits to exempted area sources. We explained in the proposal that section 116 of the Act allows State agencies to issue non-title V permits to area sources that have been exempted from, or are outside the scope of, the title V program. However, even if the Act were ambiguous in this regard, EPA would exercise its discretion in interpreting the Act to reach the same result. The EPA would do so to avoid confusion for area sources, as described above, and to achieve the policy benefits associated with having States direct their title V efforts to major sources and non-exempt area sources.

*L. Does This Rulemaking Disregard Cost Estimates for General Permits?*

Several commenters were concerned that we disregarded prior estimates of title V costs for general permits and they believe that these estimates show that title V costs would be sufficiently low that title V would not be ''unnecessarily burdensome'' for the area sources addressed in the proposal.

In the discussion of burdens and cost of title V permitting in the proposal (section II.A of the proposal), we stated that we did not have specific estimates for the burdens and costs associated with general permits for sources, but we described certain source activities associated with the part 70 and 71 rules that would apply to sources, whether they have a general or standard permit. Also, in section III of the proposal we said that general permits would reduce burdens to some extent for area sources but that the potential burden and cost reductions would not be sufficient to alter our findings that title V would be significant for area sources. To explain this last point in more detail in the proposal, we reviewed each of the four factors we used in our exemption analysis with respect to general permits, and we concluded that title V will be ''unnecessarily burdensome'' for area sources that are issued general permits, rather than standard permits. (See 70 FR 15254 and 15258–15259.)

One commenter pointed to a regulatory impact analysis (RIA) for operating permits issued in 1992, saying we should have used the estimate of $154 per year in that document in analyzing the costs associated with general permits. In response, the RIA (Regulatory Impact Analyses and Regulatory Flexibility Act Screening for Operating Permits Regulations, U.S. EPA, Office of Air Quality Planning and Standards, EPA–450/2–91–011, June 1992) did contain an estimate of $154 for the total annual costs for general permits, but it is inaccurate and outdated because it was not based on actual implementation experience, such as the cost estimates contained in the more recent 2004 ICR, which is based on actual implementation experience, and which suggests significantly higher costs for general permits, on the order of half the cost of standard permits (see more on the 2004 ICR below). The part 70 rule was not effective until July 21, 1992, and consequently, no State title V programs were approved until December of 1994, and no part 70 permits were issued in any jurisdiction until late 1996. [Also, the part 71 rule was not effective until July 31, 1996].

One commenter said we disregarded information in the current ICR for part 70 (issued in 2004), including ''re-application of general permits'' at 2 burden hours for each title V source with a general permit, compared to the estimate of ''permit renewal'' at 200 burden hours for each title V source with a standard permit, which they believe shows that title V costs for area

[9] U.S. EPA, Office of Air Quality Planning and Standards, EPA–456/R–97–004, September 1997 (Updated March 2004), Ethylene Oxide Commercial Sterilization and Fumigation Operations NESHAP Implementation Document.

sources with general permits would not be significant (thus, not ''burdensome'' for them). In response, it was an oversight for us to refer in the proposal to cost estimates in the 2000 ICR for part 70, when an updated one, the 2004 ICR, was available; however, the 2004 ICR does not support the commenter's claim that title V costs would not be significant for these area sources. We referenced the 2000 ICR in our proposal as indicating an average title V cost of $7,700 per source per year, and noted that there were no specific estimates for general permits. Similarly, the 2004 ICR indicates an average title V cost of $7,300 per source per year, and, although it contains specific estimates of title V costs for certain activities required for sources with general permits, it does not provide specific estimates of title V costs for all activities that would occur for such sources. For example, the 2004 ICR lists twelve different activities that title V sources would experience (see table 2, average source burden by activity, page 16). The ICR lists all activities that may apply to a typical source, not all that will necessarily apply to every source. For example, there are burden hour estimates for three different types of permit revisions, but not all sources may need any of these permit revisions in any given year. The commenter is correct that the activity of ''re-application of general permits'' at 2 burden hours per year would only apply to sources with general permits, and that another activity, ''permit renewal'' at 200 burden hours per year, would only apply to sources with standard permits. Both of these activities reflect the requirements of title V for sources to prepare permit applications for permit renewals, which for general permits, may be streamlined, compared to standard permits. [See § 70.6(d)(2), which allows applications for general permits, including permit renewal applications, to ''deviate from the requirements of § 70.5,'' which applies for standard permits.] However, title V sources are subject to many other activities the commenter did not acknowledge. For example, another activity listed in the table, ''prepare monitoring reports'' at 80 hours per source per year, would apply to sources with general permits and standard permits. [See the assumption section of the ICR (page 36), which specifies that ''[a]ll sources with issued permits (including those covered by general permits) will report monitoring data semi-annually and compliance certifications annually.''] Also, the 2004 ICR is silent with respect to whether the remaining activities in the table would be required of sources with general permits, but many of them would apply to such sources because § 70.6(d) requires general permits to ''comply with all requirements applicable to other part 70 permits.'' Certain of these remaining activities may be streamlined or simplified for sources with general permits, compared to sources with standard permits, but the ICR does not provide different burden hour estimates to acknowledge these differences. For example, sources with general permits would have to prepare an initial permit application when they apply for coverage under the general permit, consistent with § 70.6(d)(2), but the ICR lists the activity of ''prepare application'' at 300 hours per source per year, without estimating the potential reduction in burdens and costs that may occur through streamlined permit applications for general permits. Although the information in the 2004 ICR is more detailed, our analysis for the final rule results in the same conclusion as our review of the 2000 ICR for the proposal: That title V costs would be somewhat lower for sources with general permits, compared to sources with standard permits. Thus, the view of the commenter that title V costs would not be significant for area sources with general permits is not supported by the 2004 ICR.

Another commenter criticized our reference in the proposal of the $7,700 average cost estimate for title V sources, taken from the 2000 ICR, because that value reflects an average from among all sources, including the biggest industrial facilities in the country, and the costs to a smaller source obtaining either an individual or general permit should be less. In response, EPA agrees that costs for area sources are likely to be lower than the average cost of issuing all title V permits to all sources, for the reasons indicated by the commenter. EPA referenced the average cost of title V for all sources in the proposal because the cost estimates of the ICRs are the best estimates of title V costs available, even though they suffer from the limitations noted by the commenter. EPA's assessment of costs and burdens of title V for area sources covered by today's rule assumed that costs would be lower than the average for all sources, but still significant in light of the characteristics of the area sources. The 2004 ICR estimates average annual title V costs for all sources at $7,300, and it also does not provide all the information one would need to determine specific costs for area sources, whether they have general or standard permits.

Each ICR developed by EPA is based on the best information available to the Agency at the time it is prepared, such that more realistic estimates of burdens and costs for title V sources in general would be found in more recent ICRs, as implementation experience is gained. In addition, each ICR is approved by OMB for a set period of time in the future (typically three years), until the next ICR is approved, or the current ICR is extended.

EPA relied to some extent on the information in the ICRs for this rulemaking because it is the best information available on title V burdens and costs and no one submitted any better information to analyze title V burdens and costs for these area sources. EPA has conducted outreach and provided a 60-day public comment period to collect information on the costs and burdens for these sources for this rulemaking, and we provided a similar opportunity for the current ICR. No one submitted, or cited to, any more accurate and complete cost estimates for general permits under title V than those available to EPA. See the notice of March 23, 2004 (69 FR 13524) soliciting comment on the current ICR (Attachment 1 of the current ICR).

## IX. Effective Date of Today's Final Rule Under the Administrative Procedure Act

Section 553(d) of the Administrative Procedure Act (APA) generally provides that rules may not take effect earlier than 30 days after they are published in the **Federal Register**. However, section 553(d)(1) of the APA, provides that a substantive rule which grants or recognizes an exemption or relieves a restriction, may take effect earlier. Today's final rule grants an exemption from title V permitting requirements for a large number of area sources, so we make this final rule effective immediately.

## X. Statutory and Executive Order Reviews

### *A. Executive Order 12866: Regulatory Planning and Review*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), we must determine whether a regulatory action is ''significant'' and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines a ''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, adversely affecting in a material way the economy, a sector of the economy,

productivity, competition, jobs, the environment, public health or safety in 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 entitlement, grants, user fees, or loan programs of 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.

Under Executive Order 12866, it has been determined that this rule is a ''significant regulatory action'' because it raises important legal and policy issues. As such, this rule was submitted to OMB for review. Because this rule exempts area sources that would be subject to title V requirements absent this final rule, this final rule reduces burdens on area sources, and thus it is not economically significant. Also, area sources subject to the secondary lead NESHAP are already subject to title V (since their earlier deferral has expired) and this final rule does not change this, so this final rule does not change burdens for them. The final rule does not impose any burdens and therefore a detailed economic analysis is unnecessary.

*B. Paperwork Reduction Act*

This action does not impose any new information collection burden. Instead, it reduces such burdens by exempting a large number of area sources from title V requirements. However, the information collection requirements in the existing regulations (parts 70 and 71) were previously approved by OMB under the requirements of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. The existing ICR for part 70 is assigned EPA ICR number 1587.06 and OMB control number 2060–0243; for part 71, the EPA ICR number is 1713.05 and the OMB control number is 2060–0336. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20004 or by calling (202) 566–1672. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

*C. Regulatory Flexibility Act (RFA)*

The RFA generally requires an Agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business that meets the Small Business Administration size standards for small businesses found in 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, country, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant *adverse* economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

This rule reduces economic impacts on small entities by exempting certain categories of ''non-major'' industrial sources from the permitting requirements under title V of the Clean Air Act (Act). These sources tend to be smaller businesses and there are estimated at up to 38,000 small entities. They are currently subject to title V permitting (40 CFR parts 70 and 71) under previous rulemaking actions, and they will remain subject to these requirements until we exempt them. We have therefore concluded that today's final rule will relieve regulatory burden for these affected small entities.

*D. Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating a 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 where 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, EPA 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 our regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's rule contains no federal mandates under the regulatory provisions of title II of the UMRA for

State, local, or tribal governments or the private sector. Today's final rule imposes no enforceable duty on any State, local or tribal governments or the private sector. This final rule exempts a large number of sources from title V operating permit programs, which will reduce the duties government entities with title V programs would be required to perform and it will remove the requirement for many private sector entities to obtain operating permits under title V programs. Therefore, today's action is not subject to the requirements of sections 202 and 205 of the UMRA.

In addition, EPA has determined that this final rule contains no regulatory requirements that might significantly or uniquely affect small governments. This final rule exempts a large number of area sources from the requirement to obtain operating permits under title V. As such it also removes the requirements for small governments with approved operating permit programs to issue permits to those area sources. Therefore, today's final rule is not subject to the requirements of section 203 of the UMRA.

*E. Executive Order 13132: Federalism*

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, or on the distribution of power and responsibilities among the various levels of government.''

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Today's rule will not impose any new requirements under title V of the Clean Air Act, and it will not affect the ability of States to issue non-title V permits to these area sources, if they so choose. Accordingly, it will not substantially alter the overall relationship or distribution of powers between governments for the part 70 and part 71 operating permits programs. Thus, Executive Order 13132 does not apply to this final rule.

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

Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the federal government and the Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes.''

This final rule 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 in Executive Order 13175. Today's action does not significantly or uniquely affect the communities of Indian tribal governments. As discussed above, today's action imposes no new requirements on Indian tribal governments under title V of the Clean Air Act. Accordingly, the requirements of Executive Order 13175 do not apply to this rule.

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

Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866 and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

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

This final rule is not a ''significant energy action,'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This final rule exempts a large number of small sources from the obligation to obtain an operating permit under title V of the Clean Air Act and is not likely to have any adverse energy effects.

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and 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 in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The NTTAA does not apply to this final rule because it does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

*J. 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. We 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 December 19, 2005.

**List of Subjects**

*40 CFR Part 63*

Administrative practice and procedure, Air pollution control, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

*40 CFR Part 70*

Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

*40 CFR Part 71*

Administrative practice and procedure, Air pollution control, Reporting and recordkeeping requirements.

Dated: December 9, 2005.

**Stephen L. Johnson,**

*Administrator.*

■ For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as set forth below.

## PART 63—[AMENDED]

■ 1. The authority citation for part 63 continues to read as follows:

**Authority:** 42 U.S.C. 7401, *et seq.*

## Subpart M—[Amended]

■ 2. Section 63.320 is amended by revising paragraph (k) to read as follows:

**§ 63.320 Applicability.**

* * * * *

(k) If you are an owner or operator of an area source subject to this subpart, you are exempt from the obligation to obtain a permit under 40 CFR part 70 or 71, provided you are not required to obtain a permit under 40 CFR 70.3(a) or 71.3(a) for a reason other than your status as an area source under this subpart. Notwithstanding the previous sentence, you must continue to comply with the provisions of this subpart applicable to area sources.

## Subpart N—[Amended]

■ 3. Section 63.340 is amended by revising paragraph (e) to read as follows:

**§ 63.340 Applicability and designation of source.**

* * * * *

(e) If you are an owner or operator of an area source subject to this subpart, you are exempt from the obligation to obtain a permit under 40 CFR part 70 or 71, provided you are not required to obtain a permit under 40 CFR 70.3(a) or 71.3(a) for a reason other than your status as an area source under this subpart. Notwithstanding the previous sentence, you must continue to comply with the provisions of this subpart applicable to area sources.

■ 4. Table 1 to Subpart N is amended by revising the entry for § 63.1(c)(2) to read as follows:

TABLE 1 TO SUBPART N OF PART 63.—GENERAL PROVISIONS APPLICABILITY TO SUBPART N

| General provisions reference | Applies to subpart N | Comment |
|---|---|---|
| * | * | * |
| § 63.1(c)(2) | Yes | § 63.340(e) of Subpart N exempts area sources from the obligation to obtain Title V operating permits. |
| * | * | * |

## Subpart O—[Amended]

■ 5. Section 63.360 is amended by:

■ a. Revising the entry for § 63.1(c)(2) in Table 1; and

■ b. Revising paragraph (f).

The revisions read as follows:

**§ 63.360 Applicability.**

* * * * *

TABLE 1 OF SECTION 63.360.—GENERAL PROVISIONS APPLICABILITY TO SUBPART O

| Reference | Applies to using 10 tons in subpart O [a] | Applies to sources using 1 to 10 tons in subpart O [a] | Comment |
|---|---|---|---|
| * | * | * | * |
| 63.1(c)(2) | Yes | | § 63.360(f) exempts area sources subject to this subpart from the obligation to obtain Title V operating permits. |
| * | * | * | * |

* * * * *

(f) If you are an owner or operator of an area source subject to this subpart, you are exempt from the obligation to obtain a permit under 40 CFR part 70 or 71, provided you are not required to obtain a permit under 40 CFR 70.3(a) or 71.3(a) for a reason other than your status as an area source under this subpart. Notwithstanding the previous sentence, you must continue to comply with the provisions of this subpart applicable to area sources.

* * * * *

## Subpart T—[Amended]

■ 6. Section 63.460 is amended by adding paragraph (h) to read as follows:

**§ 63.460 Applicability and designation of source.**

* * * * *

(h) If you are an owner or operator of an area source subject to this subpart, you are exempt from the obligation to obtain a permit under 40 CFR part 70 or 71, provided you are not required to obtain a permit under 40 CFR 70.3(a) or 71.3(a) for a reason other than your

status as an area source under this subpart. Notwithstanding the previous sentence, you must continue to comply with the provisions of this subpart applicable to area sources.

**§ 63.468 [Amended]**

■ 7. Section 63.468 is amended by removing and reserving paragraph (j).

■ 8. Appendix B to Subpart T is amended by revising the entry for § 63.1(c)(2) to read as follows:

APPENDIX B TO SUBPART T OF PART 63.—GENERAL PROVISIONS APPLICABILITY TO SUBPART T

| Reference | Applies to subpart T | | Comment |
|---|---|---|---|
| | BCC | BVI | |
| * | * | * | * * * * |
| § 63.1(c)(2) | Yes | Yes | Subpart T, § 63.460(h) exempts area sources subject to this subpart from the obligation to obtain Title V operating permits. |
| * | * | * | * * * * |

## Subpart RRR—[Amended]

■ 9. Section 63.1500 is amended by revising paragraph (e) to read as follows:

**§ 63.1500 Applicability.**

* * * * *

(e) If you are an owner or operator of an area source subject to this subpart, you are exempt from the obligation to obtain a permit under 40 CFR part 70 or 71, provided you are not required to obtain a permit under 40 CFR 70.3(a) or 71.3(a) for a reason other than your status as an area source under this subpart. Notwithstanding the previous sentence, you must continue to comply with the provisions of this subpart applicable to area sources.

* * * * *

■ 10. Appendix A to Subpart RRR is amended by revising the entry for § 63.1(c)(2) to read as follows:

APPENDIX A TO SUBPART RRR OF PART 63.—GENERAL PROVISIONS APPLICABILITY TO SUBPART RRR

| Citation | Requirement | Applies to RRR | Comment |
|---|---|---|---|
| * | * | * | * * * * |
| § 63.1(c)(2) | | Yes | § 63.1500(e) exempts area sources subject to this subpart from the obligation to obtain Title V operating permits. |
| * | * | * | * * * * |

## PART 70—[AMENDED]

■ 1. The authority citation for part 70 continues to read as follows:

**Authority:** 42 U.S.C. 7401, *et seq.*

■ 2. Section 70.3 is amended as follows:

■ a. By revising paragraph (a) introductory text.

■ b. By removing and reserving paragraph (b)(3).

■ c. By revising paragraph (b)(4) introductory text.

**§ 70.3 Applicability.**

(a) *Part 70 sources.* A State program with whole or partial approval under this part must provide for permitting of the following sources:

* * * * *

(b) * * *

(4) The following source categories are exempted from the obligation to obtain a part 70 permit:

* * * * *

## PART 71—[AMENDED]

■ 1. The authority citation for part 71 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

**§ 71.3 [Amended]**

■ 2. Section 71.3 is amended by removing and reserving paragraph (b)(3).

[FR Doc. 05–24072 Filed 12–16–05; 8:45 am]

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Monday,
December 19, 2005

# Part IV

# Environmental Protection Agency

## 40 CFR Part 60

## Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors; Proposed Rule

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 60**

**[EPA–OAR–2005–0117; FRL–8008–1]**

**RIN 2060–AL97**

## Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** On December 19, 1995, EPA adopted new source performance standards (NSPS) and emission guidelines for large municipal waste combustion (MWC) units. The NSPS and emission guidelines were fully implemented by December 2000. Section 129 of the Clean Air Act (CAA) requires EPA to review, and if appropriate, revise the NSPS and emission guidelines every 5 years. In this action, EPA is proposing to revise the emission limits in the NSPS and emission guidelines to reflect the levels of performance actually achieved by the emission controls installed to meet the emission limits set forth in the December 19, 1995, NSPS and emission guidelines.

The MWC NSPS and emission guidelines apply to the combustion of non-hazardous municipal solid waste. Hazardous waste combustors (incinerators) are addressed by CAA section 112 standards.

**DATES:** *Comments.* Submit comments on or before February 6, 2006. Because of the need to resolve the issues raised in this action in a timely manner, EPA will not grant requests for extensions beyond this date.

*Public Hearing.* If anyone contacts EPA by December 30, 2005 requesting to speak at a public hearing, EPA will hold a public hearing on January 6, 2006. If you are interested in attending the public hearing, contact Ms. Pamela Garrett at (919) 541–7966 to verify that a hearing will be held.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–OAR–2005–0117, by one of the following methods:

*Agency Web Site: http://www.epa.gov/edocket/.* EDOCKET, EPA's electronic public docket and comment system, will be replaced by an enhanced Federal wide electronic docket management and comment system located at *http://www.regulations.gov.* When that occurs, you will be redirected to that site to access the docket and submit comments. Follow the on-line instructions.

*E-mail:* Send your comments via electronic mail to *a-and-r-docket@epa.gov,* Attention Docket ID No. EPA–OAR–2005–0117.

*Facsimile:* Fax your comments to (202) 566–1741, Attention Docket ID No. EPA–OAR–2005–0117.

*Mail:* Send your comments to: EPA Docket Center (EPA/DC), EPA, Mailcode 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. EPA–OAR–2005–0117.

*Hand Delivery:* Deliver your comments to: EPA Docket Center (EPA/DC), EPA West Building, Room B108, 1301 Constitution Ave., NW., Washington, DC, 20460, Attention Docket ID No. EPA–OAR–2005–0117. Such deliveries are accepted only during the normal hours of operation (8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays), and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–OAR–2005–0117. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* 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 *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.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.

*Public Hearing:* If a public hearing is held, it will be held at EPA's Campus located at 109 T.W. Alexander Drive in Research Triangle Park, NC, or an alternate site nearby. Persons interested in presenting oral testimony must contact Ms. Pam Garrett at (919) 541–7966 at least 2 days in advance of the hearing. If no one contacts Ms. Garrett in advance of the hearing with a request to present oral testimony at the hearing, we will cancel the hearing. The public hearing will provide interested parties the opportunity to present data, views, or arguments concerning the proposed action.

*Docket:* All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., 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 at *http://www.regulations.gov* or in hard copy at the EPA Docket Center (EPA/DC), EPA West Building, 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 EPA Docket Center is (202) 566–1742.

**FOR FURTHER INFORMATION CONTACT:** Mr. Walt Stevenson, Combustion Group, Emission Standards Division (C439–01), U.S. EPA, Research Triangle Park, North Carolina 27711, (919) 541–5264, e-mail *stevenson.walt@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

*Organization of This Document.* The following outline is provided to aid in locating information in this preamble.

I. General Information
- A. Do the proposed amendments apply to me?
- B. What should I consider as I prepare my comments?

II. Background Information

III. Summary of the Proposed Amendments
- A. Are revisions to the emission limits being proposed?
- B. Are other amendments being proposed?
- C. Is an implementation schedule being proposed?
- D. Has EPA changed the applicability date of the NSPS?

IV. Rationale for the Proposed Amendments
- A. How were the proposed emission limits developed?
- B. How were the proposed operator stand-in provisions developed?
- C. Why did EPA add two MWC combustor categories to the list of MWC combustor types?

D. How were the additional carbon monoxide (CO) limits developed?
E. Is EPA proposing an averaging period for measuring activated carbon injection (ACI) rate?
F. Are any other changes being considered for measuring ACI?
G. How did EPA determine the amended performance testing and monitoring requirements?
H. How did EPA determine the other amendments?
I. How was the implementation schedule developed?
V. Impacts of the Proposed Amendments for Existing Units
VI. Did EPA consider requiring MWC units equipped with electrostatic precipitator-based scrubbing systems to replace the ESP with a fabric filter?
VII. How do the proposed amendments relate to section 112(c)(6) of the Clean Air Act?
VIII. Statutory and Executive Order Reviews
A. Executive Order 12866, Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks
H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use
I. National Technology Transfer Advancement Act

## I. General Information

### *A. Do the proposed amendments apply to me?*

*Regulated Entities.* Categories and entities potentially affected by the proposed amendments are MWC units with a design combustion capacity of greater than 250 tons per day. The NSPS and emission guidelines for municipal waste combustors affect the following categories of sources:

| Category | NAICS code | SIC code (optional) | Examples of potentially regulated entities |
|---|---|---|---|
| Industry, Federal government, and State/local/tribal governments. | 562213<br>92411 | 4953<br>9511 | Solid waste combustors or incinerators at waste-to-energy facilities that generate electricity or steam from the combustion of garbage (typically municipal solid waste); and solid waste combustors or incinerators at facilities that combust garbage (typically municipal solid waste) and do not recover energy from the waste combustion. |

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by the proposed rule. To determine whether your facility would be regulated by the proposed rule, you should examine the applicability criteria in 40 CFR 60.32b of subpart Cb and 40 CFR 60.50b of subpart Eb. If you have any questions regarding the applicability of the proposed rule to a particular entity, contact the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

### *B. What should I consider as I prepare my comments?*

1. *Submitting Confidential Business Information (CBI).* Do not submit information that you consider to be CBI electronically through EDOCKET, regulations.gov, or e-mail. Send or deliver information identified as CBI to only the following address: Mr. Walt Stevenson, c/o OAQPS Document Control Officer (Room C404–02), U.S. EPA, Research Triangle Park, NC 27711, Attention Docket ID No. OAR–2005–0117. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

2. Tips for Preparing Your Comments. When submitting comments, remember to:

(a) Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

(b) Follow directions. The EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

(c) Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

(d) Describe any assumptions and provide any technical information and/or data that you used.

(e) If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

(f) Provide specific examples to illustrate your concerns, and suggest alternatives.

(g) Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

(h) Make sure to submit your comments by the comment period deadline identified in the preceding section titled Dates.

*Docket.* The docket number for the proposed amendments to the large MWC NSPS (40 CFR part 60, subpart Eb) and emission guidelines (40 CFR part 60, subpart Cb) is Docket ID No. OAR–2005–0117.

*Worldwide Web (WWW).* In addition to being available in the docket, an electronic copy of this proposed rule is available on the WWW through the Technology Transfer Network Web site (TTN Web). Following signature, EPA posted a copy of the proposed rule on the TTN's policy and guidance page for newly proposed or promulgated rules at *http://www.epa.gov/ttn/oarpg.* The TTN provides information and technology exchange in various areas of air pollution control.

## II. Background Information

Section 129 of the CAA, entitled ''Solid Waste Combustion,'' requires EPA to develop and adopt NSPS and emission guidelines for solid waste incineration units pursuant to CAA sections 111 and 129. Section 111(b) of the CAA (NSPS program) addresses emissions from new MWC units and CAA section 111(d) (emission guidelines program) addresses emissions from existing MWC units. The NSPS are directly enforceable Federal regulations. The emission guidelines are not directly enforceable

but, rather, are implemented by State air pollution control agencies through sections 111(d)/129 State plans.

In December 1995, EPA adopted NSPS (subpart Eb) and emission guidelines (subpart Cb) for MWC units with a combustion capacity greater than 250 tons per day. These MWC units are referred to as large MWC units. Both the NSPS and emission guidelines require compliance with emission limitations that reflect the performance of maximum achievable control technology (MACT). The NSPS apply to new MWC units after the effective date of the NSPS or at start-up, whichever is later. The emission guidelines apply to existing MWC units and required compliance by December 2000. These retrofits were completed on time, and the controls installed to meet the required emission limitations were highly effective in reducing emissions of all of the CAA section 129 pollutants emitted by large MWC units. Relative to a 1990 baseline, the emission guidelines reduced organic emissions (dioxin/furan) by more than 99 percent, metal emissions (cadmium, lead, and mercury) by more than 93 percent, and acid gas emissions (hydrogen chloride and sulfur dioxide) by more than 91 percent.

Section 129(a)(5) of the CAA requires EPA to conduct a 5-year review of the NSPS and emissions guidelines and, if appropriate, revise the NSPS and emission guidelines. The EPA has completed that review, and these proposed amendments reflect the changes EPA believes are appropriate.

## III. Summary of Proposed Amendments

Following year 2000 compliance with the emission guidelines, EPA gathered information on the performance levels actually being achieved by large MWC units retrofitted to comply with the emission guidelines. Today's proposed amendments would revise the NSPS and emission guidelines based on the performance levels being achieved by large MWC units. The revisions discussed in the following text apply to both the NSPS and the emission guidelines, unless otherwise specified.

### *A. Are revisions to the emission limits being proposed?*

Yes. The proposed amendments would revise many of the emission limits in both the NSPS and emission guidelines. Relative to the NSPS, the most significant changes would be in the lead and cadmium emission limits. Relative to the emission guidelines, the most significant changes would be in the dioxin/furan and lead emission limits. Also associated with the revised emissions limits, are proposed amendments to change the dimensions (units of measure) of the emission limits for cadmium, lead, and mercury from milligrams per dry standard cubic meter to micrograms per dry standard cubic meter (μg/dscm). EPA believes the proposed emission limits can be achieved with the same emission control technology currently used by large MWCs. EPA requests comment on achievability of the proposed limits and whether the proposed limits adequately consider emission variability. The proposed emission limits for the NSPS and emission guidelines are summarized in Table 1 of this preamble.

TABLE 1.— PROPOSED EMISSION LIMITS FOR LARGE MWC UNITS

| Pollutant | Proposed emission limit for existing MWC units* | Proposed emission limit for new MWC units* |
|---|---|---|
| Dioxin/furan (CDD/CDF) | 21 nanograms per dry standard cubic meter total mass basis. | 13 nanograms per dry standard cubic meter total mass basis**. |
| Cadmium (Cd) | 31 micrograms per dry standard cubic meter | 3.5 micrograms per dry standard cubic per dry meter. |
| Lead (Pb) | 250 micrograms per dry standard cubic meter | 84 micrograms per dry standard cubic meter. |
| Mercury (Hg) | 80 micrograms per dry standard cubic meter or 85 percent reduction of mercury emissions**. | 49 micrograms per dry standard cubic meter or 90 percent reduction of mercury emissions. |
| Particulate Matter (PM) | 24 milligrams per dry standard cubic meter | 9.5 milligrams per dry standard cubic meter. |
| Hydrogen chloride (HCl) | 26 parts per million dry volume or 97 percent reduction of hydrogen chloride emissions. | 25 parts per million dry volume or 98 percent reduction of hydrogen chloride emissions. |
| Sulfur dioxide ($CO_2$) | 23 parts per million dry volume or 80 percent reduction of sulfur dioxide emissions. | 19 parts per million dry volume or 90 percent reduction of sulfur dioxide emissions. |
| Nitrogen Oxides ($NO_X$) | Varies by combustor type (see table 1 to subpart Cb of part 60). | 180 parts per million dry volume/150 parts per million dry volume after first year of operation**. |

*All emission limits are measured at 7 percent oxygen.
**No change proposed.

### *B. Are other amendments being proposed?*

The proposed amendments would also make the following changes based on information received during implementation of the MWC emission guidelines and would apply equally to the NSPS and emission guidelines, unless otherwise specified.

*Operating Practices*

- The proposed amendments would revise the operator stand-in provisions in § 60.54b(c) to clarify how long a shift supervisor is allowed to be off site when a provisionally certified control room operator is standing in. A provisionally certified control room operator could stand in for up to 12 hours without notifying EPA; for up to 2 weeks if EPA is notified; and longer than 2 weeks if EPA is notified and the MWC owner demonstrates to EPA that a good faith effort is being made to ensure that a certified chief facility operator or certified shift supervisor is on site as soon as practicable.
- The proposed amendments would add two additional classifications of MWC units to the emission guidelines and would add associated CO limits to assure good combustion practices. The two new classifications are ''spreader stoker refuse-derived fuel (RDF)-fired/100 percent coal capable combustor'' and ''semi-suspension RDF-fired combustor/wet RDF process conversion.''

*Operating Parameters*

- The proposed amendments would revise § 60.58b(m) to establish an 8-hour block average for measuring activated carbon injection (ACI) rate. This would make the NSPS and emission guidelines for large MWC units consistent with the newer (year 2000) section 129 regulations for small MWC units (40 CFR part 60, subparts AAAA, BBBB), which monitors ACI rate using an 8-hour block average.

*Performance Testing and Monitoring*

- The proposed amendments would revise the annual mercury testing

requirements to allow for optimization of mercury control operating parameters by waiving operating parameter limits during the mercury performance test and during the 2 weeks preceding the mercury performance test. This is already done for dioxin testing.

• The proposed amendments would revise the reduced testing requirements for exceptionally well-operated MWC units. Exceptionally well-operated units are those with emissions significantly below the emission limits. Specifically, EPA proposes to lower the dioxin/furan criteria and add an associated mercury criteria to qualify for reduced testing.

• The proposed amendments would add flexibility to the annual compliance testing schedule so that a facility still tests once per calendar year, but no less than 9 months and no more than 15 months since the previous test. The revision would provide flexibility to facilities when facing scheduled and unscheduled outages, adverse local weather conditions, and other conditions, while still meeting the intent of the compliance testing requirements.

• The proposed amendments would allow the use of parametric monitoring limits from an exceptionally well-operated MWC unit (i.e., unit with emissions significantly below the emission limits) to be applied to all identical units at the same plant site without retesting.

• The proposed amendments would increase the continuous emission monitoring system (CEMS) data collection rates from 90 percent of operating time on a quarterly calendar basis to 95 percent of operating time on a quarterly calendar basis.

• The proposed amendments would revise the particulate matter compliance testing requirements to allow the optional use of a particulate matter CEMS in place of EPA Method 5.

*Other Amendments*

• The proposed amendments would clarify the meaning of the term ''Administrator'' in the regulations.

• Other details to fine tune the regulation are also proposed.

*C. Is an implementation schedule being proposed?*

Yes. Under the proposed emission guidelines, and consistent with CAA section 129, revised State plans containing the revised emission limits and other requirements in the proposed emission guidelines would be due within 1 year after promulgation of the revisions. That is, revised State plans would have to be submitted to EPA 1 year after the date by which EPA promulgates revised limits.

The proposed emission guidelines then allow MWC units up to 2 years from the date of approval of a State plan to comply. Consistent with CAA section 129, EPA, therefore, expects States to require compliance as expeditiously as practicable. Large MWC units have already installed the emission control equipment necessary to meet the proposed revised limits, and EPA, therefore, anticipates that most State plans will include compliance dates sooner than 3 years following promulgation of the final rule. In most cases, the only changes necessary are to review the revisions and adjust the emission monitoring and reporting accordingly.

In revising the emission limits in a State plan, a State has two options. First, it could insert the new emission limits in place of the current emission limits, follow procedures in 40 CFR part 60, subpart B, and submit a revised State plan to EPA for approval. If the revised State plan contains only the new emission limits (i.e., the existing emission limits are not retained), then the new emission limits must become effective immediately since the current limits would be removed from the State plan. A second approach would be for a State plan to include both the current and the new emission limits. This allows a phased approach in applying the new limits. That is, the State plan would make it clear that the existing emission limits remain in force and apply until the date the new emission limits are effective (as defined in the State plan).

*D. Has EPA changed the applicability date of the NSPS?*

No. The applicability date for the NSPS units remains September 20, 1994; however, units for which construction or modification is commenced after the date of this proposal will be subject to more stringent emission limits than units on which construction or modification was completed prior to that date. Under the proposed amendments, units that commenced construction after September 20, 1994, and on or before December 19, 2005, or that are modified 6 months or more after the effective date of any final standards, would continue to be subject to the NSPS emission limits that were promulgated in 1995 and that remain in the 40 CFR part 60, subpart Eb NSPS. Units that commence construction after December 19, 2005 would meet the revised emission limits that are being added to the subpart Eb NSPS.

The EPA is not aware of any MWC units that were modified or reconstructed after June 19, 1996 (effective date of the December 19, 1995 NSPS), therefore, EPA is proposing to simplify the applicability text for the NSPS to be MWC units that commenced construction, modification, or reconstruction after September 20, 1994. The EPA believes the use of one date is the most understandable format. The EPA requests comment on this approach and whether all dates referenced in CAA section 129 should remain in the revised NSPS, even if the dates have passed and have no utility.

## IV. Rationale for the Proposed Amendments

*A. How were the proposed emission limits developed?*

The proposed emission limits are based on the performance of MACT. One set of emission limits is proposed for existing MWC units regulated under CAA section 111(d) emission guidelines, and another set of emission limits is proposed for new MWC units regulated under CAA section 111(b) NSPS. Both sets of limits were developed following the procedures discussed below.

As background, the current emission limits in the emission guidelines, as well as the proposed emission limits for the emission guidelines, are based on the application of either spray dryer/electrostatic precipitator/activated carbon injection/selective non-catalytic reduction technology (SD/ESP/ACI/SNCR) or spray dryer/fabric filter/activated carbon injection/selective non-catalytic reduction technology (SD/FF/ACI/SNCR). The current emission limits in the NSPS, as well as the proposed NSPS emission limits, are based on SD/FF/ACI/SNCR technology alone. In practice, and as allowed by the emission guidelines, existing MWC units have used a mix of SD/ESP/ACI/SNCR technology and SD/FF/ACI/SNCR technology to comply with the emission guidelines.

Following MACT compliance in December 2000, EPA obtained compliance test reports from all operating large MWC units (167 units at 66 plants) and used those data to evaluate MACT performance. When the MWC regulations were proposed in 1994, no MWC units were operating with the full set of controls, and significant engineering judgment was necessary in selecting the emission limits. The year 2000 compliance data show that the actual performance of the control technology that industry installed to meet the 1995 NSPS and

emission guidelines achieves reductions superior to the 1995 limits. The EPA used the MACT data in the compliance test reports to develop the emission limits contained in the proposed amendments. The EPA believes the proposed emission limits more accurately reflect actual MACT performance.

The first step in the analysis was to subdivide the database into two subgroups based on emission control technology. For the emission guidelines, the data were subcategorized to MWC units equipped with SD/ESP/ACI/SNCR. For the NSPS, data were subcategorized to MWC units equipped with SD/FF/ACI/SNCR. The data were subcategorized this way because the emission guidelines are based on SD/ESP/ACI/SNCR control and the NSPS are based on SD/FF/ACI/SNCR control. The remaining steps of the analysis were the same for both data sets.

Next, the data were screened. The screening was based on the expectation that similar MWC units at a single MWC plant should have similar emissions. That is, at an MWC plant, MWC units with the same configuration, firing waste from the same waste pit, and controlled with the same design of pollution control equipment, would be expected to have similar emissions. The test data for multiple MWC units at an MWC plant were compared to identify the difference between the test results. This was done for all MWC plants. Next, the mean and standard deviation of the differences were calculated for the entire MWC database. This mean and standard deviation were then used to screen test results for each MWC plant. If the test results from multiple MWC units at a specific MWC plant differed by more than the mean plus one standard deviation from the full dataset, the test data for that MWC plant were removed from analysis. This was repeated for each CAA section 129 pollutant. Less than 14 percent of the data were excluded during screening.

Next, a statistical analysis of the remaining database was conducted to identify the best fitting frequency distribution. After identifying the best fitting frequency distribution, an actually achievable emission limit was calculated (*i.e.*, the mean performance plus a variability factor). Where the analysis supported limits more stringent than the current limits, new limits are proposed. This procedure was followed in developing the proposed emission limits for the ''stack test'' pollutants (dioxin/furan, Cd, Pd, Hg, PM, and HCl).

For $SO_2$ and $NO_X$, a different approach was used. For these pollutants, CEMS, rather than stack tests, are used to determine compliance. CEMS can generate up to 8,760 hours of data per year and emissions variability must be carefully addressed in order to select an appropriate emission limit. Typically, EPA analyzes more than 1,000 hours of CEMS data per source in order to evaluate and address emissions variability when setting emission limits to be enforced by CEMS. To develop the proposed $SO_2$ and $NO_X$ limits, EPA used a two-step process. First, the mean performance level for $SO_2$ and $NO_X$ control was determined using the year 2000 MACT compliance data. Next, a variability factor was identified based on an analysis of $SO_2$ and $NO_X$ CEMS data from four MWC plants. The variability analysis was based on the evaluation of more than 2,400 hours of $SO_2$ CEMS data and 3,500 hours of $NO_X$ CEMS data. The variability factor was added to the mean performance level from the year 2000 MACT database to determine new emission limits. Where the analysis supported $SO_2$ and $NO_X$ limits more stringent than the current limits, new limits are proposed.

EPA requests comment on the data screening procedure used for this proposal and requests suggestions for alternative data screening procedures. EPA also requests comment on the appropriateness to screen out data. The data screening procedure for the proposal is presented in a data analysis memo contained in the docket for this rulemaking.

*B. How were the proposed operator stand-in provisions developed?*

Under the good combustion practices component of the regulations (§ 60.54b(c)(2)), a fully certified MWC plant supervisor or MWC shift supervisor must be on site during all periods of MWC operation, except those periods when a provisionally certified control room operator ''stands in.'' A provisionally certified control room operator on site can stand in for the duration of the plant or shift supervisor's shift when the plant or shift supervisor must leave prior to the end of the shift. In implementing the MACT regulations in the late 1990s, a number of questions were raised on this issue. State regulators and MWC owners and operators questioned how long a certified plant or shift supervisor is allowed to be off site, and how long a provisionally certified control room operator is allowed to stand in. Questions were raised about what should be done if a plant supervisor became sick or was off for a week of training or vacation. The EPA examined the issue, and in 1998 issued an enforcement guidance memorandum to reflect EPA's intent in developing the regulation. Under the enforcement guidance memorandum, a provisionally certified control room operator can stand in for a certified plant or shift supervisor when they are off site for (1) periods up to twelve hours without notifying EPA; (2) periods up to two weeks if EPA is notified; and (3) periods longer than two weeks if EPA is notified and the MWC owner demonstrates to EPA that a good faith effort is being made to ensure that a certified chief facility operator or certified control room shift supervisor is on site. These stand-in provisions were incorporated into the small MWC MACT regulations promulgated in 2000. The EPA is now proposing to amend the large MWC NSPS and emission guidelines to be consistent with this EPA enforcement guidance memorandum and the small MWC regulations.

The EPA is aware that later this year the American Society of Mechanical Engineers (ASME) is planning to publish updated Standards for the Qualification and Certification of Resource Recovery Facility Operators (QRO–1–1994). The MWC rules currently require MWC operators obtain this certification. A number of changes to QRO are planed by the ASME. At this time it appears the principal affect would be the need for EPA to revise the MWC rules to use the QRO term ''operator certification'' in place of the term ''fully certified'' as currently used in the MWC rules. If the ASME completes the QRO update by the time the MWC rules are finalized, the new QRO procedures will be incorporated into the final MWC rule.

*C. Why did EPA add two MWC combustor categories to the list of MWC combustor types?*

In the 1995 emission guidelines, EPA identified three distinct types of RDF-fired MWC units: (1) RDF stoker, (2) pulverized coal/RDF mixed fuel-fired combustor, and (3) spreader stoker coal/RDF mixed fuel-fired combustor. Recently, EPA has identified two additional types of RDF-fired MWC designs that do not fit within the three types of RDF combustors as defined in the regulations. Since none of the three previous subcategories of RDF municipal waste combustors correctly describe the design or operation of these particular units, EPA recognized a need to add combustor types that would adequately describe and set CO emission limits for these combustors.

The EPA is proposing to add definitions for ''spreader stoker RDF-fired combustor/100 percent coal capable'' and ''semi-suspension RDF-

fired combustor/wet RDF process conversion.'' For these MWC technology types, the proposed amendments would add good combustion practice-based CO limits. A spreader/stoker RDF-fired combustor/100 percent coal capable combustor fires RDF into the combustion zone by a mechanism that throws the fuel onto the grate from above. Combustion takes place both in suspension and on the grate. Such a unit is capable of firing 100 percent coal as a replacement for RDF. A semi-suspension RDF-fired combustor/wet RDF process conversion means a combustion unit that was converted from wet RDF processing to dry RDF processing. For both of these technologies, CO emission limits are proposed based on levels achievable by good combustion practices.

*D. How were the additional carbon monoxide (CO) limits developed?*

First, EPA determined that both good combustion practices and MACT had been fully implemented at the two additional MWC types discussed above. Next, EPA obtained over 5,000 hours of CO CEMS data from each MWC type and conducted a statistical analysis of the data to identify the best fitting distribution. After identifying the best fitting distribution, EPA calculated a statistically achievable emission limit based on a 24-hour block average for each of the two MWC types. The new CO limits fall within the range of current good combustion practice-based CO limits for other MWC combustors that range from 50 to 250 parts per million (ppm).

*E. Is EPA proposing an averaging period for measuring activated carbon injection (ACI) rate?*

The proposed amendments would revise § 60.58b(m) to specify an 8-hour block average period for measuring the ACI rate. Section 60.58b(m) requires an owner or operator using ACI to select an ACI operating parameter that can be used to calculate ACI feed rate (e.g., screw feeder speed) during the mercury and dioxin/furan performance test. The current § 60.58b does not, however, indicate the averaging time to be used, and the performance test period can vary from test to test.

To select an averaging period, EPA examined the Hg test sampling period of twelve MWC units that use ACI. The test duration averaged about 7 hours. To establish consistency, a fixed 8-hour block averaging period is being proposed for ongoing measurement of the ACI system operating parameters used to calculate ACI feed rate.

*F. Are any other changes being considered for measuring ACI?*

The EPA is considering including in the final regulation a requirement to monitor the pneumatic injection pressure at the location where the activated carbon is injected into the flue gases in order to monitor ACI. This would quickly identify a clogged injection nozzle. If this were done, the same 8-hour block average would be used for measuring injection pressure. The EPA specifically requests comments on the reasonableness of such monitoring.

*G. How did EPA determine the amended performance testing and monitoring requirements?*

*Annual testing schedule.* While implementing the mandatory 12-month testing schedule under the current regulations, MWC owners and operators found the testing schedule difficult to comply with. The current schedule does not provide flexibility to accommodate unscheduled MWC outages, local weather conditions, and other unexpected conditions. After an outage, bringing the MWC units back on line, rescheduling the test, notifying the regulatory agencies, and preparing for the test can cause delays and prevent testing within the specified 12-month period. Inclement weather can cause similar problems. To accommodate the need for flexibility while retaining an annual test schedule, EPA proposes to revise the testing schedule to once per calendar year, with no less than 9 months and no more than 15 months between tests.

*Optimization Parameters.* The proposed amendments would revise the testing requirements to allow the use of optimized parametric monitoring data from the most recently tested MWC unit to be applied to all similar MWC units on site. The use of this approach would be limited to exceptionally well-run MWC units where dioxin/furan and Hg tests show levels less than one half the dioxin/furan and Hg standards.

*Optimization Testing.* The proposed amendments would revise the operating parameter requirements for the annual testing to waive parameters during Hg testing. The use of this approach would provide the same flexibility in Hg testing as currently allowed for dioxin/furan testing. The standards presently allow the operating parameters to be waived during the dioxin/furan performance test and during the two weeks preceding the performance test (§ 60.53b(b) and (c)). Such flexibility is needed in cases where the owner or operator wishes to use the performance test to establish different site-specific maximum or minimum values for their operating parameters for Hg control. Waiving the operating parameters associated with dioxin/furan control (i.e., load level and temperature at the control device inlet) during these times allows the source to optimize the performance of the controls and to perform the tests necessary to show that the emission limits are met while operating under the revised parameter values. The EPA requests comments on whether other parameters need such flexibility. If you suggest additional flexibility, identify the parameters and explain why the flexibility is needed.

*Reduced Testing for Well-operated MWC Units.* The EPA is proposing to amend the NSPS and emission guidelines provisions that allow reduced frequency for testing of exceptionally well-operated MWC units. Well-operated MWC units are those with emissions significantly below the emission limits. Currently, reduced testing is allowed if dioxin/furan emission levels have been repeatedly shown to be less than half of the emission limit. The proposed amendments would require both dioxin/furan and mercury emissions to both be less than half the emission limit to qualify for reduced testing. By amending the requirements to qualify for reduced testing, we are providing an incentive for MWC owners or operators to optimize an MWC unit's carbon injection system and other operating parameters for exceptional reduction of both mercury and dioxin/furan emissions.

*CEMS Data Availability.* The proposed amendments would increase the CEMS data collection requirement from 90 percent of the operating days per calendar quarter to 95 percent of the operating days per calendar quarter. The EPA obtained year 2003 CEMS data from a large MWC plant. That data included CEMS information on six parameters for each of three MWC units at the plant ($SO_2$, $NO_X$, opacity, flue gas temperature at scrubber discharge, CO, and HCl). Overall, the data contained 72 calendar quarters of CEMS data (3 combustion units x 4 calendar quarters x 6 parameters). All CEMS produced more than 99 percent data availability for all calendar quarters for all parameters monitored. As demonstrated by the data, well-designed and operated CEMS reliably collect data at rates higher than required in current regulations; thus, the proposed amendments would increase the data availability requirement to reflect current operating practices and performance.

*PM CEMS.* The proposed amendments would allow the use of PM CEMS as an alternative to PM performance testing by EPA Method 5. Owners or operators who choose to rely on PM CEMS would be able to discontinue their annual Method 5 test. The proposed amendments incorporate the use of PS–11 for PM CEMS and PS–11 QA Procedure 2 to ensure that PM CEMS are installed and operated properly and produce good quality monitoring data.

An owner or operator of an MWC unit who wishes to use PM CEMS would be required to notify EPA one month before starting use of PM CEMS and one month before stopping use of the PM CEMS. Additionally, EPA requests comment on the appropriateness of dropping the opacity monitoring requirements for MWC units that use PM CEMS.

The PM emissions limits are based on data from infrequent (normally annual) stack tests and have been enforced by stack test. The change to use of PM CEMS for measurement and enforcement of the same emission limits must be carefully considered in relation to an appropriate averaging period for data reduction. The EPA considered this issue and concluded the use of a 24-hr block average was appropriate to address PM emissions variability and EPA has included the use of a 24-hour block average in the proposed rule. The 24-hour block average would be calculated following procedures in Method 19.

PM CEMS have been applied successfully at various sources including fossil fueled power plants and MWC units in Germany.

*Other CEMS.* The EPA considered proposing the use of HCl CEMS, Hg CEMS, and multi-metal CEMS as alternatives to the existing ways of demonstrating compliance with the HCl, Hg, Cd, and Pb emissions limits. Although the proposed rule does not include such monitoring provisions, EPA is considering development of PS and including such provisions in the final rule as an optional test method. The EPA has not included such provisions in the proposed rules because it appears the current practice of continuous monitoring of $SO_2$ and PM in combination with the continuous monitoring of operating parameters (boiler load, fuel gas temperature and ACI rate) give a good indication of acid gas, metals and organic emissions from MWC units. The EPA specifically requests comment on the reasonableness of including optional provisions for use of HCl CEMS, Hg CEMS, and multi-metal CEMS in the final rule.

Relative to HCl monitoring, EPA is aware that State agencies, such as those in Michigan, Massachusetts, and Pennsylvania, already require the use of HCl CEMS for MWC units in their jurisdictions. The EPA is also aware that PS for HCl CEMS have been developed by the Northeast States for Coordinated Air Use Management (NESCAUM) and the Commonwealth of Pennsylvania. In response, EPA will consider such actions as a request by Michigan, Massachusetts, and Pennsylvania to use HCl CEMS as an alternate test method for determining compliance with the HCl emission limits in both the NSPS and emission guidelines for large MWC units located in the states of Michigan, Massachusetts, and Pennsylvania. The EPA will address this request in the final rule.

The EPA has proposed PS–13 for HCl CEMS and believes that PS can serve as the basis for PS for HCl CEMS use at MWC units. In addition to the procedures used in proposed PS–13 for HC1 for initial accuracy determination using the relative accuracy test, a comparison against a referenced method, EPA is taking comment on an alternate initial accuracy determination procedure, similar to the one in section 11 of PS–15 using the dynamic or analyte spiking procedure.

Relative to the use of Hg CEMS, the EPA believes that PS–12A for fossil fuel-fired boilers can provide the basis for using Hg CEMS at MWC units. The EPA is aware of the use of Hg CEMS use at MWC units in Germany. Six sites employ Hg CEMS; three MWC units, one hazardous waste combustor, one sewage sludge combustor, and one sewage sludge/coal-fired power plant.

EPA believes multi-metals CEMS can be used in many applications, including MWC units. The EPA has monitored side-by-side evaluations of multi-metals CEMS with Method 29 at industrial waste incinerators and found good correlation. The EPA was also approved to the use multi-metals CEMS as an alternative monitoring method at a hazardous waste combustor. The EPA believes it is possible to adapt proposed PS–10 or other EPA performance specifications to allow the use of multi-metal CEMS at MWC units. In addition to the procedures used in proposed PS–10 for initial accuracy determination using the relative accuracy test, a comparison against a reference method, EPA is taking comment on an alternate initial accuracy determination procedure, similar to the one in section 11 of PS–15 using the dynamic or analyte spiking procedure.

Whether or not EPA includes provisions for use of HCl, Hg, or multi-metal CEMS in the final NSPS and emission guidelines, at any time, an owner or operator of an MWC unit may apply for approval of these monitoring methods in lieu of specified monitoring requirements. Such requests are authorized according to the general provisions of part 60 at 40 CFR 60.13(i).

The EPA is also aware of the use of semi-continuous or CEMS for dioxin/furan as alternatives to the existing ways of showing compliance with the dioxin/furan emissions limits. One semi-continuous dioxin/furan sampling system is the Adsorption Method for Sampling of Dioxins and Furans (AMESA), which operates like an automated Method 23 sampler and yields average dioxin and furan emissions over a specified period from 14 to 30 days. Again, the proposed rule does not include provisions for such monitoring, but EPA is considering including such provisions in the final regulations as an optional test method for measuring dioxin/furan emissions. The EPA specifically requests comments on the reasonableness of including provisions for this type of dioxin/furan monitoring.

The EPA continues to be interested in dioxin/furan monitoring technologies, as evidenced by the upcoming Environmental Technology Verification testing program scheduled for summer 2005. During that two-week program, at least four dioxin/furan monitoring technologies will be evaluated, one of which was successfully tested in December 2004 at a MWC unit.

MWC unit owners and operators should note that the use of HCl, Hg, multi-metal, and dioxin/furan CEMS technology may allow the discontinuation of various parametric monitoring including flue gas, temperature, MWC load, and ACI rate.

### *H. How did EPA determine the other amendments?*

*Administrator.* The NSPS and emission guidelines refer to both ''Administrator'' and ''EPA Administrator.'' Because both terms are used in the regulation and neither has been defined, it has been unclear to personnel implementing CAA section 111(d)/129 plans whether Administrator was to be construed broadly to include the Administrator of the U.S. EPA and all of his/her designees, including the Administrator of a State Air Pollution Control Agency consistent with the definition in the General Provisions, or was intended to refer only to the Administrator of the U.S. EPA. To clarify the intent, the text has been revised to ''EPA'' to refer to the EPA Administrator where appropriate. The term ''Administrator'' now refers to the appropriate representative (e.g., Director

of a State Air Pollution Control Agency for section 111(d)/129 State plans and EPA Administrator (or delegate) for section 111(d)/129 Federal plans). Definitions for the terms ''EPA'' and ''Administrator'' are included in the proposed rule.

*I. How was the implementation schedule developed?*

A consent decree issued by the U.S. District Court for the District of Columbia requires EPA to promulgate any revisions of the emission guidelines or NSPS for large MWC units that result from this technical review by April 28, 2006. (*See Sierra Club* v. *Whitman,* No. 01–1537 (D.D.C.) Consent decree file entered on May 22, 2003.) Consistent with CAA section 129, EPA is proposing that revisions to State plans be submitted to EPA one year following adoption of the revisions (approximately April 28, 2007). Dates in this preamble discussion and in the proposed rule are estimated and will depend on the date of publication of the final rule in the **Federal Register**.

Next, EPA chose to provide up to two additional years for MWC units to implement the revised guidelines (i.e., units must be in compliance by the date two years after the date specified for submitting State plans). Thus, final compliance would occur on or before April 28, 2009 (approximately). As proposed, while revised State plans must specify compliance no later than three years following adoption of the final rule (a compliance date of approximately April 28, 2009), consistent with CAA section 129, EPA expects States to require compliance as expeditiously as practical, and EPA anticipates that many States will submit revised State plans that include earlier compliance dates. The proposed emission limits can be achieved using the same air pollution control technology that served as the basis of the current emission limits.

The EPA requests comment on an alternate compliance schedule, as follows. That schedule would be to allow the same one year for State plan submittal (approximately April 28, 2007), but allow only one additional year for MWC units to achieve final compliance (approximately April 28, 2008), with the option that a State can request a longer compliance date for specific MWC units, but in no case longer than four years after the date by which revised State plans are due (the maximum allowed by CAA section 129). In requesting a longer site-specific schedule, a State would have to provide a demonstration why additional time is needed and how much additional time is needed. Again, EPA requests comment on this alternative schedule.

## V. Impacts of the Proposed Amendments for Existing Units

The EPA projects the proposed amendments will have no additional impacts to air, water, or energy since the proposed emission limits can be achieved using the same air pollution control technology that was used to comply with the current emission limits. Similarly, EPA expects no additional cost or economic impact for the same reason. Existing large MWC units will continue to use their existing MACT control technology to meet the emission limits, and will not incur costs to retrofit equipment. The same conclusions apply to new MWC units since EPA expects that new MWC units will be equipped with the same control technology used to comply with the 1995 NSPS. EPA requests comment on the projections that revising the emission limits as proposed here will not lead to any changes in MWC operations, costs, or emissions. For example, we seek information on whether MWC operations could change (and the resultant impacts on costs and emissions) to ensure that an adequate variability margin (some times called a compliance margin) remains with the proposed limits.

## VI. Did EPA consider requiring MWC units equipped with electrostatic precipitator (ESP)-based scrubbing systems to replace the ESP with a fabric filter?

Yes. The EPA considered the option of requiring the MWC owner or operator of MWC units equipped with ESP-based scrubbing systems to replace the ESP with a fabric filter. The EPA conducted an analysis of impacts resulting from the implementation of such an option. The analysis identified 21 MWC units with ESP-based scrubbing systems. All other MWC units are currently equipped with fabric filter-based scrubbing systems. As shown in Table 2 of this preamble, ESP replacement at the 21 identified MWC units would reduce MWC emissions by about 130 tons per year (tpy). The analysis determined that the annualized cost of ESP replacement at these units would be about $14.5 million per year. If this cost is evenly assigned to the emissions reductions listed in Table 2 of this preamble, the cost of these emission reductions would exceed $100,000 per ton removed. The EPA has recently completed other rulemakings that have achieved considerable reductions of fine particulate matter (PM 2.5). Because of EPA's interest in reducing such emissions, the reductions in PM 2.5 emissions resulting from replacing ESPs with fabric filters were also calculated. The PM 2.5 reduction would be about 8 tpy. If all costs associated with ESP replacement were assigned to PM 2.5 reductions, the cost of these additional reductions in PM 2.5 emissions would be about $900,000 per ton removed. After considering the above factors in relation to recent EPA rules, EPA concluded that the cost-reduction ratio for ESP replacement was excessive, and decided not to require ESP replacement. For a more detailed discussion of the analysis, see the Docket.

TABLE 2.—EMISSION REDUCTION AND COST FOR 21 MWC UNITS WITH ESP-BASED SCRUBBING SYSTEMS

| Pollutant | Current emissions (with ESP based control system), tpy | Emissions of fabric filter option (with FF-based control system), tpy | Potential emission reduction, tpy |
|---|---|---|---|
| Dioxin/furan (CDD/CDF) | 2.6 E–4 | 1.6E–4 | 1.0E–4 |
| Cd | 0.20 | 0.03 | 0.17 |
| Pb | 2.7 | 0.30 | 2.4 |
| Hg | 0.70 | 0.20 | 0.50 |
| PM | 210 | 80 | 130 |
| PM 2.5 | 60 | 44 | 16 |
| Capital Cost (million, 2002 $) | NA | 119 | NA |
| Total Annual Cost (million, $ per year, 2002 $) | NA | 14.5 | NA |

## VII. How do the proposed amendments relate to section 112(c)(6) of the Clean Air Act?

Section 112(c)(6) of the CAA requires EPA to identify categories of sources of seven specified pollutants to assure that sources accounting for not less than 90 percent of the aggregate emissions of each such pollutant are subject to standards under CAA section 112(d)(2) or 112(d)(4). The EPA has identified municipal waste combustors as a source category that emits five of the seven CAA section 112(c)(6) pollutants: Hg, dioxin, furans, polycyclic organic matter (POM), and polychlorinated biphenols (PCBs). (The POM emitted by MWC units is composed of 16 polyaromatic hydrocarbons (PAH) and extractable organic matters (EOM).) In the **Federal Register** notice *Source Category Listing for Section 112(d)(2) Rulemaking Pursuant to Section 112(c)(6) Requirements,* 63 FR 17838, 17849, Table 2 (1998), EPA identified municipal waste combustors as a source category ''subject to regulation'' for purposes of CAA section 112(c)(6) with respect to the CAA section 112(c)(6) pollutants that MWC units emit. MWC units are solid waste incineration units currently regulated under CAA section 129. For purposes of CAA section 112(c)(6), EPA has determined that standards promulgated under CAA section 129 are substantively equivalent to those promulgated under CAA section 112(d). *See Id.* at 17845; see also 62 FR 33625, 33632 (1997). As discussed in more detail below, the CAA section 129 standards effectively control emissions of the five identified CAA section 112(c)(6) pollutants. Further, since CAA section 129(h)(2) precludes EPA from regulating these substantial sources of the five identified CAA section 112(c)(6) pollutants under CAA section 112(d), EPA cannot further regulate these emissions under that CAA section. As a result, EPA considers emissions of these five pollutants from MWC units ''subject to standards'' for purposes of CAA section 112(c)(6).

As required by the statute, the CAA section 129 MWC standards include numeric emission limitations for the nine pollutants specified in that section. The combination of good combustion practices (GCP) and add-on air pollution control equipment (spray dryer, fabric filter or ESP, ACI, and selective non-catalytic reduction) effectively reduces emissions of the pollutants for which emission limits are required under CAA section 129: Hg, dioxin, furans, Cd, Pb, PM, $SO_2$, HCl, and $NO_X$. Thus, the NSPS and emissions guidelines specifically require reduction in emissions of three of the CAA section 112(c)(6) pollutants: Hg, dioxin, and furans. As explained below, the air pollution controls necessary to comply with the requirements of the MWC NSPS and emission guidelines also effectively reduce emissions of the following CAA section 112(c)(6) pollutants that are emitted from MWC units: POM and PCBs.

Although the CAA section 129 MWC standards do not have separate, specific emissions standards for PCBs and POM, emissions of these two CAA section 112(c)(6) pollutants are effectively controlled by the same control measures used to comply with the numerical emissions limits for the enumerated CAA section 129 pollutants. Specifically, as byproducts of combustion, the formation of PCBs and POM is effectively reduced by the combustion and post-combustion practices required to comply with the CAA section 129 standards. Any PCBs and POM that do form during combustion are captured by the combination of spray dryer, PM control, and ACI system, which are necessary post-combustion MWC controls. The combination of spray dryer, PM control, and ACI greatly reduces emissions of these organic pollutants, as well as reducing Hg emissions. The fact that POM and PCBs are effectively controlled by the application of MACT is confirmed by POM and PCB emission tests conducted at one large MWC with MACT controls which showed non-detectable levels of POM and PCBs. Based on post-MACT compliance tests at all 167 large MWC units, the MWC MACT regulations reduced Hg emissions by 95 percent and dioxin/furan emissions by greater than 99 percent from pre-MACT levels. In light of the fact that the MACT controls also effectively reduce emissions of POM and PCBs, it is, therefore, reasonable to conclude that POM and PCB emissions are substantially reduced at all 167 large MWC units. Thus, while the proposed rule does not identify specific limits for POM and PCB, they are for the reasons noted above nonetheless ''subject to regulation'' for purposes of section 112(c)(6) of the CAA.

## VIII. Statutory and Executive Order Reviews

### *A. Executive Order 12866: Regulatory Planning and Review*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA must determine whether the regulatory action is ''significant'' and, therefore, subject to review by OMB and the requirements of the Executive Order. The Executive Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

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

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

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights 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, OMB has notified EPA that it considers this a ''significant regulatory action'' within the meaning of the Executive Order. The EPA has submitted this action to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

### *B. Paperwork Reduction Act*

The Office of Management and Budget previously approved the information collection requirements contained in the NSPS and emission guidelines for large MWC units under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., at the time the NSPS and emission guidelines were promulgated on December 19, 1995. The information collection request has been assigned OMB Control Number 2060–0210 (EPA ICR No. 1506.10).

The proposed amendments result in no changes to the information collection requirements of the NSPS or emission guidelines and will have no impact on the information collection estimate of project cost and hour burden made and approved by OMB during the development of the NSPS and emission guidelines. Therefore, the information collection requests have not been revised.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the

existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 40 CFR chapter 15.

*C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the agency certifies that the proposed amendments will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small government organizations, and small government jurisdictions.

For purposes of assessing the impacts of the proposed amendments on small entities, small entity is defined as follows: (1) A small business in the regulated industry that has gross annual revenues of less than $6 million; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of the proposed amendments on small entities, I certify that this action would not have a significant economic impact on a substantial number of small entities. The proposed amendments will not impose any requirements on any entities because it does not impose any additional regulatory requirements.

Nevertheless, we continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

*D. Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act (UMRA) of 1995, 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 by State, local, and Tribal governments, in the aggregate, or by 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 proposed 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 EPA 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, EPA must develop a small government agency plan under section 203 of the UMRA. 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's regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The EPA has determined that the proposed amendments 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. Thus, the proposed amendments are not subject to the requirements of section 202 and 205 of the UMRA. In addition, EPA has determined that the proposed amendments contain no regulatory requirements that might significantly or uniquely affect small governments. Therefore, the proposed amendments are not subject to the requirements of section 203 of the UMRA.

*E. Executive Order 13132: Federalism*

Executive Order 13132 (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

Under section 6 of Executive Order 13132, EPA may not issue a regulation that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. Also, EPA may not issue a regulation that has federalism implications and that preempts State law, unless EPA consults with State and local officials early in the process of developing the proposed regulation.

The proposed amendments do not have federalism implications. They 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 proposed amendments will not impose substantial direct compliance costs on State or local governments because the proposed regulations will not require any change in the emission control technology currently used to comply with the 1995 NSPS and emissions guidelines, and will not preempt State law. Thus, Executive Order 13132 does not apply to the proposed amendments.

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

Executive Order 13175, (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.'' ''Policies that have Tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

The proposed amendments do not have Tribal implications, as specified in Executive Order 13175. They will not have substantial direct effects on Tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of

power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. The EPA is not aware of any large MWC unit owned or operated by Indian Tribal government. Thus, Executive Order 13175 does not apply to the proposed amendments.

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

Executive Order 13045 (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, EPA 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 EPA considered.

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. The proposed amendments are not subject to Executive Order 13045 because they are based on technology performance and not on health and safety risks. Also, the proposed amendments are not ''economically significant.''

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

Executive Order 13211 (66 FR 28355, May 22, 2001) provides that agencies shall prepare and submit to the Administrator of the Office of Information and Regulatory Affairs, OMB, a Statement of Energy Effects for certain actions identified as ''significant energy actions.'' Section 4(b) of Executive Order 13211 defines ''significant energy actions'' as ''* * * any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action * * *.'' The proposed amendments are not considered to be a ''significant regulatory action'' under Executive Order 12866. They also are not likely to have a significant adverse effect on the supply, distribution, or use of energy.

Since there would be no change in energy consumption resulting from the proposed amendments, EPA does not expect any price increase for any energy type. We also expect that there would be no impact on the import of foreign energy supplies, and no other adverse outcomes are expected to occur with regards to energy supplies.

Therefore, EPA concludes that the proposed amendments are not likely to have a significant adverse effect on the supply, distribution, or use of energy.

*I. National Technology Transfer Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) of 1995 (Public Law No. 104–113; 15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in regulatory and procurement 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, business practices) developed or adopted by one or more voluntary consensus bodies. The NTTAA directs EPA to provide Congress, through annual reports to the Office of Management and Budget (OMB), with explanations when an agency does not use available and applicable voluntary consensus standards.

The MWC NSPS and emission guidelines involve technical standards. The EPA cites the following methods in the NSPS and emission guidelines: Methods 1, 3, 3A, 3B, 5, 6, 6A or 6C, 7 or 7A, 7C, 7D, or 7E, 9, 10, 10A or 10B, 19, 22, 23, 26, 26A, and 29 of 40 CFR part 60, appendix A; Performance Specifications (PS) 1, 2, 3, 4, and 11 of 40 CFR part 60, appendix B; and appendix F of 40 CFR part 60.

In previous searches and review, which have been documented and placed in the docket, EPA identified four voluntary consensus standards that have already been incorporated by reference in 40 CFR 60.17. The voluntary consensus standard ASTM D6216 (1998), ''Standard Practice for Opacity Monitor Manufacturers to Certify Conformance with Design and Performance Specifications,'' is an acceptable alternative for opacity monitor design specifications given in EPA's PS 1 (promulgated in March 1983). As a result, EPA incorporated ASTM D6216–98 by reference into PS 1 as the design specifications for opacity monitors in August 2000. (See 40 CFR part 60, appendix B.) The MWC NSPS and emissions guidelines also incorporate by reference into 40 CFR part 60.17 ASME QRO–1–1994, ''Standard for the Qualification and Certification of Resource Recovery Facility Operators'' for operator qualification and certification; ASME PTC 4.1–1964 (reaffirmed 1991), ''Power Test Codes: Test Code for Steam Generating Units,'' for steam or feedwater flow; and ASME Interim Supplement 19.5 (6th Edition, 1971), ''Instruments and Apparatus: Application, Part II of Fluid Meters,'' for nozzle and orifice design.

In this search and review, EPA conducted searches to identify voluntary consensus standards in addition to EPA methods in the MWC NSPS and emission guidelines. No applicable voluntary consensus standards were identified for EPA Methods 7D, 9, 10A, 19, and 22; and PS 3 and 4A. The search for emissions measurement procedures identified 27 voluntary consensus standards potentially applicable to the proposed amendments. One of the 27 voluntary consensus standards identified in this search was not available at the time the review was conducted for the purposes of the proposed amendments because the standard is under development by a voluntary consensus body: ASTM WK3159 (Begun in 2003), ''Practice for Quality Assurance of Instrumental Monitoring Systems.'' The EPA determined that two of the remaining 26 standards identified for measuring emissions subject to the NSPS and emission were practical alternatives to EPA test methods for the purposes of the proposed amendments. The EPA determined that 24 standards were not practical alternatives to EPA test methods, therefore, EPA does not intend to adopt these standards for this purpose. The reasons for EPA's determinations are discussed in a memorandum in the docket. The two acceptable monitoring methods are discussed below.

The EPA identified two voluntary consensus standards as acceptable alternatives to EPA test methods. ASME PTC 19–10–1981-Part 10, ''Flue and Exhaust Gas Analyses'' includes manual and instrumental methods of analyses for carbon monoxide, nitrogen oxides, oxygen, and sulfur dioxide. The manual methods of ASME PTC 19–10–1981–Part 10 for measuring the nitrogen oxide, oxygen, and sulfur dioxide content of exhaust gas are acceptable

alternatives to Methods 3B, 6, 6A, 7, and 7C. The instrumental methods of ASME PTC 19–10–1981–Part 10 are not acceptable as a substitute for EPA Methods 3A, 6C, 7A, 7E, 10, and 10B. The instrumental methods are only general descriptions of procedures and are not true methods. Therefore, while some of the manual methods are acceptable alternatives to EPA methods, the instrumental methods are not.

The voluntary consensus standard ASTM D6784–02, ''Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method),'' is an acceptable alternative to EPA Method 29 (portion for mercury only) as a method for measuring mercury. A full discussion of acceptable and not acceptable voluntary consensus standards is contained in a memorandum in the docket.

**List of Subjects in 40 CFR Part 60**

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: December 7, 2005.

**Stephen L. Johnson,**

*Administrator.*

For the reasons stated in the preamble, title 40, chapter I, of the Code of Federal Regulations is proposed to be amended as follows:

## PART 60—[AMENDED]

1. The authority citation for part 60 continues to read as follows:

**Authority:** 42 U.S.C. 7401, *et seq.*

## Subpart A—[Amended]

2. Section 60.17 is amended by revising paragraph (a)(76) and adding paragraph (h)(4) to read as follows:

### § 60.17 Incorporations by reference.

* * * * *

(a) * * *

(76) ASTM D6784–02, Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method), IBR approved for appendix B to part 60, Performance Specification 12A, section 8.6.2., § 60.58b(d)(2)(iii) and 60.58b(d)(2)(iv).

* * * * *

(h) * * *

(4) ASME PTC 19–10–1981-Part 10, Flue and Exhaust Gas Analyses, IBR approved for § 60.58b(b)(i), § 60.58b(c)(2), § 60.58b(d)(1)(ii), § 60.58b(d)(2)(ii), § 60.58b(e)(12)(i)(A), § 60.58b(e)(12)(i)(B), § 60.58b(g)(2), § 60.58b(h)(10)(i)(A), § 60.58b(h)(10)(i)(B), and § 60.58b(i)(3)(ii)(B).

* * * * *

## Subpart Cb—[Amended]

3. Revise § 60.30b, to read as follows:

### § 60.30b Scope and delegation of authority.

(a) This subpart contains emission guidelines and compliance schedules for the control of certain designated pollutants from certain municipal waste combustors in accordance with section 111(d) and section 129 of the Clean Air Act and subpart B of this part. The provisions in these emission guidelines apply instead of the provisions of § 60.24(f) of subpart B of this part.

(b) The following authorities shall be retained by EPA:

(1) Approval of exemption claims in § 60.32b(b)(1), (d), (e), (f)(1), (i)(1);

(2) Approval of a nitrogen oxides trading program under § 60.33b(d)(2); and

(3) Approval of other monitoring systems used to obtain emissions data when data are not obtained by continuous emissions monitoring systems as specified in § 60.58b(e)(14), (h)(12), and (i)(11), as specified in § 60.38b.

4. Amend § 60.31b by adding the definitions of ''Semi-suspension refuse-derived fuel-fired combustor/wet refuse-derived fuel process conversion'' and ''Spreader stoker refuse-derived fuel-fired combustor/100 percent coal capable'' in alphabetical order to read as follows:

### § 60.31b Definitions.

* * * * *

*Semi-suspension refuse-derived fuel-fired combustor/wet refuse-derived fuel process conversion* means a combustion unit that was converted from a wet refuse-derived fuel process to a dry refuse-derived fuel process, and because of constraints in the design of the system, includes a low furnace height (less than 60 feet between the grate and the roof) and a high waste capacity-to-undergrate air zone ratio (greater than 300 tons of waste per day (tpd) fuel per each undergrate air zone).

*Spreader stoker refuse-derived fuel-fired combustor/100 percent coal capable* means a spreader stoker refuse-derived fuel-fired combustor that typically fires 100 percent refuse-derived fuel but is equipped to burn 100 percent coal instead of refuse-derived fuel to fulfill 100 percent steam or energy demand.

5. Amend § 60.32b by:

a. Revising paragraph (b)(1);

b. Revising paragraph (d);

c. Revising paragraph (e);

d. Revising paragraph (f)(1); and

e. Revising paragraph (i)(1) to read as follows:

### § 60.32b Designated facilities.

* * * * *

(b) * * *

(1) Notifies EPA of an exemption claim,

* * * * *

(d) A qualifying small power production facility, as defined in section 3(17)(C) of the Federal Power Act (16 U.S.C. 796(17)(C)), that burns homogeneous waste (such as automotive tires or used oil, but not including refuse-derived fuel) for the production of electric energy is not subject to this subpart if the owner or operator of the facility notifies EPA of this exemption and provides data documenting that the facility qualifies for this exemption.

(e) A qualifying cogeneration facility, as defined in section 3(18)(B) of the Federal Power Act (16 U.S.C. 796(18)(B)), that burns homogeneous waste (such as automotive tires or used oil, but not including refuse-derived fuel) for the production of electric energy and steam or forms of useful energy (such as heat) that are used for industrial, commercial, heating, or cooling purposes, is not subject to this subpart if the owner or operator of the facility notifies EPA of this exemption and provides data documenting that the facility qualifies for this exemption.

(f) * * *

(1) Notifies EPA of an exemption claim, and

* * * * *

(i) * * *

(1) Notifies EPA of an exemption claim,

* * * * *

6. Amend § 60.33b by:

a. Revising paragraph (a);

b. Revising paragraph (b);

c. Revising paragraph (c);

d. Removing tables 1 and 2; and

e. Revising paragraph (d)(2) and (d)(3) introductory text to read as follows:

### § 60.33b Emission guidelines for municipal waste combustor metals, acid gases, organics, and nitrogen oxides.

(a) The emission limits for municipal waste combustor metals are specified in paragraphs (a)(1) through (a)(3) of this section.

(1) For approval, a State plan shall include emission limits for particulate matter and opacity at least as protective as the emission limits for particulate matter and opacity specified in

paragraphs (a)(1)(i) through (a)(1)(iii) of this section.

(i) Before April 28, 2009, the emission limit for particulate matter contained in the gases discharged to the atmosphere from a designated facility is 27 milligrams per dry standard cubic meter, corrected to 7 percent oxygen. On and after April 28, 2009, the emission limit for particulate matter contained in the gases discharged to the atmosphere from a designated facility is 24 milligrams per dry standard cubic meter, corrected to 7 percent oxygen.

(ii) [Reserved]

(iii) The emission limit for opacity exhibited by the gases discharged to the atmosphere from a designated facility is 10 percent (6-minute average).

(2) For approval, a State plan shall include emission limits for cadmium at least as protective as the emission limits for cadmium specified in paragraphs (a)(2)(i) through (a)(2)(iv) of this section.

(i) Before April 28, 2009, the emission limit for cadmium contained in the gases discharged to the atmosphere from a designated facility is 40 micrograms per dry standard cubic meter, corrected to 7 percent oxygen. On and after April 28, 2009, the emission limit for cadmium contained in the gases discharged to the atmosphere from a designated facility is 31 micrograms per dry standard cubic meter, corrected to 7 percent oxygen.

(ii) [Reserved]

(3) For approval, a State plan shall include emission limits for mercury at least as protective as the emission limits specified in this paragraph (a)(3). The emission limit for mercury contained in the gases discharged to the atmosphere from a designated facility is 80 micrograms per dry standard cubic meter or 15 percent of the potential mercury emission concentration (85-percent reduction by weight), corrected to 7 percent oxygen, whichever is less stringent.

(4) For approval, a State plan shall include an emission limit for lead at least as protective as the emission limit for lead specified in this paragraph. Before April 28, 2009, the emission limit for lead contained in the gases discharged to the atmosphere from a designated facility is 440 micrograms per dry standard cubic meter, corrected to 7 percent oxygen. On and after April 28, 2009, the emission limit for lead contained in the gases discharged to the atmosphere from a designated facility is 250 micrograms per dry standard cubic meter, corrected to 7 percent oxygen.

(b) The emission limits for municipal waste combustor acid gases, expressed as sulfur dioxide and hydrogen chloride, are specified in paragraphs (b)(1) through (b)(3) of this section.

(1) [Reserved]

(2) [Reserved]

(3) For approval, a State shall include emission limits for sulfur dioxide and hydrogen chloride at least as protective as the emission limits specified in paragraphs (b)(3)(i) and (b)(3)(ii) of this section.

(i) Before April 28, 2009, the emission limit for sulfur dioxide contained in the gases discharged to the atmosphere from a designated facility is 29 parts per million by volume or 25 percent of the potential sulfur dioxide emission concentration (75-percent reduction by weight or volume), corrected to 7 percent oxygen (dry basis), whichever is less stringent. On and after April 28, 2009, the emission limit for sulfur dioxide contained in the gases discharged to the atmosphere from a designated facility is 23 parts per million by volume or 20 percent of the potential sulfur dioxide emission concentration (80-percent reduction by weight or volume), corrected to 7 percent oxygen (dry basis), whichever is less stringent. Compliance with this emission limit is based on a 24-hour daily geometric mean.

(ii) Before April 28, 2009, the emission limit for hydrogen chloride contained in the gases discharged to the atmosphere from a designated facility is 29 parts per million by volume or 5 percent of the potential hydrogen chloride emission concentration (95-percent reduction by weight or volume), corrected to 7 percent oxygen (dry basis), whichever is less stringent. On and after April 28, 2009, the emission limit for hydrogen chloride contained in the gases discharged to the atmosphere from a designated facility is 26 parts per million by volume or 3 percent of the potential sulfur dioxide emission concentration (97-percent reduction by weight or volume), corrected to 7 percent oxygen (dry basis), whichever is less stringent.

(c) The emission limits for municipal waste combustor organics, expressed as total mass dioxin/furan, are specified in paragraphs (c)(1) and (c)(2) of this section.

(1) For approval, a State plan shall include an emission limit for dioxin/furan contained in the gases discharged to the atmosphere from a designated facility at least as protective as the emission limit for dioxin/furan specified in paragraphs (c)(1)(i), (c)(1)(ii), and (c)(1)(iii) of this section, as applicable.

(i) Before April 28, 2009, the emission limit for designated facilities that employ an electrostatic precipitator-based emission control system is 60 nanograms per dry standard cubic meter (total mass), corrected to 7 percent oxygen.

(ii) Before April 28, 2009, the emission limit for designated facilities that do not employ an electrostatic precipitator-based emission control system is 30 nanograms per dry standard cubic meter (total mass), corrected to 7 percent oxygen.

(iii) On and after April 28, 2009, the emission limit for designated facilities is 21 nanograms per dry standard cubic meter (total mass), corrected to 7 percent oxygen.

(2) [Reserved]

(d) * * *

(2) A State plan may establish a program to allow owners or operators of municipal waste combustor plants to engage in trading of nitrogen oxides emission credits. A trading program must be approved by EPA before implementation.

(3) For approval, a State plan shall include emission limits for nitrogen oxides from fluidized bed combustors at least as protective as the emission limits listed in paragraphs (d)(3)(i) and (d)(3)(ii) of this section.

* * * * *

**§ 60.34b [Amended]**

6a. Amend § 60.34b by removing table 3.

7. Add tables 1, 2, and 3 to subpart Cb to read as follows:

TABLE 1 TO SUBPART CB OF PART 60.—NITROGEN OXIDES GUIDELINES FOR DESIGNATED FACILITIES

| Municipal waste combustor technology | Before April 28, 2009, nitrogen oxides emission limit (parts per million by volume) [a] | On and after April 28, 2009, nitrogen oxides emission limit (parts per million by volume) [a] |
|---|---|---|
| Mass burn waterwall | 205 | 205 |
| Mass burn rotary waterwall | 250 | 158 |
| Refuse-derived fuel combustor | 250 | 219 |
| Fluidized bed combustor | 180 | 180 |
| Mass burn refractory combustors | no limit | no limit. |

[a] Corrected to 7 percent oxygen, dry basis.

TABLE 2 TO SUBPART CB OF PART 60.—NITROGEN OXIDES LIMITS FOR EXISTING DESIGNATED FACILITIES INCLUDED IN AN EMISSIONS AVERAGING PLAN AT A MUNICIPAL WASTE COMBUSTOR PLANT [b]

| Municipal waste combustor technology | Before April 28, 2009, nitrogen oxides emission limit (parts per million by volume) [b] | On and after April 28, 2009, nitrogen oxides emission limit (parts per million by volume) [a] |
|---|---|---|
| Mass burn waterwall | 185 | 185 |
| Mass burn rotary waterwall | 220 | 142 |
| Refuse-derived fuel combustor | 230 | 197 |
| Fluidized bed combustor | 165 | 165 |

[a] Mass burn refractory municipal waste combustors and other MWC technologies not listed above may not be included in an emissions averaging plan.
[b] Corrected to 7 percent oxygen, dry basis.

TABLE 3 TO SUBPART CB OF PART 60.—MUNICIPAL WASTE COMBUSTOR OPERATING GUIDELINES

| Municipal waste combustor technology | Carbon monoxide emissions level (parts per million by volume) [a] | Averaging time (hrs) [b] |
|---|---|---|
| Mass burn waterwall | 100 | 4 |
| Mass burn refractory | 100 | 4 |
| Mass burn rotary refractory | 100 | 24 |
| Mass burn rotary waterwall | 250 | 24 |
| Modular starved air | 50 | 4 |
| Modular excess air | 50 | 4 |
| Refuse-derived fuel stoker | 200 | 24 |
| Fluidized bed, mixed fuel (wood/refuse-derived fuel) | 200 | [c] 24 |
| Bubbling fluidized bed combustor | 100 | 4 |
| Circulating fluidized bed combustor | 100 | 4 |
| Pulverized coal/refuse-derived fuel mixed fuel-fired combustor | 150 | 4 |
| Spreader stoker coal/refuse-derived fuel mixed fuel-fired combustor | 200 | 24 |
| Semi-suspension refuse-derived fuel-fired combustor/wet refuse-derived fuel process conversion | 250 | [c] 24 |
| Spreader stoker refuse-derived fuel-fired combustor/100 percent coal capable | 250 | [c] 24 |

[a] Measured at the combustor outlet in conjunction with a measurement of oxygen concentration, corrected to 7 percent oxygen, dry basis. Calculated as an arithmetic average.
[b] Averaging times are 4-hour or 24-hour block averages.
[c] 24-hour block average, geometric mean.

8. Revise § 60.36b to read as follows:

**§ 60.36b Emission guidelines for municipal waste combustor fugitive ash emissions.**

For approval, a State plan shall include requirements for municipal waste combustor fugitive ash emissions at least as protective as those requirements listed in § 60.55b of subpart Eb of this part.

9. Amend § 60.38b by revising paragraph (b) to read as follows:

**§ 60.38b Compliance and performance testing.**

* * * * *

(b) For approval, a State plan shall include the alternative performance testing schedule for dioxin/furan specified in § 60.58b(g)(5)(iii) of subpart Eb of this part, as applicable, for those designated facilities that achieve both a dioxin/furan emission level less than or equal to 10 nanograms per dry standard

cubic meter total mass, corrected to 7 percent oxygen and a mercury emission level less than or equal to 40 micrograms per dry standard cubic meter total mass, corrected to 7 percent oxygen.

* * * * *

10. Amend § 60.39b by:

a. Revising paragraph (b);

b. Revising paragraph (c) introductory text;

c. Revising paragraph (c)(4)(iii)(B);

d. Revising paragraph (e); and

e. Adding paragraphs (g) and (h) to read as follows:

**§ 60.39b Reporting and recordkeeping guidelines and compliance schedules.**

* * * * *

(b) Not later than December 19, 1996, each State in which a designated facility is located shall submit to EPA a plan to implement and enforce all provisions of this subpart except those specified under § 60.33b (a)(4), (b)(3), and (d)(3). Not later than April 28, 2007, each State in which a designated facility is located shall submit to EPA a plan to implement and enforce all provisions of this subpart, as amended on [DATE FINAL RULE IS PUBLISHED IN THE **Federal Register**]. The compliance schedule specified in this paragraph is in accordance with section 129(b)(2) of the Clean Air Act and applies instead of the compliance schedule provided in § 60.23(a)(1) of subpart B of this part.

(c) For approval, a State plan that is required to be submitted by December 19, 1996 and is submitted prior to December 19, 2005 shall include the compliance schedules specified in paragraphs (c)(1) through (c)(5) of this section.

* * * * *

(4) * * *

(iii) * * *

(B) The owner or operator of a designated facility may request that the Administrator waive the requirement specified in § 60.54b(d) of subpart Eb of this part for chief facility operators, shift supervisors, and control room operators who have obtained provisional certification from the American Society of Mechanical Engineers on or before the initial date of State plan approval.

* * * * *

(e) Not later than August 25, 1998, each State in which a designated facility is operating shall submit to EPA a plan to implement and enforce all provisions of this subpart specified in § 60.33b (a)(4), (b)(3), and (d)(3).

* * * * *

(g) For approval, a revised State plan submitted not later than April 28, 2007 in accordance with paragraph (b) of this section, shall include compliance schedules for meeting the revised April 28, 2009 emission limits in § 60.33b(a), (b), (c), (d), and § 60.34b(a), and the revised testing provisions in § 60.38b(b). Compliance with the revised April 28, 2009 emission limits shall be required as expeditiously as practicable, but no later than April 28, 2009.

(h) In the event no plan for implementing the emission guidelines is approved by EPA, all designated facilities meeting the applicability requirements under § 60.32b shall be in compliance with all of the guidelines, including the revised April 28, 2009 emission limits in § 60.33b(a), (b), (c), (d), and § 60.34b(a), and the revised testing provisions in § 60.38b(b), no later than [DATE 5 YEARS AFTER DATE FINAL RULE IS PUBLISHED IN THE **Federal Register**].

## Subpart Eb—[Amended]

11. Amend § 60.50b by:

a. Revising paragraph (a);

b. Revising paragraph (b)(1);

c. Revising paragraph (e);

d. Revising paragraph (f);

e. Revising paragraph (g)(1);

f. Revising paragraph (j)(1); and

g. Revising paragraph (n) to read as follows:

**§ 60.50b Applicability and delegation of authority.**

(a) The affected facility to which this subpart applies is each municipal waste combustor unit with a combustion capacity greater than 250 tons per day of municipal solid waste for which construction, modification, or reconstruction is commenced after September 20, 1994.

(b) * * *

(1) Notifies EPA of an exemption claim;

* * * * *

(e) A qualifying small power production facility, as defined in section 3(17)(C) of the Federal Power Act (16 U.S.C. 796(17)(C)), that burns homogeneous waste (such as automotive tires or used oil, but not including refuse-derived fuel) for the production of electric energy is not subject to this subpart if the owner or operator of the facility notifies EPA of this exemption and provides data documenting that the facility qualifies for this exemption.

(f) A qualifying cogeneration facility, as defined in section 3(18)(B) of the Federal Power Act (16 U.S.C. 796(18)(B)), that burns homogeneous waste (such as automotive tires or used oil, but not including refuse-derived fuel) for the production of electric energy and steam or forms of useful energy (such as heat) that are used for industrial, commercial, heating, or cooling purposes, is not subject to this subpart if the owner or operator of the facility notifies EPA of this exemption and provides data documenting that the facility qualifies for this exemption.

(g) * * *

(1) Notifies EPA of an exemption claim; and

* * * * *

(j) * * *

(1) Notifies EPA of an exemption claim;

* * * * *

(n) The following authorities shall be retained by the Administrator of the U.S. EPA and not transferred to a State:

(1) Approval of exemption claims in paragraphs (b), (e), (f), (g) and (j) of this section;

(2) Enforceability under Federal law of all Federally enforceable, as defined in § 60.51b, limitations and conditions;

(3) Determination of compliance with the siting requirements as specified in § 60.57b(a);

(4) Acceptance of relationship between carbon monoxide and oxygen as part of initial and annual performance tests as specified in § 60.58b(b)(7); and

(5) Approval of other monitoring systems used to obtain emissions data when data is not obtained by CEMS as specified in § 60.58b(e)(14), (h)(12), and (i)(11).

* * * * *

12. Amend § 60.51b by revising the definition of ''Federally enforceable'' and adding the definitions for ''Administrator'' and ''EPA'' in alphabetical order to read as follows:

**§ 60.51b Definitions.**

*Administrator* means:

(1) For approved and effective State Section 111(d)/129 plans, the Director of the State air pollution control agency, or employee of the State air pollution control agency that is delegated the authority to perform the specified task;

(2) For Federal Section 111(d)/129 plans, the Administrator of the EPA, an employee of the EPA, the Director of the State air pollution control agency, or employee of the State air pollution control agency to whom the authority has been delegated by the Administrator of the EPA to perform the specified task; and

(3) For NSPS, the Administrator of the EPA, an employee of the EPA, the Director of the State air pollution control agency, or employee of the State air pollution control agency to whom the authority has been delegated by the

Administrator of the EPA to perform the specified task.

* * * * *

*EPA* means the Administrator of the EPA or employee of the EPA that is delegated to perform the specified task.

*Federally enforceable* means all limitations and conditions that are enforceable by EPA including the requirements of 40 CFR part 60, 40 CFR part 61, and 40 CFR part 63, requirements within any applicable State implementation plan, and any permit requirements established under 40 CFR 52.21 or under 40 CFR 51.18 and 40 CFR 51.24.

* * * * *

13. Amend § 60.52b by:

a. Revising paragraph (a) introductory text;

b. Revising paragraph (a)(1);

c. Revising paragraph (a)(3);

d. Revising paragraph (a)(4);

e. Revising paragraph (a)(5);

f. Revising paragraph (b) introductory text;

g. Revising paragraph (b)(1); and

h. Revising paragraph (c) introductory text to read as follows:

**§ 60.52b Standards for municipal waste combustor metals, acid gases, organics, and nitrogen oxides.**

(a) The limits for municipal waste combustor metals are specified in paragraphs (a)(1) through (a)(5) of this section.

(1) On and after the date on which the initial performance test is completed or is required to be completed under § 60.8 of subpart A of this part, no owner or operator of an affected facility shall cause to be discharged into the atmosphere from that affected facility any gases that contain particulate matter in excess of the limits specified in paragraph (a)(1)(i) or (a)(1)(ii) of this section.

(i) For affected facilities that commenced construction, modification, or reconstruction after September 20, 1994, and on or before December 19, 2005, the emission limit is 24 milligrams per dry standard cubic meter, corrected to 7 percent oxygen.

(ii) For affected facilities that commenced construction, modification, or reconstruction after December 19, 2005, the emission limit is 9.5 milligrams per dry standard cubic meter, corrected to 7 percent oxygen.

* * * * *

(3) On and after the date on which the initial performance test is completed or is required to be completed under § 60.8 of subpart A of this part, no owner or operator of an affected facility shall cause to be discharged into the atmosphere from that affected facility any gases that contain cadmium in excess of the limits specified in paragraph (a)(3)(i) or (a)(3)(ii) of this section.

(i) For affected facilities that commenced construction, modification, or reconstruction after September 20, 1994, and on or before December 19, 2005, the emission limit is 20 micrograms per dry standard cubic meter, corrected to 7 percent oxygen.

(ii) For affected facilities that commenced construction, modification, or reconstruction after December 19, 2005, the emission limit is 3.5 micrograms per dry standard cubic meter, corrected to 7 percent oxygen.

(4) On and after the date on which the initial performance test is completed or is required to be completed under § 60.8 of subpart A of this part, no owner or operator of an affected facility shall cause to be discharged into the atmosphere from the affected facility any gases that contain lead in excess of the limits specified in paragraph (a)(4)(i) or (a)(4)(ii) of this section.

(i) For affected facilities that commenced construction, modification, or reconstruction after September 20, 1994, and on or before December 19, 2005, the emission limit is 200 micrograms per dry standard cubic meter, corrected to 7 percent oxygen.

(ii) For affected facilities that commenced construction, modification, or reconstruction after December 19, 2005, the emission limit is 84 micrograms per dry standard cubic meter, corrected to 7 percent oxygen.

(5) On and after the date on which the initial performance test is completed or is required to be completed under § 60.8 of subpart A of this part, no owner or operator of an affected facility shall cause to be discharged into the atmosphere from the affected facility any gases that contain mercury in excess of the limits specified in paragraph (a)(5)(i) or (a)(5)(ii) of this section.

(i) For affected facilities that commenced construction, modification, or reconstruction after September 20, 1994 and on or before December 19, 2005, the emission limit is 80 micrograms per dry standard cubic meter or 15 percent of the potential mercury emission concentration (85-percent reduction by weight), corrected to 7 percent oxygen, whichever is less stringent.

(ii) For affected facilities that commenced construction, modification, or reconstruction after December 19, 2005, the emission limit is 49 micrograms per dry standard cubic meter, or 10 percent of the potential mercury emission concentration (90-percent reduction by weight), corrected to 7 percent oxygen, whichever is less stringent.

(b) The limits for municipal waste combustor acid gases are specified in paragraphs (b)(1) and (b)(2) of this section.

(1) On and after the date on which the initial performance test is completed or is required to be completed under § 60.8 of subpart A of this part, no owner or operator of an affected facility shall cause to be discharged into the atmosphere from that affected facility any gases that contain sulfur dioxide in excess of the limits specified in paragraph (b)(1)(i) or (b)(1)(ii) of this section.

(i) For affected facilities that commenced construction, modification, or reconstruction after September 20, 1994 and on or before December 19, 2005, the emission limit is 30 parts per million by volume or 20 percent of the potential sulfur dioxide emission concentration (80-percent reduction by weight or volume), corrected to 7 percent oxygen (dry basis), whichever is less stringent. The averaging time is specified in § 60.58b(e).

(ii) For affected facilities that commenced construction, modification, or reconstruction after December 19, 2005, the emission limit is 19 parts per million by volume or 10 percent of the potential sulfur dioxide emission concentration (90-percent reduction by weight or volume), corrected to 7 percent oxygen (dry basis), whichever is less stringent. The averaging time is specified in § 60.58b(e).

* * * * *

(c) The limits for municipal waste combustor organics are specified in paragraphs (c)(1) and (c)(2) of this section.

* * * * *

14. Amend § 60.53b by:

a. Revising paragraph (b)(1);

b. Revising paragraph (b)(2);

c. Revising paragraph (c)(1); and

d. Revising paragraph (c)(2) to read as follows:

**§ 60.53b Standards for municipal waste combustor operating practices.**

* * * * *

(b) * * *

(1) During the annual dioxin/furan or mercury performance test and the 2 weeks preceding the annual dioxin/furan or mercury performance test, no municipal waste combustor unit load limit is applicable if the provisions of paragraph (b)(2) of this section are met.

(2) The municipal waste combustor unit load limit may be waived in writing by the Administrator for the purpose of evaluating system performance, testing

new technology or control technologies, diagnostic testing, or related activities for the purpose of improving facility performance or advancing the state-of-the-art for controlling facility emissions. The municipal waste combustor unit load limit continues to apply, and remains enforceable, until and unless the Administrator grants the waiver.

(c) * * *

(1) During the annual dioxin/furan or mercury performance test and the 2 weeks preceding the annual dioxin/furan or mercury performance test, no particulate matter control device temperature limitations are applicable.

(2) The particulate matter control device temperature limits may be waived in writing by the Administrator for the purpose of evaluating system performance, testing new technology or control technologies, diagnostic testing, or related activities for the purpose of improving facility performance or advancing the state-of-the-art for controlling facility emissions. The temperature limits continue to apply, and remain enforceable, until and unless the Administrator grants the waiver.

15. Amend § 60.54b by revising paragraph (c)(2) to read as follows:

**§ 60.54b Standards for municipal waste combustor operator training and certification.**

* * * * *

(c) * * *

(2) If both the certified chief facility operator and certified shift supervisor are unavailable, a provisionally certified control room operator on site at the municipal waste combustion unit may fulfill the certified operator requirement. Depending on the length of time that a certified chief facility operator and certified shift supervisor are away, the owner or operator of the affected facility must meet one of three criteria:

(i) When the certified chief facility operator and certified shift supervisor are both off site for 12 hours or less, and no other certified operator is on site, the provisionally certified control room operator may perform the duties of the certified chief facility operator or certified shift supervisor without notice to, or approval by, the Administrator.

(ii) When the certified chief facility operator and certified shift supervisor are off site for more than 12 hours, but for 2 weeks or less, and no other certified operator is on site, the provisionally certified control room operator may perform the duties of the certified chief facility operator or certified shift supervisor without notice to, or approval by, the Administrator. However, the owner or operator of the affected facility must record the period when the certified chief facility operator and certified shift supervisor are off site and include that information in the annual report as specified under § 60.59b(g)(5).

(iii) When the certified chief facility operator and certified shift supervisor are off site for more than 2 weeks, and no other certified operator is on site, the provisionally certified control room operator may perform the duties of the certified chief facility operator or certified shift supervisor without notice to, or approval by, the Administrator. However, the owner or operator of the affected facility must take two actions:

(A) Notify the Administrator in writing. In the notice, state what caused the absence and what actions are being taken by the owner or operator of the facility to ensure that a certified chief facility operator or certified shift supervisor is on site as expeditiously as practicable.

(B) Submit a status report and corrective action summary to the Administrator every 4 weeks following the initial notification. If the Administrator provides notice that the status report or corrective action summary is disapproved, the municipal waste combustion unit may continue operation for 90 days, but then must cease operation. If corrective actions are taken in the 90-day period such that the Administrator withdraws the disapproval, municipal waste combustion unit operation may continue.

* * * * *

16. Amend § 60.55b by revising paragraph (a) to read as follows:

**§ 60.55b Standards for municipal waste combustor fugitive ash emissions.**

(a) On and after the date on which the initial performance test is completed or is required to be completed under § 60.8 of subpart A of this part, no owner or operator of an affected facility shall cause to be discharged to the atmosphere visible emissions of combustion ash from an ash conveying system (including conveyor transfer points) in excess of 5 percent of the observation period (i.e., 9 minutes per 3-hour period), as determined by EPA Reference Method 22 (40 CFR part 60, appendix A) observations as specified in § 60.58b(k), except as provided in paragraphs (b) and (c) of this section.

* * * * *

17. Amend § 60.57b by revising paragraphs (a) introductory text and (a)(6) to read as follows:

**§ 60.57b Siting requirements.**

(a) The owner or operator of an affected facility shall prepare a materials separation plan, as defined in § 60.51b, for the affected facility and its service area, and shall comply with the requirements specified in paragraphs (a)(1) through (a)(10) of this section. The initial application is defined as representing a good faith submittal as determined by EPA.

* * * * *

(6) As required under § 60.59b(a), the owner or operator shall submit to EPA a copy of the notification of the public meeting, a transcript of the public meeting, the document summarizing responses to public comments, and copies of both the preliminary and final draft materials separation plans on or before the time the facility's application for a construction permit is submitted under 40 CFR part 51, subpart I, or part 52, as applicable.

* * * * *

18. Amend § 60.58b by:

a. Revising paragraphs (b) introductory text, (b)(6)(i), and (b)(7);

b. Revising paragraphs (c) introductory text, (c)(2), (c)(3), (c)(9), and (c)(11);

c. Revising paragraphs (d)(1)(ii), (d)(1)(vii), (d)(2)(ii), (d)(2)(iii), (d)(2)(iv), and (d)(2)(ix);

d. Revising paragraphs (e)(7) introductory text, (e)(12)(i)(A), (e)(12)(i)(B), and (e)(14);

e. Revising paragraphs (g)(2), (g)(5)(i), (g)(5)(iii), and (g)(7);

f. Revising paragraphs (h)(6) introductory text, (h)(10)(i)(B), and (h)(12);

g. Revising paragraphs (i)(3)(ii)(B), (i)(10) introductory text, and (i)(11);

h. Revising paragraph (m)(2); and

i. Adding paragraphs (c)(10) and (g)(5)(ii) to read as follows:

**§ 60.58b Compliance and performance testing.**

* * * * *

(b) The owner or operator of an affected facility shall install, calibrate, maintain, and operate a continuous emission monitoring system for measuring the oxygen or carbon dioxide content of the flue gas at each location where carbon monoxide, sulfur dioxide, nitrogen oxides emissions, or particulate matter (if the owner or operator elects to continuously monitor particulate matter emissions under paragraph (c)(10) of this section) are monitored and record the output of the system and shall comply with the test procedures and test methods specified in paragraphs (b)(1) through (b)(7) of this section.

* * * * *

(6) * * *

(i) The fuel factor equation in Method 3B shall be used to determine the relationship between oxygen and carbon dioxide at a sampling location. Method 3, 3A, or 3B, or ASME PTC–19–10–1981—Part 10 (incorporated by reference, see § 60.17 of subpart A of this part), as applicable, shall be used to determine the oxygen concentration at the same location as the carbon dioxide monitor.

* * * * *

(7) The relationship between carbon dioxide and oxygen concentrations that is established in accordance with paragraph (b)(6) of this section shall be submitted to EPA or the director of a State air pollution control agency, if so delegated by EPA, as part of the initial performance test report and, if applicable, as part of the annual test report if the relationship is reestablished during the annual performance test.

(c) Except as provided in paragraph (c)(10) of this section, the procedures and test methods specified in paragraphs (c)(1) through (c)(11) of this section shall be used to determine compliance with the emission limits for particulate matter and opacity under § 60.52b(a)(1) and (a)(2).

* * * * *

(2) The EPA Reference Method 3, 3A or 3B, or ASME PTC–19–10–1981—Part 10 (incorporated by reference, see § 60.17 of subpart A of this part), as applicable, shall be used for gas analysis.

(3) EPA Reference Method 5 shall be used for determining compliance with the particulate matter emission limit. The minimum sample volume shall be 1.7 cubic meters. The probe and filter holder heating systems in the sample train shall be set to provide a gas temperature no greater than 160°C. An oxygen or carbon dioxide measurement shall be obtained simultaneously with each Method 5 run.

* * * * *

(9) Following the date that the initial performance test for particulate matter is completed or is required to be completed under § 60.8 of subpart A of this part for an affected facility, the owner or operator shall conduct a performance test for particulate matter on a calendar year basis (no less than 9 months and no more than 15 calendar months following the previous performance test).

(10) In place of particulate matter testing with EPA Reference Method 5, an owner or operator may elect to install, calibrate, maintain, and operate a continuous emission monitoring system for monitoring particulate matter emissions discharged to the atmosphere and record the output of the system. The owner or operator of an affected facility who elects to continuously monitor particulate matter emissions instead of conducting performance testing using EPA Method 5 shall install, calibrate, maintain, and operate a continuous emission monitoring system and shall comply with the requirements specified in paragraphs (c)(10)(i) through (c)(10)(xiv) of this section.

(i) Notify the Administrator one month before starting use of the system.

(ii) Notify the Administrator one month before stopping use of the system.

(iii) The monitor shall be installed, evaluated, and operated in accordance with § 60.13 of subpart A of this part.

(iv) The initial performance evaluation shall be completed no later than 180 days after the date of initial startup of the affected facility, as specified under § 60.8 of subpart A of this part or within 180 days of notification to the Administrator of use of the continuous monitoring system if the owner or operator was previously determining compliance by Method 5 performance tests, whichever is later.

(v) The owner or operator of an affected facility may request that compliance with the particulate matter emission limit be determined using carbon dioxide measurements corrected to an equivalent of 7 percent oxygen. The relationship between oxygen and carbon dioxide levels for the affected facility shall be established as specified in paragraph (b)(6) of this section.

(vi) The owner or operator of an affected facility shall conduct an initial performance test for particulate matter emissions as required under § 60.8 of subpart A of this part. Compliance with the particulate matter emission limit shall be determined by using the continuous emission monitoring system specified in paragraph (c)(10) of this section to measure particulate matter and calculating a 24-hour block arithmetic average emission concentration using EPA Reference Method 19, section 4.1.

(vii) Compliance with the particulate matter emission limit shall be determined based on the 24-hour daily (block) average of the hourly arithmetic average emission concentrations using continuous emission monitoring system outlet data.

(viii) At a minimum, valid continuous monitoring system hourly averages shall be obtained as specified in paragraphs (c)(10)(viii)(A) and (c)(10)(viii)(B) of this section for 75 percent of the operating hours per day for 95 percent of the operating days per calendar quarter that the affected facility is combusting municipal solid waste.

(A) At least two data points per hour shall be used to calculate each 1-hour arithmetic average.

(B) Each particulate matter 1-hour arithmetic average shall be corrected to 7 percent oxygen on an hourly basis using the 1-hour arithmetic average of the oxygen (or carbon dioxide) continuous emission monitoring system data.

(ix) The 1-hour arithmetic averages required under paragraph (c)(10)(vii) of this section shall be expressed in milligrams per dry standard cubic meter corrected to 7 percent oxygen (dry basis) and shall be used to calculate the 24-hour daily arithmetic average emission concentrations. The 1-hour arithmetic averages shall be calculated using the data points required under § 60.13(e)(2) of subpart A of this part.

(x) All valid continuous emission monitoring system data shall be used in calculating average emission concentrations even if the minimum continuous emission monitoring system data requirements of paragraph (c)(10)(viii) of this section are not met.

(xi) The continuous emission monitoring system shall be operated according to Performance Specification 11 in appendix B of this part.

(xii) During each relative accuracy test run of the continuous emission monitoring system required by Performance Specification 11 in appendix B of this part, particulate matter and oxygen (or carbon dioxide) data shall be collected concurrently (or within a 30-to 60-minute period) by both the continuous emission monitors and the test methods specified in paragraphs (c)(10)(xii)(A) and (c)(10)(xii)(B) of this section.

(A) For particulate matter, EPA Reference Method 5 shall be used.

(B) For oxygen (or carbon dioxide), EPA Reference Method 3, 3A, or 3B, as applicable shall be used.

(xiii) Quarterly accuracy determinations and daily calibration drift tests shall be performed in accordance with procedure 2 in appendix F of this part.

(xiv) When particulate matter emissions data are not obtained because of continuous emission monitoring system breakdowns, repairs, calibration checks, and zero and span adjustments, emissions data shall be obtained by using other monitoring systems as approved by the Administrator or EPA Reference Method 19 to provide, as necessary, valid emissions data for a minimum of 75 percent of the hours per day that the affected facility is operated and combusting municipal solid waste

for 95 percent of the days per calendar quarter that the affected facility is operated and combusting municipal solid waste.

(11) Following the date that the initial performance test for opacity is completed or is required to be completed under § 60.8 of subpart A of this part for an affected facility, the owner or operator shall conduct a performance test for opacity on an annual basis (no less than 9 calendar months and no more than 15 calendar months following the previous performance test) using the test method specified in paragraph (c)(6) of this section.

(d) * * *

(1) * * *

(ii) The EPA Reference Method 3, 3A, or 3B, or ASME PTC–19–10–1981—Part 10 (incorporated by reference, see § 60.17 of subpart A of this part), as applicable, shall be used for flue gas analysis.

* * * * *

(vii) Following the date of the initial performance test or the date on which the initial performance test is required to be completed under § 60.8 of subpart A of this part, the owner or operator of an affected facility shall conduct a performance test for compliance with the emission limits for cadmium and lead on a calendar year basis (no less than 9 calendar months and no more than 15 calendar months following the previous performance test).

* * * * *

(2) * * *

(ii) The EPA Reference Method 3, 3A, or 3B, or ASME PTC–19–10–1981—Part 10 (incorporated by reference, see § 60.17 of subpart A of this part), as applicable, shall be used for flue gas analysis.

(iii) The EPA Reference Method 29 or ASTM D6784–02 (incorporated by reference, see § 60.17 of subpart A of this part), shall be used to determine the mercury emission concentration. The minimum sample volume when using Method 29 for mercury shall be 1.7 cubic meters.

(iv) An oxygen (or carbon dioxide) measurement shall be obtained simultaneously with each Method 29 or ASTM D6784–02 (incorporated by reference, see § 60.17 of subpart A of this part), test run for mercury required under paragraph (d)(2)(iii) of this section.

* * * * *

(ix) Following the date that the initial performance test for mercury is completed or is required to be completed under § 60.8 of subpart A of this part, the owner or operator of an affected facility shall conduct a performance test for mercury emissions on a calendar year basis (no less than 9 calendar months and no more than 12 calendar months from the previous performance test), unless the owner or operator follows the testing schedule specified in paragraph (g)(5)(iii) of this section.

* * * * *

(e) * * *

(7) At a minimum, valid continuous monitoring system hourly averages shall be obtained as specified in paragraphs (e)(7)(i) and (e)(7)(ii) of this section for 75 percent of the operating hours per day for 95 percent of the operating days per calendar quarter that the affected facility is combusting municipal solid waste.

* * * * *

(12) * * *

(i) * * *

(A) For sulfur dioxide, EPA Reference Method 6, 6A, or 6C, or ASTM D6784–02 (incorporated by reference, see § 60.17 of subpart A of this part), shall be used.

(B) For oxygen (or carbon dioxide), EPA Reference Method 3, 3A, or 3B, or ASTM D6784–02 (incorporated by reference, see § 60.17 of subpart A of this part), as applicable, shall be used.

* * * * *

(14) When sulfur dioxide emissions data are not obtained because of continuous emission monitoring system breakdowns, repairs, calibration checks, and/or zero and span adjustments, emissions data shall be obtained by using other monitoring systems as approved by EPA or EPA Reference Method 19 to provide, as necessary, valid emissions data for a minimum of 75 percent of the hours per day that the affected facility is operated and combusting municipal solid waste for 95 percent of the days per calendar quarter that the affected facility is operated and combusting municipal solid waste.

* * * * *

(g) * * *

(2) The EPA Reference Method 3, 3A, or 3B, or ASTM D6784–02 (incorporated by reference, see § 60.17 of subpart A of this part), as applicable, shall be used for flue gas analysis.

* * * * *

(5) * * *

(i) For affected facilities, performance tests shall be conducted on a calendar year basis (no less than 9 calendar months and no more than 15 calendar months following the previous performance test.)

(ii) For the purpose of evaluating system performance to establish new operating parameter levels, testing new technology or control technologies, diagnostic testing, or related activities for the purpose of improving facility performance or advancing the state-of-the-art for controlling facility emissions, the owner or operator of an affected facility that qualifies for the performance testing schedule specified in paragraph (g)(5)(iii) of this section, may test one unit and apply the operating parameters to similarly designed and equipped units on site by meeting the requirements specified in paragraphs (g)(5)(ii)(A) through (g)(5)(ii)(D) of this section.

(A) Follow the testing schedule established in paragraph (g)(5)(iii) of this section. For example, each year a different affected facility at the municipal waste combustor plant shall be tested, and the affected facilities at the plant shall be tested in sequence (*e.g.*, unit 1, unit 2, unit 3, as applicable).

(B) Upon meeting the requirements in paragraph (g)(5)(iii) of this section for one affected facility, the owner or operator may elect to apply the average carbon mass feed rate and associated carbon injection system operating parameter levels as established in paragraph (m) of this section to similarly designed and equipped units on site.

(C) Upon testing each subsequent unit in accordance with the testing schedule established in paragraph (g)(5)(iii) of this section, the dioxin/furan and mercury emissions of the subsequent unit shall not exceed the dioxin/furan and mercury emissions measured in the most recent test of that unit prior to the revised operating parameter levels.

(D) The owner or operator of an affected facility that selects to follow the performance testing schedule specified in paragraph (g)(5)(iii) of this section and apply the carbon injection system operating parameters to similarly designed and equipped units on site shall follow the procedures specified in § 60.59b(g)(4) for reporting.

(iii) Where all performance tests over a 2-year period indicate that both dioxin/furan emissions are less than or equal to 7 nanograms per dry standard cubic meter (total mass) and that mercury emissions are less than or equal to 25 micrograms per dry standard cubic meter for all affected facilities located within a municipal waste combustor plant, the owner or operator of the municipal waste combustor plant may elect to conduct annual performance tests for one affected facility (*i.e.*, unit) per year at the municipal waste combustor plant. At a minimum, a performance test for dioxin/furan and

mercury emissions shall be conducted on a calendar year basis (no less than 9 calendar months and no more than 15 months following the previous performance test) for one affected facility at the municipal waste combustor plant. Each year a different affected facility at the municipal waste combustor plant shall be tested, and the affected facilities at the plant shall be tested in sequence (*e.g.*, unit 1, unit 2, unit 3, as applicable). If each annual performance test continues to indicate both a dioxin/furan emission level less than or equal to 7 nanograms per dry standard cubic meter (total mass) and a mercury emission level less than or equal to 25 micrograms per dry standard cubic meter, the owner or operator may continue conducting a performance test on only one affected facility per calendar year. If any annual performance test indicates either a dioxin/furan emission level greater than 7 nanograms per dry standard cubic meter (total mass) or a mercury emission level greater than 25 micrograms per dry standard cubic meter, performance tests shall thereafter be conducted annually on all affected facilities at the plant until and unless all annual performance tests for all affected facilities at the plant over a 2-year period indicate a dioxin/furan emission level less than or equal to 7 nanograms per dry standard cubic meter (total mass) and mercury emission level less than or equal to 25 micrograms per dry standard cubic meter.

* * * * *

(7) The owner or operator of an affected facility where activated carbon is used to comply with the dioxin/furan and mercury emission limits specified in § 60.52b(c) or the dioxin/furan and mercury emission limits specified in paragraph (g)(5)(iii) of this section shall follow the procedures specified in paragraph (m) of this section for measuring and calculating the carbon usage rate.

* * * * *

(h) * * *

(6) At a minimum, valid continuous emission monitoring system hourly averages shall be obtained as specified in paragraphs (h)(6)(i) and (h)(6)(ii) of this section for 75 percent of the operating hours per day for 95 percent of the operating days per calendar quarter that the affected facility is combusting municipal solid waste.

* * * * *

(10) * * *

(i) * * *

(B) For oxygen (or carbon dioxide), EPA Reference Method 3, 3A, or 3B, or ASME PTC–19–10–1981—Part 10 (incorporated by reference, see § 60.17 of subpart A of this part), as applicable, shall be used.

* * * * *

(12) When nitrogen oxides continuous emissions data are not obtained because of continuous emission monitoring system breakdowns, repairs, calibration checks, and zero and span adjustments, emissions data shall be obtained using other monitoring systems as approved by EPA or EPA Reference Method 19 to provide, as necessary, valid emissions data for a minimum of 75 percent of the hours per day for 95 percent of the days per calendar quarter the unit is operated and combusting municipal solid waste.

(i) * * *

(3) * * *

(ii) * * *

(B) For oxygen (or carbon dioxide), EPA Reference Method 3, 3A, or 3B, or ASME PTC–19–10–1981—Part 10 (incorporated by reference, see § 60.17 of subpart A of this part), as applicable, shall be used.

* * * * *

(10) At a minimum, valid continuous emission monitoring system hourly averages shall be obtained as specified in paragraphs (i)(10)(i) and (i)(10)(ii) of this section for 75 percent of the operating hours per day for 95 percent of the operating days per calendar quarter that the affected facility is combusting municipal solid waste.

* * * * *

(11) All valid continuous emission monitoring system data must be used in calculating the parameters specified under paragraph (i) of this section even if the minimum data requirements of paragraph (i)(10) of this section are not met. When carbon monoxide continuous emission data are not obtained because of continuous emission monitoring system breakdowns, repairs, calibration checks, and zero and span adjustments, emissions data shall be obtained using other monitoring systems as approved by EPA or EPA Reference Method 10 to provide, as necessary, the minimum valid emission data.

* * * * *

(m) * * *

(2) During operation of the affected facility, the carbon injection system operating parameter(s) that are the primary indicator(s) of the carbon mass feed rate (e.g., screw feeder setting) shall be averaged over a block 8-hour period, and the 8-hour block average must equal or exceed the level(s) documented during the performance tests specified under paragraphs (m)(1)(i) and (m)(1)(ii) of this section, except as specified in paragraphs (m)(2)(i) and (m)(2)(ii) of this section.

(i) During the annual mercury performance test and the 2 weeks preceding the annual mercury performance test, no limit is applicable for average mass carbon feed rate.

(ii) The limit for average mass carbon feed rate may be waived in accordance with permission granted by the Administrator for the purpose of evaluating system performance, testing new technology or control technologies, diagnostic testing, or related activities for the purpose of improving facility performance or advancing the state-of-the-art for controlling facility emissions.

* * * * *

19. Amend § 60.59b by:

a. Revising paragraph (d)(2)(i) introductory text;

b. Revising (d)(2)(ii) introductory text;

c. Revising paragraph (d)(3);

d. Revising paragraph (d)(6) introductory text;

e. Revising paragraph (d)(6)(iv);

f. Revising paragraph (d)(6)(v);

g. Revising paragraph (d)(7);

h. Revising paragraph (d)(12) introductory text;

i. Revising paragraph (g) introductory text;

j. Revising paragraph (g)(1)(ii);

k. Revising paragraph (g)(1)(iv);

l. Revising paragraph (g)(1)(v);

m. Revising paragraph (g)(4);

n. Revising paragraph (h)(1);

o. Adding paragraph (d)(2)(i)(E);

p. Adding paragraph (d)(2)(ii)(E);

q. Adding paragraph (d)(6)(vi);

r. Adding paragraph (d)(10);

s. Adding paragraph (d)(12)(iv);

t. Adding paragraph (g)(5); and

u. Adding paragraph (m) to read as follows:

**§ 60.59b Reporting and recordkeeping requirements.**

* * * * *

(d) * * *

(2) * * *

(i) The measurements specified in paragraphs (d)(2)(i)(A) through (d)(2)(i)(E) of this section shall be recorded and be available for submittal to the Administrator or review onsite by an EPA or State inspector.

* * * * *

(E) For owners and operators who elect to continuously monitor particulate matter emissions instead of conducting performance testing using EPA Method 5, all 1-hour average particulate matter emission concentrations as specified under § 60.58b(d)(10).

(ii) The average concentrations and percent reductions, as applicable, specified in paragraphs (d)(2)(ii)(A)

through (d)(2)(ii)(E) of this section shall be computed and recorded, and shall be available for submittal to the Administrator or review on-site by an EPA or State inspector.

* * * * *

(E) For owners and operators who elect to continuously monitor particulate matter emissions instead of conducting performance testing using EPA Method 5, all 24-hour daily arithmetic average particulate matter emission concentrations as specified under § 60.58b(d)(10).

(3) Identification of the calendar dates when any of the average emission concentrations, percent reductions, or operating parameters recorded under paragraphs (d)(2)(ii)(A) through (d)(2)(ii)(E) of this section, or the opacity levels recorded under paragraph (d)(2)(i)(A) of this section are above the applicable limits, with reasons for such exceedances and a description of corrective actions taken.

* * * * *

(6) Identification of the calendar dates for which the minimum number of hours of any of the data specified in paragraphs (d)(6)(i) through (d)(6)(vi) of this section have not been obtained including reasons for not obtaining sufficient data and a description of corrective actions taken.

* * * * *

(iv) Municipal waste combustor unit load data;

(v) Particulate matter control device temperature data; and

(vi) For owners and operators who elect to continuously monitor particulate matter emissions instead of performance testing by EPA Method 5, particulate matter emissions data.

(7) Identification of each occurrence that sulfur dioxide emissions data, nitrogen oxides emissions data, particulate matter emissions data (for owners and operators who elect to continuously monitor particulate matter emissions instead of conducting performance testing using EPA Method 5) or operational data (i.e., carbon monoxide emissions, unit load, and particulate matter control device temperature) have been excluded from the calculation of average emission concentrations or parameters, and the reasons for excluding the data.

* * * * *

(10) The results of daily drift tests and quarterly accuracy determinations for particulate matter continuous emission monitoring systems (for owners and operators who elect to continuously monitor particulate matter emissions instead of conducting performance testing using EPA Method 5), as required under appendix F of this part, procedure 2.

* * * * *

(12) The records specified in paragraphs (d)(12)(i) through (d)(12)(iv) of this section.

* * * * *

(iv) Records of when a certified operator is temporarily off site. Include two main items:

(A) If the certified chief facility operator and certified shift supervisor are off site for more than 12 hours, but for 2 weeks or less, and no other certified operator is on site, record the dates that the certified chief facility operator and certified shift supervisor were off site.

(B) When all certified chief facility operators and certified shift supervisors are off site for more than 2 weeks and no other certified operator is on site, keep records of four items:

(*1*) Time of day that all certified persons are off site.

(*2*) The conditions that cause those people to be off site.

(*3*) The corrective actions taken by the owner or operator of the affected facility to ensure a certified chief facility operator or certified shift supervisor is on site as soon as practicable.

(*4*) Copies of the written reports submitted every 4 weeks that summarize the actions taken by the owner or operator of the affected facility to ensure that a certified chief facility operator or certified shift supervisor will be on site as soon as practicable.

* * * * *

(g) Following the first year of municipal combustor operation, the owner or operator of an affected facility shall submit an annual report that includes the information specified in paragraphs (g)(1) through (g)(5) of this section, as applicable, no later than February 1 of each year following the calendar year in which the data were collected (once the unit is subject to permitting requirements under title V of the Act, the owner or operator of an affected facility must submit these reports semiannually).

(1) * * *

(ii) A list of the highest emission level recorded for sulfur dioxide, nitrogen oxides, carbon monoxide, particulate matter (for owners and operators who elect to continuously monitor particulate matter emissions instead of conducting performance testing using EPA Method 5), municipal waste combustor unit load level, and particulate matter control device inlet temperature based on the data recorded under paragraphs (d)(2)(ii)(A) through (d)(2)(ii)(E) of this section.

* * * * *

(iv) The total number of days that the minimum number of hours of data for sulfur dioxide, nitrogen oxides, carbon monoxide, particulate matter (for owners and operators who elect to continuously monitor particulate matter emissions instead of conducting performance testing using EPA Method 5), municipal waste combustor unit load, and particulate matter control device temperature data were not obtained based on the data recorded under paragraph (d)(6) of this section.

(v) The total number of hours that data for sulfur dioxide, nitrogen oxides, carbon monoxide, particulate matter (for owners and operators who elect to continuously monitor particulate matter emissions instead of conducting performance testing using EPA Method 5), municipal waste combustor unit load, and particulate matter control device temperature were excluded from the calculation of average emission concentrations or parameters based on the data recorded under paragraph (d)(7) of this section.

* * * * *

(4) A notification of intent to begin the reduced dioxin/furan performance testing schedule specified in § 60.58b(g)(5)(iii) of this section during the following calendar year and notification of intent to apply the average carbon mass feed rate and associated carbon injection system operating parameter levels as established in § 60.58b(m) to similarly designed and equipped units on site.

(5) Documentation of periods when all certified chief facility operators and certified shift supervisors are off site for more than 12 hours.

(h) * * *

(1) The semiannual report shall include information recorded under paragraph (d)(3) of this section for sulfur dioxide, nitrogen oxides, carbon monoxide, particulate matter (for owners and operators who elect to continuously monitor particulate matter emissions instead of conducting performance testing using EPA Method 5), municipal waste combustor unit load level, particulate matter control device inlet temperature, and opacity.

* * * * *

(m) Owners and operators who elect to continuously monitor particulate matter emissions instead of conducting performance testing using EPA Method 5 must notify the Administrator one month prior to starting or stopping use

of the particulate matter continuous emission monitoring system.

[FR Doc. 05–23968 Filed 12–16–05; 8:45 am]

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Federal Register

Monday,
December 19, 2005

# Part V

# The President

## Executive Order 13392—Improving Agency Disclosure of Information

Federal Register
Vol. 70, No. 242
Monday, December 19, 2005

# Presidential Documents

**Title 3—**

## The President

**Executive Order 13392 of December 14, 2005**

## Improving Agency Disclosure of Information

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to ensure appropriate agency disclosure of information, and consistent with the goals of section 552 of title 5, United States Code, it is hereby ordered as follows:

**Section 1.** *Policy.*

(a) The effective functioning of our constitutional democracy depends upon the participation in public life of a citizenry that is well informed. For nearly four decades, the Freedom of Information Act (FOIA) has provided an important means through which the public can obtain information regarding the activities of Federal agencies. Under the FOIA, the public can obtain records from any Federal agency, subject to the exemptions enacted by the Congress to protect information that must be held in confidence for the Government to function effectively or for other purposes.

(b) FOIA requesters are seeking a service from the Federal Government and should be treated as such. Accordingly, in responding to a FOIA request, agencies shall respond courteously and appropriately. Moreover, agencies shall provide FOIA requesters, and the public in general, with citizen-centered ways to learn about the FOIA process, about agency records that are publicly available (e.g., on the agency's website), and about the status of a person's FOIA request and appropriate information about the agency's response.

(c) Agency FOIA operations shall be both results-oriented and produce results. Accordingly, agencies shall process requests under the FOIA in an efficient and appropriate manner and achieve tangible, measurable improvements in FOIA processing. When an agency's FOIA program does not produce such results, it should be reformed, consistent with available resources appropriated by the Congress and applicable law, to increase efficiency and better reflect the policy goals and objectives of this order.

(d) A citizen-centered and results-oriented approach will improve service and performance, thereby strengthening compliance with the FOIA, and will help avoid disputes and related litigation.

**Sec. 2.** *Agency Chief FOIA Officers.*

(a) *Designation.* The head of each agency shall designate within 30 days of the date of this order a senior official of such agency (at the Assistant Secretary or equivalent level), to serve as the Chief FOIA Officer of that agency. The head of the agency shall promptly notify the Director of the Office of Management and Budget (OMB Director) and the Attorney General of such designation and of any changes thereafter in such designation.

(b) *General Duties.* The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency:

(i) have agency-wide responsibility for efficient and appropriate compliance with the FOIA;

(ii) monitor FOIA implementation throughout the agency, including through the use of meetings with the public to the extent deemed appropriate by the agency's Chief FOIA Officer, and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing the FOIA, including the extent to which the agency meets the milestones

in the agency's plan under section 3(b) of this order and training and reporting standards established consistent with applicable law and this order;

(iii) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to carry out the policy set forth in section 1 of this order;

(iv) review and report, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing the FOIA; and

(v) facilitate public understanding of the purposes of the FOIA's statutory exemptions by including concise descriptions of the exemptions in both the agency's FOIA handbook issued under section 552(g) of title 5, United States Code, and the agency's annual FOIA report, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply.

(c) *FOIA Requester Service Center and FOIA Public Liaisons.* In order to ensure appropriate communication with FOIA requesters:

(i) Each agency shall establish one or more FOIA Requester Service Centers (Center), as appropriate, which shall serve as the first place that a FOIA requester can contact to seek information concerning the status of the person's FOIA request and appropriate information about the agency's FOIA response. The Center shall include appropriate staff to receive and respond to inquiries from FOIA requesters;

(ii) The agency Chief FOIA Officer shall designate one or more agency officials, as appropriate, as FOIA Public Liaisons, who may serve in the Center or who may serve in a separate office. FOIA Public Liaisons shall serve as supervisory officials to whom a FOIA requester can raise concerns about the service the FOIA requester has received from the Center, following an initial response from the Center staff. FOIA Public Liaisons shall seek to ensure a service-oriented response to FOIA requests and FOIA-related inquiries. For example, the FOIA Public Liaison shall assist, as appropriate, in reducing delays, increasing transparency and understanding of the status of requests, and resolving disputes. FOIA Public Liaisons shall report to the agency Chief FOIA Officer on their activities and shall perform their duties consistent with applicable law and agency regulations;

(iii) In addition to the services to FOIA requesters provided by the Center and FOIA Public Liaisons, the agency Chief FOIA Officer shall also consider what other FOIA-related assistance to the public should appropriately be provided by the agency;

(iv) In establishing the Centers and designating FOIA Public Liaisons, the agency shall use, as appropriate, existing agency staff and resources. A Center shall have appropriate staff to receive and respond to inquiries from FOIA requesters;

(v) As determined by the agency Chief FOIA Officer, in consultation with the FOIA Public Liaisons, each agency shall post appropriate information about its Center or Centers on the agency's website, including contact information for its FOIA Public Liaisons. In the case of an agency without a website, the agency shall publish the information on the Firstgov.gov website or, in the case of any agency with neither a website nor the capability to post on the Firstgov.gov website, in the **Federal Register**; and

(vi) The agency Chief FOIA Officer shall ensure that the agency has in place a method (or methods), including through the use of the Center, to receive and respond promptly and appropriately to inquiries from FOIA requesters about the status of their requests. The Chief FOIA Officer shall

also consider, in consultation with the FOIA Public Liaisons, as appropriate, whether the agency's implementation of other means (such as tracking numbers for requests, or an agency telephone or Internet hotline) would be appropriate for responding to status inquiries.

**Sec. 3.** *Review, Plan, and Report.*

(a) *Review.* Each agency's Chief FOIA Officer shall conduct a review of the agency's FOIA operations to determine whether agency practices are consistent with the policies set forth in section 1 of this order. In conducting this review, the Chief FOIA Officer shall:

(i) evaluate, with reference to numerical and statistical benchmarks where appropriate, the agency's administration of the FOIA, including the agency's expenditure of resources on FOIA compliance and the extent to which, if any, requests for records have not been responded to within the statutory time limit (backlog);

(ii) review the processes and practices by which the agency assists and informs the public regarding the FOIA process;

(iii) examine the agency's:

(A) use of information technology in responding to FOIA requests, including without limitation the tracking of FOIA requests and communication with requesters;

(B) practices with respect to requests for expedited processing; and

(C) implementation of multi-track processing if used by such agency;

(iv) review the agency's policies and practices relating to the availability of public information through websites and other means, including the use of websites to make available the records described in section 552(a)(2) of title 5, United States Code; and

(v) identify ways to eliminate or reduce its FOIA backlog, consistent with available resources and taking into consideration the volume and complexity of the FOIA requests pending with the agency.

(b) *Plan.*

(i) Each agency's Chief FOIA Officer shall develop, in consultation as appropriate with the staff of the agency (including the FOIA Public Liaisons), the Attorney General, and the OMB Director, an agency-specific plan to ensure that the agency's administration of the FOIA is in accordance with applicable law and the policies set forth in section 1 of this order. The plan, which shall be submitted to the head of the agency for approval, shall address the agency's implementation of the FOIA during fiscal years 2006 and 2007.

(ii) The plan shall include specific activities that the agency will implement to eliminate or reduce the agency's FOIA backlog, including (as applicable) changes that will make the processing of FOIA requests more streamlined and effective, as well as increased reliance on the dissemination of records that can be made available to the public through a website or other means that do not require the public to make a request for the records under the FOIA.

(iii) The plan shall also include activities to increase public awareness of FOIA processing, including as appropriate, expanded use of the agency's Center and its FOIA Public Liaisons.

(iv) The plan shall also include, taking appropriate account of the resources available to the agency and the mission of the agency, concrete milestones, with specific timetables and outcomes to be achieved, by which the head of the agency, after consultation with the OMB Director, shall measure and evaluate the agency's success in the implementation of the plan.

(c) *Agency Reports to the Attorney General and OMB Director.*

(i) The head of each agency shall submit a report, no later than 6 months from the date of this order, to the Attorney General and the OMB Director that summarizes the results of the review under section 3(a) of this order and encloses a copy of the agency's plan under section 3(b) of this order.

The agency shall publish a copy of the agency's report on the agency's website or, in the case of an agency without a website, on the Firstgov.gov website, or, in the case of any agency with neither a website nor the capability to publish on the Firstgov.gov website, in the **Federal Register**.

(ii) The head of each agency shall include in the agency's annual FOIA reports for fiscal years 2006 and 2007 a report on the agency's development and implementation of its plan under section 3(b) of this order and on the agency's performance in meeting the milestones set forth in that plan, consistent with any related guidelines the Attorney General may issue under section 552(e) of title 5, United States Code.

(iii) If the agency does not meet a milestone in its plan, the head of the agency shall:

(A) identify this deficiency in the annual FOIA report to the Attorney General;

(B) explain in the annual report the reasons for the agency's failure to meet the milestone;

(C) outline in the annual report the steps that the agency has already taken, and will be taking, to address the deficiency; and

(D) report this deficiency to the President's Management Council.

**Sec. 4.** *Attorney General.*

(a) *Report.* The Attorney General, using the reports submitted by the agencies under subsection 3(c)(i) of this order and the information submitted by agencies in their annual FOIA reports for fiscal year 2005, shall submit to the President, no later than 10 months from the date of this order, a report on agency FOIA implementation. The Attorney General shall consult the OMB Director in the preparation of the report and shall include in the report appropriate recommendations on administrative or other agency actions for continued agency dissemination and release of public information. The Attorney General shall thereafter submit two further annual reports, by June 1, 2007, and June 1, 2008, that provide the President with an update on the agencies' implementation of the FOIA and of their plans under section 3(b) of this order.

(b) *Guidance.* The Attorney General shall issue such instructions and guidance to the heads of departments and agencies as may be appropriate to implement sections 3(b) and 3(c) of this order.

**Sec. 5.** *OMB Director.* The OMB Director may issue such instructions to the heads of agencies as are necessary to implement this order, other than sections 3(b) and 3(c) of this order.

**Sec. 6.** *Definitions.* As used in this order:

(a) the term ''agency'' has the same meaning as the term ''agency'' under section 552(f)(1) of title 5, United States Code; and

(b) the term ''record'' has the same meaning as the term ''record'' under section 552(f)(2) of title 5, United States Code.

**Sec. 7.** *General Provisions.*

(a) The agency reviews under section 3(a) of this order and agency plans under section 3(b) of this order shall be conducted and developed in accordance with applicable law and applicable guidance issued by the President, the Attorney General, and the OMB Director, including the laws and guidance regarding information technology and the dissemination of information.

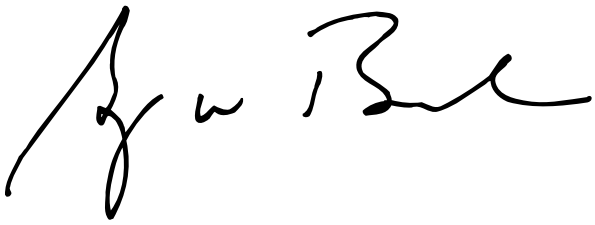
(b) This order:

(i) shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations;

(ii) shall not be construed to impair or otherwise affect the functions of the OMB Director relating to budget, legislative, or administrative proposals; and

(iii) is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right or benefit,

substantive or procedural, enforceable at law or in equity by a party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person.



THE WHITE HOUSE,
*December 14, 2005.*

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Air programs; approval and promulgation; State plans for designated facilities and pollutants:
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## LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html.*

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**H.R. 584/P.L. 109–125**
Department of the Interior Volunteer Recruitment Act of 2005 (Dec. 7, 2005; 119 Stat. 2544)

**H.R. 680/P.L. 109–126**

To direct the Secretary of Interior to convey certain land held in trust for the Paiute Indian Tribe of Utah to the City of Richfield, Utah, and for other purposes. (Dec. 7, 2005; 119 Stat. 2546)

**H.R. 1101/P.L. 109–127**

To revoke a Public Land Order with respect to certain lands erroneously included in the Cibola National Wildlife Refuge, California. (Dec. 7, 2005; 119 Stat. 2548)

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| 8 | | 4.50 | [3] July 1, 1984 |
| 9 | | 13.00 | [3] July 1, 1984 |
| 10–17 | | 9.50 | [3] July 1, 1984 |
| 18, Vol. I, Parts 1–5 | | 13.00 | [3] July 1, 1984 |
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[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[3] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

[4] No amendments to this volume were promulgated during the period January 1, 2004, through January 1, 2005. The CFR volume issued as of January 1, 2004 should be retained.

[5] No amendments to this volume were promulgated during the period April 1, 2000, through April 1, 2005. The CFR volume issued as of April 1, 2000 should be retained.

[6] No amendments to this volume were promulgated during the period April 1, 2004, through April 1, 2005. The CFR volume issued as of April 1, 2004 should be retained.

[7] No amendments to this volume were promulgated during the period July 1, 2004, through July 1, 2005. The CFR volume issued as of July 1, 2004 should be retained.

[8] No amendments to this volume were promulgated during the period July 1, 2004, through July 1, 2005. The CFR volume issued as of July 1, 2003 should be retained.

[9] No amendments to this volume were promulgated during the period October 1, 2004, through October 1, 2005. The CFR volume issued as of October 1, 2004 should be retained.